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FORD MOTOR COMPANY

10  
11 **STATE OF CALIFORNIA**  
12 **NEW MOTOR VEHICLE BOARD**

13 In the Matter of the Protest of

14 KPAUTO, LLC, dba PUTNAM FORD OF SAN  
MATEO,

15 Protestant,

16 v.

17 FORD MOTOR COMPANY,

18 Respondent.

**Protest No. PR-2759-21**

**RESPONDENT FORD MOTOR  
COMPANY'S POST-HEARING BRIEF**

19  
20 Respondent Ford Motor Company ("Ford") submits its post-hearing brief.  
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On July 28, 2021, KPA Auto, LLC, doing business as Putnam Ford of San Mateo (“Putnam” or “Putnam Ford”) submitted a warranty labor rate increase from \$177 per hour to \$436.76 per hour. The requested rate was nearly double the rate of the surrounding dealers and the highest warranty labor rate in California, and the entire U.S., among Ford and Lincoln dealers. In support of its unreasonably high warranty labor rate increase, Putnam submitted a slew of repair orders that on their face were riddled with material inaccuracies and seemly fraudulent discrepancies. Because of the number of material inaccuracies, suspected fraud, and the unreasonable requested rate, Ford timely and in accordance with the California Motor Vehicle Code, offered an adjusted rate of \$220 per hour. Putnam declined the adjusted rate, resulting in this Protest. It was only after lengthy discovery, which Putnam tried to evade (and for which it was subsequently sanctioned), did Ford unearth the extent of Putnam’s deceptive practices. The evidence further supported Ford’s original findings that the submission was materially inaccurate and/or fraudulent. At the conclusion of this brief, there will be no question that (1) Ford met its burden to show that the requested labor rate of \$436.76 is materially inaccurate and/or fraudulent, and (2) Ford met its burden to show that it complied with the notification provision in Section 3065.2(d)(1).

### INTRODUCTION

\$436.76 per hour: a dollar figure so obviously outrageous that Putnam, chose not to include it in its Protest. Unsurprisingly, when Ford dug into Putnam’s warranty labor rate submission (“Submission”) requesting this absurd rate, it found that the underlying documentation was riddled with discrepancies and inaccuracies. Putnam had been “tinkering” with the data in the repair orders (A. Kamenetsky: 9/27/23, 1600:25-1601:3) in order to give the false appearance of a \$436.76 hourly rate. More specifically, Putnam had been “backing into” the so-called sold hour figure after finalizing the customer labor total. (K. Putnam: 9/25/23, 1044:2-11.)<sup>1</sup> The sold hours reported in the repair orders were fake. Ford timely responded to Putnam pursuant to Section 3065.2(d)(1) of the California Vehicle

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<sup>1</sup> Throughout this brief, Ford will refer to Putnam’s use of what it purports to be “sold hours.” These so-called sold hours are an artificial construct that bear no relation to reality, or to any actual increment of time. Perhaps most importantly, “sold hours” do not always mean the same thing in any individual Putnam repair order; for Putnam, sold hours are not determined through any consistently applied methodology.

1 Code, denied the request, and offered an adjusted, fair market rate of \$220 per hour. Putnam brought  
2 the instant protest.

3 Putnam's "tinkering" and use of "basic algebra" was on full display during the hearing. Ford  
4 exposed: improper use of flat rate charges in the Submission; numerous examples of how the sold  
5 hours did not generate the charges; and many examples of accounting discrepancies that call into  
6 question the validity of the entire Submission. Simply, Putnam's Submission was "a mess." (A.  
7 Kanouse: 9/19/23, 489:17-490:6.) Underneath the mess are numerous material inaccuracies and  
8 outright fraud. Putnam's request of \$436.76 an hour is not only unreasonable, but it is based on fiction.

9 Ford has met its burden to show that Putnam's Submission was materially inaccurate or  
10 fraudulent, and that it has satisfied Section 3065.2's procedures. Ford's evidence of numerous  
11 discrepancies and inaccuracies in the repair orders has gone un rebutted. Further, Ford fully satisfied  
12 the statute's notice requirements. To the extent any evidence presented at the hearing was not  
13 contained in Ford's denial letter, supplementation is justified. The hearing offered substantial evidence  
14 of Ford's justifications. The Submission was in disarray making it unmanageable and onerous for Ford  
15 personnel to provide the type of calculations prepared by an expert forensic accountant, and the  
16 numerous misrepresentations and omissions present in the Submission prevented Ford from knowing  
17 the full scope of Putnam's fraud. Ford has met its statutory burden, and the Board should find the  
18 Submission should be rejected in its entirety. Putnam's warranty labor rate should be ordered back to  
19 its prior rate of \$177 and Ford permitted to claw back its overpayment of \$43 per hour of warranty  
20 labor expenses it has been paying Putnam since October 2021.

21 Even if Ford had not met its burden (which it has), this is of no import here. Section 3065.4  
22 allows the Board to engage in an independent review of the evidence and calculate a rate pursuant to  
23 the requirements of Section 3065.2. First, it may consider whether the rate is reasonable (it is not) and  
24 may, therefore, reject the Submission and institute the original rate of \$177. Additionally, it may  
25 determine whether to use the Submission to calculate a rate. Because Putnam's sold hours do not  
26 generate the customer charges, as required by Section 3065.2(a), and because the Submission is  
27 inherently unreliable, it is impractical to use the Submission to calculate an accurate labor rate using  
28 Section 3065.2. Putnam's warranty labor rate request should be rejected in its entirety; its warranty

1 labor rate should be ordered back to its prior rate of \$177 and Ford permitted to claw back its  
2 overpayment of \$43 per hour of warranty labor expenses it has been paying Putnam since October  
3 2021. Alternatively, should the Board attempt to calculate a new rate, it should adopt the rate of  
4 \$198.02, which is based on technician hours, where available, and a 90-day period that is optimal to  
5 Ford, as set forth in Section 3065.2. As with this rate, Ford should be permitted to claw back an over-  
6 payment of \$21.98 per hour.

## 7 **FACTS IN EVIDENCE**

### 8 **I. BACKGROUND OF THE PARTIES**

#### 9 **A. Putnam**

10 Putnam has been a Ford new vehicle dealer authorized to sell and service new Ford vehicles,  
11 parts, and accessories pursuant to a dealer agreement with Ford, the Ford Sales and Service Agreement  
12 (“SSA”), since January 27, 2021. (Joint Ex. 1 [B5]; Putnam: 9/25/23, 1023:11-20, 1024:10-13.)  
13 Putnam purchased the assets of an insolvent Ford dealership and began its Ford dealership operations  
14 at the prior dealer’s facilities at 790 North San Mateo Drive in San Mateo. (K. Putnam: 9/25/2023,  
15 1024:14-1025:2.)

16 Kent Putnam is the majority owner of Putnam (through his company KBP Holdings, Inc.);  
17 Alvaro Vasquez is a minority owner and General Manager of Putnam and four other Putnam-brand  
18 dealerships. (Joint Ex. 1 [B8], table of ownership; Putnam: 9/25/23, 1065:14-1066:15.) Andrey  
19 Kamenetsky is the Chief Financial Officer and Group Operations Manager for Putnam Automotive  
20 Group. (Kamenetsky: 9/27/23, 1438: 5-15.) Mr. Putnam, with other minority owners, owns 11 new  
21 vehicle franchises in nine separate dealerships in the San Francisco metro area; he is the dealer  
22 principal of all of his dealerships, although each has its own general manager. (K. Putnam: 9/25/23,  
23 1064:23-1065:2.) His dealerships are all part of a parent company, Putnam Automotive Group.

24 On about March 10, 2021, just two months after opening, Putnam relocated its Ford dealership,  
25 with Ford’s approval and a formal amendment to Putnam’s SSA, to 885 North San Mateo Drive, with  
26 the intention at some future time of relocating it to an appropriate, permanent facility. (*Id.*, 1025:3-18;  
27 M. Murphy-Austin: 9/18/23, 179:12-20, 184:5-7.)

**B. Ford**

Traditionally, Ford is a manufacturer and distributor of Ford and Lincoln vehicles. It enters into SSAs with independent dealers, like Putnam, to sell and service its new vehicles, and parts, throughout the United States. Pertinent to this protest, dealers are obligated under their SSAs to provide repairs to their customers' Ford vehicles, subject to certain conditions, which are under Ford's warranty and at no charge to the customer. (*See* Joint Ex. 1 [B20], Standard Provisions, ¶ 4(b)(1) at 7.) In return, Ford pays the dealer for those warranty repairs, both for the dealer's labor and parts charges. (*Id.*, ¶ 4(b)(4) at 8 [B21]). In essence, Ford is its dealers' biggest customer of services (Ex. MM ¶ 64 [B1280]; Ex. MM at Ex. 5 [B1288]).<sup>2</sup>

The determination of the hourly rate Ford pays a dealer for warranty work it performs for Ford customers is generally governed by Ford's SSA or its uniform policies; however, in this case, because Putnam made a request under Section 3065.2 of the California Vehicle Code ("Section 3065.2"), that section governs the determination.

**II. PUTNAM'S WARRANTY LABOR RATE SUBMISSION****A. Putnam Use Various Discretionary Methods to Determine Customer Pay Pricing**

Putnam has a service department that performs customer-pay service work. During the relevant period, Putnam did not have guidelines or processes for opening repair orders or conducting repair shop operations. (Kamenetsky: 9/27/23, 1505:3-6, 1513:1-1514:18.) Nor did Putnam have rules or policies as to how technicians tracked their time on a given customer-pay repair. (K. Putnam: 9/25/23, 1068:3-1069:24.)

Mr. Putnam claimed he and Mr. Kamenetsky instructed the general manager, who in turn instructed the service advisors, to calculate the customer-pay labor charge by multiplying \$440 by the Ford factory time guide hours for the specific repair. (K. Putnam: 9/25/23, 1043:2-13.) But in reality, Mr. Putnam and Mr. Kamenetsky did not have personal knowledge as to how service advisors created

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<sup>2</sup> For the period January through November 2023, Ford paid Putnam \$700,587 in warranty claims versus Putnam's reported revenue of \$581,639 in "Repair Shop," i.e. customer pay repairs. (Ex. MM at Ex. 5 [B1288].) Had Ford paid Putnam during that time period at its claimed \$436.36 hourly rate for warranty repairs, it would have been \$1,363,245. (*Id.*)

1 any given repair order. (K. Putnam: 9/25/23, 1067:23-1063:2 (no personal knowledge of service  
2 advisor work and cannot tell the difference between “a/hours” and “s/hours”); Kamenetsky: 9/27/23,  
3 1505:18-1506:9 (no personal knowledge of creating repair orders).)

4 In fact, Putnam did not have a set methodology for calculating a labor charge. Rather, the  
5 methods changed, and numbers were altered based on a service advisor’s discretion, a desire to obtain  
6 commissions, balancing out the cost for parts, and reverse engineering a \$440 labor rate. Putnam  
7 purportedly provided customers an estimate to perform the repair, and the estimate would not include  
8 an hourly rate for the labor costs. (*Id.*, 1128:10-25.) After the final labor charge was already  
9 determined, Putnam would often calculate the sold hours that would be the closest to a \$440 per hour  
10 rate. (K. Putnam: 9/25/23, 1123:16-1125:4; D. Martinez: 9/20/23, 682:4-11, 683:10-14, 755:15-17;  
11 *see also* K. Putnam: 9/25/23, 1044:5-11 (Putnam did not want to raise its customer prices, so it “did  
12 basic algebra and [it] backed into the [\$440/hour] labor rate.”).)

13 The price was based on the service advisor’s discretion. (Kamenetsky: 9/27/23, 1540:11-22.)  
14 As such, Putnam’s service advisors manipulated the repair orders. (Martinez: 9/20/23, 697:4-6.)  
15 Putnam tracked the effective labor rate of service advisors to make sure they were performing as  
16 desired. (K. Putnam: 9/25/23, 1129:7-1130:9.) Service advisors received commissions based on their  
17 ability to inflate the apparent labor rate. (Martinez: 9/20/23, 697:7-9.)

18 Putnam also used a flat-rate model to price many of its repairs: “I don’t think the code talks  
19 about sold hours and actual hours and – it is what you charge – **it is what you charge for the job. It**  
20 **is not what we charge in hours. It is what we charge in dollars for any particular repair.**” (K.  
21 Putnam: 9/25/23, 1140:1-8 (emphasis added); *accord id.*, 1128:16-25; Kamenetsky: 9/27/23, 1468:24-  
22 1469:3 (admitting to using flat-rate for diagnostic work).) As a result, the sold hours are not always  
23 equal to the Ford factory time guide hours and a service advisor may use discretion in setting sold  
24 hours so long as it would yield a \$440/hour rate. (K. Putnam: 9/25/23, 1124:22-1125:4.)

#### 25 B. Putnam Hires FrogData to Maximize its Warranty Labor Rate Submission

26 Prior to Putnam’s acquisition of the subject Ford dealership, in 2019 or 2020, Mr. Putnam put  
27 a plan into place to increase the warranty labor rate at all of his dealerships. (Kamenetsky: 9/27/23,  
28 1473:6-23.) Mr. Kamenetsky hired FrogData to prepare Putnam’s Submission. (*Id.*, 1474:3-6.)

1 FrogData is a warranty “uplift” vendor that prepares the dealer’s warranty labor rate submission to its  
2 manufacturer. (J. Korenak: 9/27/23, 1353:1-1354:6.) Jeffrey Korenak, FrogData’s Director of  
3 Implementation, testified that his “job is to get the dealer as much money as possible, end of story.”  
4 (*Id.*, 1362:9-12.) That, in fact, is the company’s marketing pitch—to offer a service to dealers to help  
5 them maximize their warranty labor rate. (*Id.*, 1406:2-11.)

6 In order to maximize a dealer’s labor rate request, FrogData pulls data from a dealer’s DMS  
7 system in order to analyze possible rates for any 100 consecutive repair orders or 90-day period. (*Id.*,  
8 1358:24-1359:25.) Since the dealer can select any 100 or 90-day period of repair orders for its  
9 submission, FrogData evaluates approximately five months of repair orders to identify the best  
10 possible date range, or the “peak numbers” among a grouping of repair orders. (*Id.*, 1360:2-13,  
11 1361:17-1362:22.) FrogData pulls data from a dealership database and only consults the accounting  
12 copies of the repair orders to validate that the data for qualified lines matches with the data on the  
13 repair order. (*Id.*, 1371:1-8.) It does not question the data in the repair orders, such as the variation of  
14 labor rates, because it is “completely irrelevant to [FrogData],” and “[t]he repair order is the source  
15 document so that’s that.” (*Id.*, 1375:16-24, 1374:7-8.)

16 FrogData determined the set of repair orders to be included in the Submission. (Joint Ex. 7.) It  
17 prepared a spreadsheet that identified the qualified repairs used for its analysis, which did not include  
18 actual hours (Joint Ex. 3 [B45])<sup>3</sup> and Putnam’s labor rate request letter (Joint Ex. 2 [B44]). (Korenak:  
19 9/27/23, 1365:19-1366:20, 1367:18-23, 1368:16-1370:13; *see* 1371:16-1374:23 (identifying the data  
20 in each column of the spreadsheet); *see also* J. Becic: 9/18/23, 48:13-52:2.) While Mr. Kamenetsky  
21 testified he oversaw all the dealership submissions, he was not sure whether he even reviewed  
22 Putnam’s before it was submitted to Ford. (Kamenetsky: 9/27/23, 1537:14-1538:4.)

23 Of the 550 to 600 warranty rate submissions Mr. Korenak has prepared for other California  
24 dealers since 2020, only three or four have had a calculated rate over \$300 per hour, one or two  
25 submissions have had \$350, but none ever over \$400 per hour. (Korenak: 9/27/23, 1411:4-9, 1412:13-  
26 25, 1416:14-18.)

27  
28 <sup>3</sup> FrogData’s spreadsheet includes only sold hours, not actual hours. (Korenak: 9/27/23, 1372:9-12.)



**C. Putnam Requests an Unreasonable Warranty Labor Rate of \$436.76 per Hour**

In 2021, Putnam's warranty labor rate was \$177/hour. (Becic: 9/18/23, 45:2-3.) On August 24, 2021, through Ford's internet portal, Putnam submitted a request to Ford for an increase in its hourly warranty labor rate (hereinafter "Putnam's Initial Submission"). (*Id.*, 44:12-22, 45:12-18; Joint Ex. 2 [B44].) Putnam requested an hourly rate of \$436.76. (Becic: 9/18/23, 44:23-45:3.)

Putnam's Initial Submission contained 250 repair orders, with 1,006 total repair lines, of which only 41 lines were identified as "qualified." (Ex. MM [B1267-68], Figures 4 & 5.) Despite the volume of repairs, the Initial Submission only contained a total of 46.8 sold hours, and total customer labor charges of \$20,440.55, for an average labor rate of \$436.76. (Becic: 9/18/23, 65:24-66:15; final line of Joint Ex. 3, Putnam Ford Labor tab [B45].)

On September 20, 2021, by letter dated September 17, Ford requested additional Putnam repair orders for the one-month period after June 7, 2021, pursuant to Section 3065.2(d)(4). (Becic: 9/18/23, 46:14-47:7; Joint Ex. 5 [B49].) Ford's ground for requesting the additional repair orders was that the labor rate requested—\$436.76—was "outrageously high." (Becic: 9/18/23, 46:14-47:7)

Putnam submitted an additional 168 repair orders, with 667 repair lines to Ford on September 27, 2021 ("Supplemental Submission" and collectively with the Initial Submission, the "Submission"). (*Id.*, 47:12-16.) The Supplemental Submission contained only 32 lines of qualified repairs. (S. Heinemann: 9/25/23, 908:21-909:1; Ex. MM [B1267-68], Figures 4 & 5 at 13-14.)

**III. FORD SETS PUTNAM'S WARRANTY LABOR RATE AT \$220/HOUR****A. Veteran Ford Employees Identify the Proposed Rate of \$436.76 per Hour as Outrageous and Excessively High**

Veteran Ford employees described Putnam's labor rate request as "outrageous," "excessively high," and "egregious." (*E.g.*, Becic: 9/18/23, 68:14-23 ("astronomical"); Murphy-Austin: 9/18/23, 189:5-17 ("outrageous," "excessively high"); Kanouse: 9/19/23, 306:17-307:6 ("way higher" than anything he's seen historically in California); M. Sweis: 9/20/23, 522:4-17 ("egregious").) It was nearly double the rate of the surrounding dealers and by far the highest warranty labor rate in California and the entire U.S. among Ford and Lincoln dealers. (Becic: 9/18/23, 68:24-69:12; Murphy-Austin: 9/18/23, 189:5-17.)



1 Rich Reibel (who retired from Ford at the end of 2021) had primary responsibility for  
2 evaluating Putnam's Submission. (Becic: 9/18/23, 70:12-19.) Mr. Becic worked with and was trained  
3 by Mr. Reibel before his retirement, and he observed Mr. Reibel's process and later familiarized  
4 himself with the Submission and Mr. Reibel's analysis. (*Id.*, 70:9-22, 112:2-9, 123:2-9.) Mr. Reibel  
5 observed that the Submission contained numerous accounting red flags and highly unusual data. (*See*,  
6 *e.g.* Joint Ex. 6 [B50-51].) As such, Ford did not believe the data in the Submission was reliable and  
7 could not be used to calculate and alternative rate. (*Id.* at 2 [B51].) Mr. Reibel and Mr. Becic looked  
8 at the warranty labor rates of surrounding dealers before Ford's denial letter to assess "market-  
9 appropriate" rates. (Becic: 9/18/23, 124:12-125:9; Ex. 6 [A29].)

10 When a dealer submits a request for an increase in its warranty labor rate, the Ford reviewing  
11 team typically informs the regional office. (*See* Murphy-Austin: 9/18/23, 206:20-207:3.) Meghan  
12 Murphy-Austin, then San Francisco Regional Manager, was made aware of the request. (*Id.*, 207:1-  
13 3.) When Ms. Murphy-Austin learned Putnam requested \$436.76, she felt it was "outrageous" and  
14 "excessively high," "almost double the next highest dealer in the nation and all of the surrounding  
15 dealers in [Putnam's] area." (*Id.*, 189:5-10.) She was "very concerned" that the rate was "bad for  
16 customers, bad for Putnam Ford's reputation, bad for the surrounding Ford dealers' reputations, bad  
17 for Ford Motor Company's reputation" and that it "really reinforced" the "perception that car dealers  
18 price gouge." (*Id.*, 189:10-17.) Ms. Murphy-Austin was also concerned that it was not a competitive  
19 rate in the market, that customers would be paying more for a comparable repair at Putnam versus  
20 surrounding dealers. (*Id.*, 189:18-23.)<sup>4</sup>

21 Ms. Murphy-Austin met with Mr. Putnam and General Manager Al Vasquez at the dealership  
22 to discuss her concerns. (*Id.*, 189:24-190:16, 219:9-16.) Mr. Putnam and Mr. Vasquez assured her that  
23 she should not be concerned for the customers because the price the customer paid would still be

24 \_\_\_\_\_  
25 <sup>4</sup> David Martinez, Putnam's service manager beginning on September 1, 2021, also testified that when  
26 customers asked what Putnam's hourly rate was, and he told them \$440, customers "lashed back at us,  
27 saying that [Putnam] were rip-offs," they got really upset, and said that Towne Ford and Serramonte  
28 Ford were "\$220 cheaper per hour" than Putnam. (Martinez: 9/20/23, 674:17-675:18.) Mr. Becic  
testified that the rate Putnam sought was "bad for [Ford's] customers because it appears that Putnam  
Ford, with the support of Ford, is gouging customers with this high of a rate. . . Not only bad for the  
customer, it is bad for Ford. It is bad for our brand." (Becic: 9/18/23, 69:13-20.)

1 comparable to the neighboring dealers, despite the requested labor rate. (*Id.*) They explained that the  
2 customer charge would remain comparable to that of surrounding dealers because the sold hours  
3 Putnam used to calculate the customer charge would be lower than what the job would take, which  
4 would offset the higher labor rate. (*Id.*, 191:22-192:16 (emphasis added).) According to Ms. Murphy-  
5 Austin, “the labor and the sold hours [would not] reflect reality.” (*Id.*) Mr. Putnam admitted to her—  
6 before the commencement of this litigation—that they were manipulating the sold hours to keep the  
7 charges to the customer competitive with the market. (*Id.*, 197:16-198:2.)<sup>5</sup> Mr. Putnam admitted the  
8 same at the hearing; he testified Putnam manipulated the sold hours on repair orders in order to “back  
9 into the [\$440/hour] rate.” (K. Putnam: 9/25/23, 1044:2-11.) Putnam never “rais[ed] the price to the  
10 customer. The price to the customer is not going to change . . . so we backed into it. We did basic  
11 algebra and we backed into the [\$440] rate.” (*Id.*, 1123:16-22 (emphasis added).)

12 **B. Ford Denies Putnam’s Unreasonable Request and Offers \$220 per Hour**

13 Ford responded to Putnam’s Submission in writing on October 26, 2021 (“Denial Letter”).  
14 (Becic: 9/18/23, 70:23-71:6; Joint Ex. 6 [B50-51].) In the Denial Letter, Ford explained:

15 Unfortunately, your request for a labor rate adjustment must be denied because it is  
16 materially inaccurate or fraudulent. After a review of the provided documentation and  
17 the additional repair orders (ROs) provided pursuant to our request, we are unable to  
18 verify the labor rates you are charging at your dealership. While we have been able to  
19 verify some of the repairs included in your analysis, there are others that do not seem  
20 to follow a consistent pricing practice, and many of the provided labor hours (customer  
21 estimate hours) do not seem appropriate for the repair, or consistent with the technician  
22 clocked hours being shown. Rather than reflect reality, the hours assigned to the repair  
23 appear designed to demonstrate a \$440 per hour labor rate.

24 (Joint Ex. 6 at 1 [50].)

25 Ford identified several examples supporting its concerns. Those include: large discrepancies  
26 between the lower sold hours Putnam used to calculate its rate and the much higher technician hours  
27 for a given repair; failure to combine diagnostic time and charges with the actual repair; inconsistent  
28 hourly rates between repairs; excessive customer charges for repairs that should have cost less; and as  
the fact that \$436.76 is double the rates of other dealers in the market. (Joint Ex. 6 at 1-2 [B50-51].)

---

27 <sup>5</sup> Ms. Murphy-Austin testified that Mr. Putnam and Mr. Vasquez never confirmed specifically what  
28 they were using to set the lower times that they then matched up with the higher hourly labor rates.  
(Murphy-Austin: 9/18/23, 203:7-25.)

1 Ford did not calculate an adjusted rate. (*Id.* at 2 [B51]; Becic: 9/18/23, 162:24-163:5 (testifying  
2 that Ford did not make a calculation).) Rather, Ford ultimately concluded:

3 The inconsistencies and excessive customer charges in the ROs you provided,  
4 including the examples discussed above, make it unreasonable, if not effectively  
5 impossible, for Ford Motor Company to use your ROs to calculate a labor rate. As such,  
6 we have no choice but to propose an adjusted retail labor rate of \$220.00 per hour which  
seems to be the most common customer pay rate your documentation shows in repairs  
where we see what appears to be valid documentation.

7 (Joint Ex. 6 at 2 [B51].)

8 Mr. Becic testified Mr. Reibel found it “effectively impossible” to calculate a rate because it  
9 is “difficult to interpret the repair orders and to determine what an actual rate might be” from all the  
10 discrepancies in the repair orders Ford examined, making it “difficult to figure out exactly what was  
11 going on.” (Becic: 9/18/23, 112:10-17.) Ford could not calculate an effective labor rate from Putnam’s  
12 Submission because many of the qualified repairs lacked technician hours. (*Id.*, 166:4-20.)

13 **IV. INCONSISTENCIES, DISCREPANCIES, AND MANIPULATION OF HOURS AND**  
14 **OTHER DATA PERMEATE THE REPAIR ORDERS IN PUTNAM’S SUBMISSION**

15 At the hearing, Ford witnesses John Becic, Allen Kanouse, and Maher (“Mike”) Sweis,  
16 described in detail the multiple problems with Putnam’s submission. Mr. Becic has worked for Ford  
17 for 18 years and currently is a field operations manager. (Becic: 9/18/23, 33:4-8.) His current  
18 responsibilities include managing the entire complex processing and analysis of all Ford dealer  
19 warranty labor and parts rate increase requests with his team of analysts and ultimately validating the  
20 requested rate, all within the tight state time deadlines to approve or deny a request. (*Id.*, 36:5-37:3.)  
21 Consequently, he has extensive experience in reviewing repair orders and addressing complex issues  
22 that may arise in those submissions. (*Id.*, 37:19-39:10.) Mr. Kanouse has worked for Ford since 2003,  
23 first as contractor consulting with dealers on warranty-related issues and between 2008 and October  
24 2022, as a warranty auditor. (Kanouse: 9/19/23, 259:9-261:15.) For about 20 years before he began  
25 working with Ford, he was the service manager at various dealerships. (*Id.*, 248:19-259:8, 273:15-  
26 20.). For a majority of his professional career he has reviewed and analyzed repair orders on almost a  
27 daily basis. (*Id.*, 271:16-273:14.) Mr. Sweis is a master certified automotive technician (Sweis:  
28 9/20/23, 515:25-516:1) working as a repair improvement specialist at Ford (*Id.*, 509:7-12). Mr. Sweis

1 has worked in the automotive industry for approximately 30 years, (*Id.*, 510:18-21.) He has worked as  
2 a repair technician, owned and operated a repair shop for 10 years, is a diagnostic master, taught  
3 college courses on automotive technology, and worked as a technical repair specialist and field service  
4 engineer. (*Id.*, 510:22-512:11, 513:4-15, 514:16-17, 515:8-9, 516:4-6.)

5 Given their extensive backgrounds in dealing with repair orders and repairs, Mr. Becic, Mr.  
6 Kanouse, and Mr. Sweis spotted numerous anomalies, discrepancies, and inaccuracies with Putnam's  
7 Submission. The following are examples of these anomalies, discrepancies, and inaccuracies, not an  
8 exhaustive list. These examples will be discussed below in more detail in the Argument section.

- 9
- 10 • Dividing the total labor charge by the sold hours yields impossible hourly rates, often with  
11 infinitely repeating decimals. See, for example Joint Ex. 7:
    - 12 • RO 10049 [B1792-93] (Line A, \$439.140566 . . . );
    - 13 • RO 10206 [B1467-69] (Line E , \$442.211765 . . . );
    - 14 • RO 10239 [B1399-1400] (Line D, \$450.78125);
    - 15 • RO 10305 [B1867-68] (Line D, \$442.78333 . . . ); and
    - 16 • RO 10362 [B1977-81] (Line F, \$\$442.751428571, repeating and Line I, \$433.333 repeating).

17 This makes clear that the sold hours were not generating the charges, because it is  
18 impossible (and impractical) to use a rate that has fractions of a cent using the CDK  
19 software system that generates the repair orders. (*See, e.g.* Kanouse: 9/19/23, 318:4-7,  
20 320:17-321:9, 341:23-344:25.)

- 21 • Unusual and large discrepancies between actual hours (hours worked by the technician)  
22 and sold hours (hours purportedly billed to the customer). See, for example Joint Ex. 7:
  - 23 • RO 10071 [B1748] (Line A, 3.2 hours vs. 0.5 hours);
  - 24 • RO 10206 [B1468] (Line E, 7.38 hours vs. 3.4 hours);
  - 25 • RO 10239 [B1399] (Line D, 10.7 hours vs. 3.2 hours);
  - 26 • RO 10248 [B1380] (Line D, 3.8 hours vs. 0.5 hours); and
  - 27 • RO 10362 [B1980], Line H, (11.37 hours vs. 0.6 hours).

28 Typically sold hours would be the same as or very close to actual hours, i.e. within .1 or .2  
hours. (*See, e.g.*, Becic: 9/18/23, 106:7-19; Kanouse: 9/19/23, 319:5-320:16.) Instead, the  
sold hours were significantly lower than actual hours, thus driving up the hourly rate.

- 29 • The wide diversity in rates on the same repair suggest that the goal was to get an average  
30 of \$440 per hour within a single repair order. See, for example Joint Ex. 7:
  - 31 • RO 10036 [B1828] (hourly rates of \$440, \$501.80, and \$756.50); and
  - 32 • RO 10251 [B1371] (includes hourly rate of \$220 and \$641.06).
- 33 • Repairs where actual or sold hours are zero. See, for example Joint Ex. 7:
  - 34 • RO 10036 [B1829-30] (Lines E&F);
  - 35 • RO 10049 [B1792] (Line A);
  - 36 • RO 10251 [B1372] (Line F);

- RO 10277 [B1325] (Line A); and
  - RO 10048 [B1795] (Line A).
- Diagnostics were almost always affiliated with a 1-hour charge, i.e. “flat rate” charges, regardless of the type of diagnostic. See, for example Joint Ex. 7:
    - RO 10259 [B1352] (Line A);
    - RO 10206 [B1467] (Line A);
    - RO 10148 [B1583] (Line A);
    - RO 10118 [B1647 ](Line A);
    - RO 10106 [B1674] (Line C);
    - RO 10094 [B1700] (Line A);
    - RO 10091 [B1705] (Line A); and
    - RO 10036 [B1828] (Line B).
  - Additional lines of qualified repairs that should be combined with others before calculating rate. If combined as required, the hourly rate drops. See, for example Joint Ex. 7:
    - RO 10305 [B1867-68] (Lines A and D should have been combined, which would have dropped the rate to \$83.41 per hour)
    - RO 10048 [B1795] (Lines A, D, and E are all related and should be included in qualified repair, but cannot calculate a rate for Line A because sold hours are zero); (See also Becic: 9/18/23, 73:12-21, 75:9-76:24.)
  - Technician hours were improperly characterized as “internal shop policy” repairs, and not customer-pay or warranty repairs. See, for example Joint Ex. 7:
    - RO 10239 [B1399];
    - RO 10248 [B1381]; and
    - RO 10415 [B2103].

As a result of these anomalies, Mr. Becic and Mr. Kanouse explained that the information in the repair orders was: **not accurate**, (Kanouse: 9/19/23, 314:25-315:2, 322:8-9, 328:18-20, 335:13-15, 345:14-16, 488:7-10; Becic: 9/18/23, 102:14-15), **misleading** (Becic: 9/18/23, 93:13-14, 102:16-18); **fraudulent**, (*id.*, 71:14-16, 93:13-14); **not “normal”**(Kanouse: 9/19/23, 312:3-6, 327:8-10, 332:24-25, 337:2-4, 342:6-12, 355:5-6, 460:17-18; Becic, 9/18/23, 64:9-11, 77:14-15, 79:5-8, 87:7-8, 103:1-3, 106:7-8); and **could not be trusted** (Kanouse: 9/19/23, 300:17-20, 306:14-16, 310:20-23, 317:4-6, 322:10-12, 328:21-329:3, 335:10-12, 345:11-13, 351:9-11, 356:3-6, 489:1-3; Becic: 9/18/23, 103:4-6, 166:19-20).

Notably, no Putnam service manager, service advisor, or technician, or even Mr. Vasquez, Putnam’s General Manager who is charged with overseeing its service operations, testified for Putnam

1 to rebut the overwhelming evidence Ford presented regarding the repair order's inaccuracies and  
2 anomalies.<sup>6</sup> Therefore, Ford's evidence on the repair order analyses stands un rebutted.

3 **V. PUTNAM USED A NON-AUTHORIZED LOCATION FOR REPAIRS**

4 **A. Judge van Rooyen Sanctions Putnam and Finds it Used the Barn, an**  
5 **Unauthorized Location, for Repairs in the Submission**

6 After Ford responded to the Submission, it became aware that Putnam was using a facility  
7 called the "Barn" to perform repairs on Ford vehicles. During the hearing, Judge van Rooyen made  
8 the following findings of fact on the record:

9 [S]ome of the repairs in Putnam Ford's warranty labor rate request submission were  
10 performed at a facility other than Putnam Ford's authorized facility at 885 North  
11 San Mateo Drive, San Mateo, California. And . . . order[ed] that Putnam Ford is  
precluded from arguing or speculating as to the location where any repair reflected  
in any specific repair order in the submission was performed.

12 (Hearing: 9/28/2023, 1620:3-11.)

13 Mr. Putnam admitted that the Barn is not an authorized facility of Ford; it is a Nissan facility.  
14 (K. Putnam: 9/25/23, 1073:4-16.) He also acknowledged that Nissan required that all of its authorized  
15 facilities be used exclusively for Nissan operations. (*Id.*, 1073:25-1074:3.)<sup>7</sup>

16 It is not evident from the face of any single repair order in the Submission which repairs were  
17 performed at the Barn. (*See generally* Joint Ex. 7.) Rather, Putnam represented that the address on  
18 each repair order's header was evidence each was performed at the authorized facility. (K. Putnam:  
19 9/25/23, 1098:7-16.) It is "absolutely" unusual for a dealer to service vehicles at an unapproved  
20 facility. (L. Swann: 9/21/23, 808:2-7.)

21  
22  
23 <sup>6</sup> Putnam also did not call Kevin Lindner, Putnam's service manager during the submission period, or,  
24 Rick Saroff, a former Putnam service advisor – both of whom worked with repair orders daily.

25 <sup>7</sup> Mr. Putnam apparently did not want Nissan to know that Putnam's Ford dealership was using the  
26 Barn for Ford service. When one of its owners, Al Vasquez, knew that Nissan executives were coming  
27 to the Burlingame facilities for an inspection, Mr. Vasquez told the Ford service manager, David  
28 Martinez, to close the Barn doors, remove all the Ford vehicles out of the Barn, and assure that all  
Ford technicians were out of sight; Mr. Martinez thought this was "totally abnormal." (Martinez:  
9/20/23, 763:6-764:15, 767:20-768:14; Ex. X [B1222] (text message sent to Mr. Martinez to remove  
the Ford employees from the Barn due to an upcoming Nissan visit).)



**B. The Chronicle of Location Weighs on Credibility**

The Board has already found that Putnam used the Barn to perform repairs during the relevant period. Nonetheless, Ford recounts the following facts regarding ferreting out the location of repairs because they are salient as to the credibility, or lack thereof, of Mr. Putnam, Mr. Kamenetsky. Because these two individuals represent the owners and top management, these facts are relevant to the lack of credibility of the Putnam organization as a whole, particularly as it relates to the Submission.

**C. Ford Learns that Certain Repairs Were Done at the Barn**

In the Fall of 2022, Ford learned from Mr. Sweis, a Ford field service engineer, that Putnam performed Ford repairs at the Barn. As a field service engineer, Mr. Sweis routinely visited about 13 Northern California Ford dealers to consult with their management and assist their technicians on diagnostics and repair procedures; Putnam was one of those 13 dealerships. (Sweis: 9/20/23, 516:7-519:3, 521:11-17.)

Mr. Sweis first visited Putnam in mid-September 2021 with the outgoing field service engineer; they met Putnam's technicians, both at Putnam's main facility and the Barn. (*Id.*, 522:24-523:25.<sup>8</sup>) It was clear to Mr. Sweis that the outgoing field service engineer had been to the Barn before to provide technical assistance to the technicians, meaning use of the Barn predated this visit. (*Id.*, 524:1-17.) During his visit, there were six or seven of Putnam's Ford technicians at the Barn, all working on Ford vehicles. (*Id.*, 523:15-22, 526:3-11.)

**D. Putnam Obfuscates Ford's Discovery On the Location of Repairs**

During discovery in Fall 2022, Ford sought discovery on where each repair was performed. (*See* Respondent's Mot. to Compel Production of Documents, Ex. A (Respondent's Request for Identification and Production of Documents) at 9 (Request No. 40).) The Board overruled Putnam's objections to this discovery and ordered production of documents. (October 13, 2022, Rulings on Objections to Requests for Production of Documents at 2.)

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<sup>8</sup> The photo in Ex. CC [B1234] depicts an aerial view both Putnam's main Ford facility at 885 North San Mateo Drive (outlined in red in the bottom right corner) and the location of the Barn a few blocks away (outlined in green) on the Nissan of Burlingame property (outlined in red in the upper left corner). (Sweis: 9/20/23, 526:20-528:10.)

1           Shortly after the October 2022 discovery hearing, and after Putnam’s counsel became aware  
2 that Ford was probing facts related to location, Mr. Putnam requested a meeting with LaShawne  
3 Swann, the San Francisco Regional Manager, to discuss possible relocation. (Swann: 9/21/23, 792:3-  
4 4, 805:2-8.) During the tour, Mr. Putnam made a comment that “Ford knew they were servicing  
5 vehicles at the Nissan facility,” that “caught [Ms. Swann] off guard.” (*Id.*, 805:21-807:3.) The  
6 comment was “out of the blue[,]” and Ms. Swann believes Mr. Putnam “was actually saying it to kind  
7 of sneak it in as if [she] knew, and [she] didn’t. (*Id.*, 807:23-25.)

8           The pre-hearing deadline for the Parties to exchange documents was November 18, 2022. (1st  
9 Am. Pre-Hr’g Conf. Order at 2.) Putnam did not produce documents relating to location responsive to  
10 Request No. 40. (Resp. Mot. to Extend Deadlines (12/12/22) ¶ 4.) Ford began the conferral process to  
11 obtain these documents.

12           On December 14, 2022, Mr. Putnam signed a declaration under penalty of perjury. (K. Putnam:  
13 9/25/23, 1092:8-14.) In the declaration, Mr. Putnam testified: “Through discussions with dealership  
14 staff and third parties, I have confirmed that during the time period covered by the repair order  
15 submission, all Ford service work was performed at the authorized Ford location.” (*Id.*, 1093:1-6.)  
16 However, through impeachment, it was revealed he only spoke with Mr. Kamenetsky and Mr.  
17 Vasquez; he did not speak to a single service advisor or any third parties. (*Id.*, 1093:7-1094:19.) During  
18 his deposition, Mr. Putnam testified that he did not consult any documents or emails in advance of  
19 preparing his sworn declaration, but at trial he testified he reviewed emails from an environmental  
20 service company. (*Id.*, 1094:23-1096:22.) Mr. Putnam also swore in his declaration that the address  
21 stamped on the repair orders was evidence the repair was performed at the authorized location (*id.*,  
22 1098:7-16); but at trial he contradicted himself and agreed that Ford could not rely on the address on  
23 a repair order to know where the repair was done (*id.*, 1102:11-16). So, he signed a declaration without  
24 asking for further information, observing any repairs, or speaking with any individual who actually  
25 performs repairs. (*Id.*, 1097:7-23.) As such, he admitted that his declaration was not accurate. (*Id.*,  
26 1102:23-1103:1.)

27           The parties had numerous conferrals throughout December 2022 and January 2023 regarding  
28 documents that could demonstrate the location of the repairs identified in the Submission. During the



1 conferrals, Putnam continuously insisted it had no responsive documents and the repairs were not  
2 performed at the Barn or Nissan facility. In a letter dated December 13, 2022, Putnam’s counsel  
3 represented “Putnam did not use an overflow area for Ford service work until after the time period of  
4 the submission. As a result, we believe all the repairs subject to Putnam’s labor rate request were  
5 performed at Putnam’s authorized Ford service facility.” (Ex. O at 2 [B1169].) Putnam’s counsel  
6 followed up with a letter on December 22, 2022, “As confirmed in the Declaration of Kent Putnam  
7 filed by our office on December 14, 2022, each RO has the address of Putnam’s Ford operations: 885  
8 N. San Mateo Drive. All repairs on the ROs subject to Putnam’s labor rate submission (as well as the  
9 additional 30 days of supplemental ROs) were conducted at this address and there are no other  
10 responsive documents to produce.” (Ex. Q at 2 [B1177]; *accord* Putnam: 9/25/23, 1108:10-22.)  
11 Putnam doubled down on this representation on January 24, 2023, going so far claiming it was  
12 “*unreasonable* for Ford to maintain its belief in the face of a sworn declaration.” (Ex. S at 5 [B1186]  
13 (emphasis in original); Putnam: 9/25/23, 1114:19-1115:25 (admitting this statement is wrong).)  
14 Putnam made the same representations to this Board. (*See* Ex. T at 10 [B1197]; *but see* Putnam:  
15 9/25/23, 1116:11-1117:25 (admitting statement in pleading was untrue).)<sup>9</sup>

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20 <sup>9</sup> Putnam also made misrepresentations relating to location directly to Ford. In January 2023, Ms.  
21 Swann toured Mr. Putnam’s Nissan facility pursuant to Putnam’s request for a relocation. (Swann:  
22 9/21/23, 808:16-21, 809:2-9.) Ms. Swann observed Ford vehicles being serviced at both the Barn and  
23 inside Nissan’s main service area. (*Id.*, 809:12-25.) Ms. Swann mentioned to Mr. Putnam “you are not  
24 supposed to service these vehicles here.” (*Id.*, 810:8-10.) Mr. Putnam responded that it was “Nissan  
25 customer-pay” or “retail work.” (*Id.*, 810:9-12.) In other words, Mr. Putnam told her Ford vehicle  
26 owners brought those vehicles to the Nissan dealership for customer-pay work, despite that the Ford  
27 dealership was just blocks away. (*Id.*, 808:16-811:23.) Mr. Putnam testified he never told Ms. Swann  
28 that the Ford vehicles at the Nissan dealership were brought to Nissan to be repaired by Nissan techs,  
because “there is no Ford customers [sic] driving into a Nissan dealership.” (K. Putnam: 9/25/23,  
1047:5-1048:4.) But the question posed to Mr. Putnam and his response conveniently addressed only  
vehicles she saw in the Barn, not the two vehicles she saw being serviced inside the Nissan main  
service department. (*Id.*) Mr. Putnam’s credibility is flimsy. He also admitted “it is possible,”  
“sometimes can happen” that Ford vehicles would be brought over to the main Nissan service facility  
to have repairs done, by Ford technicians. (*Id.*, 1078:9-1079:10.)

**E. Putnam Learns that Ford Has Evidence of Repairs Performed at the Barn And Tries to Covertly Add the Barn as an Authorized Location**

On February 10, 2023, Ford disclosed Suzanne Heinemann, an expert forensic accountant, and her expert report. (Ex. MM.) Ms. Heinemann's report discussed facts learned from Mr. Sweis regarding the capabilities of the Putnam Ford facility and why, based on those capabilities and the nature of certain repairs, specific repairs could not or would not have been performed at the Barn. (*Id.* at ¶¶ 3, 9, 18, 20-21, 24-25). Specifically, Mr. Sweis reviewed the repair orders in Putnam's submission (Joint Ex. 7) and identified several repairs that could only have been performed at the Barn. Those repairs include:

- RO 10049 [B1792-93], Line A—major engine repair, requiring removal of engine; RO indicates the vehicle was at Putnam's from March 17 to April 22, 2021, so both engine and parts that were torn out of it had to be sitting on the floor of the service area where no one would touch it for over a month; in Mr. Sweis's experience, it was done at the Barn with "almost 100% certainty." (Sweis: 9/20/23, 557:11-559:16.) Per Line A, the customer was charged \$4,654.89 for this repair.
- RO 10206 [B1467-69], Lines A and E—left side turbo, which requires removal of the turbo from the sides of the engine, requiring a lot of space to keep the disassembled parts for the 11 days the car was down waiting for parts. Mr. Sweis was "nearly 100 percent" certain it was done at the Barn, as he had previously assisted the technician at the Barn on the exact same model vehicle. (*Id.*, 570:2-571:13.) Per Lines A and E, the customer was charged \$440 and \$1,503.52, respectively, for a total of \$1,943.38 for this repair.
- RO 10239 [B1399-1400], Line D—replace crank shaft, requires removal of transmission, seven days in shop, so had to take up space on floor or rack. Mr. Sweis "almost 100%" certain done at the Barn. (*Id.*, 575:5-579:4.) Per Line D, the customer was charged \$1,442.50 for this repair.
- RO 10305 [B1868], Line D—replace left-hand turbo charger assembly, down for 13 days, requires more than one service bay to complete. (*Id.*, 579:5-581:1.) Per Line D, the customer was charged \$1,062.68 for this repair.<sup>10</sup>
- RO 10362 [B1978-80], Line F—major engine repair to replace cylinder head, spark plugs, and related parts replaced, requires removal of top part of engine, air duct boxes, valve cover, exhaust and intake, would fill up an 8 by 3-foot bench while vehicle there for almost two months. (*Id.*, 581:2-583:5.) Per Line F, the customer was charged a total of \$1,549.63, combining the charges of two technicians that worked on this repair.

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<sup>10</sup> Mr. Sweis also identified a non-qualified repair that could not possibly have been done at the Barn or Putnam's main service area. RO 10091 [B1705], Line B, describes a four-wheel alignment, which could not possibly have been done at main facility or the Barn as neither has the necessary alignment machine. (Sweis: 9/20/23, 560:8-562:15.) Per Line B, the customer was charged \$190 for this repair.

1 Mr. Sweis explained that doing a heavy repair, like an engine repair, entails removing an space  
2 to remove the engine and large equipment. (*Id.*, 530:25-531:13; *see also* 554:24-555:12 (normal things  
3 he saw at the Barn).) Each technician also needs significant space for his large toolbox, which can be  
4 eight-feet wide and ten-feet tall; they are not easily movable, needing a flatbed tow truck to move them  
5 to another location. (*Id.*, 536:15-537:14.) Consequently, that technician is pretty stationary, working  
6 in the same bay and location all the time. (*Id.*)<sup>11</sup>

7 After receiving Ms. Heinemann's report, around April 2023, Putnam attempted to covertly add  
8 the Barn as an authorized location. While Ms. Swann was going over documentation for Ford, she  
9 learned that the Mr. Putnam had not yet signed and returned a certain contract. (Swann: 9/21/23,  
10 812:13-25.) A Ford employee informed Ms. Swann that Mr. Putnam had submitted a request to change  
11 the address on the contract to include the Nissan building as an authorized location. (*Id.*, 812:2-7.) Ms.  
12 Swann believed Mr. Putnam was trying to get in a change of address without Ford noticing. (*Id.*,  
13 813:20-23.)

14 **F. Putnam Provides False Testimony That It Received Approval to Perform**  
15 **Customer Pay Work at the Barn**

16 Putnam's deception continued into the hearing. Mr. Putnam and Mr. Kamenetsky testified at  
17 the hearing that Ms. Swann expressly gave her approval for Putnam to do customer pay work at the  
18 Barn. (K. Putnam: 9/25/23, 1050:24-1051:4; Kamenetsky: 9/27/23, 1459:7-16.) But Ms. Swann  
19 confirmed that she never gave such approval. (Swann: 9/28/23, 1638:4-24.)

20 Mr. Putnam's credibility was demonstrated to be nonexistent during the hearing. He was  
21 **impeached with inconsistent statements 15 times**. (K. Putnam: 9/25/23, 1068:3-1069:6 (describe  
22 policies and procedures as rules), 1069:10-24 (no rules for how technicians track their time), 1070:6-  
23 1072:4 (have to perform repairs at authorized location to be qualified), 1075:15-1076:22 (Nissan pays

24 \_\_\_\_\_  
25 <sup>11</sup> Former Putnam technicians and a service advisor that worked at Putnam Ford during the submission  
26 period testified that repairs at the Barn may have begun as early as April or May 2021, all well within  
27 the submission period. (Decl. of David Rebuella Lopez, Ex. Y [B1223], ¶ 2 (Putnam technician from  
28 April 2021 to January 2022), ¶¶ 6,8 (he and other technicians stationed at main facility and Barn  
throughout their employment); Decl. of Yesse Cruz, Ex. Z [B1225], ¶ 2 (service technician from time  
Putnam opened through June 2021), ¶¶ 6-7 (as a Putnam technician, performed both warranty and  
customer-pay work at main facility and the Barn).)

1 for expenses related to the Barn), 1079:14-1080:3 (no oral agreement between Nissan and Putnam for  
2 the Barn), 1088:22-1091:8 (when barn was in use), 1093:7-1094:22 (who he spoke with about use of  
3 the barn), 1095:16-1096:18 (allegedly looked at documents regarding timing of use of the barn),  
4 1096:23-1097:13 (what he was told about repairs at the Barn), 1104:10-23 (timing of use of the Barn),  
5 1120:7-17 (whether other dealerships serviced vehicles at the Barn), 1121:1-9 (when Chevrolet  
6 dealership stopped servicing vehicles at the Barn), 1124:3-18 (service advisor did not have discretion  
7 over hourly labor rate), 1127:9-1128:1 (no dealership process for technicians tracking work on a  
8 repair), 1129:11-1130:1 (track effective labor rate of service advisor).)

9 Mr. Putnam feigned confusion over the word “accurate.” (*Id.*, 1146:1-10.) He intentionally,  
10 and repeatedly misheard the word “defies.” (*Id.*, 1144:15-24.) He would also contradict himself over  
11 the timing of the repairs at the Barn throughout his testimony. (*See, e.g., id.*, 1107:13-21, 1109:18-  
12 1110:25.)

13 Similarly, Mr. Kamenetsky was **impeached with inconsistent statements eight times**.  
14 (Kamenetsky: 9/27/23, 1500:15-1501:22 (not involved in management of the dealership), 1511:3-  
15 1512:11 (service advisors enter the sold hours on a repair order), 1513:4-9 (don't know names of all  
16 service advisors), 1522:8-1524:25 (manufacturer has to approve facility location), 1526:24-1527:20  
17 (discussion with Mr. Putnam about location of service work), 1538:16-1539:6 (basis for sold hours),  
18 1539:24-1540:22 (service advisor prices the job based on his discretion), 1542:24-1543:17 (Putnam  
19 might use Ford’s time guide, so long as not using a multiplied time guide).) And Mr. Kamenetsky  
20 betrayed his deceit by fearing he would be impeached before he answered a question. (*Id.* 1505:7-15.)

21 Putnam is still doing Ford repairs at the Barn. (*Id.*, 1439:9-13.)

22 **VI. A FORENSIC ACCOUNTANT FOUND NUMEROUS MATERIAL INACCURACIES**  
23 **IN THE PUTNAM SUBMISSION**

24 Ms. Heinemann, an expert forensic accountant and economic consultant, testified at the hearing  
25 regarding her review of the Submission and her opinions concerning material inaccuracies and indicia  
26 of fraud. (Heinemann: 9/25/23, 1003:3-24; Ex. MM at 2, 11, 11 n. 29, 16, 24- 28 [B1256, 1265, 1270,  
27 1278-82].) Ms. Heinemann has nearly 30 years of experience as a forensic accountant and economic  
28 consultant across a variety of industries. (Heinemann: 9/25/23, 875:10-20, 882:22-885:11, 886:4-

1 888:3, 894:11-897:11.) She is a Certified Public Accountant by the state of California and accredited  
2 in business valuation through the American Institute of Certified Public Accountants; she is a member  
3 of the AICPA specifically in their forensic services section, as well as a member of other professional  
4 organizations. (*Id.*, 876:12-877:16, 881:5-25.) Ms. Heinemann has testified in over 15 cases in  
5 arbitrations, state and federal courts and motor vehicle agencies and been deposed in 30 or more cases,  
6 and worked in a support role, as a case manager, in numerous other cases for testifying experts. (*Id.*,  
7 898:15-23, 899:12-900:4; *see generally*, Ex. MM at B1291 (summary of her credentials), and B1292-  
8 1301 (list of her select cases).) She has worked extensively on cases involving the automotive industry  
9 for over 15 years, mostly on analyzing dealership operations in a variety of types of  
10 dealer/manufacturer disputes. (Heinemann: 9/25/23, 891:23-892:22.)

11 As a forensic accountant, Ms. Heinemann analyzes business records (here, repair orders), and  
12 related data, including financial statements or data from market competitors, to find trends and reach  
13 conclusions about the issues presented in litigation or other consulting engagements. (*Id.*, 882:1-21.)

14 Ford asked Ms. Heinemann to consider the requirements of Section 3065.2 in the context of  
15 the sales data, the repair order data, and calculations from the data Putnam and Ford provided, provide  
16 an assessment of the accuracy of Putnam's claimed hourly rate, and consider alternative methods of  
17 calculating that rate, and providing opinions on these issues. (*Id.*, 875:21-876:8.) For her analysis, she  
18 relied on Section 3065.2, the repair orders Putnam provided and the FrogData spreadsheet included in  
19 Putnam's submission, various letters and correspondence, Putnam's dealer financial statements,  
20 market-related data of the 13 surrounding dealers, and composite financial information of those  
21 dealers. (*Id.*, 901:23-903:7.) She also spoke to Ford employees John Becic and Mike Sweis, and Ford  
22 contractor Tonya Gill, and after issuing her report, she reviewed depositions and Putnam's CDK  
23 system to review a limited set of its repair orders. (*Id.*, 903:8-904:3.)

24 **A. The Population of Repair Orders in Ms. Heinemann's Analysis**

25 Ms. Heinemann's analysis began with identifying the population of repair orders at issue.  
26 While FrogData identified a total of 72 repair lines with qualified repairs in Putnam's initial and  
27 supplemental submission, Ms. Heinemann identified two additional qualified repairs, one in each of  
28 the submission groups, for a total of 74. (*Id.*, 915:10-916:5, 917:8-16; Ex. MM [B1267], ¶ 34 at 13,

1 Figure 5 [B1268] at 14 (adding Line D of Repair Order 10048 (battery replacement directly related to  
2 a failed starter on a different line and a rear bar repair on Line B of Repair Order 10287, after consulting  
3 with Ford's labor rate analyst.)

4 Ms. Heinemann was concerned about the small sample size because anomalies in a single  
5 repair line can have a significant impact. (Heinemann: 9/25/23, 910:18-911:18.) It is particularly  
6 concerning when a single line with an anomaly has a big dollar amount. (*Id.*, 914:21-915:9 (referencing  
7 a single repair line with zero actual hours, but a customer charge of \$4,000 to \$5,000).)

8 **B. The Sold Hours Did Not Generate the Charges**

9 Ms. Heinemann concluded that that the Submission's sold hours were not a meaningful  
10 measure of the labor hours that generated the charges. (*Id.*, 933:6-12; *see also* 933:13-934:21  
11 (summary of reasons).) Her opinion was based on the following six observations.

12 1. The Sold Hours Are Designed to Derive a Rate Close to \$440 per Hour After the  
13 Repair Order is Closed

14 Ms. Heinemann discerned that sold hours are often inserted into the repair orders after the labor  
15 charge had been determined and the repair order is closed. (*Id.*, 933:19-22.) Of the 74 qualified repair  
16 lines, about 50% of them calculate out to exactly \$440. (*Id.*, 935:5-7.)<sup>12</sup> The other 50% calculate to  
17 something other than \$440, and they do not calculate to a whole dollar amount. (*Id.*, 935:15-19.) The  
18 rate actually includes decimals into infinity, which is mathematically impossible if a pure sold hour  
19 multiplied by \$440 (or any number to two decimal places) generated the charges. (*Id.*, 935:19-24.)  
20 This was "a clear indication that the . . . sale hour is really an after-the-fact metric. It is a hypothetical  
21 that is in the repair order that is independent of the total charges." (*Id.*, 936:1-8.)

22 Ms. Heinemann also found other indicators that the hours were calculated after the charge was  
23 determined. For example, Joint Ex. 7, RO 10365 [B1989], Line H, has a customer charge of \$644.30,  
24 the actual hours are .8, but the sold hours are 10.4. (*Id.*, 939:10-13.). The rate based on the sold hours  
25 is \$61.95, with extending decimals. (*Id.*, 939:16-18.) Ms. Heinemann observed that among the  
26

27 \_\_\_\_\_  
28 <sup>12</sup> Many of these charges are in fact flat rate charges which are addressed, *infra* (Heinemann: 9/25/26,  
943:8-20).



1 nonqualified set, there were numerous repair order lines with a rate of \$61.95, typically for oil pan  
2 type maintenance. (*Id.*, 939:19-25.) The rate in RO 10365 indicated to Ms. Heinemann, that the service  
3 advisor simply looked up the wrong rate, decided that this repair was general maintenance and not a  
4 warranty-like repair. (*Id.*, 939:25-940:16.) The sold hours were inserted after the fact to obtain the  
5 desired hourly rate, albeit the wrong rate for this repair in this instance. (*Id.*, 940:9-16.)

6                   2. Sold Hours are Zero but the Customer was Charged for Labor

7                   “[T]here are instances where sales hour are zero, yet there are total charges . . . . [T]hat is a  
8 clear indication that sale hours in the CDK system are independent of total charges . . . . You  
9 mathematically cannot have zero hours and still get total charges if those two are related to each other.”  
10 (*Id.*, 937:14-19.) A Putnam service advisor confirmed her observation, as he testified in his deposition  
11 that he input sold hours after closing the repair order. (*Id.*, 937:20-938:18; RO 10071 [B1748].)

12                   3. The Large Discrepancies Between Higher Actual Hours and Lower Sold Hours  
13                   Indicates the Sold Hours are Hypothetical

14                   Ms. Heinemann observed a significant difference between actual hours and sold hours, and she  
15 learned from Mr. Becic, Mr. Sweis, and Ms. Gill that these discrepancies were highly unusual.  
16 (Heinemann: 9/25/23, 940:22-941:10.) The vast difference indicates the sold hours are a “hypothetical  
17 benchmark,” and she questions whether there is “something to effectuate a 440 rate.” (*Id.*, 941:11-15.)  
18 “There is not a lot of credibility to sale hours if they don’t relate to or are even close to on balance the  
19 amount of actual time the dealership is spending to repair vehicles.” (*Id.*, 941:17-20.) Ultimately, Ms.  
20 Heinemann had “concerns about the manipulability of sale hours as well as the manipulability of the  
21 rate if, at the end of the day, the only information that we know to be totally accurate is the amount  
22 the customer paid and, where it is logged, the technician hours on the vehicle.” (*Id.*, 942:4-9.) This  
23 repeated discrepancy led her to conclude that sold hours are not a good proxy for actual time spent  
24 when the population of qualified repairs is viewed as a whole. (*Id.*, 941:11-943:7.)

25                   4. Flat Rate Repairs Should Not Be Included

26                   Ms. Heinemann testified that “[a] flat rate is not an expression of an hourly rate[.]” (*Id.*, 943:23-  
27 24.) Of the 74 qualified repair lines, at least 25% are for diagnoses which are always associated with  
28 one sold hour for a rate of exactly \$440, regardless of the actual hours recorded to make that diagnosis.

1 To Ms. Heinemann, in those many instances, the sold hours are not persuasive evidence of a  
2 meaningful proxy to determine the overall effective labor rate. (*Id.*, 943:8-944:6.) Ms. Heinemann's  
3 observation is supported by the deposition testimony of a Putnam service advisor who testified  
4 diagnostics are typically set at a flat rate of one sold hour, as well as an example from the qualified  
5 population where the sold hours are zero, with the same charge of \$440. (*Id.*, 944:7-19.) It led her to  
6 conclude that the sold hours do not generate the charges in Putnam's submission. (*Id.*, 944:20-24.)

7                   5. Putnam Only Accounts for Actual Hours to Document Labor Expenses

8           Labor charges to the customer flow directly into Putnam's accounting system as revenue. (*Id.*,  
9 946:23-947:1.) Only the technician hours, not the sold hours, carry down to the dealer's accounting of  
10 labor costs, or its expenses against that revenue, and into their financial statements. (*Id.*, 946:1-947:2.)  
11 It is the actual hours that is reported and accounted for at the bottom of the repair orders in the cost of  
12 labor section, which then goes into the dealer's general accounting ledger. (*Id.*) This is basic  
13 accounting, internal controls associated with the total charges to the customer. (*Id.*, 947:19-22.) In  
14 contrast, the sold hours do not appear anywhere on the bottom of the repair orders as cost of labor, nor  
15 on Putnam's financial statements. (*Id.*, 948:9-14.) Putnam's own reliance on actual hours, and not sold  
16 hours, to track expenses, is indicative of the fact that actual hours generate the charges.

17                   6. \$436.76 is Wholly Inconsistent with the Market

18           Ms. Heinemann compared Putnam's requested rate to the warranty labor rates of the 13  
19 surrounding Ford dealers in the San Francisco area, namely those within the Census Bureau's San  
20 Francisco Metropolitan Statistical Area ("MSA"), which includes San Mateo. (*Id.*, 950:22-951:22.)  
21 Such benchmarking of competitors is one of the most effective ways to assess both the reasonableness  
22 and accuracy or reliability of Putnam's claimed rate based on its sold hours. (*Id.*, 951:23-952:15,  
23 953:9-12.) Putnam's claimed rate is twice the average of the 13 other dealers, and 72% higher than  
24 that of the dealer with the highest rate (Dealer 8, \$256 per hour). (*Id.*, 952:16-953:12; Ex. MM, Figure  
25 11 at 24 [B1278], ¶¶ 57-59 at 23-24.)<sup>13</sup> To Ms. Heinemann, it also is not reasonable that a new  
26

27 <sup>13</sup> Ms. Heinemann did not adjust the February 2023 rates into September 2021 dollars to capture  
28 inflation from the time of the Submission. If this had been done, Putnam's rate would have been  
comparatively even higher.



1 dealership like Putnam (the Submission was submitted shortly after it opened) could actually secure a  
2 customer-pay rate that is 70 to 100% greater than its competitors. (Heinemann: 9/25/23, 953:13-20.)<sup>14</sup>  
3 Putnam suggested that the MSA rates were not useful because Ms. Heinemann had not verified  
4 whether other dealers had updated their warranty labor rates through a Section 3065.2 submission.  
5 However, Ms. Heinemann dismissed the idea that:

6 [any of] these dealerships were on the precipice of asking Ford or telling Ford that  
7 their retail labor rate to customers has doubled since their last submission . . .  
8 [b]ecause it would not be economically rational that these dealerships hadn't  
9 updated their rate since the rates we see on this chart, and it wouldn't be  
economically rational that they could take their existing customer base and  
substantially increase prices such that it would have a material impact on these blue  
lines that we see on the chart.

10 (*Id.*, 954:2-14.) Stated another way, for Putnam's argument to have weight, the Board would have to  
11 believe that all 13 other dealerships were acting irrationally and could be making twice as much in  
12 labor charges, but simply chose not to.

13 **C. Putnam's Gross Profit Margin Indicates It is Not Charging \$440 per Hour**

14 Ms. Heinemann also compared Putnam's gross profit margins to composite data of the 13 other  
15 San Francisco MSA dealers. (*Id.*, 955:9-956:1.) The gross profit margin is "the difference between  
16 revenue from repairs and the costs associated with technicians and providing service. . . . It really is  
17 an expression of really price minus cost." (*Id.*, 956:7-13). Ms. Heinemann determined that Putnam's  
18 gross profit margins in its service department is actually lower than the average of the gross profit  
19 margins of the 13 surrounding dealers. (*Id.*, 956:3-5.) If Putnam were really charging customers twice  
20 as much per hour on customer repairs as those other dealers, one would expect that its gross profit

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25 <sup>14</sup> Section 3065.2 was approved by the Governor on October 12, 2019, with an effective date of January  
26 1, 2020. While conceivable that every one of the surrounding dealers has not yet submitted a request  
27 to Ford for a warranty labor rate increase, it would not be economically rational for them to not have  
28 done so in the three years since the law went into effect. As Ms. Heinemann explained, warranty work  
is an "incredibly lucrative" and substantial part of a dealer's service department; it's a guaranteed  
revenue stream from a guaranteed payor, Ford. (Heinemann: 9/25/23, 953:21-954:23.)

margin would be *greater*. (*Id.*, 957:5-9.)<sup>15</sup> To Ms. Heinemann, this was additional evidence that Putnam does not have a labor rate of \$440 per hour. (*Id.*, 958:3.)

**D. The Qualified Repair Population Lacks Reliability Due to Location**

While Ms. Heinemann does not opine on the legal issue of whether customer-pay repairs preformed at an unauthorized facility are qualified. However, if location is relevant, the fact that the repair order does not reflect the location where a repair was done raises a “red flag,” rendering some portion of the repair order population unreliable. (*Id.*, 918:13-15, 918:16-920:4). It is impossible to identify which repairs would need to be excluded before calculating Putnam’s effective labor rate. This is also evidence that Putnam’s submission was riddled with issues and is unreliable. (*Id.*, 917:17-920:4; Ex. MM, Section 5.A., ¶¶ 18-19 at 8 [B1262].)<sup>16</sup>

**E. Putnam’s Labor Rate is Not \$440 an Hour**

Notwithstanding the multiple inconsistencies, discrepancies, and other suspect issues that Ms. Heinemann found in the data, and without deleting repairs that likely were conducted at the Barn, Ms. Heinemann, as a forensic accountant, nonetheless calculated effective rates for the Board in her report’s Exhibits 2 and 3, based on both sold and the available actual hours. (Heinemann: 9/25/23, 960:19-961:4; Ex. MM, Exs. 2 & 3 [B1285-86].) Exhibit 2 to Ms. Heinemann’s report is based on qualified lines on repair orders based on the closed repair order dates and Exhibit 3 to her report is based on the date those repair orders were opened.<sup>17</sup> (Heinemann: 9/25/23, 961:7-19.) In each of the

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<sup>15</sup> One significant factor explaining why Putnam’s gross profit margins for its service department are lower than the average of the other dealers is that it is sinking a lot of its technician time into an “unapplied labor time” account on its financials; that time reduces the overall gross profit of the department as a whole but makes its customer-pay repair account alone appear higher than the surrounding dealers. (Heinemann, 9/25/23, 956:19-957:23; Ex. MM, ¶¶ 60-62 at 25-26 and Figure 12 [B1279-80].)

<sup>16</sup> Mr. Sweis testified that it would have been implausible to perform certain repairs at the Ford, as detailed in the Location Section.

<sup>17</sup> The statute requires that the rate be based on “[a]ll repair orders **completed** in any 90-consecutive-day period.” Veh. Code § 3065.2(a)(1)(B) (emphasis added). The 90-day set of repair orders that FrogData used to calculate Putnam’s labor rate does not conform to the statute because it includes only repair orders opened on March 10, 2021. (*See, e.g.*, Joint Ex. 3, Putnam for Labor Tab, spreadsheet row 1010 (FrogData’s earliest, RO 10036, which was opened on March 10, 2021).) The

1 tables, Ms. Heinemann separated FrogData's 72 repair order lines in the columns labeled "Putnam"  
2 and Analytic West's 74 repair order lines in the columns labeled "AW." (*Id.*, 962:7-18.) She then  
3 calculated rates based on every potential set of 90 consecutive days of repair orders from the 120 days  
4 of repair orders in the Submission.<sup>18</sup> (*Id.*, 962:2-6.) The red boxes on each table represent the repair  
5 set that optimizes rates in Putnam's favor, with the darkest red box being the most optimized, and the  
6 green boxes optimize the rates for Ford, again with the darkest green boxes the most favorable rate to  
7 Ford. (*Id.*, 964:8-20.) The column headed "Sale Hours" are the calculations using only Putnam's  
8 claimed sold hours, and the three columns labeled "Technician Hours" for the calculations based on  
9 actual hours, per the variations noted in the footnotes per column. (*Id.*, 966:10-967:20.)

10 Using technician hours on Exhibit 3, the opening-date repair order sets, the optimal rate for  
11 Ford is \$173.84 per hour. Using the closed-date repair orders in Exhibit 2, the optimal rate for Ford is  
12 \$198.02 per hour. Ms. Heinemann rejects Putnam's requested rate of \$436.76. (*Id.*, 958:3.) Ms.  
13 Heinemann concludes that the actual, technician hours are the more reliable metric of the labor that  
14 generated the customer charges, despite the problems with this data. (*Id.*, 949:21-950:21.) There are  
15 repair lines missing actual hours or where actual hours were moved, in whole or in part, to other  
16 accounts, like the ISP or training as Mr. Kanouse testified, reducing the clocked actual hours and  
17 thereby raising the hourly rate. (*Id.*, 949:20-950:21, 971:5-972:17, 1003:13-24.) Consequently, no  
18 single calculation adequately sets a firm rate.

19 The bottom line is that Putnam's submission based on sold hours is substantially and materially  
20 inaccurate because those hours are not generating the customer charges. Putnam is not charging \$440

21 \_\_\_\_\_  
22 Submission is incomplete. It is possible there are repair orders that were opened before March 10, but  
23 closed on or after March 10, that are not included in the population. Likewise, there are repair orders  
24 opened on or before June 7, but closed after that day that should not have been included. (Heinemann:  
25 9/25/23, 928:15-929:23; Ex. MM [B1265-66], ¶¶ 27-30 at 11-12.) Ms. Heinemann correctly  
26 concluded that, since those additional "completed" repair orders were not provided, their financial  
27 impact on Putnam's claimed labor rate cannot be known; those omissions still affect the quality and  
28 accuracy of Putnam's calculation. (Heinemann: 9/20/23, 929:19-932:2; Ex. MM [B1266], ¶ 30 at 12  
and footnote 33.)

<sup>18</sup> Section 3065.2(d)(5) allows a manufacturer to calculate an adjusted rate based on "any set of the  
qualified repair orders submitted by the franchisee."

1 per hour. (*Id.*, 958:3.)<sup>19</sup> It is charging a lower rate and then artificially manipulating sold hours to give  
2 the appearance of \$440 per hour. (*Id.*, 957:24-958:11, 960:4-18; 1002:10-1003:24.)

3 This testimony went un rebutted. Edward Stockton, Putnam’s rebuttal expert, did not provide  
4 any opinions on the appropriate labor rate, the accuracy of Putnam’s Submission, or conformance with  
5 3065.2. (*See generally*, E. Stockton: 9/26/23, 1159:5-1340:24.) Nor could he have provided such  
6 testimony; it was obvious in his testimony that he did not to know how to read a repair order. (*See*,  
7 *e.g.*, *id.*, 1260:19-1262:8, 1262:16-1263:23, 1264:21-1265:6, 1281:25-1284:9 (Joint Ex. 7, RO 10043  
8 [B1806]), 1297:5-1298:18.)

### 9 RELEVANT LAW

10 Section 3065.2(a) of the Vehicle Code governs the procedure to determine a “reasonable”  
11 warranty labor rate request. Under the statute, the dealer<sup>20</sup> submits 100 consecutive repair orders which  
12 reflect both “qualified” repairs and nonqualified repairs completed in the same period, or,  
13 alternatively, all repair orders completed in any 90 consecutive days, whichever series generates the  
14 fewer repair orders. *Id.* § 3065.2(a)(1). A “qualified repair” is defined as “a repair order, closed at the  
15 time of submission, for work that was performed outside of the period of the manufacturer’s warranty  
16 and paid for by the customer, but that would have been covered by a manufacturer’s warranty if the  
17 work had been required and performed during the period of warranty.” Veh. Code § 3065.2(j).

18 The dealer then calculates the requested retail labor rate by “determining the total charges for  
19 labor from the **qualified** repair orders, **dividing by** the total number of hours **that generated those**  
20 **charges.**” *Id.* § 3065.2(a)(2) (emphasis added). The dealer’s submission must include the repair orders  
21 and the dealer’s requested rate that it determined from those repair orders. *Id.* § 3065.2(a)(1). If the  
22 rate requested is substantially higher than the dealer’s current warranty labor rate, the manufacturer  
23 has 30 days from the submission to request all repair orders closed within 30 days immediately  
24 \_\_\_\_\_

25 <sup>19</sup> Ms. Heinemann defined “materially” inaccurate, from an accounting perspective (of, for example  
26 accounting audits); it means “rising to the level where an omission or an error or inaccuracy would  
27 really change the decision of the users of the financial data.” (Heinemann: 9/25/23, 1002:10-1003:4.)  
Given primarily the rates calculated between using sold hours versus technician hours and the  
comparable market data, “the difference is so vast as to just clearly meet that threshold.” (*Id.*)

28 <sup>20</sup> The statute uses the terms “franchisee” for dealer and “franchisor” for manufacturer.

preceding or 30 days immediately following the set of repair orders submitted by the dealer. *Id.* § 3065.2(d)(4). The manufacturer then has 30 days from receipt of the supplemental repair orders to provide its response contesting the dealer's requested rate. *Id.* § 3065.2(d)(1).

The grounds on which the manufacturer may contest the dealer's rate are limited to the requested rate being materially inaccurate or fraudulent. A manufacturer may only provide one response notice, which must provide: a full explanation of all reasons for the finding, evidence substantiating the franchisor's position, a copy of all calculations used by the franchisor in determining the franchisor's position, and a proposed adjusted retail labor rate or retail parts rate, as applicable, on the basis of the initial or supplemental repair orders requested by the manufacturer. The manufacturer thereafter cannot add to, expand, supplement, or otherwise modify any element of that notification, without justification.

*Id.*

"If a franchisee disputes the franchisor's proposed adjusted retail labor rate or retail parts rate, the franchisee may file a protest with the board for a declaration of the franchisee's retail labor rate or retail parts rate." Veh. Code § 3065.4(a). Pursuant to Section 3065.4, the manufacturer has the burden to prove "it complied with Section 3065.2 and that the franchisee's determination of the retail labor rate or retail parts rate is materially inaccurate or fraudulent." *Id.*

Section 3065.4(b) instructs the Board to determine whether a manufacturer has met its burden under subpart (a), and then engage in an independent review and calculation under Section 3065.2:

Upon a decision by the board pursuant to subdivision (a), the board may determine the difference between the amount the franchisee has actually received from the franchisor for fulfilled warranty obligations and the amount that the franchisee would have received if the franchisor had compensated the franchisee at the retail labor rate and retail parts rate as determined in accordance with Section 3065.2 for a period beginning 30 days after receipt of the franchisee's initial submission under subdivision (a) of Section 3065.2.

Veh. Code § 3065.2(b). Thus, the Board has the discretion to engage in an independent calculation and is not bound to accept the calculation of either the manufacturer or the dealer. *See generally id.*

### ARGUMENT

There are three questions before the Board.

**First, did Ford meet its burden to show that the requested labor rate of \$436.76 was materially inaccurate and/or fraudulent? Yes.** The evidence identifies seemingly countless material inaccuracies in the Submission. From the inclusion of flat rate items, which by definition do not use hourly labor rates, to the clear evidence by Mr. Putnam himself of "backing in" to sold hours after

determining the customer labor charge, to the fact that an unknown number of repairs are not qualified because Putnam performed them at the Barn, almost every relevant aspect of these repair orders is inaccurate. Further, Putnam intentionally omitted and obscured facts, and outright fabricated information with the intent that Ford rely on those misrepresentations in review the labor rate submission. As such, the Submission is also fraudulent.

**Second, did Ford meet its burden to show that it complied with the notification provision in Section 3065.2(d)(1)? Yes.** The Denial Letter was timely and included the basis for its position, as required by the statute, and gave examples of the inaccuracies and inconsistencies. Any supplemental information or arguments presented during the hearing was entirely justified given Putnam's constant obfuscation and the layers of anomalies contained in the Submission.

If the Board answers yes to both the first and second question, it may stop its analysis and adopt Ford's finding that the Submission is too unreliable to be used to calculate a rate. Further, it should find that Putnam's initial rate of \$177 is still in effect.

**Three,** even if the Board has answered no to either question one or two, it should not simply accept Putnam's unreasonable rate. Rather, it may engage in its own independent calculation and ask **what should the rate be?** Either it should find that **the submission is too unreliable to be used to calculate a rate, or** it should adopt the rate of **\$198.02 per hour**. Section 3065.4 empowers the Board to conduct a *de novo* review of all evidence and may set a rate, if at all, using the formula set forth in Section 3065.2. Thus, it should not simply adopt Putnam's absurdly high rate of \$436.76 if it finds Ford did not meet its burden. Because Section 3065.2 contains a threshold reasonableness requirement, the Board may reject the Submission as non-conforming because the proposed rate is so egregiously unreasonable. If the Board does proceed to determine which hours generate the charges, the Board may either reject the Submission entirely as inherently unreliable or calculate a rate with technician hours, reaching a rate of \$198.02/hour.

**I. FORD HAS RESOUNDINGLY PROVEN PUTNAM'S SUBMISSION IS MATERIALLY INACCURATE AND FRAUDULENT**

The evidence at the hearing undoubtedly demonstrates that Putnam's Submission is, at best, fraudulent, and without a doubt, materially inaccurate.



1 Here, Section 3065.2 does not define “materially inaccurate” or “fraudulent.” However, the  
2 Board must give these terms their plain, ordinary meaning, and may consult dictionary definitions.  
3 *Halbert's Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 Cal. App. 4th 1233, 1240 (using Webster’s  
4 Dictionary to interpret the meaning of “furnish”).

5 “Accurate” is defined as “free from error,” “conforming exactly to truth or to a standard,” or  
6 “exact.” See “Accurate” Miriam-Webster Dictionary, *available at* [https://www.merriam-](https://www.merriam-webster.com/dictionary/accurate)  
7 [webster.com/dictionary/accurate](https://www.merriam-webster.com/dictionary/accurate), (last visited 12/12/23).

8 The ordinary meaning of the adjective “material” is “[o]f such a nature that knowledge of the  
9 item would affect a person's decision-making; significant; essential.” *Cty of Kern v. Alta Sierra*  
10 *Holistic Exch. Serv.*, (2020) 46 Cal. App. 5th 82, 101 (citing (Black’s Law Dict. (8th ed. 2004)). “If  
11 an objectively reasonable person would consider the new circumstances significant or important in  
12 making a decision about the subject matter of the ordinance, the change in circumstances is material.”  
13 *Id.* As Ms. Heinemann testified, “materially inaccurate” from an accounting sense means “rising to  
14 the level where an omission or an error or inaccuracy would really change the decision of the users of  
15 the financial data.” (Heinemann: 9/25/23, 1002:10-1003:4.)

16 “Fraudulent,” as in a fraudulent misrepresentation, is defined as “a false statement that is  
17 known to be false or is made recklessly — without knowing or caring whether it is true or false — and  
18 that is intended to induce a party to detrimentally rely on it. Also termed fraudulent representation;  
19 deceit.” MISREPRESENTATION, Black's Law Dictionary (11th ed. 2019); *see also Graham v. Bank*  
20 *of Am., N.A.*, (2014) 226 Cal. App. 4th 594, 605-06 (defining a fraudulent misrepresentation as (1) . .  
21 . an important fact was true; (2) that representation was false; (3) the defendant knew that the  
22 representation was false when the defendant made it, or the defendant made the representation  
23 recklessly and without regard for its truth; (4) the defendant intended that the plaintiff rely on the  
24 representation . . .”).

25 Putnam’s Submission is suffused with, at minimum, three categories of material inaccuracies  
26 and fraudulent activity.

27 First, the sold hours listed in the repair orders did not generate the final labor charges. This is  
28 a fundamental aspect of the statute. See Veh. Code § 3065.2(a). To determine the final labor rate,

1 Putnam must use the hours that “generated” the final labor charges. Yet, the evidence conclusively  
2 demonstrated that the hours listed as “sold hours” on the repair orders did not in fact generate the final  
3 labor charges to the customer. The Board need not rely on the documents and make reasonable  
4 inferences (although the documents do conclusively show the sold hours did not generate the  
5 charges)—Putnam admitted as much by explaining through witnesses Mr. Putnam and Mr.  
6 Kamenetsky that Putnam employees would “back into” the sold hours by taking the final labor charge  
7 and dividing by \$440, or, alternatively, using flat rate pricing and selection sold hours based on  
8 obtaining an hourly rate of \$440.

9 Second, the repair orders are riddled with so many accounting anomalies that, from an  
10 accounting standpoint, the anomalies call into the question the reliability of the totality of the  
11 Submission. Simply put: garbage in, garbage out.

12 Third, the Submission contains non-qualified repair orders that are not readily ascertainable.  
13 The Board had found that at least some of the repairs in the Submission occurred at the Barn, which  
14 is not an authorized location. The statute defines a qualified repair as a repair that would have  
15 otherwise qualified as a warranty repair, and because a warranty repair must be done at an authorized  
16 Ford location, it follows that any repair performed at the Barn cannot be a qualified repair. Because it  
17 is impossible to know which, if any repairs were performed at the Ford location, it is impossible to use  
18 the set to calculate a warranty labor rate.

19 These deficiencies constitute material inaccuracies in the Submission because they result in  
20 grossly inflating the proposed labor rate. Because the evidence shows that Putnam knowingly and/or  
21 recklessly submitted materially inaccurate information to Ford with the intent that Ford rely on them  
22 when calculating the labor rate, this is also proof of fraud.

23 **A. The Sold Hours Did Not Generate the Labor Charges**

24 A warranty labor rate request is a creature of statute; as such, the Board must start with the  
25 statute and apply its plain and commonsense meaning. *Coal. of Concerned Cmty's., Inc. v. City of L.A.*  
26 (2004) 34 Cal. 4th 733, 737. Section 3065.2 is very specific—to arrive at the requesting dealer’s  
27 effective labor rate, “[t]he franchisee shall calculate its retail labor rate by determining the **total**  
28 **charges for labor** from the qualified repair orders submitted and dividing that amount by the **total**



1 **number of hours that generated those charges.”** Veh. Code § 3065.2(a)(2) (emphasis added). Not  
2 only must the customer charges be based on the “labor” that it took to do the repairs, but the “hours”  
3 of labor must be those that “generated those charges.”

4 “Labor” is defined as the “expenditure of physical or mental effort,” and more specifically to  
5 this context, “human activity that provides the goods or services in an economy.” “Labor,” Merriam-  
6 Webster Dictionary *available at* <https://www.merriam-webster.com/dictionary/labor> (last visited  
7 12/12/23). To “generate” something likewise has a common sense meaning: “to bring into existence,”  
8 “to create by means of a defined process,” or “to be the cause of” something, such as an action or  
9 situation.” “Generate,” Merriam-Webster’s Dictionary *available at* [https://www.merriam-](https://www.merriam-webster.com/dictionary/generate)  
10 [webster.com/dictionary/generate](https://www.merriam-webster.com/dictionary/generate) (last visited 12/12/23). Thus, Section 3065.2’s plain language  
11 requires that, in calculating a labor rate, it is necessary to use the hours that factored into the final labor  
12 charge calculation.

13 Putnam argued that the final labor charge is the product of Ford’s time guide hours multiplied  
14 by \$440. As explained in Ford’s Pre-hearing Brief, time guide hours are not hours that “generate the  
15 charges,” and the use of a time guide is not permitted under the plain language of the statute. (*See*  
16 *Ford’s Pre-Hearing Br. at 10-12.*) Further, amendments to the statute expressly removed the use of  
17 time guide hours from the text of Section 3065.2, thus indicating that it was *not* the intent of the  
18 Legislature that dealers use a time guide to calculate warranty labor rates under Section 3065.2. (*Id.*  
19 *at 12-14.*)

20 As detailed in the following subsections, the evidence presented at the hearing has rendered  
21 the discussion of the applicability of a time guide largely academic at this point because there is no  
22 evidence that Putnam uses the Ford time guide. Instead, the testimony revealed that the sold hours  
23 reported in the Putnam Submission did not, in fact, generate the total labor charge. This is hardly a  
24 surprise. If Putnam customers paid for labor by multiplying sold hours by \$440, one would expect  
25 that, the vast majority of the time, the labor rate would come out to exactly \$440. Where the rate is a  
26 flat \$440 per hour, it frequently the result of a flat-rate charge. Because no hours determine a labor  
27 charge for a flat rate, these repair lines cannot be included. Additionally, the testimony and  
28 documentary evidence shows Putnam “backs into” the sold hours by taking the final labor charge and

1 selecting an hourly rate that can achieve a rate close to \$440/hour. This manipulation unquestionably  
2 shows that Putnam's sold hours are artificial and fraudulent.

3 1. Putnam's Time Guide Argument is a Red Herring

4 The issue of whether a dealer may rely on time guide hours instead of actual, technician hours  
5 has been largely rendered moot by the hearing. Ford presented evidence that the sold hours were not  
6 time guide hours. Specifically, Mr. Becic testified that, based on a review of a sample set of the repair  
7 lines, the sold hours did not match the time guide hours. (*See* Becic: 9/18/23, 109:18-110:8) Likewise,  
8 Mr. Kanouse testified that sold hours in specific repair orders did not match the Ford time guide.  
9 (Kanouse: 9/19/23, 315:10-16 (Putnam lists zero sold hours but time guide is 0.3), 320:14-321:16  
10 (sold hours of 3.2 when time guide would be around 4); *see also id.* 452:4-7 (same).)

11 Ford's evidence went un rebutted. Putnam did not call a single service advisor, technician, or  
12 person who has created a repair order to testify. Putnam did not offer testimony from anyone with  
13 personal knowledge of time guide or the repair order process that Putnam was indeed using time guide  
14 hours. In fact, Mr. Putnam admitted Putnam service advisors did not consistently use the time guide:

15 Q. But you do agree that the sold hours are not always equal to what might be in  
16 the time guide, true?

16 A. True.

17 Q. It is at the service advisor's discretion?

17 A. Yes.

18 (K. Putnam: 9/25/23, 1124:22-1125:1.) Mr. Putnam only expected "the 440-an-hour labor rate to  
19 hold." (*Id.*, 1125:2-4.) Additionally, Mr. Kamenetsky was impeached at the hearing with his deposition  
20 testimony, in which he stated: "The closest thing that they use is they'll refer to the factory time if  
21 they're not sure on a repair, but they are not required to use that on customer pay." (Kamenetsky:  
22 9/27/23, 1544:21-1545:3 (emphasis added).)

23 For the reasons articulated in the pre-hearing brief, time guide hours do not "generate the  
24 charges," and cannot be used for a warranty labor rate calculation under Section 3065.2. (*See* Pre-  
25 H'ing Br. at 10-14.) The plain language of the statute does not support an interpretation of the use of  
26 time guide hours, and the legislative history reveals that the Legislature considered the use of time-  
27 guide hours but amended the language out of the statute. But because the evidence at the hearing  
28

1 demonstrated that the time guide was not actually in use, this Brief will focus on the other categories  
2 of evidence demonstrating that the sold hours did not generate the charges.

3                   2. Putnam Impermissibly Included Flat Rate Charges in Its Calculations

4           Inherent in the plain language Section 3065.2 is the requirement that the charge for labor be  
5 the product of some quantity of time. There is a direct, mathematical relationship between time and  
6 the charge. A flat rate, by definition, has no correlation to the time it takes to perform a repair.  
7 (Heinemann: 9/25/23, 943:23-24 (“A flat rate is not an expression of an hourly rate . . .”).) That is a  
8 flat rate’s very purpose: the customer will pay a fixed fee regardless of time spent on the service item.  
9 Thus, where a repair charges a flat rate, regardless of time spent, no amount of time “generated the  
10 charges.” Because no time generated the charges, the repair cannot be used to calculate the labor rate.

11           Although repairs based on flat-rates should be excluded under the plain language of the statute,  
12 at least 25% of the Submission contains flat-rates associates with one sold hour. The identifiable flat-  
13 rate items are the diagnostic charges. Half of the lines that had a rate of \$440 were associated with  
14 diagnostic work which is a flat-rate charge, regardless of the time it took to perform the diagnosis.  
15 (Kamenetsky: 9/27/23, 1468:24-1469:3 (diagnostics done on a flat-rate basis); Korenak: 9/24/23,  
16 1429:5-13 (same); Heinemann: 9/25/23, 943:16-18 (relying on deposition testimony of Putnam service  
17 advisor).) But, in the CDK system, one sold hour was populated for each of these repair lines.  
18 (Heinemann: 9/25/23, 943:18-20; *see* also Joint Ex. 3, Putnam Ford Labor tab, RO 10259, Line A  
19 (spreadsheet row 114); RO 10206, Line A (spreadsheet row 329), RO 10148, Line A (spreadsheet row  
20 523), RO 10118, Line A (spreadsheet row 646), RO 10106, Line C (spreadsheet row 704), RO 10094,  
21 Line A (spreadsheet row 768), RO 10091, Line A (spreadsheet row 778), RO 10036, Line B  
22 (spreadsheet row 1006).) These flat-rate charges should be excluded from the repairs.

23           Further, Putnam would often charge the customer based on an “estimate,” and the estimate was  
24 based on the discretion of the service advisor. (Kamenetsky: 9/27/23, 1540:11-22.) The same repair  
25 does not necessarily cost the same amount for each customer because the service advisor has discretion  
26 to adjust. (*Id.*, 1540:23-1541:1.) Although Putnam uses the word “estimate,” these flat-rate charges  
27 are determined before labor is performed and are not tied to the hours it takes to perform the repair (or  
28 even the hours in the time guide). It is based on a pre-determined dollar amount set at the discretion

1 of the service advisor. These repairs should likewise be excluded, but they are not identifiable from  
2 the face of the repair order. As such, the existence of these flat-rate repairs taints the entire Submission.

3 As Ms. Heinemann observed approximately 25% of the total submission is comprised of flat  
4 rate diagnostic charges. (Heinemann: 9/25/23, 943:8-944:19.) Consequently, the resulting \$440 rate  
5 on those lines has an outsized influence on the overall calculation, rendering its impact material.<sup>21</sup>  
6 Because Putnam reported these flat-rate charges as labor charged based on hours, as opposed to  
7 indicating the charge was a flat-rate and associating them with zero hours,<sup>22</sup> it knowingly  
8 misrepresented the use of sold hours in the calculation. As such, this is also evidence of fraud.

9 3. Putnam Manipulated Sold Hours to Reach a Rate Near \$440

10 The evidence is overwhelming that Putnam manipulated the sold hours to manufacture a rate  
11 close to \$440. Ford has identified seven categories of evidence that all show that Putnam's sold hours  
12 did not generate the charges. Instead, Putnam fraudulently entered sold hours after finalizing the  
13 customer labor charge in order to falsely project a labor rate of \$440. Each of the seven categories as  
14 discussed below.

15 *i. Category One: Putnam admits to "tinkering" with the repair orders.*

16 Mr. Putnam admitted that the sold hours are artificial. He told Ms. Murphy-Austin that the  
17 price the customer paid would remain comparable to neighboring dealers because the hours Putnam  
18 used to calculate the customer charge would be lower than what the job would take, which would  
19 offset the higher labor rate. (Murphy-Austin: 9/18/23, 191:22-192:16 (emphasis added).) At the  
20 hearing, Mr. Kamenetsky believed that service advisors were "tinkering" with repair orders.  
21 (Kamenetsky: 9/27/23, 1600:25-1601:3.) This tinkering was baked into the Putnam process at a  
22

23 <sup>21</sup> For example, taken as a whole, there are 90.3 sales hours in the Submission, for a net labor charge  
24 of \$34,963. This is an average labor charge of \$387.19 when using sold hours. But, if we exclude  
25 diagnostic repairs, which are estimated to be about 25% of the repair lines, or 18 lines, that reduces  
26 the total hours by 18 hours and the total charges by \$7,920. The effect is to lower the labor rate to  
\$374.04. The difference may be even greater depending on the 90-day period selected. This \$13/hour  
difference is material given the volume of warranty repair work for which Ford pays Putnam in a year.

27 <sup>22</sup> Mr. Korenak testified that if a repair order was associated with zero hours it would be disqualified.  
28 (Korenak: 9/27/23, 1430:3-13.) But because the diagnostic repairs had one sold hour, FrogData  
included them. *Id.*

1 conceptual level—Mr. Putnam testified that rather than have hours generate charges, Putnam set up  
2 their system by using algebra to “back into the [\$440/hour] rate.” (K. Putnam: 9/25/23, 1044:2-11  
3 (emphasis added).) Putnam never “rais[ed] the price to the customer. The price to the customer is not  
4 going to change . . . so we backed into it. We did basic algebra and we backed into the [\$440] rate.”  
5 (*Id.*, (emphasis added).)

6 David Martinez, Putnam’s former service manager, confirmed the flagrant manipulation of  
7 sold hours by Putnam’s service advisors. Service advisors could and did change the sold hours after  
8 the fact, without regard to the hours listed in the Ford time guide. (Martinez: 9/20/23, 733:7-19, 735:6-  
9 9; Ex. AA, ¶ 21 [B1229].) Among the reasons they would change the sold hours was to get the rate of  
10 \$440. (Martinez: 9/20/23, 755:13-19.) The ways service advisors would get the rate to \$440 on any  
11 given day included picking a different time guide or even picking any number of hours they wanted;  
12 there was no consistent mechanism by which they manipulated the hours to get as close to \$440 as  
13 they could. (*Id.*, 755:20-756:12, 758:7-11, 761:21.) None of this happened at other Ford dealerships  
14 at which Mr. Martinez worked. (*Id.*)<sup>23</sup>

15 *ii. Category Two: Repeating decimals prove rates are fake.*

16 The math to calculate customer charges on a repair is simple—the hours multiplied by the  
17 hourly rate (in dollars, even with cents added). Even if the hourly rate includes cents, with hours to  
18 the tenth of an hour, the arithmetic will always end with no more than dollars and cents.<sup>24</sup> Reversing  
19 that process, i.e., dividing the customer charge by the number of hours, will result in dollars and  
20 possibly cents, but no more. As Mr. Kamenetsky admitted, if sold hours were actually multiplied by  
21 \$440, everything would be divisible by \$440, without additional decimals. (Kamenetsky: 9/27/23,  
22 1557:11-24, 1598:2-25.)

23  
24  
25 <sup>23</sup> While Mr. Martinez started at Putnam on September 1, 2023, he reviewed open repair orders going  
26 back a month or two, so to July or August 2021, in or closer to the submission period, and saw the  
27 results of the same practices he testified about in that earlier period. (Martinez: 9/20/23, 768:15-  
769:20.)

28 <sup>24</sup> Even in the unusual case of hours tracked to the hundredth of an hour, the arithmetic would extend  
beyond four decimal places, unlike many of the examples detailed in this section.

1 As demonstrated throughout the hearing with the assistance of the well-regarded computational  
2 website, Wolfram Alpha, many of the Submission's repair lines do not match that simple math. (*See*,  
3 *e.g.* Becic: 9/18/23, 91:1-7, 94:5-10; Kanouse: 9/19/23, 343:9-10, 350:9-14, 493:19-22.) Instead, when  
4 the final customer labor charge is divided by the sold hours the resulting rate is a nonsense rate,  
5 extending even beyond four decimal places, and often one with a repeating decimal. Here are some  
6 examples from Joint Ex. 7:

- 7 • RO 10049 [B1792-93], Line A – Sold hours=10.6, customer charge=\$4,654.89, hourly  
8 rate=\$439.140566037735849 repeating (period 13).<sup>25</sup> According to Mr. Kanouse, this  
9 rate cannot be entered into the CDK system and the sale total would have had to be  
10 manually entered into the system (as opposed to the final charge being automatically  
11 populated by CDK by multiplying hours by a set rate. (Kanouse: 9/19/23, 345:17-23.)  
12 Mr. Kanouse did not trust the data in the repair order. (*Id.*, 349:7-351:11.)<sup>26</sup>
- 13 • RO 10206 [B1468-69], Line E – Sold hours=3.4, customer charge=\$1,503.52, hourly  
14 rate=\$442.21176470588235294 repeating (period 16). According to Mr. Kanouse,  
15 there is no way this rate can be entered into the system; rather, it appears as if 3.4 hours  
16 was selected because it was the closest to approximating a \$440 rate. (Kanouse:  
17 9/19/23, 341:23-344:25; *see also* Kamenetsky: 9/27/23, 1596:17-1597:20)
- 18 • RO 10239, [B1399-1400], Line D –Sold hours=3.2, customer charge=\$1,442.50,  
19 hourly rate=\$450.78125. There is no connection between the sold hours and the final  
20 customer charged because it is impossible to enter this rate into the CDK system.  
21 (Kanouse: 9/19/23, 318:4-7, 320:17-321:9.)
- 22 • RO 10305 [B1868], Line D – Sold Hours=2.4, customer charge=\$1,062.68, hourly  
23 rate=\$442.783 repeating (period 1). There is no way that 2.4 hours generated the  
24 charges because this labor rate cannot be used in any dealer accounting system. (Becic:  
25 9/18/23, 81:25-86:5.)
- 26 • RO 10362 [B1978-80], Line F – Sold hours=3.5, customer charge=\$1,549.63, hourly  
27 rate=\$442.751428571 repeating (period 6). This is not a labor rate that could ever be  
28 entered into an accounting system. (Becic: 9/18/23, 86:6-9, 90:16-92:6.)
- RO 10362 [B1980-81], Line I –Sold hours=1.5, customer charge=\$650, hourly  
rate=\$433.33 repeating (period 1). There is no way that 1.5 hours generated the final  
customer charge. (Becic: 9/18/23, 86:6-9, 93:15-94:10.)

23 Mr. Kanouse testified that Putnam's CDK system simply cannot be programmed with an  
24 hourly rate with decimals beyond cents to calculate a charge, that the sold hours had to be manually

25 \_\_\_\_\_  
26 <sup>25</sup> The use of "period" in this context equals the number of repeating digits in the position farthest to  
the right of the decimal point.

27 <sup>26</sup> Putnam's CDK computer system is pre-programmed to calculates the customer charge from the sold  
28 hours for a given repair coded in its system and the default hourly rate the dealer sets. (Kanouse:  
9/19/23, 343:25-344:16, 465:14-17, 470:1-16.)



1 entered. (Kanouse: 9/19/23, 349:7-351:11.) Mr. Becic made similar comments about the inability of  
2 the systems dealers use to calculate charges from such hourly rates. (Becic: 9/18/23, 90:16-92:6  
3 (regarding Joint Ex. 7, RO 10362 [B1978-80], Line F).)

4 To explain the presence of repeating decimals, Mr. Kamenetsky speculated that the dollar  
5 amount of the labor may have been manually adjusted to accommodate a higher charge for parts after  
6 the fact in order to keep the customer estimate the same. (Kamenetsky: 9/27/23, 1598:25-1600:16.)  
7 This post-hoc theory only reinforces that one cannot rely on the data in the Submission and that the  
8 sold hours do not generate the charges. These examples are all evidence of Mr. Putnam's unequivocal  
9 admission— "we backed into it. We did basic algebra and we backed into the [\$440] rate," so as to  
10 keep the customer charges comparable to those of other dealers. (K. Putnam: 9/25/23, 1044:2-11  
11 (emphasis added), 1123:16-22.)

12 Putnam's counsel also tried to use Mr. Kanouse's testimony suggest that the uneven rates could  
13 be the result of discounts. (Kanouse, 9/19/23 at 363:13-366:11.) The examination was unsuccessful  
14 because Mr. Kanouse explained that the full amount for labor would still be billed, and the discounted  
15 portion would be documented separately. (*Id.*, 365:8-16.) A discount cannot explain the repair orders  
16 discussed by Mr. Kanouse. (*Id.*, 494:12-14.) Further, Mr. Korenak testified that there were only two  
17 repair lines in the Submission in which a customer received a discount, which is considerably less than  
18 the number of repairs in which the resulting rate was not nonsense. (Korenak: 9/27/23, 1424:17-23.)

19 The math does not lie. The rates produced by the sold hours and total labor charges are  
20 inconsistent and are certainly not the result of a simple equation. They must be the product of an after-  
21 the-fact calculation. And this does not happen once or twice in the Submission—it is pervasive. The  
22 sold hours are not hours that were sold. They are mathematically unrelated to the charges and  
23 manufactured for the purpose of deceiving Ford.

24 *iii. Category Three: Huge discrepancies between sold hours and actual hours*  
25 *prove sold hours are artificial.*

26 Generally, the sold hours and the actual hours "are close together. In most cases they are  
27 identical. Occasionally here and there, you might see them differ by .1 hour, maybe .2 hours. But  
28 generally they are identical, very close together." (Becic: 9/18/23, 72:6-10; *accord id.*, 106:7-19;



1 Kanouse: 9/19/23, 319:5-320:16.) The discrepancies between the sold hours and actual hours in many  
2 of Putnam's repair order repair lines led them both to comment they are highly or extremely unusual.

3 Some examples from Joint Ex. 7 include:

- 4 • RO 10071 [B1748], Line A – Actual hours=3.2, Sold hours=.5 (600%+ difference)  
5 (Becic: 9/18/23, 103:7-16, 106:7-19 (“not normal,” inconsistent with what he normally  
6 sees of equal or .1- or .2-hour difference))
- 7 • RO 10206 [B1468-69], Line E – Actual hours=7.38, Sold hours=3.4 (217% difference)  
8 (Sweis: 9/20/23, 571:14-22, 575:1-4 (“very unusual,” “never seen a discrepancy this  
9 large”))
- 10 • RO 10239, [B1399-1400], Line D – Actual hours=10.7, Sold hours=3.2 (314%  
11 difference) (Sweis: 9/20/23, 575:5-23 (“absolutely not normal”); Kanouse: 9/19/23,  
12 318:4-7, 319:5-320:16 (“very unusual”; if accurate, shows technician not efficient,  
13 would expect 100% tech efficiency rate, or close to it, meaning sold hours are equal or  
14 close to actual hours))
- 15 • RO 10248 [B1380], Line D –Actual hours=3.8, Sold hours=.5 (760% difference)  
16 (Becic: 9/18/23, 97:22-98:5, 102:25-103:6 (“large discrepancy”))
- 17 • RO 10287 [B1831], Line B – Actual hours=.77, Sold hours=.2 (350% difference)  
18 (Becic: 9/18/23, 76:25-77:19 (discrepancy “fairly large,” “not normal”))
- 19 • RO 10305 [B1867], Line B – Actual hours=7.69, Sold hours=2.4 (320% difference)  
20 (Becic: 9/18/23, 78:18-79:8 (“giant discrepancy,” “not normal”); Sweis: 9/20/23,  
21 579:5-580:6 (“extremely” unusual, “never seen other repair orders with deltas like this  
22 outside of Putnam Ford of San Mateo”))
- 23 • RO 10362 [B1977], Line A – Actual hours=3.62, Sold hours=1.0 (362% difference)  
24 (Becic: 9/18/23, 86:6-87:12 (“not normal,” “large discrepancy”))
- 25 • RO 10362 [B1980], Line G – Actual hours=6.6, Sold hours=.6 (1,100% difference),  
26 customer charge=\$264, for perfect \$440 rate based on sold hours (Becic: 9/18/23, 86:6-  
27 9, 92:7-92:24 (discrepancy is “off by a factor of 10”))
- 28 • RO 10362 [B1980], Line H – Actual hours=11.37, Sold hours=.6 (3,158% difference)  
customer charge=\$264, for perfect \$440 rate based on sold hours (Becic: 9/18/23, 86:6-  
9, 93:1-14 (“wildly off,” “appears to be misleading and fraudulent”))

22 These “giant,” “extreme” discrepancies between its sold hours and its ultimate technician hours  
23 indicated to Ford's witnesses what Mr. Putnam admitted; once the repair was completed the technician  
24 manually change to sold hours to be much lower in order to give the appearance of a higher hourly  
25 rate. (Kamenetsky: 9/27/23, 1600:25-1601:3.) Essentially, Putnam “backed into” the sold hours after  
26 the fact. Conversely, when reviewing the technician hours, the hourly rate appears to be a competitive  
27 market rate. (*Compare* Ex. MM, Ex. 2 & 3 [B1285-86] (Column entitled “Technician Hours Alt2”  
28 yields hourly rates between \$170s to \$220s), *with* Ex. MM, Figure 11, at 24 [B1278] (showing rates

1 for San Francisco MSA). This comports with Mr. Putnam’s admission to Ms. Murphy-Austin—the  
2 total charge to the customer, when considering actual hours, is competitive with the market. (Murphy-  
3 Austin: 9/18/23, 191:22-192:16.)<sup>27</sup>

4 *iv. Category Four: Repair could not have been completed in sold time.*

5 Another issue with Putnam’s stated sold hours is that, in some cases, the sold hours are not  
6 even close to the time necessary to complete the described repair. For example, Joint Ex. 7, RO 10049  
7 [B1792-93], Line A involved a complete engine removal and teardown to fix a broken timing chain  
8 guide. Putnam claimed 10.6 in sold hours and zero actual hours<sup>28</sup> and charged the customer \$4,654.89.  
9 Mr. Sweis testified it would take at least nine hours just to remove the engine and put it back in after  
10 completion of the repair, leaving only an hour to do the actual repair; in Mr. Sweis’s experience, such  
11 a repair would take at least 17 hours to complete. (Sweis: 9/20/23, 559:18-560:7.)

12 RO 10049 has additional accounting anomalies. There is also no identifiable technician on that  
13 repair line; rather, the technician number identified is “999,” which Mr. Kanouse testified is not a real  
14 or valid technician, but a “house technician.” (Kanouse: 9/19/23, 346:24-347:6.) Further, the cost of  
15 labor on Line A was zero and no dollar amounts were entered in either of the labor sale accounts 57000  
16 or 57300. (*Id.*, 345:17-349:6.) Mr. Kamenetsky, Putnam Auto Group’s CFO who obviously and  
17 inherently as a CFO must deal with accounting of labor expenses on Putnam’s books and ultimately  
18 its tax returns, did not know what was going on in this repair line. (Kamenetsky: 9/27/23, 1590:17-  
19 1591:15, 1593:10-1595:9.) To Mr. Kanouse, the repair order “makes no sense” (Kanouse: 9/19/23,  
20 348:3-4, 17-20), is not “valid” (*id.*, 349:2-3), and he would not rely on it (*id.*, 349:4-6).

21 The fact that Putnam removed an entire engine to complete a repair, and charged the customer  
22 \$4,654, but failed to track who performed the repair, the time it took to complete the repair, and the  
23 labor cost to Putnam for the repair might be charitably excused as an oversight if this were the only

26 <sup>27</sup> The customer does not see the hourly rate, because only the accounting copies contain the sales  
27 hours. (Heinemann: 9/25/23, 949:7-19.)

28 <sup>28</sup> This repair is a great example of why it was essentially impossible for Ford to calculate a rate using  
technician hours. \$4,654.89 divided by zero is, like any number divided by zero, undefined.

1 anomaly in the Submission. But this type of glaring error, in context, is yet more proof that the sold  
2 hours are artificial.

3 *v. Category Five: Missing actual hours.*

4 There are several qualified repair lines where no technician hours at all are reflected, despite  
5 the fact that some time had to have been spent by some technician to perform the repair. The lack of  
6 actual hours makes calculating an accurate hourly rate from Putnam's submission impossible. A few  
7 examples from Joint Ex. 7 are:

- 8 • RO 10036 [B1829], Line E – Sold hours=.2, Actual hours=0, customer charge=\$100.36  
(Kanouze: 9/19/23, 351:12-19, 353:1-7)
- 9 • RO 10036 [B1829-30], Line F -- Sold hours=.1, Actual hours=0, customer  
10 charge=\$75.65<sup>29</sup> (*Id.*, 351:1-2, 353:8-353:25)
- 11 • RO 10049 [B1792-93], Line A – Sold hours=10.6, Actual Hours=0, customer  
12 charge=\$4,654.89; also, no technician identified, reflects technician as “999,” indicates  
a “house account or fill in number.” (Kamenetsky: 9/27/23, 1590:17-1591:15, 1593:10-  
1595:9.)
- 13 • RO 10277 [B1325], Line A – Sold hours=.2, Actual Hours=0, customer charge=\$132  
14 (Becic: 9/18/23, 61:25-63:24)
- 15 • RO 10251 [B1372], Line F – Sold hours=1.0, Actual hours=0, customer  
16 charge=\$641.06 (Kanouze: 9/19/23, 307:7-12, 309:8-310:7)

17 The utter omission of these hours is further indication that the sold hours is entirely  
18 disconnected from the actual hours necessary to perform the repair. It is also an indication of an  
19 accounting anomaly which, as discussed *infra*, taints the entire set of repair orders.

20 *vi. Category Six: Wildly different rates in the same repair order.*

21 There are several examples, from Joint Ex. 7, wherein Putnam grossly inflated rates in the same  
22 repair order in order to uplift the average.

- 23 • RO 10036 [B1828-30], Line B, E, and F – Hourly rates are \$440, \$501.80, and \$756.50,  
24 respectively (Kanouze: 9/19/23, 351:12-19, 352:-354:15 (never seen three different  
rates on same repair order))
- 25 • RO 10251 [B1371-72], Lines C and F – Hourly rates are \$220 and \$641.06,  
26 respectively (*Id.*, 307:7-12, 311:3-9, 311:21-312 (does not make sense to have two  
different rates on same RO; not the kind of thing he has seen as auditor or previously  
as service manager))

27  
28 <sup>29</sup> Notably, for an hourly rate of \$756.50!

1 Likewise, there are at least two repair orders in which two different technicians work on a  
2 single repair, and the hours are manipulated (or omitted) so that the repair orders have a perfect total  
3 rate of \$440.

- 4 • RO 10071 [B1748], Line A -- Two technicians' sold hours and charges combined to  
5 create hourly rate of exactly \$440 – Tech 2030: Sold hours=0, customer charge=\$81.12;  
6 Tech 2018: Sold hours=.5, customer charge=\$138.88; Total Sold hours=.5, total  
7 customer charge=\$220, for hourly rate of \$440 (Becic: 9/18/23, 103:7-105:10 (not a  
8 coincidence, “seems like it is designed to demonstrate a particular labor rate,” “seems  
9 like we are being misled here”), 105:22-106:6 (“looks like entries are being made into  
10 the RO that are specifically engineered to achieve an outcome,” seems to be manual  
11 entries)
- RO 10248 [B1380], Line D – Two technicians' sold hours and charges combined to  
12 create hourly rate of exactly \$440 – Tech 2035: Sold hours=0, customer  
13 charge=\$46.31; Tech 2036: .5. customer charge=\$173.69; total Sold hours=.5, total  
14 customer charge=\$220, for hourly rate of \$440 (*Id.*, 99:25-102:24 (“seems designed to  
15 generate an outcome of \$440 per hour,” “feel[s] like Putnam is misleading” him);  
16 Kanouse: 9/19/23, 333:8-335:15 (data not accurate; doesn't trust the data))

17 In both examples, the customer is charged a labor charge where there are zero sold hours,  
18 which is a clear indicator that the hours do not generate the charges. Then the ridiculousness and  
19 obvious material inaccuracies are compounded because the two technicians' rate implausibly adds up  
20 to exactly \$440 per hour. The odds of this happening, let alone happening twice, are miniscule.

21 These disparate rates are further proof that Putnam does not have a set rate. Rather, Putnam's  
22 goal was to manipulate sold hours to achieve the specter of a \$440 per hour rate. There is no other  
23 explanation as to why Putnam would use sold hours to create rates of \$501, \$756, and \$641, or why it  
24 would have two technicians end up with blended calculations and improbably end up at exactly \$440  
25 per hour. Putnam was engaging in post hoc arithmetic to pull up the mean.

26 *vii. Category Seven: Related repairs with zero hours to inflate the rate.*

27 Qualified repairs are defined in part as repairs that would have been covered by warranty if  
28 performed during the warranty period. Veh. Code § 3065.2(j). Generally, Ford will reimburse all  
qualified repairs related to a covered warranty repair. (*See, e.g.* Becic: 9/18/23, 75:14-76:24; Kanouse:  
9/19/23, 312:24-314:9.) However, there are several instances where Putnam did not list charges or  
sold hours associates with related repairs, moving the charge for the labor to a single line, with fewer  
hours, thus inflating the average hourly rate. See examples from Joint Ex. 7:

- 1 • RO 10048 [B1795], Line A – Should be included with Lines D and E, all related to  
2 replacing vehicle battery (Becic: 9/18/23, 73:12-21, 75:9-76:24)
- 3 • RO 10305 [B1867], Line A –Actual hours=5.05, Sold hours=0, customer charge=0;  
4 5.05 technician hours should be added to 7.69 technician hours on Line D for total of  
5 12.74 Actual hours. When added, changes rate based on Actual hours for the combined  
6 single repair from \$138.18985, repeating, to \$83.41 (*Id.*, 78:1, 79:9-81:17 (would  
7 “markedly change” the rate calculation in Putnam spreadsheet if Line A had been  
8 included with Line D))
- 9 • RO 10362 [B1977], Line A – Line A – Actual hours=3.62, Sold hours= 1.0, customer  
10 charge=\$440; Line F – (combining the two technician repairs on Line F) Actual  
11 hours=9.44. Sold hours=3.5, total customer charge=\$1,549.63; Line A is diagnostic for  
12 repair on Line F; actual and sold hours and customer charges on Line A should be  
13 added to those on Line F for total of 13.06 Actual hours and 4.5 Sold hours. (*Id.*, 86:6-  
14 90:7)
- 15 • RO 10251 [B1371], Line B – Line B is the diagnostic for Line F; Line B Actual  
16 hours=5.42, Sold hours=0, customer charge=0; Actual hours of 5.42 should be added  
17 to Actual hours on Line F before calculating rate on Line F (*Id.*, 94:11-20, 95:17-96:17  
18 (adding the 5.42 hours to Line F would “definitely change the rate [on Line F]  
19 significantly”)).<sup>30</sup> Diagnostic on Line B would never take technician 5.42 hours, yet  
20 Actual hours on Line F, where repair done= 0, and no time clocking by technician  
21 (Kanouse: 9/19/23, 312:23-317:6)

22 In summary, the seven categories of evidence discussed above are left unrebutted in the  
23 evidence. Putnam relies on the self-serving testimony of two individuals with no personal knowledge  
24 of how repair orders were actually created and who never priced out a single repair to support their  
25 \$440 rate. But the documentary evidence, Putnam employees, Ford employees with years of  
26 experience reviewing repair orders, and a forensic accountant prove that this is not the case. Putnam’s  
27 Submission is materially inaccurate and fraudulent because the sold hours listed are not the hours that  
28 generate the customer labor charge. Putnam did not simply use time guide hours and multiply them  
by \$440. Instead, the charges were generated in various and inconsistent ways, including  
impermissibly included flat rate charges (where no amount of hours generate the charges) and  
manipulated sold hours after the labor charge was calculated. As such, sold hours cannot be used to  
determine Putnam’s warranty labor rate.

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<sup>30</sup>Per Mr. Korenak, FrogData did not include Line B in its spreadsheet or analysis, because it deleted all lines with sold hours of zero. (Korenak: 9/27/23, 1428:3-1429:13.) Consequently, the 5.42 technician hours on Line B were lost in the ether.

**B. Accounting Anomalies Tainted the Submission**

Putnam's Submission is also materially inaccurate and fraudulent because pervasive accounting anomalies permeate the repair orders, rendering the entire Submission defective. Repair orders are documents kept and maintained in the ordinary course of business. They play a critical role in a service department, and their accuracy is key to successful service management. (Kanouse: 9/19/23, 277:4-25.) Moreover, repair orders document the customer's concerns, are used to dispatch the vehicle to properly skilled technician or given priority, document a dealer's revenues and expenses for billing and accounting, and provide a permanent service history of a given vehicle. (*Id.*, 276:13-277:3.) They are also used by dealers to monitor charges and make sure that nothing unusual is happening. (*Id.*, 277:20-25.) To ensure their accuracy, everything must be recorded and billed properly. (*Id.*, *e.g.*, 277:4-25.)

As Ms. Heinemann testified, the repair orders are the primary source for documenting the revenue and expenses that necessarily flow into the dealer's financial statements. (Heinemann: 9/25/23, 946:19-947:2, 947:25-948:5.) The customer charges must accurately reflect the dealer's gross revenue, while the labor charges must accurately reflect the cost of those expenses, as well as the parts charges, against that revenue. (*See id.*, 944:20-947:9.) This is basic accounting: there should be internal controls associated with the total charges to the customer. (*Id.*, 947:19-22.) The revenues and expenses that flow into the financial statements become the source for the dealer's tax obligations. Accounting integrity and accuracy of the repair order data and is, as Mr. Kanouse stated, key to a dealer's operations. (Kanouse: 9/19/23, 277:4-25.)

As previously addressed, Messrs. Becic, Kanouse, and Sweis, and Ford's expert Ms. Heinemann, as well as Putnam's Messrs. Putnam and Kamenetsky, testified to the many types of inconsistencies, discrepancies, and clear manipulation of sold hours. Their testimony is replete with the Ford witnesses' observations that the information in the repair orders is **not accurate**, (Kanouse: 9/19/23, 314:25-315:2, 322:8-9, 328:18-20, 335:13-15, 345:14-16, 488:7-10; Becic: 9/18/23, 102:14-15), **misleading** (Becic: 9/18/23, 93:13-14, 102:16-18); **fraudulent**, (*id.*, 71:14-16, 93:13-14); **not "normal"** (Kanouse: 9/19/23, 312:3-6, 327:8-10, 332:24-25, 337:2-4, 342:6-12, 355:5-6, 460:17-18;



1 Becic, 9/18/23, 64:9-11, 77:14-15, 79:5-8, 87:7-8, 103:1-3, 106:7-8); and **could not be trusted**. Even  
2 Mr. Stockton, Putnam’s own expert, indicated that the repair orders were not reliable. (Stockton:  
3 9/26/23, 1296:12-21 (admitting to relying on the downstream data file over the accounting copies of  
4 the repair orders because it was more “up-to-date” than the actual repair orders).)

5 In addition to manipulation of the sold hours, Mr. Kanouse identified numerous accounting  
6 irregularities and inconsistencies, which led him to question the authenticity of all of the repair orders:  
7 “there is nothing consistent across the body of these ROs except they are a mess.” (Kanouse: 9/19/20,  
8 489:17-490:6.)

9 For example, RO 10415 (Joint Ex. 7, [B2103]) is a fake repair order created to internally  
10 balance out some of the accounting issues created by slashing sold hours to unreasonably low levels  
11 to give the impression of a high labor rate. (*Id.*, 323:6-329:2.) The entire repair order states it is a  
12 “Shop Ticket Only – Due (sic) Not Use for Service,” with Line A for two technician’s actual hours  
13 and various parts and Line B for five additional technicians’ actual hours; all sold hours are zero. (Joint  
14 Ex. 7, RO 10415 [B2103].) All of the technician’s labor charges on Lines A and B are labeled “ISP,”  
15 which stands for internal shop policy (an alternative to designate a repair line as customer-pay or  
16 warranty as the repair type). (Kanouse: 9/19/23, 323:23-324:12.) All of those technician’s hours,  
17 totaling \$890.70, however, are not posted to Account 77500 at the bottom of the repair order, which  
18 is the account for ISP expenses. (*Id.*, 325:13-326:7.) Nor are they posted to the technician training  
19 account, which would be account 77400, if they were truly technician training costs, an account which  
20 does not appear at all on the bottom of the repair order. (*Id.*, 326:14-21.) Rather, the technician hours  
21 are posted to account 57300, which is the labor sales account—the account where all labor charges for  
22 customer-pay repairs would be posted, as on other repair orders reviewed. (*Id.*, 326:5-7, 326:25-  
23 327:14.) Not only is the accounting here wrong, but Mr. Kanouse testified that this is a fake repair  
24 order (*Id.*, 355:22-356:2.) He thinks Putnam took some of each of these technician’s high number of  
25 actual hours from qualified repair lines on other repair orders to minimize the discrepancies in actual  
26 versus sold hours, while still obtaining the benefit of accounting for the expense of the technician’s  
27 total hours. (*Id.*, 327:25-328:14.) Because of these discrepancies, Mr. Kanouse testified that RO 10415  
28 is inaccurate, and the information contained therein is untrustworthy. (*Id.*, 328:15-329:2.)



1 Mr. Martinez, Putnam's former service manager, confirmed Mr. Kanouse's analysis—if the  
2 technician's actual time for a customer-pay repair line was high, some of those hours would be moved  
3 to a second line, like multi-point inspection where the customer charge was \$0, or to an internal policy  
4 line and labeled ISP. (Martinez: 9/20/23, 693:9-694:2, 695:14-696:7, 759:5-17; Ex. AA, ¶ 11  
5 [B1228].)<sup>31</sup> The testimony of Mr. Kanouse and Mr. Martinez further demonstrates that Putnam's sold  
6 hours do not represent the actual or accurate time a service technician spent performing a repair.

7 While reviewing repair orders with qualified repairs on various lines, Mr. Kanouse also noted  
8 the additional anomaly that actual technician hours were being designated as internal shop policy  
9 repairs, as opposed to customer-pay or warranty repairs, and accounted for in accounts other than the  
10 expected cost of labor accounts at the bottom of the repairs orders. This apparently was a way to  
11 expense technician costs of labor other than a customer pay repair. (Kanouse: 9/19/23, 428:2-12,  
12 457:16-17.) Examples from Joint Ex. 7 include:

- 13 • RO 10239 [B1399], Line C – Actual hours=.02 to check and set tire pressure coded as  
14 ISP account, not to customer charge (*Id.*, 321:17-322:2)
- 15 • RO 10248 [B1381], Line E – Actual hour=.46 for multi-point inspection, at cost of  
16 labor of \$16.10, where Line B already was for 100,000 mile maintenance, which  
17 included multi-point inspection; .46 hours and \$16.10 went into ISP account; customer  
18 charge=0; dollar amount of cost of labor blocked out (\*\*\*\*\*)<sup>32</sup> (Kanouse: 9/19/23,  
19 329:3-16, 336:11-338:9 (“makes no sense”))
- 20 • RO 10248 [B1381], Line F – Actual hour=1.24 for “check and set tire pressure,” where  
21 Line B already was for 100,000-mile maintenance, which included tire pressure; cost  
22 of labor=\$43.30, technician hours went into ISP account; dollar amount blocked out  
23 (\*\*\*\*\*) (Kanouse: 9/19/23, 329:3-16, 335:16-336:10)

24 Mr. Kanouse confirmed that as a service manager for 20 years, he never accounted for time in  
25 this manner. Nor are the irregularities and inconsistencies explained away by how different dealers do  
26 their accounting. (*Id.*, 490:7-21, 496:2-6.)

27 <sup>31</sup> While Mr. Martinez started at Putnam on September 1, 2023, he reviewed open repair orders going  
28 back a month or two, so to July or August 2021, in or closer to the submission period and saw the  
same practices he testified about in that earlier period. (Martinez: 9/20/23, 768:15-769:20.)

<sup>32</sup> Series of stars (\*\*\*\*\*) in account 77500 for cost of labor totals from ISP entries means the amount  
is manually blocked out, which is unusual on an accounting copy of a repair order. (Kanouse: 9/19/23,  
354:25-355:6.)

1 Section 3065.2 assumes that the repair orders in a dealer's submission are accurate. Accurate  
2 information is essential to deriving an accurate and sound effective warranty labor rate. When the  
3 repair orders fail to reflect the repairs actually performed, accurate work by the service department, or  
4 accurate accounting, they are, at minimum, materially inaccurate. Ford has clearly demonstrated  
5 Putnam's repair orders are the farthest from a true representation of the repairs performed, repair orders  
6 the likes of which Ford's experienced witnesses have never seen before. That is precisely what Section  
7 3065.2 anticipated when it provided manufacturers with the opportunity to challenge a dealer's  
8 claimed customer-pay labor rate on the basis the submission is materially inaccurate or fraudulent.  
9 Ford has demonstrated the thresholds in Putnam's submission in spades.

10 **C. Repairs Performed at the Unauthorized Barn Location are not "Qualified**  
11 **Repairs" and Their Inclusion Renders the Submission Materially Inaccurate and**  
12 **Fraudulent.**

13 Putnam's submission is materially inaccurate and fraudulent for another independent reason—  
14 any repairs reflected in Putnam's submission that were not performed at its authorized location at 885  
15 N. San Mateo Drive, San Mateo are, by definition, not "qualified repairs" that can be included in the  
16 calculation of its customer-pay labor rate.

17 Under 3065.2(a)(2), only "qualified repair orders" can be used to calculate a labor rate. A  
18 "qualified repair order" is specifically defined in the Vehicle Code as:

19 a repair order, closed at the time of submission, for work that was performed outside  
20 of the period of the manufacturer's warranty and paid for by the customer, **but that**  
21 **would have been covered by a manufacturer's warranty** if the work had been  
required and performed during the period of warranty.

22 Veh. Code § 3065.2(j) (emphasis added).

23 To determine what "would have been covered by the manufacturer's warranty," the Board  
24 should look to the SSA. Paragraph 5(a) of the Standard Provisions of Putnam's SSA requires Putnam  
25 to "establish and maintain at the DEALERSHIP LOCATION approved by [Ford] DEALERSHIP  
26 FACILITIES . . . .". (Joint Ex. 1 at 21 [B21].) Pursuant to Paragraph 5(b), the DEALERSHIP  
27 LOCATION and DEALERSHIP FACILITIES are to be identified in the Dealership Facilities  
28 Supplement. Putnam's SSA identifies only its facility at 885 N. San Mateo Drive as its authorized

1 facility, and no other. (*Id.*; see also Murphy-Austin: 9/18/23, 184:5-12.) Paragraph 5(c) of the Standard  
2 Provisions is unambiguous—Putnam

3 shall not move or substantially modify or change the usage of any of the  
4 DEALERSHIP LOCATION or FACILITIES for COMPANY PRODUCTS, nor  
5 shall Dealer or any person named in subparagraphs F(i) or F(ii) hereof directly or  
6 indirectly establish or operate in whole or in part any other locations or facilities  
for the sale or service of COMPANY PRODUCTS . . . without the prior written  
consent of [Ford].”

7 (Emphasis added.) Ford has never consented to any other facilities for any of Putnam’s operations.

8 (Swann: 9/21/23, 806:18-807:6.) Putnam is, and has always been, precluded from conducting any  
9 dealership operations at any facilities other than those authorized by its SSA including vehicle and  
10 parts sales, warranty service, customer-pay service, in short, all dealership operations. (Murphy-  
11 Austin: 9/18/23, 185:6-20, 186:10-23; Swann: 9/21/23, 817:8-19, 820:17-821:2.)

12 Section 1.1.03 of Ford’s 2021 Warranty Manual provides “[w]arranty repairs must be  
13 performed at an authorized Ford or Lincoln dealership” to be reimbursable warranty repairs; work  
14 performed elsewhere is not warranty work. The Barn and the Nissan dealership are not part of an  
15 “authorized Ford or Lincoln dealership.” (Ex. A, at 005 [B946].) Under both Putnam’s SSA and Ford’s  
16 Warranty Manual, the only valid repairs that would have been “covered by [Ford’s] warranty” if  
17 “**performed** during the period of warranty” would be work performed at Putnam’s authorized facility.  
18 Consequently, repairs done at the Barn, or any other unauthorized location, are not “qualified repairs,”  
19 and cannot be included in the calculation of Putnam’s proposed warranty labor rate.

20 Even Mr. Putnam agreed that for a repair to be qualified it must take place at an approved  
21 facility. (K. Putnam: 9/25/23, 1070:6-1072:4.)<sup>33</sup> Some number of the repairs were performed at the  
22 Barn, as detailed *supra*, and it is impossible to identify with a reasonable degree of certainty all of the  
23 repairs that were performed at the Barn. However, it is not an insignificant amount. The five repairs  
24 identified by Mr. Sweis represent total labor charges of \$10,597.98. This is a staggering 30.5% of the  
25 total charges in the Submission (\$34,963). See Ex. MM at 15 [B1269] (Figure 6 listing net labor charge

26  
27  
28 <sup>33</sup> Putnam was impeached with his testimony at the hearing on this matter. (Putnam: 9/25/23, 1070:6-  
1072:4.) During the hearing, he attempted to change his answer.

1 of \$34,963.) This would certainly have a material impact on any calculation of Putnam's rate if they  
2 were removed. Looking at only Putnam's Initial Submission, of which RO 10049, 10206 and 10239  
3 were a part, the total charges in these three repairs is \$8040.77, which is 39.3% of the \$20,440.55 total  
4 in that submission. (*See* Joint Ex. 3, Putnam Ford Labor tab, first row (most recent RO included is RO  
5 10277), last row (total charges=\$20,440.55).)

6         Given Putnam's desperate attempts to cover up the facts surrounding location, the evidence  
7 shows that this misrepresentation was intentional or, at the very least, reckless. *See, e.g.*, Putnam:  
8 9/25/2023, 1098:2-16 (Declaration that the address on the repair order represented where the repair  
9 was performed), 1100:8-14 (address on repair order indicates where repair was completed), 1101:18-  
10 25 (same), 1108:10-22 (letter from counsel stating address indicates location repair was performed).)  
11 Therefore, the inclusion of repair orders performed at a nonauthorized location was indeed fraudulent.  
12 Because neither Ford nor this Board can ferret out the repair performed at the Barn, the whole  
13 Submission should be found to be fraudulent and rejected as nonconforming to Section 3065.2.

## 14     **II. FORD'S DENIAL LETTER COMPLIED WITH SECTION 3065.2(d)**

15         Under Section 3065.2(d)(1), a franchisor shall provide written notice to a franchisee should it  
16 find a labor rate request materially inaccurate or fraudulent. It states, in relevant part:

17             If the franchisor seeks to contest the retail labor rate, retail parts rate, or both, the  
18 franchisor shall submit no more than one notification to the franchisee. The  
19 notification shall be limited to an assertion that the rate is materially inaccurate or  
20 fraudulent, and shall provide a full explanation of any and all reasons for the  
21 allegation, evidence substantiating the franchisor's position, a copy of all  
22 calculations used by the franchisor in determining the franchisor's position, and a  
23 proposed adjusted retail labor rate or retail parts rate, as applicable, on the basis of  
the repair orders submitted by the franchisee or, if applicable, on the basis provided  
in paragraph (5). After submitting the notification, the franchisor shall not add to,  
expand, supplement, or otherwise modify any element of that notification,  
including, but not limited to, its grounds for contesting the retail labor rate, retail  
parts rate, or both, without justification.

24 Veh. Code § 3065.2(d)(1) (hereafter "Notification Provision").

25         The evidence establishes that Ford has satisfied the requirements of Section 3065.2(d)(1). To  
26 be certain, satisfaction of Section 3065.2(d)(1) does *not* impact the arguments and evidence this Board  
27 may consider. (*See infra* P.III.B.) Even if it did, the Board would be permitted to consider all evidence  
28 and arguments presented by Ford during the hearing.

**A. The Denial Letter was Timely**

Ford's Denial Letter was timely. Ford received Putnam's Initial Submission on August 24, 2021, despite its request letter being dated July 28, 2021. (Becic: 9/18/23, 44:12-22.) Within 30 days of August 24, Ford noted in its September 17 letter that the requested rate of \$437.76 was substantially higher than Putnam's current warranty labor rate of \$177 and requested 30 additional days of repair orders, per subsection (d)(4) of 3065.2. (Joint Ex. 5 [B49].) Ford received the supplemental repair orders on September 27, 2021. (Becic: 9/18/23, 47:12-16.) Ford served its Denial Letter on October 26, 2021, within 30 days of the Supplemental Submission. Ford complied with each of the 30-day time periods in 3065.2(d)(1) and (4).

**B. The Denial Letter Contained all Necessary Components**

Ford's Denial Letter (Joint Ex. 6 [B50-51]) met each of the statutory requirements enumerated in Section 3065.2(d)(1).

1. "[A]n assertion that the rate is materially inaccurate or fraudulent, and shall provide a full explanation of any and all reasons for the allegation[.]"

The Denial Letter clearly asserted that the Submission was materially inaccurate or fraudulent. (Joint Ex. 6 at 1 [B50] ("Unfortunately, your request for a labor rate adjustment must be denied because it is materially inaccurate or fraudulent.")) The Denial Letter provided several reasons for its determination:

- **Ford was unable to verify the requested labor rate of \$436/hour based on the ROs provided.** (Joint Ex. 6 at 1[B50] ("After a review of the provided documentation and the additional repair orders (ROs) provided pursuant to our request, we are unable to verify the labor rates you are charging at your dealership."))
- **Based on the ROs, Ford could not identify a consistent pricing practice.** (Joint Ex. 6 at 1 [B50] ("While we have been able to verify some of the repairs included in your analysis, there are others that do not seem to follow a consistent pricing practice[.]").)
- **The customer (sold) hours are not appropriate for the repair identified.** (Joint Ex. 6 at 1 [B50] ("[M]any of the provided labor hours (customer estimate hours) do not seem appropriate for the repair[.]"); Joint Ex. 6 at 2 [B51] ("[T]here is a considerable disconnect between the amount of work this repair required and what is being reported on the repair order copy."))
- **There is a discrepancy between the actual (technician) hours and the sold hours.** (Joint Ex. 6 at 1 [B50] ("Many of the provided labor hours (customer estimate hours) .

1 .. [are not] consistent with the technician clocked hours being shown.”); Joint Ex. 6 at  
2 2 [B51] (“As described in this letter, given the inconsistency in rates being charged and  
the hours being shown, we have no alternative but to contest your calculation because  
the rate you calculated is materially inaccurate or fraudulent.”).)

- 3  
4 • **The sold hours do not reflect the reality of the time worked, and instead appear  
designed to generate a charge of \$440 per hour.** (Joint Ex. 6 at 1 [B50] (“Rather than  
reflect reality, the hours assigned to the repair appear designed to demonstrate a \$440  
per hour labor rate.” Joint Ex. 6 at 1 [B50] (“[T]here is a considerable disconnect  
between the amount of work this repair required and what is being reported on the  
repair order copy.”); Joint Ex. 6 at 2 [B51] (“In sum, the requested rate seems not to be  
based on customer quoted hours, or technician recorded time, but rather on a desire to  
attempt to demonstrate an inordinately high labor rate of approximately \$440.00 per  
hour, which is generally around double the rate being charged in the market by other  
dealers of any other brand.”).)
- 9 • **A concern that the ROs submitted were not the final version.** (Joint Ex. 6 at 2 [B51]  
10 (“These disconnects aggravate a concern that many of the ROs you submitted are listed  
as duplicates, which may not be the final version.”).)

11 2. “[S]hall provide . . . evidence substantiating the franchisor’s position . . .”

12 Ford’s Denial Letter provided specific examples as evidence of the reasons provided for  
13 believing the submission was materially inaccurate or fraudulent. Specifically, it cited and analyzed  
14 several specific repair orders (ROs 10239, 10305, 10283, 10287, 10048, 10251, 10206, 10248, 10216,  
15 10319, 10365). It further clarified that “[t]he examples above are just examples; the evidence  
16 substantiating Ford Motor Company’s position contesting your request is all the documentation you  
17 submitted as part of your request, including the additional repair orders.” (Joint Ex. 6 at 2 [B51].)

18 The statute does not require that the Denial Letter provide *all* possible evidence. Rather, it need  
19 only identify its reasoning (*e.g.* there is a significant discrepancy between sold hours and actual hours),  
20 and evidence of that reason (*e.g.* RO 10305 [B1867-68] (12.74 hours actual time, but 2.4 sold hours)).

21 There is no requirement that Ford identify all evidence of fraud. Ford identified inconsistencies  
22 that led it to believe there was fraud. But it would be nearly impossible for Ford to provide further  
23 evidence because the only documentation it was permitted under the statutory scheme at that time was  
24 the fraudulent documents themselves – Ford would need to look into evidence outside the four corners  
25 of the of the repair orders to concretely establish fraud. Thus, to read the statute to require all possible  
26 evidence would effectively render the statute’s permission to raise fraud as an objection meaningless.  
27 It was enough for Ford to identify the inconsistencies that led it to suspect fraud at this stage.



1                   3. “[A] copy of calculations used by the franchisor in determining the franchisor’s  
2                   position”

3                   Under the plain language of this provision, the franchisor must provide a copy of calculations  
4 “used” to determine its position. Thus, the requirement to provide calculations turns on whether such  
5 calculations were ultimately “used” by Ford in evaluating its position. Putnam incorrectly reads this  
6 provision to require that Ford must create and must use calculations to determine its “position” or an  
7 adjusted retail labor rate. However, the statute contains no such directive. Nor could it. Requiring a  
8 manufacture to employ calculations in every instance would conflict with the ability of a manufacturer  
9 to object to a proposed rate as either materially inaccurate or fraudulent. *See In re Rochelle B.* (1996)  
10 49 Cal. App. 4th 1212, 1216 (a statute must be read to harmonize all provisions). By including the  
11 ability to reject a submission due to material inaccuracies or fraud, the legislature considered that a  
12 submission might contain inaccurate or fraudulent repair orders, thus impeding the accuracy and  
13 usefulness of any calculations. Likewise, there is no requirement that a manufacturer independently  
14 gather data to use in calculations. The statute simply does not support Putnam’s position.

15                   4. “[A] proposed adjusted retail labor rate or retail parts rate, as applicable, on the  
16                   basis of the repair orders submitted by the franchisee . . .”

17                   **Ford did not provide calculations to Putnam because it did not use calculations to support**  
18 **its position.** (*See* Becic: 9/18/23, 162:24-163:5 (testifying that Ford did not make a calculation); *see*  
19 *generally* Joint Ex. 6 [B50-51].) Putnam’s repair orders were so riddled with inconsistencies and  
20 inaccuracies, as previously described at length, making “it unreasonable, if not effectively impossible”  
21 for Ford to perform calculations in reaching a proposed labor rate. The Denial Letter explained:

22                   The inconsistencies and excessive customer charges in the ROs you provided,  
23 including the examples discussed above, **make it unreasonable, if not effectively**  
24 **impossible, for Ford Motor Company to use your ROs to calculate a labor rate.**  
25 As such, we have no choice but to propose an adjusted retail labor rate of \$220.00  
per hour which seems to be the most common customer pay rate your  
documentation shows in repairs where we see what appears to be valid  
documentation.



1 (Joint Ex. 6 at 2 [B51] (emphasis added).)<sup>34</sup>

2 Ms. Heinemann, an expert forensic accountant, was able to calculate several possible rates  
3 after an extensive review of the Submission. However, she also agreed that it made sense why Ford  
4 was unable to do the same:

5 Q. Was Ford wrong in its denial when it said, “unreasonable, if not effectively  
6 impossible, for Ford to use the ROs to calculate a labor rate”

7 A. Well, I can appreciate their position, right? If they are accustomed to receiving  
8 submissions where sale hours comport with actual hours and the data for repair  
9 lines generally make sense with what they understand the time it takes for a repair,  
10 if that -- the data submission from Putnam looked more like that, and if the data  
11 submission from Putnam had values for all the technician hours, I think that it might  
12 have been a more straightforward thing for Ford to say, "Hey, look, you know, your  
13 sale hours don't look right. I am going to do technician hours." But the fact of the  
14 matter is even technician hours are not perfect. There is missing data there as well.  
15 . . . So does it make sense that they maybe threw their hands up? It makes sense to  
16 me . . . .

17 Q. I guess, do they both make sense? Does it make sense for Ford to say, "This data  
18 is so messed up I can't do it," and also for you to say, "All right. This data is messed  
19 up, but I am going to go ahead and come up with calculations as best I can," all at  
20 the same time?

21 A. I think that's right, and I think, you know, what really sort of highlights that is,  
22 you know, the calculations we just walked through on Exhibit 2 and 3, there is a  
23 wide range of values, but there is information that I use to help guide us to the right  
24 point. That is very different than my understanding of what persons at Ford, or  
25 frankly other manufacturers, typically do. I mean, I think that -- my sense is they  
26 take data and they calculate. And I think here there is a lot of reasons why I am here  
27 doing a broader forensic look to try to get to an answer that makes sense.

28 (Heinemann: 9/25/23, 975:12-977:5.)

Ford endeavored to propose a reasonable rate based on what Putnam’s customers actually paid  
per hour, and it clearly stated the basis for its figure in the Denial Letter. However, Ford could not and  
did not engage in calculations to reach this rate.

---

<sup>34</sup> Mr. Becic also reaffirmed that it was effectively impossible to use Putnam’s ROs to calculate an  
alternative rate during the hearing. (Becic: 9/18/23, 97:15-21 (cannot use data from repair orders to  
calculate a rate), 112:10-17 (“I believe that he did not do an analysis because it is difficult to interpret  
the repair orders and to determine what an actual rate might be. Just based on the discrepancies that  
we have examined, it is difficult to figure out exactly what's going on.”), 126:14-12 (“I believe it was  
extremely difficult, if not impossible, to calculate a rate based on the discrepancies in the data that we  
saw.”), 166:4-16 (cannot calculate a rate based on actual hours where actual hours listed as zero, but  
charged \$641.06 for labor).)

1           **C. Any Supplementation to the Denial Was Justified**

2           To the extent any evidence or argument presented during the hearing was not contained in the  
3 Denial Letter, Ford's supplementation of its argument was justified and statutorily permissible.

4           Section 3065.2(d)(1) expressly permits changes or additions to the manufacturer's response  
5 where there is "justification." "Justification" is not defined in the statute. Its common definition is a  
6 "an acceptable reason for doing something." "Justification, Merriam-Webster's Dictionary, *available*  
7 *at* <https://www.merriam-webster.com/dictionary/justification> (last visited 12/13/23).

8           Notably, subsection (d)(1) does not say "material" or "substantial" justification, as is common  
9 in so many other California statutes. "Substantial justification" has been defined by courts, as  
10 "justification that is clearly reasonable because it is well grounded in both law and fact"; simple  
11 "justification" must mean something less, which is consistent with the dictionary definition above.  
12 *Farnum v. Iris Biotechnologies, Inc.* (2022) 86 Cal. App. 5th. 602, 611 (noting "substantial  
13 justification" definition in prior cases but ruling that it was not necessary to decide definition of  
14 "without justification" in statute at issue, just that it must mean something less weighty); *see also*  
15 *White Winston Select Asset Fund Series Fund Mp-18 v. Musclepharm Corp.* (2021) 2021 Cal. Super.  
16 LEXIS 65347 at \*4-\*6 (ruling under same shareholder records demand statute, "without justification"  
17 means "not reasonably supported by California law or by the evidence").

18           Subsection (d)(1) also does not limit how or when the manufacturer can modify or supplement  
19 its reasons for finding a submission materially inaccurate or fraudulent. In the absence of any express  
20 deadline or means of notification, it reasons that notification at any time before the hearing is  
21 appropriate so long as the supplementation is justified.<sup>35</sup> Certainly, additional facts that were revealed  
22

23 \_\_\_\_\_  
24 <sup>35</sup> This approach is consistent with the holding in *Subaru of Am., Inc. v. Putnam Auto., Inc.* (2021) 60  
25 Cal. App. 5th 829, 833. In this termination case brought by one of Putnam's other entities under a  
26 statute that precluded the manufacturer from raising any additional grounds in the litigation beyond  
27 those in the termination notice. The statute did not contain a "justification" provision. The arbitrator  
28 allowed Subaru to introduce additional grounds during the hearing, finding no due process violation  
of the Putnam entity's due process rights, because it had actual notice of those new grounds in the  
course of discovery. Thus, if introduction of new arguments during a hearing is acceptable when the  
statute has no justification provision, then supplementation during a hearing where the statute allows  
supplementation, but has no stated time limit, is certainly permissible.

1 during discovery beyond those discernable from the face of the repair orders and not known at the  
2 time of the notice are “justifications” for expanding the bases for demonstrating a submission is  
3 materially inaccurate or fraudulent at trial.

4 The record is rife with evidence of Putnam’s manipulations, falsifications, and evasive  
5 behavior, all which justify supplementation. These facts are detailed extensively, *supra*. Ford stated  
6 that it denied the rate because the Submission was materially inaccurate or fraudulent. It provided  
7 evidence, thus meeting its obligations. Through its investigation, it later learned of additional examples  
8 of the inaccuracies and fraud, such as testimony that the repairs were not qualified because they were  
9 not performed at the Ford dealership, and evidence of inconsistencies buried in the almost 900-page  
10 Submission.

11 Putnam, through argument at the hearing, has suggested that, to the extent Ford points to  
12 accounting anomalies apparent from the face of the repair orders, those arguments are somehow  
13 forfeited because they were not in the initial Denial Letter. This is a gross oversimplification. These  
14 issues could not have reasonably been identified by October 26, 2021. Although Putnam identified  
15 only 72 qualified repairs among the repair orders (there are 74 by Ford’s count), these were buried  
16 among 1,673 individual repairs that had to be manually reviewed because of the extensive fraud and  
17 misrepresentations. (Heinemann: 9/25/23, 914:14-16.) In fact, not even Putnam’s vendor, FrogData,  
18 or its economist, Mr. Stockton, reviewed these repair orders manually.<sup>36</sup> As demonstrated through the  
19 testimony of Ms. Heinemann, because of the misrepresentations, many of the accounting  
20 inconsistencies and irregularities only became apparent by reviewing the totality of the Submission.  
21 (*Id.*, 939:10-940:21 (explaining why a qualified repair line with a rate of \$61.95 is indicative of  
22 entering sales hours after-the-fact based on the reoccurrence of this rate in the non-qualified set).) Ford  
23 does not need a forensic accountant to probe every entry in a dealer’s 900-page warranty labor rate

24 \_\_\_\_\_  
25 <sup>36</sup> Neither Mr. Korenak nor Mr. Stockton analyzed the repair orders in any meaningful way. Mr.  
26 Korenak testified that he uses a software system that runs reports and pulls data into spreadsheets and  
27 allows for a “quick[]” analysis of qualified repairs. (Korenak: 9/27/23, 1359: 9-25.) After populating  
28 a spreadsheet, they “let the math do what it does.” (*Id.* 1359:23-25; *see also id.* 1370:14-1371:8.) Mr.  
Stockton relied on a data file prepared by Putnam that did not contain all of the same information as  
the repair orders themselves. (Stockton: 9/26/23, 1297:5- 1298:16.) He testified that he preferred the  
data file over the repair orders. (*Id.*, 1297:2-4.)

1 submission, however here, given the volume of the irregularities and inconsistencies and the forensic  
2 accountant expertise needed to identify the hidden inconsistencies, Ford unsurprisingly supplemented  
3 its list of material inaccuracies and fraud that it discovered during the course of litigation. (*See, e.g.,*  
4 *id.*, 975:12-977:5, 979:20-980:1 (testimony that Ford would not have this expertise).)

5 **III. IF THE BOARD FINDS FORD HAS NOT MET ITS BURDEN, IT SHOULD FIND THE**  
6 **SUBMISSION UNUSABLE OR SET A RATE OF \$198.02**

7 As previously stated, Ford has met its burden. And, having met its burden, the Board should  
8 conclude the Submission is too unreliable to be used to calculate a rate. Therefore, it should declare  
9 that Putnam's initial rate of \$177 is still in effect. However, even if the Board determines Ford has not  
10 met its burden, the Board need not adopt Putnam's outrageous rate of \$436.76. Rather, it may conduct  
11 an independent review of the evidence and set a rate, if possible. In conducting the review, contrary  
12 to the suggestion of Putnam, it may consider all evidence and engage in an independent application of  
13 Section 3065.2. In applying Section 3065.2, it should reject the entire Submission as unreasonable and  
14 decline to set a rate. Likewise, it may find that the entire submission is so inherently inaccurate that it  
15 can decline to set a rate. If it does choose to set a rate, it should select \$198.02, which is based on the  
16 use of technician hours.

17 **A. Even if Ford Has Not Met its Burden, Section 3065.4 Does Not Require that the**  
18 **Board Accept Putnam's Outrageous Proposed Rate**

19 "[T]he first step in statutory construction is to examine the statutory language and give it a  
20 plain and commonsense meaning." *People v. Verduzco* (2012) 210 Cal. App. 4th 1406, 1414. Section  
21 3065.4(b) states:

22 Upon a decision by the board pursuant to subdivision (a), the board may determine  
23 the difference between the amount the franchisee has actually received from the  
24 franchisor for fulfilled warranty obligations and the amount that the franchisee  
25 would have received if the franchisor had compensated the franchisee at the retail  
labor rate and retail parts rate as determined in accordance with Section 3065.2 for  
a period beginning 30 days after receipt of the franchisee's initial submission under  
subdivision (a) of Section 3065.2.

26 The provision begins with "a decision," but does to specify the type of decisions (whether the  
27 manufacturer has or has not met its burden). Further, the statute states that the Board may determine  
28 the difference between the rate received by the franchisee and what it should receive under the statute,

1 indicating that the Board is not required to simply adopt the dealer's proposed rate if a manufacturer  
2 has not met its burden. *See generally id.* In fact, Section 3065.2(b) provides the Board with a number  
3 of options when deciding a rate. It has the ability to declare a rate, as stated in 3065.4(a). It may accept  
4 Ford's rate, accept Putnam's, calculate a new rate using Section 3065.2, or refuse to calculate any rate.  
5 Here, if the Board determines that Ford has not met its burden in any respect, it should independently  
6 calculate a rate. The evidence presented at the hearing has proven that the sold hours used to calculate  
7 Putnam's proposed rate are inaccurate and Putnam's proposed rate is highly unreasonable. This merits  
8 the Board's exercise of discretion to calculate a new rate, as set forth below.

9 **B. The Board May Consider All Evidence**

10 As a threshold matter, if the Board is to engage in an independent calculation, it must determine  
11 the scope of its review. Putnam has routinely suggested that evidence not referenced within the four  
12 corners of Ford's Denial Letter should not be considered by the Board. However, the Board can and  
13 must consider all evidence presented during the course of the hearing in reaching its determination, as  
14 discussed in detail the following subsections.

15 As discussed below, the plain language of the Vehicle Code does not permit the Board to limit  
16 its review of a Section 3065.4 protest to the arguments and evidence contained in the initial Section  
17 3065.2(d)(1) response and submission. Section 3065.4 instructs the Board to engage in an independent  
18 review of the warranty labor rate, even if the manufacturer has failed to satisfy the notification  
19 requirements. Likewise, Section 3066 provides that the Board permit extensive discovery and engage  
20 in a full evidentiary hearing. These provisions would be rendered meaningless if the Board were to  
21 cabin its review exclusively to the manufacturer's initial response letter and evidence.

22 Nor can the Board interpret the statute in a way that would be contrary to public policy. As  
23 discussed below, Putnam's interpretation rewards fraudulent, deceptive, and unfair practices—dealers  
24 can submit fraudulent or materially inaccurate repair orders, and so long as a manufacturer cannot  
25 detect the fraud or material inaccuracies within 30 days, the Board must award the dealer's requested  
26 rate. Such an interpretation would contravene public policy against fraudulent and deceptive business  
27 practices and would require companion litigation in courts that would waste judicial resources.

1 Finally, the Board must read the statute, where possible, in a way that is consistent with Due  
2 Process. Revising the labor rate up would amount to a deprivation of property, and, therefore, Ford is  
3 entitled to due process, which includes an evidentiary hearing and right to be heard. By extension, the  
4 Board must be able to consider the evidence and arguments presented or else it would render the due  
5 process meaningless.

6 1. The Statute Permits a Review of Evidence Beyond that Contained in the  
7 Notification Letter

8 To be certain, any supplementation of the Denial Letter is justified. But, even if it were not,  
9 this would have no functional impact. The Board may consider all evidence as part of its review. All  
10 of the Submission's irregularities are in front of the Board as part of its analysis under Section 3065.2  
11 The scope of the Board's review is a statutory question. The Board

12 must give the statutory provisions at issue a reasonable and common sense  
13 interpretation, consistent with the apparent purpose and intention of the Legislature.  
14 If possible, we will give significance to the plain meaning of every word, phrase,  
15 and sentence of a statute in pursuance of the legislative purpose, harmonizing the  
16 various parts of an enactment by considering each particular clause or section in the  
context of the statutory framework as a whole. In this process, we must take into  
account the context, object, and history of the legislation, as well as public policy  
and contemporaneous construction in our attempt to arrive at a construction that is  
practical rather than technical in nature.

17 *In re Rochelle B.*, 49 Cal. App. 4th at 1216. The Board may not interpret the statute in a way that  
18 renders a provision meaningless. *Shah v. Dep't of Human Res.* (2023) 92 Cal. App. 5th 590, 595,  
19 *review denied* (Sept. 13, 2023).

20 Section 3065.4(b) defines the scope of the Board's review and does not limit the scope of  
21 review to arguments contained in a Section 3065.2(d)(1) notification (or supplemental notification):

22 Upon a decision by the board pursuant to subdivision (a), the board may determine  
23 the difference between the amount the franchisee has actually received from the  
24 franchisor for fulfilled warranty obligations and the amount that the franchisee  
25 would have received if the franchisor had compensated the franchisee at the retail  
labor rate and retail parts rate as determined in accordance with Section 3065.2 for  
a period beginning 30 days after receipt of the franchisee's initial submission under  
subdivision (a) of Section 3065.2.

26 Section 3066 reinforces the fact that the Board may consider all evidence during a hearing to  
27 set a rate, regardless of whether the evidence or argument was identified in the manufacturer's Section  
28



1 3065.2(d)(1) notification or supplementation. It requires that, upon receiving a protest under 3065.4,  
2 the Board shall fix a time and place for a hearing. Veh. Code § 3066. During the hearing,

3 [t]he board or an administrative law judge designated by the board shall hear and  
4 consider the oral and documented evidence introduced by the parties and other  
5 interested individuals and groups, and the board shall make its decision solely on  
6 the record so made. Chapter 4.5 (commencing with Section 11400) of Part 1 of  
7 Division 3 of Title 2 of the Government Code and Sections 11507.3, 11507.6,  
8 11507.7, 11511, 11511.5, 11513, 11514, 11515, and 11517 of the Government  
9 Code apply to these proceedings.

10 *Id.* § 3066(a). The hearing (and pre-hearing procedures) are governed, *inter alia*, by Chapter 4.5  
11 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code, which  
12 is California’s Administrative Procedures Act. This provides for a trial-like adjudicative proceeding,  
13 which includes the presentation of oral and documentary evidence, cross examination, impeachment,  
14 and submission of oral and written arguments. Additionally, Section 3066 provides for extensive pre-  
15 hearing discovery, as it incorporates Gov. Code §§ 11507.6 (discovery), 11507.7 (motion to compel),  
16 11511 (depositions), 11511.5 (prehearing conference), 11513 (evidence permitted at trial), 11514  
17 (affidavit may be submitted at trial), 11515 (taking notice).

18 If the intent of the legislature was to limit the manufacturer to the arguments raised in the  
19 notification and evidence submitted with the notification, there would be no need to allow for  
20 discovery at all. At most, it could permit limited discovery for the franchisee to probe the evidence  
21 and arguments presented by the manufacturer.

22 Thus, all evidence, regardless of whether Ford “could have or “should have” included such  
23 evidence or argument in the Denial Letter may be considered here.

## 24 2. Putnam’s Interpretation is Inconsistent with California’s Public Policy

25 In construing a statute, “[i]f the language permits more than one reasonable interpretation, . . .  
26 the court looks to a variety of extrinsic aids, including . . . public policy.” *Cal. Disability Servs. Ass’n*  
27 *v. Bargmann* (2020) 52 Cal. App. 5th 911, 916 (internal quotation marks and citations omitted). “While  
28 not dispositive, we also consider the public policy implications of a particular interpretation, to ensure  
that the construction we adopt will not produce manifestly adverse effects that the Legislature could  
not have intended when it enacted that law.” *Pac. Gas & Elec. Co. v. Superior Court* (2017) 10 Cal.



1 App. 5th 563, 579–580, *as modified on denial of reh'g* (Apr. 20, 2017) (internal quotation marks  
2 omitted). When discerning the public policy of the state of California, it is appropriate to look to  
3 constitutional or statutory provisions. *See, e.g., Carter v. Escondido Union High Sch. Dist.* (2007) 148  
4 Cal. App. 4th 922, 929 (in wrongful termination context, discusses test to determine public policy by  
5 looking to statutory or constitutional provisions).

6 The plain language of the statute permits this Board to consider all of Ford’s evidence and  
7 arguments. Should the Board find the statute ambiguous and determine Section 3065.2(d)(1) could be  
8 read to limit the scope of the Board’s review, the Board should reject such an interpretation on the  
9 basis of public policy.

10 Putnam’s argument conflicts with California’s policy interest in preventing unfair or deceptive  
11 business practices (Bus. & Prof. Code, § 17200) and fraud and deceit (Civ. Code, §§ 1572, 1709). As  
12 demonstrated by this case, interpreting a statute whereby a manufacturer may only deny a rate based  
13 on the information contained in the submission would force manufacturers to rely on potentially  
14 fraudulent and materially inaccurate data in calculating a rate. This rewards deceptive business  
15 practices on the part of the dealers, as the manufacturer would have no recourse but to rely on fraud  
16 to calculate a rate.

17 Additionally, California has an interest in “conserving judicial resources and promoting  
18 judicial economy by minimizing repetitive litigation, preventing inconsistent judgments which  
19 undermine the integrity of the judicial system, and avoiding the harassment of parties through repeated  
20 litigation.” *Meridian Fin. Servs., Inc. v. Phan* (2021) 67 Cal. App. 5th 657, 686–687, *review denied*  
21 (Nov. 10, 2021); *accord Ghaderi v. United Airlines, Inc.* (N.D. Cal. 2001) 136 F.Supp.2d 1041, 1043  
22 (“Public policy favors avoiding waste of both litigants’ and judicial resources”). Putnam’s  
23 interpretation binds the hands of a manufacturer from meaningfully asserting claims of fraud and/or  
24 material inaccuracy where that claim relies on evidence that exists outside of the repair orders or initial  
25 notification, regardless of the circumstances. If the Board cannot hear these claims, then manufacturers  
26 will be forced to seek redress in a trial court. This would be a waste of judicial resources and lead to  
27 repetitive litigation.

1 Limiting the scope of the Board’s review is bad for public policy, and Putnam’s interpretation  
2 should not be entertained.

3  
4 3. Reading Section 3065.2(d)(1) to Limit the Review to the Denial Letter Would  
5 Violate Due Process

6 The Board “must read the Constitution and the statute together; if the statute is reasonably  
7 capable of interpretation consistent with the Constitution, the statute will be given that meaning, rather  
8 than another in conflict with the Constitution.” *Cty. of Madera v. Gendron* (1963) 59 Cal. 2d 798, 801  
9 (internal quotation marks omitted). The Board should not espouse an interpretation which invites  
10 constitutional difficulties. *D’Amico v. Bd. of Med. Exam’rs* (1970) 6 Cal. App. 3d 716, 726. “Where,  
11 by the terms of the statute and by a fair, reasonable interpretation, the court can arrive at a meaning  
12 consistent with requirements of the Constitution, then the statute should be given that meaning rather  
13 than another meaning or construction which would conflict with the Constitution.” *San Dieguito*  
14 *Union High Sch. Dist. v. Rosander* (1985) 171 Cal. App. 3d 968, 977 (citations omitted).

15 Both the United States Constitution and the California Constitution guarantee that government  
16 may not deprive an individual of “life, liberty, or property, without due process of law.” (U.S. Const.,  
17 5th & 14th Amends.; Cal. Const., Art. I, § 7.) The essence of due process is the requirement that “a  
18 person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.  
19 The opportunity to be heard must be afforded at a meaningful time and in a meaningful manner.”  
20 *Today’s Fresh Start, Inc. v. L.A. Cty. Office of Educ.* (2013) 57 Cal. 4th 197, 212 (internal citations  
21 and quotation marks omitted) (emphasis added); *see also United States v. James Daniel Good Real*  
22 *Prop.* (1993) 510 U.S. 43, 48 (holding due process requires that individuals receive notice and a  
23 meaningful opportunity to be heard before the government deprives them of property).

24 To determine whether a governmental deprivation implicates the requirements of federal due  
25 process, “we must look to see if the interest is within the Fourteenth Amendment’s protection of liberty  
26 and property.” *Bd. of Regents v. Roth* (1972) 408 U.S. 564, 571; *accord Corrales v. Bradstreet* (2007)  
27 153 Cal. App. 4th 33, 59–60 (“Where a state law is challenged on due process grounds, we inquire (1)  
28 whether the State has deprived the claimant of a protected property interest, and (2) whether the State’s

1 procedures comport with due process, i.e., whether the party was given notice reasonably calculated  
2 to apprise interested parties of the pendency of the action and afford them an opportunity to present  
3 their objections.” (citing federal cases)). “When the state acts to deprive an individual of an important  
4 interest, it may not do so without affording the procedural due process protection required by the  
5 Fourteenth Amendment.” *Corrales*, 153 Cal. App. 4th at 59–60. In evaluating the manner of process  
6 afforded an individual, the Board should weigh the individual’s private interest, the risk of an  
7 erroneous deprivation of this interest through the procedures used, and the government’s interest,  
8 including the burden of additional procedural safeguards. *Mathews v. Eldridge* (1976) 424 U.S. 319,  
9 332-35.<sup>37</sup>

10 Money is undoubtedly private property in which Ford has a property interest. *See Webb’s*  
11 *Fabulous Pharmacies, Inc. v. Beckwith* (1980) 449 U.S. 155, 160 (“The principal sum deposited in  
12 the registry of the court plainly was private property[] and was not the property of Seminole County.”).  
13 Because proceedings under Section 3065.4 have the potential to deprive Ford of property by  
14 instructing Ford to compensate Putnam at a rate higher than \$220 per hour, Ford deserves a meaningful  
15 opportunity to be heard prior to any such deprivation. This is a significant property interest that  
16 requires significant process.

17 In considering the process that is due, as well as the burden of additional procedural safeguards  
18 under *Matthews*, Section 3066 serves as a barometer. Section 3066 already contemplates a full hearing  
19 under California’s APA, as well as discovery. *See Veh. Code* § 3066(a) (specifying the hearing will  
20 be governed, *inter alia*, by *Gov. Code* §§ 11507.6 (discovery), 11507.7 (motion to compel), 11511  
21 (depositions), 11511.5 (prehearing conference), 11513 (evidence permitted at trial), 11514 (affidavit  
22 may be submitted at trial), 11515 (taking notice)). The Legislature’s incorporation of the APA and  
23 numerous evidentiary provisions indicates that a fulsome adjudicative proceeding is due to parties  
24 before the Board.

25  
26  
27 <sup>37</sup> California has adopted a fourth factor (dignitary interest) in addition to the three *Matthews* factors.  
28 *Today’s Fresh Start*, 57 Cal. 4th at 213. This factor only applies where the party seeking due process  
is a natural person. *Id.* (“Accordingly, the dignitary interest factor plays no role when due process  
rights are asserted by an entity rather than an individual.”).

1 Further, due process is not served by limiting Ford to 30 days following the submission of the  
2 repair orders to identify all evidence of material inaccuracy or fraud. Ford has a robust warranty labor  
3 review team that is efficient and effective; however, in this instance, as discussed in great detail herein,  
4 Putnam's request was not the typical warranty labor request. It is impractical to expect Ford to unearth  
5 all of the irregularities in such a voluminous submission in 30 days, especially when it required special  
6 skills and expertise in accounting. Simply put, requiring Ford to complete a full forensic evaluation of  
7 1,673 repairs in 30 days, identifying every error therein, and reducing every error to writing is  
8 fundamentally unreasonable and unjust. Ford required more time and more outside and inside  
9 resources—such as the resources outlined in Section 3066—in order to engage in a meaningful review.

10 Likewise, there is a high risk of erroneous deprivation without a meaningful opportunity to  
11 present evidence. Ford is expressly permitted to raise fraud and material inaccuracies as a basis for a  
12 denial of a submission. If the concern is that the submission itself—the repair orders and the data  
13 therein—are inaccurate and/or fraudulent, there would not only be a risk, but a guarantee of erroneous  
14 deprivation in violation of *Matthews* if the manufacturer is required to establish the existence of fraud  
15 through the exclusive use of fraudulent documents and data. Information outside of the four corners  
16 of the submission is necessary to establish a document is fraudulent. For example, the discrepancies  
17 between the actual hours and sold hours in the repair orders are quintessential signs of fraud. But Ford  
18 needed to interview former Putnam employees to confirm that Putnam employees would work  
19 backwards from the total labor charge to “sell” labor hours that were going to result in an hourly rate  
20 close to \$440/hour. Similarly, Ford could not have known from the face of the repair orders that  
21 Putnam had performed the repairs off site at the Barn and the Nissan dealership. It was not until Ford  
22 investigated other issues of fraud that Ford uncovered the location issue. Indeed, as detailed at length  
23 above, Putnam's response was to flatly lie and mislead Ford about the location of the repairs. To  
24 prohibit the Board from considering the evidence showing that the repair orders were reverse  
25 engineered and not qualified because this evidence could not have been included in the Denial Letter  
26 would be fundamentally unfair.

27 Section 3065.2, in conjunction with Section 3065.4 and 3066, must be construed to allow the  
28 Board to consider all evidence presented by Ford which proves Putnam's submission was materially

1 inaccurate or fraudulent or both. Only then will Ford’s fundamental due process rights be preserved.  
2 Any other interpretation would render Section 3065.2 unconstitutional.<sup>38</sup>

3 **C. The Submission is Patently Unreasonable and Should Be Denied**

4 Section 3065.2, by its plain terms, requires that every labor rate request be reasonable.  
5 Putnam’s labor rate request is “outrageously high” (Becic: 9/18/2023, 46:23-24), “excessively high”  
6 (*id.*, 189:7-8), “egregious,” (Sweis: 9/20/23, 522:16-17) and certainly not reasonable (Kanouse:  
7 9/19/23, 306:20-25). Because the rate is not reasonable, the Board should reject Putnam’s submission  
8 and return the rate to \$177 per hour.

9 1. Section 3065.2 Requires that the Labor Rate Be Reasonable

10 It is elementary that, in interpreting a statute, the Board must enforce the plain meaning of the  
11 text. *Verduzco*, 210 Cal. App. 4th at 1414. Similarly, no portion of a statute may be rendered  
12 superfluous. *Klein v. United States of Am.* (2010) 50 Cal. 4th 68, 80-81. Language in a statute should  
13 be read in the context of the statutory framework as a whole to harmonize various parts, *Coal. of*  
14 *Concerned Cmty.*, 34 Cal. 4th at 737, and statutes should not be read to lead to an absurd result, *id.*

15 Under the plain language Section 3065.2, reasonableness acts as a veritable coda to a request.  
16 *See Veh. Code* § 3065.2(a) (“A franchisee seeking to establish or modify its retail labor rate, retail  
17 parts rate, or both, **to determine a reasonable warranty reimbursement** schedule shall, no more  
18 frequently than once per calendar year, complete the following requirements[.]” (emphasis added)).  
19 Not only must the rate be reasonable, but the requirements of Section 3065.2 should be used to  
20 “determine a reasonable warranty reimbursement schedule.” *Id.* The mandate of reasonableness is  
21 there, in black and white, at the top of the statute.

22 Not only does the statute plainly require that the labor rate be “reasonable,” but this  
23 interpretation is consistent with the Vehicle Code as a whole. Section 3065, which governs warranty

24 \_\_\_\_\_  
25 <sup>38</sup> There is a broader challenge to Section 3065.2’s constitutionality—that the statutory limits on Ford’s  
26 grounds to reject a labor rate request to only material inaccuracy or fraud violates Ford’s right to a fair  
27 trial under the due process clauses of the U.S. and California constitutions by, for example, not  
28 allowing challenges that the rate is usurious or otherwise adverse to consumers where so outrageously  
unreasonable, as here, or other similar grounds. This issue, however, must be left to the courts. *E.g.*,  
*Hand v. Bd. of Exam’rs* (1977) 66 Cal. App. 3d 605, 619 (agency lacks jurisdiction to rule that statute  
it is charged with enforcing is unconstitutional due to separation of powers issue).

1 compensation and requires that franchisors are to “fairly” compensate franchisees for labor when  
2 performing warranty repairs. Veh. Code § 3065(a) (“Every franchisor shall properly fulfill every  
3 warranty agreement made by it and adequately and **fairly compensate** each of its franchisees for labor  
4 and parts used to satisfy the warranty obligations[.]” (emphasis added)). The clear intent of the  
5 legislature is that Section 3065.2 be used to calculate a reasonable, or fair, warranty labor rate in order  
6 to achieve “fair” compensation. This Board cannot ignore the plain language of the statute and render  
7 the mandate that rates be “reasonable” and “fair” meaningless.

8         Were the plain language not enough, the legislative history bludgeons this point home. The  
9 California legislature emphasized this directive in its findings and declarations at the outset of AB 179  
10 when it stated: “California franchise laws require manufacturers to provide **reasonable**  
11 **reimbursement to dealers for warranty work**, but fail to establish a clear procedure to determine  
12 whether a reimbursement is reasonable.” (Tab A, Section 1(c) at 2 (emphasis added).) It went on to  
13 state that “It is the intent of this act to ensure that new motor vehicle dealers are treated fairly by their  
14 franchisors, that dealers are **reasonably compensated for performing warranty repairs** on behalf  
15 of their franchisors, . . . .” (*Id.*, Section 1(i) at 3 (emphasis added).)

16         Further, Ford’s interpretation is consistent with California’s policy interest in protecting  
17 consumers from unnecessarily high prices. *See, e.g., Josten v. Rite Aid Corp.* (S.D. Cal. Nov. 20, 2018)  
18 2018 WL 6062415, at \*5 (charging consumer higher prices violates public policy); *Smith v. State Farm*  
19 *Mut. Auto. Ins. Co.* (2001) 93 Cal. App. 4th 700, 719 (“Examples of unfair business practices include:  
20 charging a higher than normal rate for [a service].”).<sup>39</sup>

21         Conversely, the absence of a threshold reasonableness requirement for a labor rate request  
22 would lead to an absurd, and impermissible, result. Untethering a labor rate from a reasonableness  
23

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24 <sup>39</sup> Ford’s Sales and Service Agreement (“SSA”) mandates that a dealer charge only reasonable, market,  
25 competitive rates to its customer. (Joint Ex. 1 ¶ 6(h) [B23] (requiring Putnam to “develop and maintain  
26 his own programs, designed to develop good relationships between the Dealer and the public. . . . The  
27 Dealer shall not make, directly or indirectly, any false or misleading statement or representation to any  
28 customer as to . . . the Dealer’s or [Ford’s] prices or charges . . .”), ¶ 6(i) [B23-24] (Putnam shall  
“conduct Dealership Operations in a manner that will reflect favorably at all times on the reputation  
of the Dealer, other [Ford] authorized dealers, [Ford], [Ford] Products . . . . The Dealer shall avoid in  
every way any ‘bait’, deceptive, misleading, confusing or illegal advertising or business practice.”).)



1 standard would incentivize franchisees to price-gouge consumers for 90 days in order to inflate their  
2 purported customer pay labor rate and force Ford to pay for warranty labor in gross excess of market  
3 rates. This would not only harm the consumer (both during the 90-day period and in the long term by  
4 impacting the warranty program), but it would be contrary to the purpose of the statute, which is to  
5 allow franchisees to obtain a market rate for the warranty repairs for which the manufacturer pays.

6                   2. The Evidence (Unsurprisingly) Proves \$436.76/hour is not Reasonable

7           Reasonableness is a question of fact. *E.g., Great W. Distillery Prods. v. John A. Wathen*  
8 *Distillery Co.* (1937) 10 Cal. 2d 442, 446 (“What is a reasonable price is a question of fact dependent  
9 on the circumstances of each particular case.”); *accord House v. Lala* (1960) 180 Cal. App. 2d 412,  
10 418. While no court has yet interpreted the word “reasonable” in the context of Section 3065.2, there  
11 is no dearth of California law on the topic in other situations. The definition of reasonable in the  
12 context of a price, rate, or cost is well-covered by California courts.

13           The “reasonable value” of a service is the same as the “going rate” for the services, *Maglica v.*  
14 *Maglica* (1998) 66 Cal. App. 4th 442, 446, or the “reasonable market value at the current market  
15 prices,” *Punton v. Sapp Bros. Constr. Co.* (1956) 143 Cal. App. 2d 696, 701. Reasonable market value,  
16 or fair market value, is the price that “a willing buyer would pay to a willing seller, neither being under  
17 compulsion to buy or sell, and both having full knowledge of all pertinent facts.” *Alameda Cty. Flood*  
18 *Control & Water Conservation Dist. v. Dep’t of Water Res.* (2013) 213 Cal. App. 4th 1163, 1174–75,  
19 fn. 9.

20           Putnam’s labor rate increase—from \$177 per hour to \$436.76—is outrageously, and  
21 unreasonably, high. Individuals who have worked in the automotive industry for decades and who are  
22 intimately familiar with the market for warranty labor rates and customer pay labor rates in the San  
23 Francisco Bay Areas, testified that \$436.76/hour is approximately double the labor rate for the region.  
24 (*See, e.g.,* Becic: 9/18/2023, 189:7-10 (“[T]his rate was excessively high. It was almost double the  
25 next highest dealer in the nation and all of the surrounding dealers in the area.”)); Austen-Murphy:  
26 9/18/2023, 200:11:12 (the rate was “roughly twice the neighboring dealers.”), 212:19-20 (“it would  
27 be a rate that is outrageously high compared to the market.”); Kanouse: 9/19/23, 307:4-6 (“this is way  
28 higher than anything that I have seen [in California] historically.”); Sweis: 9/20/23, 522:14-17 (“I



1 worked the entire San Francisco Bay Area. All my dealerships were there. And they were – I believe  
2 the maximum was 250 an hour. 440 was egregious in my opinion.”.) Forensic accounting expert, Ms.  
3 Heinemann, explained why looking at comparable warranty labor rates—which is already a basis for  
4 determining reasonableness under California law—is an appropriate metric in this case:

5 [O]ne of the most effective ways to think about reasonableness and accuracy of a  
6 rate, is to compare the outcome of using sale hours as a rate related to total charges.  
7 The most effective, efficient way to evaluate reasonableness of that is to look at  
8 what other dealers are themselves receiving in warranty labor reimbursement rates  
because those are an expression of those other dealers' retail rates in the same broad  
geography.

9 (Heinemann: 9/25/23, 951:14-22.) It is simply economically unreasonable to compensate Putnam \$440  
10 for inefficient technicians when other dealerships get around \$200 in the same market. (*Id.*, 959:8-16;  
11 *see also* 934:18-21 (“If sales hours are used, the result is wholly inconsistent with market rates for the  
12 13 other competitors that are in the San Francisco area.”).) Ms. Heinemann captures this discrepancy  
13 quite vividly:

Figure 11<sup>57</sup>  
SF MSA Warranty Labor Rates



1 Exhibit MM at 24, Figure 11 [B1278].

2 The Board need not only rely on Ford employees or experts. Putnam's own vendor and witness,  
3 Mr. Korenak, stated that of the 550 to 600 warranty labor rate submissions he has done in California  
4 since July 2020, outside of Putnam's dealerships, only three or four have sought over \$300/hour.  
5 (Korenak: 9/27/2023, 1416:14-18; *see also* 1405:18-19.) And Mr. Martinez, a former Putnam  
6 employee explained that when customers did learn of a \$440 labor rate, "customers were lashing back  
7 at us saying that we were rip-offs. . ." and that customers "shopped us and compared us to Towne  
8 Ford, compared us to Serramonte Ford, and said that the dealerships were \$220 cheaper per hour than  
9 we are." (Martinez: 9/20/23, 674:23-675:5.)

10 The Board can likewise consider rates previously deemed acceptable to Putnam. *Children's*  
11 *Hosp. Cent. Cal. v. Blue Cross of Cal.* (2014) 226 Cal. App. 4th 1260, 1274-75 (evidence of reasonable  
12 value can be shown through prior agreement to pay and accept payment, there regarding managed  
13 health care plan to hospital). Here, Putnam's negotiated rate with its fleet customers is \$220. (Martinez:  
14 9/20/23, 703:2-6.)

15 Evidence that \$436.76 per hour is unreasonable has gone un rebutted. Putnam did not present  
16 the testimony of a single individual who testified that \$436.76 per hour rate is reasonable or consistent  
17 with the market. In fact, Kamenetsky testified that Putnam's rate for warranty-like, qualified, customer  
18 pay repairs was intentionally not priced to be competitive. (Kamenetsky: 9/27/23, 1541:12-14.)

19 In the words of seasoned mechanic, Mr. Sweis, "There is something called common sense, and  
20 then there is something egregious in my opinion. 440 is ridiculous. When I was told that [Putnam was  
21 charging 440/hour] I was surprised." (Sweis: 9/20/23, 627:1-3.)

22 3. Because Ford's Rate Is Not Reasonable, the Board May Either Reject the  
23 Submission or Determine an Alternative Rate

24 The statute does not simply state that the rate must be reasonable, but that the requirements  
25 enumerated in Section 3065.2 must be used to determine a reasonable rate. This leaves the Board with  
26 two scenarios: either Putnam failed to follow the requirements in Section 3065.2, or Putnam followed  
27  
28

1 the requirements, but nonetheless resulted in an unreasonable rate. The Board must act in either  
2 scenario. Here, Ford contends the former occurred.<sup>40</sup>

3 If the Board concludes that Putnam did not follow the requirements in Section 3065.2, the  
4 Board should reject the Submission outright as nonconforming and allow the rate to return to the  
5 original rate of \$177 per hour. As argued below, Putnam did not properly employ the requirements of  
6 Section 3065.2 because it provided materially inaccurate and fraudulent repair orders in which the  
7 sold hours listed did not generate the charges to the customer. The fact that the rate is unreasonable is  
8 further evidence that Putnam did not follow the requirements of the statute. The statute's methodology  
9 is designed to rely on free market principles, and, when applied properly, it should result in a  
10 reasonable rate.

11 The "reasonableness" requirement cannot be ignored under any of the canons of construction  
12 discussed above. Once applied here, Putnam's Submission must be rejected, and Ford should be  
13 permitted to collect its overpayment in excess of \$177 per hour.

14 **D. The Submission Is Materially Inaccurate and Fraudulent And Cannot Be Used**

15 Should the Board endeavor to apply Section 3065.2 despite the unreasonableness of the rate  
16 request, it should find it cannot calculate a rate because the Submission is too materially inaccurate  
17 and fraudulent to apply Section 3065.2(a)'s formula. For the reasons addressed at length above, it is  
18 impossible to know which hours, if any, generated the final labor charge. As such, the Board can reject  
19 the Submission as too materially inaccurate and fraudulent to be used and set the rate at the original  
20 \$177 per hour. Ford should be permitted to collect its overpayment in excess of \$177 per hour.

21 **E. If The Board Calculates a Rate, it Should Set the Rate at \$198.02 per Hour**

22 Alternatively, should the Board use the repair orders to calculate a labor rate consistent with  
23 Section 3065.2, it should select the rate of \$198.02, which was identified in Ms. Heinemann's Report,  
24  
25  
26

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27 <sup>40</sup> Because Putnam's Submission was fraudulent and materially inaccurate, the Board need not grapple  
28 with how to apply Section 3065.2's reasonableness requirement where the submission technically  
satisfies the requirements but is nonetheless unreasonable.

1 Exhibit MM, including Exhibit 2 to the report [B1285].<sup>41</sup> This rate is based on the following  
2 considerations.

3 First, it may consider only orders completed during a 90-day period. This tracks the plain  
4 language of the statute. *See* Veh. Code § 3065.2(a)(1) (“The franchisee shall submit . . . (B) All repair  
5 orders completed in any 90-consecutive day period.”).

6 Second, the Board should use actual, or technician hours, not sold hours, as the sold hours are  
7 entirely artificial, as explained at length *supra*.

8 Third, the Board should not consider repair lines in the repair orders that do not report  
9 technician hours. Section 3065.2 specifies that the rate shall be calculated by “determining the total  
10 charges for labor from the qualified repair orders and dividing that amount by the total number of  
11 hours that generated those charges.” *Id.* § 3065.2.(a)(3). The Board cannot divide by zero. Where zero  
12 hours resulted in a charge, the charge should be excluded based on a plain interpretation of the statute.

13 Fourth, the Board should select a 90-day period most favorable to Ford. Section 3065.4  
14 instructs the Board to determine any difference between the amount the dealer has actually received  
15 and “the amount that the franchisee *would have* received if the franchisor had compensated the  
16 franchisee at the retail labor rate . . . as determined in accordance with section 3065.2.” *Id.* § 3065.4(b)  
17 (emphasis added). Thus, the Board must select a rate that a manufacturer “would have” selected in  
18 applying Section 3065.2. When the manufacturer requests additional repair orders pursuant to Section  
19 3065.2, the manufacturer is permitted to calculate a rate based on any 90-day period it chooses. *Id.*  
20 § 3065.2(d)(5) (“the franchisor may calculate a proposed adjusted retail labor rate . . . based upon any  
21 set of the qualified repair orders submitted by the franchisee.”). Essentially, the statute permits the  
22 manufacturer to select the most favorable rate to it supported by the repair orders.

23 Here, Putnam deprived Ford of an opportunity to calculate a rate most favorable to Ford  
24 because it provides such a bafflingly inaccurate submission, which took a literal expert forensic  
25 accountant to sift through. Thus, in selecting a rate here, the Board must act as if it were the  
26

27 <sup>41</sup> Ms. Heinemann testified that that she would select a date range favorable to Putnam based on  
28 personal preferences. Her testimony, while demonstrative of her good faith and credibility, should not  
be given legal weight, as she was not endeavoring to apply Section 3065.4 and 3065.2. B2400

1 manufacturer and provide Putnam with the rate “it would have received” if Ford had been able to apply  
2 Section. 3065.2 and select a rate using a 90-day period most favorable to Ford.

3 Using Exhibit MM, Ex. 2 [B1285], the Board should select a rate of \$198.02. Since Ford has  
4 been paying in excess of that rate since November 2021, Ford should be permitted to claw-back \$21.98  
5 per hour of warranty work since then.

### 6 CONCLUSION

7 Putnam should not be rewarded for its deception and campaign to hide the truth. Putnam should  
8 face the consequences of its own deception. The Submission simply cannot be trusted—it is tainted,  
9 rendering it materially inaccurate and fraudulent and it should be rejected outright.

10 For all of these reasons, Ford respectfully requests that the Board overrule Putnam’s protest  
11 and determine that Ford met its burden in satisfying the notice provision and showing that the  
12 Submission was materially inaccurate and fraudulent. The sold hours reported did not generate the  
13 final labor charges, there were so many inaccuracies and anomalies in the Submission rendering the  
14 Submission untrustworthy, and it is impossible to determine which repairs are qualified. As such, it  
15 should find that the original labor rate of \$177 is still in effect and order Putnam to reimburse Ford all  
16 warranty labor hours paid in excess of \$177 per hour.

17 Alternatively, the Board should find that the rate is unreasonable and, as such, the whole  
18 request is non-conforming to the Statute, and it should find that the original labor rate of \$177 is still  
19 in effect and order Putnam to reimburse Ford all warranty labor hours reimbursed in excess of \$177  
20 per hour.

21 Should the Board attempt a calculation, it should find that the appropriate hourly warranty  
22 labor rate is the rate of \$198.02 and order Putnam to reimburse Ford all warranty labor hours  
23 reimbursed in excess of \$198.02 per hour.

Dated: January 18, 2023

GREENBERG TRAURIG, LLP

By: /s/ Elayna M. Fiene  
H. Camille Papini-Chapla  
Steven M. Kelso  
Gwen Young  
Elayna M. Fiene  
April Connally

Attorneys for Respondent  
Ford Motor Company

**PROOF OF SERVICE**

CAPTION: KPAuto, LLC, dba Putnam Ford of San Mateo v. Ford Motor Company

BOARD: NEW MOTOR VEHICLE BOARD

PROTEST NOS.: **PR-2759-21**

I am employed in the City and County of Denver, State of Colorado. I am over the age of 18 years and not a party to this action. My business address is 1144 15th Street, Suite 3300, Denver, CO 80202.

On January 18, 2023, I served the foregoing **Respondent Ford Motor Company's Post-hearing Brief** on each party in this action, as follows:

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- ☐ (BY MAIL) I caused such envelope to be deposited in the United States mail at Denver, Colorado, with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing documents for mailing. It is deposited with the United States Postal Service each day and that practice was followed in the ordinary course of business for the service herein attested to.
- ☐ (BY FACSIMILE) The facsimile machine I used complied with California Rules of Court, Rule 2003, and no error was reported by the machine. Pursuant to California Rules of Court, Rule 2006(d), I caused the machine to print a transmission record of the transmission, a copy of which is attached to this Affidavit.
- ☐ (BY FEDERAL EXPRESS) I caused such envelope to be delivered by air courier, with the next day service.
- ☒ (BY EMAIL) at the email address listed above.

Executed on January 18, 2023, at Denver, Colorado.

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

/s/ Elayna M. Fiene  
Elayna M. Fiene



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

In the Matter of the Protest of  
KPAUTO, LLC, dba PUTNAM FORD OF SAN  
MATEO,  
  
Protestant,  
  
v.  
  
FORD MOTOR COMPANY,  
  
Respondent.

**Protest No. PR-2759-21**

**RESPONDENT FORD MOTOR  
COMPANY'S PROPOSED FINDINGS OF  
FACT AND CONCLUSIONS OF LAW**

Pursuant to the schedule for post-hearing briefing entered at the close of the hearing on  
September 28, 2023, as amended, Respondent Ford Motor Company ("Ford") submits its proposed  
findings of facts and conclusions of law.

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**PROCEDURAL BACKGROUND**

1  
2 1. Protestant Putnam Ford of San Mateo (“Putnam”) filed a protest with the California  
3 New Motor Vehicle Board (“Board”) on December 30, 2021, Protest No. PR-2759-21, challenging  
4 Ford’s denial of Putnam’s requested warranty labor rate request, submitted pursuant to California  
5 Vehicle Code Section 3065.2 (“Section 3065.2” or “3065.2”).

6 2. Putnam requested a warranty labor rate of \$436.76 per hour on August 24, 2021, based  
7 on its submission of 90 consecutive repair orders for the period of March 10 through June 7, 2021  
8 (“Initial Submission”). On September 20, 2021, Ford requested an additional 30 days of consecutive  
9 repair orders, as allowed by Section 3065.2 (“Supplemental Submission,” collectively with the Initial  
10 Submission, the “Submission”), which it received on September 27 for the period June 8 through July  
11 7, 2021. Ford issued its denial of Putnam’s requested rate on October 26, 2021 (“Denial Letter”).

12 3. In its protest, Putnam claimed Ford’s Denial Letter was untimely and failed to provide  
13 sufficient indications for how Ford’s adjusted labor rate was calculated. (Protest, ¶¶ 7-9.) Putnam also  
14 alleged it uses Ford’s warranty time guide to set the hours it uses to calculate the customer charges,  
15 and therefore, Ford cannot prove that Putnam’s requested hourly rate is materially inaccurate or  
16 fraudulent. (*Id.*, ¶¶ 10-11.)

17 4. On May 18, 2023, after discovery permitted by Vehicle Code § 3066, the Board  
18 referred the case to the State Office of Administrative Hearings for a contested case hearing;  
19 Administrative Law Judge Wim van Rooyen was ultimately assigned to the hear the case.

20 5. A Prehearing and Mandatory Settlement Conference was held on August 11, 2023, in  
21 advance of the merits hearing set to commence on September 18, 2023. Among other pre-hearing  
22 matters, Administrative Law Judge van Rooyen heard oral argument on the following briefed motions:  
23 (a) Ford’s motion *in limine* regarding technology procedures for Zoom hearing; (b) Ford’s motion *in*  
24 *limine* to exclude evidence and argument that Ford engaged in adverse conduct towards Putnam; and  
25 (c) Ford’s second motion to compel production of documents regarding its Request for Production No.  
26 40 and for evidentiary sanctions against Putnam regarding that motion. On August 15, the  
27 Administrative Law Judge issued his order granting Ford’s two motions *in limine* on technology  
28 procedures and its purported adverse conduct against Putnam and denying Ford’s motion to compel

1 and for evidentiary sanctions. The latter motion was denied without prejudice to any party's ability to  
2 object at the hearing to the offering of evidence or argument concerning matters that should have been  
3 previously disclosed or produced in discovery.<sup>1</sup>

4 6. The hearing on the merits was held on September 18 through 21 and September 25  
5 through 28, 2023.

6 7. At the hearing, Putnam was represented by its counsel, Gavin M. Hughes and Robert  
7 A. Mayville of the Law Offices of Gavin M. Hughes; Ford was represented by its counsel, Steven M.  
8 Kelso, Elayna M. Fiene, and April C. Connally of Greenberg Traurig LLP. Ford presented the  
9 following witnesses: Ford employees John Becic, Megan Murphy-Austin, Allen Kanouse, Maher  
10 "Mike" Sweis, and LaShawne Swann, former Putnam service manager David Martinez (live and by  
11 declaration), expert Suzanne Heinemann, CPA, and the declarations of former Putnam technicians  
12 Yesse Cruz and David Rebuella Lopez; Putnam presented the following witnesses: Kent Putnam,  
13 dealer principal of Putnam, Putnam Group CFO Andrey Kamenetsky, FrogData director Jeffrey  
14 Korenak, and expert Edward Stockton.

15 8. During the hearing, Judge van Rooyen considered testimonial and documentary  
16 evidence on Putnam's failures to produce certain documents to Ford in advance of Mr. Kamenetsky's  
17 deposition. After oral argument on September 27 and 28, Judge van Rooyen granted Ford's motion  
18 for sanctions against Putnam, entering the following finding of fact and preclusion of Putnam  
19 argument or evidence on the issue, as follows:

20 Some of the repairs in Putnam Ford's warranty labor rate request submission were  
21 performed at a facility other than Putnam Ford's authorized facility at 885 North San  
22 Mateo Drive, San Mateo, California. . . . Putnam Ford is precluded from arguing or  
speculating as to the location where any repair reflected in any specific repair order in  
the submission was performed.<sup>2</sup>

23 9. At the conclusion of the hearing, a post-hearing briefing schedule was entered, which  
24 was subsequently modified.

25 10. The record was closed upon the completion of the post-hearing briefing.

---

27 <sup>1</sup> See August 15, 2023 Order Resolving Motions Argued at Prehearing Conference.

28 <sup>2</sup> Transcript of 9/28/23 hearing at 1620:1-11.

**FINDINGS OF FACT****I. BACKGROUND OF THE PARTIES**

1. Putnam has been a Ford new vehicle dealer authorized to sell and service new Ford vehicles and parts, pursuant to a dealer agreement with Ford, the Ford Sales and Service Agreement (“SSA”), since January 27, 2021. (Joint Ex. 1 [B5]; K. Putnam: 9/25/23, 1023:11-20; 1024:10-13.)

2. Kent Putnam is the majority owner of Putnam through his company KBP Holdings, Inc.; Alvaro Vasquez is a minority owner and General Manager of Putnam and four other Putnam brand dealerships. (Joint Ex. 1 [B8], table of ownership; K. Putnam: 9/25/23, 1065:14-1066:15.) Andrey Kamenetsky is the Chief Financial Officer and Group Operations Manager for Putnam Automotive Group. (Kamenetsky: 9/27/23 1438: 5-15.)

3. Mr. Putnam, with other minority owners, owns 11 new vehicle franchises in nine separate dealerships in the San Francisco metro area. (K. Putnam: 9/25/23, 1064:23-1065:2.)

4. Since March 10, 2021, Putnam Ford’s approved location has been at 885 North San Mateo Drive. (*Id.*, 1025:3-18; Murphy-Austin: 9/18/23, 179:12-20, 184:5-7.)

5. Ford traditionally is a manufacturer and distributor of Ford and Lincoln vehicles.

6. Ford dealers are obligated under their SSAs to provide repairs to their customers’ Ford vehicles which are under Ford’s warranty and at no charge to the customer. (*See* Joint Ex. 1 [B20], Standard Provisions, ¶ 4(b)(1) at 7.) In return, Ford pays the dealer for those warranty repairs, both for the dealer’s labor and parts charges. (*Id.*, [B21] ¶ 4(b)(4) at 8.)

7. For the period January through November 2022, Ford paid Putnam \$700,587 in warranty claims versus Putnam’s reported revenue of \$581,639 in “Repair Shop,” *i.e.* customer-pay repairs. (Ex. MM [B1288], Ex. 5, under “Sales” heading, “Warranty and Policy Claims” line.).

8. Section 3065.2 of the California Vehicle Code (“Section 3065.2”) governs the determination of the hourly rate Ford pays a dealer for warranty work it performs for Ford customers.

**II. PUTNAM’S CUSTOMER-PAY PRICING**

9. Putnam has a service department that does customer-pay service work on Ford vehicles.

10. During the relevant period, Putnam did not have any guidelines or processes for how to open repair orders or conduct repair shop operations. (Kamenetsky: 9/27/23, 1505:3-6; 1513:1-

1 1514:18.) Nor did Putnam have any rules or policies as to how technicians would track their time on  
2 any given customer-pay repair. (K. Putnam: 9/25/23, 1068:3-1069:24.)

3 11. Putnam alleges its service advisors calculate the labor charge for all customer-pay  
4 repairs by multiplying \$440 by the Ford factory time guide hours for a given repair. (K. Putnam:  
5 9/25/23, 1043:2-13.) However, neither Mr. Putnam nor Mr. Kamenetsky were familiar with the  
6 process of creating a repair order. (K. Putnam: 9/25/23, 1067:23-1063:2 (no personal knowledge of  
7 service advisor work and cannot tell the difference between “a/hours” and “s/hours”); Kamenetsky:  
8 9/27/23, 1505:18-1506:9 (no personal knowledge of creating repair orders).)

9 12. The evidence shows that Putnam did not just multiply the time guide by an hourly rate  
10 of \$440. Putnam did not have a set methodology it always employed to calculate a labor charge.  
11 Rather, the methods changed, and numbers were altered based on a service advisor’s discretion,<sup>3</sup> a  
12 desire to obtain commissions,<sup>4</sup> balancing out the cost for parts,<sup>5</sup> and reverse engineering a \$440 labor  
13 rate.<sup>6</sup> Because of the service advisor’s discretion, the same repair does not necessarily cost the same  
14 amount for each customer. (Kamenetsky: 9/27/23, 1540:23-1541:1.)

15 13. Mr. Putnam did not want to raise its customer prices, so it “did basic algebra and [it]  
16 backed into the [\$440/hour] labor rate” after providing a cost estimate for the repair to the customer.  
17 (K. Putnam: 9/25/23, 1044:5-11; 1128:10-25.) The estimate provided to the customer did not include  
18 an hourly rate for the labor costs. (*Id.*)

19 14. After the final labor charge was already determined, Putnam would often calculate the  
20 sold hours that would be the closest to a \$440 per hour rate. (Kamenetsky: 9/27/23, 1540:11-22; K.

21  
22 \_\_\_\_\_  
23 <sup>3</sup> K. Putnam: 9/25/23, 1124:22-1125:1 (discretion to not use Ford time guide), 1137:24-1138:3 (not  
24 following \$440 hourly rate), 1140:18-20 (“looks like” service advisors clearly have discretion over  
25 the rate, after reviewing eight repair lines on four repair orders); Kamenetsky: 9/27/23, 1539:24-  
1541:1 (discretion to adjust customer price); 1542:8-16 (discretion to change the DMS system’s \$440  
rate).

26 <sup>4</sup> Martinez: 9/20/23, 771:15-24.

27 <sup>5</sup> Kamenetsky: 9/27/28, 1598:25-1600:16.

28 <sup>6</sup> K. Putnam: 9/25/23, 1044:5-11; 1128:10-25.



1 Putnam: 9/25/23, 1123:16-1125:4; Martinez: 9/20/23, 682:4-11, 683:10-14, 755:15-17.) Putnam’s  
2 service advisors manipulated the repair orders. (Martinez: 9/20/23, 697:4-6.) Mr. Kamenetsky  
3 admitted: “The closest thing that they use is they’ll refer to the factory time if they’re not sure on a  
4 repair, but they are not required to use that on customer-pay.” (Kamenetsky: 9/27/23, 1544:21-1545:3  
5 (emphasis added).) Putnam only expected the “440-an-hour labor rate to hold.” (K. Putnam: 9/25/23,  
6 1124:22-11:25:4.)

7 15. David Martinez, Putnam’s former service manager, confirmed Putnam’s service  
8 advisors changed the sold hours after the fact, without regard to hours listed in the Ford time guide.  
9 (Martinez: 9/20/23, 733:7-19, 735:6-9; Ex. AA, ¶ 21.) Among the reasons they would change the sold  
10 hours was to get the rate of \$440. (*Id.*, 755:13-19.) The ways service advisors would get the rate to  
11 \$440 on any given day included picking a different time guide or even picking any number of hours  
12 they wanted; there was no consistent mechanism by which they manipulated the hours to get as close  
13 to \$440 as they could. (*Id.*, 755:20-756:12; 758:7-11; 761:21.) None of this happened at other Ford  
14 dealerships at which Mr. Martinez worked. (*Id.*)<sup>7</sup>

15 16. Putnam tracked the effective labor rate of service advisors to make sure they were  
16 performing as desired. (K. Putnam: 9/25/23, 1129:7-1130:9.) Mr. Martinez testified that service  
17 advisors would receive commissions based on their ability to inflate the apparent labor rate. (Martinez:  
18 9/20/23, 697:4-9.)

19 17. As a result, the sold hours are not always equal to the Ford factory time guide hours  
20 and a service advisor may use discretion in setting sold hours so long as it would yield a \$440/hour  
21 rate. (K. Putnam: 9/25/23, 1124:22-1125:4.)

22 18. Putnam also used a flat-rate model for many of its repairs. (K. Putnam: 9/25/23: 1140:1-  
23 8; *accord id.*, 1128:16-25; Kamenetsky: 9/27/23, 1468:24-1469:3 (admitting to using flat-rate for  
24 diagnostic work).)

25  
26  
27 <sup>7</sup> While Mr. Martinez started at Putnam on September 1, 2023, he reviewed open repair orders going  
28 back a month or two, so to July or August 2021, in or closer to the submission period, and saw the  
results of the same practices he testified about in that earlier period. (Martinez: 9/20/23, 768:15-  
769:20.)

**III. PUTNAM'S WARRANTY LABOR RATE SUBMISSION**

19. In 2019 or 2020, before Putnam acquired the Ford dealership, Mr. Putnam put a plan into place to increase the warranty labor rate at all of his dealerships. (Kamenetsky: 9/27/23, 1473:6-23.) Mr. Kamenetsky hired FrogData to prepare Putnam's Submission. (*Id.*, 1474:3-6.)

20. FrogData is a warranty "uplift" vendor that prepares the dealer's warranty labor rate submission to its manufacturer. (Korenak: 9/27/23, 1353:1-1354:6.) FrogData's goal is to "get the dealer as much money as possible[.]" (*Id.*, 1362:9-12, 1406:2-11.)

21. FrogData pulls data from a dealership database and consults the accounting copies of the repair orders only to validate that the data for qualified lines matches with the data on the repair order. (*Id.*, 1371:1-8.) It does not question the data in the repair orders, such as the variation of labor rates because it is "completely irrelevant to [FrogData]" and "[t]he repair order is the source document so that's that." (*Id.*, 1375:5-24, 1374:7-8, 1388:17-23, 1430:14-1431:10.)

22. FrogData assumes that the repairs have all been performed at the dealer's approved service location. (*Id.*, 1393:16-23, 1410:17-24.)<sup>8</sup>

23. FrogData determined the set of repair orders to be included in the Submission. (Joint Ex. 7.) FrogData prepared a spreadsheet that identified the qualified repairs it used for its analysis (Joint Ex. 3 [B45]) and Putnam's labor rate request letter (Joint Ex. 2 [B44]). (Korenak: 9/27/23, 1365:19-1366:20, 1367:18-23, 1368:16-1370:13; *see* 1371:16-1374:23 (identifying the data in each column of the spreadsheet); *see also* Becic: 9/18/23, 48:13-52:2.)

24. Of the 550 to 600 warranty rate submissions Mr. Korenak has prepared for California dealers since 2020, other than those from Putnam dealerships, only three or four have had a calculated rate over \$300 per hour, one or two submissions have had \$350, but none over \$400 per hour. (Korenak: 9/27/23, 1411:4-9, 1412:13-25; 1416:14-18.)

25. In 2021, Putnam's warranty labor rate was \$177/hour. (Becic: 9/18/23, 45:2-3.)

---

<sup>8</sup> FrogData also eliminates otherwise qualified repairs where the sold hours are \$0, even if there is a customer charge (*id.*, 1428:3-1429:13, e.g., RO 10048 [B1795], Line A), does not compare sold hours with the actual technician hours, as it does not enter the actual hours on its spreadsheet (*id.*, 1375:5-13, 1424:3-7) and does not perform any market analysis to get a sense of the prevailing warranty labor rates of area dealers (*id.*, 1417:13-20).

1           26.     On August 24, 2021, through Ford's internet portal, Putnam submitted a request to Ford  
2 for an increase in its hourly warranty labor rate, its Initial Submission. (*Id.*, 44:12-22; 45:12-18; Joint  
3 Ex. 2 [B44].) Putnam requested an hourly rate of \$436.76. (Becic: 9/18/23, 44:23-45:3.)

4           27.     Putnam's Initial Submission contained 250 repair orders, with 1,006 total repair lines,  
5 of which only 41 lines were identified as "qualified." (Ex. MM [B1267-68], Figures 4 & 5.) The Initial  
6 Submission only contained a total of 46.8 sold hours, and total customer labor charges of \$20,440.55,  
7 for an average labor rate of \$436.76. (Becic: 65:24-66:15; final line of Joint Ex. 3 [B45], Putnam Ford  
8 Labor tab.)

9           28.     On September 20, 2021, by letter dated September 17, Ford requested additional  
10 Putnam repair orders for the one-month period after June 7, or through July 7, 2023, pursuant to  
11 Section 3065.2(d)(4). (Becic: 9/18/23, 46:14-47:7; Joint Ex. 5 [B49].)

12           29.     Putnam submitted an additional 168 repair orders, with 667 repair lines to Ford on  
13 September 27, 202. (*Id.*, 47:12-16.). Among this set, there were only an additional 32 lines of qualified  
14 repairs. (Heinemann: 9/25/23, 908:21-909:1; Ex. MM [B1267-68], Figures 4 and 5 at 13-14.)

15 **IV. FORD'S RESPONSE TO PUTNAM'S LABOR RATE INCREASE REQUEST**

16           30.     Rich Reibel had primary responsibility for evaluating Putnam's Submission; he retired  
17 from Ford in 2021. (Becic: 9/18/23, 70:12-19.) Mr. Becic worked with and was trained by Mr. Reibel  
18 before his retirement, and he observed Mr. Reibel's process and later familiarized himself with the  
19 Submission and Mr. Reibel's analysis. (*Id.*, 70:9-22, 112:2-9, 123:2-9.)

20           31.     Mr. Reibel observed that the Submission contained numerous accounting irregularities  
21 and unusual data. (*See, e.g.* Joint Ex. 6 [B50-51].) As such, Ford did not believe the data in the  
22 Submission was reliable and could not be used to calculate an alternative rate. (*Id.* at 2.)

23           32.     Mr. Reibel and Mr. Becic looked at the warranty labor rates of surrounding dealers to  
24 assess "market-appropriate" rates. (Becic: 9/18/23, 124:12-125:9; Ex. 6 [A29].)

25           33.     Putnam's requested rate was nearly double the rate of the surrounding dealers. (Becic:  
26 9/18/23, 68:24-69:12; Murphy-Austin: 9/18/23, 189:5-17.) Ford employees described Putnam's labor  
27 rate request as "outrageous," "excessively high," and "egregious." (*E.g.*, Becic: 9/18/23, 68:14-23  
28 ("astronomical"); Murphy-Austin: 9/18/23, 189:5-17 ("outrageous," "excessively high"); Kanouse:

1 9/19/23, 306:17-307:6 (“way higher” than anything he’s seen historically in California); Sweis:  
2 9/20/23, 522:4-17 (“egregious”).)

3 34. When a dealer submits a request for an increase in its warranty labor rate, the Ford  
4 reviewing team typically informs the regional office. (*See* Murphy-Austin: 9/18/23, 206:20-207:3.)  
5 Meghan Murphy-Austin, then San Francisco Regional Manager, was made aware of the request. (*Id.*,  
6 207:1-3.)

7 35. When Ms. Murphy-Austin learned Putnam had requested \$436.76, she felt it was  
8 “outrageous” and “excessively high,” “almost double the next highest dealer in the nation and all of  
9 the surrounding dealers in [Putnam’s] area.” (Murphy-Austin: 9/18/23, 189:5-10.) She was “very  
10 concerned” that the rate was “bad for customers, bad for Putnam Ford’s reputation, bad for the  
11 surrounding Ford dealers’ reputations, bad for Ford Motor Company’s reputation” and that it “really  
12 reinforced” the “perception that car dealers price gouge.” (*Id.*, 189:10-17.) Ms. Murphy-Austin was  
13 also concerned that it was not a competitive rate in the market and that customers would be paying  
14 more for a comparable repair at Putnam versus surrounding dealers. (*Id.*, 189:18-23.)<sup>9</sup>

15 36. Ms. Murphy-Austin met with Mr. Putnam and General Manager Al Vasquez to discuss  
16 her concerns. (Murphy-Austin: 9/18/23, 189:24-190:16, 219:9-16.) Mr. Putnam and Mr. Vasquez  
17 assured her that she should not be concerned for the customers because the price the customer paid  
18 would still be comparable to the neighboring dealers. (*Id.*) They informed her that the labor times they  
19 used to calculate the customer charge would be lower than what the job would take, which would  
20 offset the higher labor rate. (Murphy-Austin: 9/18/23, 191:22-192:16, 197:16-198:2.) According to  
21 Ms. Murphy-Austin, “the labor and the sold hours [would not] reflect reality.” (*Id.*)

22 37. Mr. Putnam admitted at the hearing that he changed the sold hours on repair orders in  
23 order to “back into the [\$440/hour] rate.” (K. Putnam: 9/25/23, 1044:2-11). Putnam never “rais[ed]

24

25 <sup>9</sup> David Martinez, Putnam’s service manager beginning on September 1, 2021, also testified that when  
26 customers asked what Putnam’s hourly rate was, and he told them \$440, customers “lashed back at us,  
27 saying that [Putnam] were rip-offs,” they got really upset, and said that Towne Ford and Serramonte  
28 Ford were “\$220 cheaper per hour” than Putnam. (Martinez: 9/20/23, 674:17-675:18.) Mr. Becic  
testified that the rate Putnam sought was “bad for [Ford’s] customers because it appears that Putnam  
Ford, with the support of Ford, is gouging customers with this high of a rate, . . . Not only bad for the  
customer, it is bad for Ford. It is bad for our brand.” (Becic: 9/18/23, 69:13-20.)

1 the price to the customer. The price to the customer is not going to change . . . so we backed into it.  
2 We did basic algebra and we backed into the [\$440] rate.” (*Id.*, 1044:2-11 (emphasis added).)

3 38. Ford responded to Putnam’s Submission in writing on October 26, 2021 (“Denial  
4 Letter”). (Becic: 9/18/23, 70:23-71:6; Joint Ex. 6 [B50-51].)

5 39. In the Denial Letter, Ford stated:  
6 Unfortunately, your request for a labor rate adjustment must be denied because it  
7 is materially inaccurate or fraudulent. After a review of the provided documentation  
8 and the additional repair orders (ROs) provided pursuant to our request, we are  
9 unable to verify the labor rates you are charging at your dealership. While we have  
10 been able to verify some of the repairs included in your analysis, there are others  
that do not seem to follow a consistent pricing practice, and many of the provided  
labor hours (customer estimate hours) do not seem appropriate for the repair, or  
consistent with the technician clocked hours being shown. Rather than reflect  
reality, the hours assigned to the repair appear designed to demonstrate a \$440 per  
hour labor rate.

11 (Joint Ex. 6 at 1.)

12 40. Ford identified several examples supporting its concerns. Those include: large  
13 discrepancies between the lower sold hours Putnam used to calculate its rate and the much higher  
14 technician hours for a given repair; failure to combine diagnostic time and charges with the actual  
15 repair; inconsistent hourly rates between repairs; and excessive customer charges for repairs that  
16 should have cost less; as well as the fact that Putnam’s claimed hourly rate of \$436.76 is about double  
17 the rates of the other dealers in the market of any brand. (Joint Ex. 6 at 1, 2.)

18 41. Ford did not use any calculations to arrive at its adjusted rate. (*Id.* at 2; Becic: 9/18/23,  
19 162:24-163:5 (testifying that Ford did not make a calculation).)

20 The inconsistencies and excessive customer charges in the ROs you provided,  
21 including the examples discussed above, make it unreasonable, if not effectively  
22 impossible, for Ford Motor Company to use your ROs to calculate a labor rate. As such,  
23 we have no choice but to propose an adjusted retail labor rate of \$220.00 per hour which  
seems to be the most common customer-pay rate your documentation shows in repairs  
where we see what appears to be valid documentation.

24 (Joint Ex. 6 at 2 [B51]; *accord* Becic: 9/18/23, 112:10-17 (explaining why it was “effectively  
25 impossible” to calculate a rate), *see also, id.*, 97:15-21, 126:11-16).)

26 42. Ford could not calculate an effective labor rate using technician hours because they  
27 were absent on many qualified repairs. (*Id.*, 166:4-20.)

**V. TESTIMONY REGARDING INCONSISTENCIES, DISCREPANCIES, AND  
IRREGULARITIES IN THE PUTNAM'S SUBMISSION**

43. At the hearing, Ford witnesses John Becic, Allen Kanouse, and Maher ("Mike") Sweis, described in detail the multiple problems with Putnam's Submission.

44. Becic has worked for Ford for 18 years and currently is a field operations manager. (Becic: 9/18/23, 33:4-8.) His current responsibilities include managing the entire complex processing and analysis of all Ford dealer warranty labor and parts rate increase requests with his team of analysts and ultimately validating the requested rate, all within the tight state time deadlines to approve or deny a request. (*Id.*, 36:5-37:3.) Consequently, he has extensive experience in reviewing repair orders and addressing complex issues that may arise in those submissions. (*Id.*, 37:19-39:10.) Based on his experience and knowledge, the Board finds him competent to provide the testimony detailed herein and his testimony credible.

45. Mr. Kanouse has worked for Ford since 2003, first as a contractor consulting with dealers on warranty-related issues and between 2008 and October 2022, as a warranty auditor. (Kanouse: 9/19/23, 259:9-261:15.) For about 20 years before he began working with Ford, he was the service manager at various dealerships. (*Id.*, 248:19-259:8, 273:15-20.). For a majority of his professional career through today, he has reviewed and analyzed repair orders on almost a daily basis. (*Id.*, 271:16-273:14.) Based on his experience and knowledge, the Board finds him competent to provide the testimony detailed herein and his testimony credible.

46. Mr. Sweis is a master certified automotive technician (Sweis: 9/20/23, 515:25-516:1) working as a repair improvement specialist at Ford (*Id.*, 509:7-12). Mr. Sweis has worked in the automotive industry for approximately 30 years, (*Id.*, 510:18-21.) He has worked as a repair technician, owned and operated a repair shop for 10 years, is a diagnostic master, taught college courses on automotive technology, and has worked as a technical repair specialist and field service engineer. (*Id.*, 510:22-512:11, 513:4-15, 514:16-17, 515:8-9, 516:8-9.) Based on his experience and knowledge, the Board finds him competent to provide the testimony detailed herein and his testimony credible.

47. Mr. Becic, Mr. Kanouse, and Mr. Sweis spotted examples of numerous anomalies, discrepancies, and inaccuracies with Putnam's Submission, as detailed below.

**A. Dividing Putnam's Total Labor Charge by the Sold Hours Creates Impossible Hourly Rates**

48. Ford's witnesses testified to numerous examples of repairs in the Submission in which dividing the total labor charge by the number of sold hours resulted in an hourly rate extending past dollars and cents. This evidence included the following examples:

- RO 10049 [B1792-93], Line A – Sold hours=10.6, customer charge=\$4,654.89, hourly rate=\$439.140566037735849 repeating (period 13).<sup>10</sup> According to Mr. Kanouse, this rate cannot be entered into the CDK system and the sale total would have had to be manually entered into the system (as opposed to the final charge being automatically populated by CDK by multiplying hours by a set rate. (Kanouse: 9/19/23, 345:17-23.) Mr. Kanouse did not trust the data in the repair order. (*Id.*, at 349:7-351:11.)<sup>11</sup>
- RO 10206 [B1468-69], Line E – Sold hours=3.4, customer charge=\$1,503.52, hourly rate=\$442.21176470588235294 repeating (period 16). According to Mr. Kanouse, there is no way this rate can be entered into the system; rather, it appears as if 3.4 hours was selected because it was the closest to approximating a \$440 rate. (Kanouse: 9/19/23, 341:23-344:25; *see also* Kamenetsky: 9/27/23, 1596:17-1597:20.)
- RO 10239 [B1399-1400], Line D – Sold hours=3.2, customer charge=\$1,442.50, hourly rate=\$450.78125. According to Mr. Kanouse, there is no connection between the sold hours and the final customer charge because it is impossible to enter this rate into the CDK system. (Kanouse: 9/19/23, 318:4-7, 320:17-321:9.)
- RO 10305 [B1868], Line D – Sold Hours=2.4, customer charge=\$1,062.68, hourly rate=\$442.783 repeating (period 1). According to Mr. Kanouse, there is no way that 2.4 hours generated the charges because this labor rate cannot be used in any dealer accounting system. (Becic: 9/18/23, 81:25-86:5.)
- RO 10362 [B1978-80], Line F – Sold hours=3.5, customer charge=\$1,549.63, hourly rate=\$442.751428571 repeating (period 6). According to Mr. Becic, this is not a labor rate that could ever be entered into an accounting system. (Becic: 9/18/23, 86:6-9, 90:16-92:6.)

<sup>10</sup> The use of "period" in this context equals the number of repeating digits in the position farthest to the right of the decimal point.

<sup>11</sup> Putnam's CDK computer system is pre-programmed to calculate the customer charge from the sold hours for a given repair coded in its system and the default hourly rate the dealer sets. (Kanouse: 9/19/23, 343:25-344:16, 465:14-17, 470:1-16.)



- RO 10362 [B1980-81], Line I – Sold hours=1.5, customer charge=\$650, hourly rate=\$433.33 repeating (period 1). There is no way that 1.5 hours generated the final customer charge. (Becic: 9/18/23, 86:6-9, 93:15-94:10.)

49. It is impossible to use a rate that has fractions of a cent using the CDK software system that generates the repair orders. (*See, e.g.*, Kanouse: 9/19/23, 318:4-7, 320:17-321:9, 341:23-344:25.)

50. If sold hours were actually multiplied by \$440, everything would be divisible by \$440, without additional decimals. (Kamenetsky: 9/27/23, 1557:11-24, 1598:2-25.)

51. These examples are evidence of repair orders in which the sold hours did not generate the final labor charge.

### **B. Discrepancies Between Actual and Sold Hours**

52. Generally, in the automotive service industry, the sold hours and the actual hours “are close together. In most cases they are identical. Occasionally here and there, you might see them differ by .1 hour, maybe .2 hours. But generally they are identical, very close together.” (Becic: 9/18/23, 72:6-10; *accord id.*, 106:7-19; Kanouse: 9/19/23, 319:5-320:16.)

53. Discrepancies between the sold hours and actual hours in many of Putnam’s repair orders are highly or extremely unusual. This evidence includes the following examples:

- RO 10071 [B1748], Line A – Actual hours=3.2, Sold hours=.5 (600%+ difference) (Becic: 9/18/23, 103:7-16, 106:7-19 (“not normal,” inconsistent with what he normally sees of equal or .1- or .2-hour difference))
- RO 10206 [B1468-69 Line E – Actual hours=7.38, Sold hours=3.4 (217% difference) (Sweis: 9/20/23, 571:14-22; 575:1-4 (“very unusual,” “never seen a discrepancy this large”))
- RO 10239 [B1399-1400], Line D – Actual hours=10.7, Sold hours=3.2 (314% difference) (Sweis: 9/20/23, 575:5-23 (“absolutely not normal”); Kanouse: 9/19/23, 318:4-7, 319:5-320:16 (“very unusual,” if accurate, shows technician not efficient, would expect 100% tech efficiency rate, or close to it, meaning sold hours are equal or close to actual hours))
- RO 10248 [B1380], Line D – Actual hours=3.8, Sold hours=.5 (760% difference) (Becic: 9/18/23, 97:22-98:5, 102:25-103:6 (“large discrepancy”))
- RO 10287 [B1831], Line B – Actual hours=.77, Sold hours=.2 (350% difference) (Becic: 9/18/23, 76:25-77:19 (discrepancy “fairly large,” “not normal”))
- RO 10305 [B1867-68], Line B – Actual hours=7.69, Sold hours=2.4 (320% difference) (Becic: 9/18/23, 78:18-79:8 (“giant discrepancy,” “not normal”); Sweis: 9/20/23, 579:5-580:6 (“extremely” unusual, “never seen other repair orders with deltas like this outside of Putnam Ford of San Mateo”))

- RO 10362 [B1980], Line A – Actual hours=3.62, Sold hours=1.0 (362% difference) (Becic: 9/18/23, 86:6-87:12 (“not normal,” “large discrepancy”))
- RO 10362 [B1980], Line G – Actual hours=6.6, Sold hours=.6 (1,100% difference), customer charge=\$264, for perfect \$440 rate based on sold hours (Becic: 9/18/23, 86:6-9, 92:7-24 (discrepancy is “off by a factor of 10”))
- RO 10362 [B1977], Line H – Actual hours=11.37, Sold hours=.6 (3,158% difference) customer charge=\$264, for perfect \$440 rate based on sold hours (Becic: 9/18/23, 86:6-9, 93:1-14 (“wildly off,” “appears to be misleading and fraudulent”))

54. These discrepancies are consistent with Putnam’s admission that once a repair was completed, sold hours would be manually changed to be much lower to give the appearance of a higher hourly rate. (Kamenetsky: 9/27/23, 1600:25-1601:3.)

55. These examples are evidence of repair orders in which the sold hours did not generate the final labor charge.

### **C. Differences in Hourly Rates on the Same Repair Order**

56. Very different hourly rates appear in the same repair order. This evidence includes the following examples:

- RO 10036 [B1828-30], Line B, E, and F – Hourly rates are \$440, \$501.80, and \$756.50, respectively (Kanouse: 9/19/23, 351:12-19, 352:9-354:15 (never seen three different rates on same repair order))
- RO 10251 [B1371-72], Lines C and F – Hourly rates are \$220 and \$641.06, respectively (Kanouse: 307:7-12, 311:3-9, 311:21-312:16 (does not make sense to have two different rates on same RO; not the kind of thing he has seen as auditor or previously as service manager))

57. There are repair orders in which two different technicians work on a single repair, where the recorded sold hours and hourly rates for each technician are different, as well as the hourly rates per customer charges, but when combined reflect a total rate of \$440:

- RO 10071 [B1748], Line A – Two technicians’ sold hours and charges combined to create hourly rate of exactly \$440 – Tech 2030: Sold hours=0, customer charge=\$81.12; Tech 2018: Sold hours=.5, customer charge=\$138.88; Total Sold hours=.5, total customer charge=\$220, for hourly rate of \$440 (Becic: 9/18/23, 103:7-105:10 (not a coincidence, “seems like it is designed to demonstrate a particular labor rate,” “seems like we are being misled here”), 105:22-106:6 (“looks like entries are being made into the RO that are specifically engineered to achieve an outcome,” such that it appears to be manually entered))
- RO 10248 [B1380], Line D – Two technicians’ sold hours and charges combined to create hourly rate of exactly \$440 – Tech 2035: Sold hours=0, customer

charge=\$46.31; Tech 2036: .5, customer charge=\$173.69; total Sold hours=.5, total customer charge=\$220, for hourly rate of \$440 (Becic: 9/18/23, 99:25-102:24 (“seems designed to generate an outcome of \$440 per hour,” “feel[s] like Putnam is misleading” him); (Kanouse: 9/19/23, 333:8-335:15 (data not accurate; doesn’t trust the data))

58. It is implausible that the accounting on any of these repairs is accurate.

59. These examples are evidence of repair orders in which the sold hours did not generate the final labor charge.

**D. Actual Hours Are Zero**

60. There are qualified repair lines containing no reported technician hours despite the fact that some time had to have been spent by some technician to perform the repair. This evidence includes the following examples:

- RO 10036 [B1829], Line E – Sold hours=.2, Actual hours=0, customer charge=\$100.36 (Kanouse: 351:12-19, 353:1-7)
- RO 10036 [B1829-30] Line F – Sold hours=.1, Actual hours=0, customer charge=\$75.65<sup>12</sup> (Kanouse: 9/19/23, 351:1-2, 353:8-353:25)
- RO 10049 [B1792-93], Line A – Sold hours=10.6, Actual Hours=0, customer charge=\$4,654.89; also, no technician identified, reflects technician as “999,” indicates a “house account or fill in number.” (Kamenetsky: 9/27/23, 1590:17-1591:15, 1593:10-1595:9)
- RO 10277 [B1325], Line A – Sold hours=.2, Actual Hours=0, customer charge=\$132 (Becic: 9/18/23, 61:25-63:24)
- RO 10251 [B1372], Line F – Sold hours=1.0, Actual hours=0, customer charge=\$641.06 (Kanouse: 9/20/23, 307:7-12, 309:8-310:7)

61. The omission of technician hours indicates that the sold hours are not related to the actual hours necessary to perform the repair.

62. These examples are evidence of repair orders in which the sold hours did not generate the final labor charge.

**E. Presence of Flat Rate Charges**

63. A flat rate repair is one in which the customer-pays a fixed fee for a specific type of work, regardless of the time spent on the service. (See Heinemann: 9/25/23, 943:23-25 (“A flat rate is

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<sup>12</sup> Notably, for an hourly rate of \$756.50.

1 not an expression of an hourly rate . . .”).) Flat rate charges have no relationship to the hours of labor  
2 resulting in the customer charge. (*Id.*)

3 64. Putnam charged customers a flat fee of \$440 for diagnosing a customer’s complaint,  
4 but none the less recorded one sold hour, regardless of the time to complete the diagnosis. (*See*  
5 Kamenetsky: 9/27/23, 1468:24-1469:3 (diagnostics done on a flat-rate basis).) Per the various rows  
6 on FrogData’s spreadsheet (Joint Ex. 3, Putnam Ford Labor Tab), evidence of this includes:

- 7 • RO 10259 [B1352], Line A (row 114);
- 8 • RO 10206 [B1468], Line A (row 329);
- 9 • RO 10148 [B1583], Line A (row 523);
- 10 • RO 10118 [B1647 ], Line A (row 646);
- 11 • RO 10106 [B1674], Line C (row 704);
- 12 • RO 10094 [B1700], Line A (row 768);
- 13 • RO 10091 [B1705], Line A, (row 778); and
- 14 • RO 10036 [B1828], Line B (row 1006).

15 65. Approximately 25% of the Submission contains flat-rate charges for diagnoses, all  
16 associated with one sold hour. (Kamenetsky, *supra*; Korenak: 9/24/23 1429:5-13 (same); Heinemann:  
17 9/25/23, 943:16-18 (relying on deposition testimony of Putnam service advisor, Saroff).) In Putnam’s  
18 CDK system, one sold hour was automatically populated for each of these repair lines. (Heinemann:  
19 9/25/23, 943:18-20.)

20 66. Further, Putnam would often charge the customer based on an “estimate,” and the  
21 estimate was based on the discretion of the service advisor. (Kamenetsky: 9/27/23, 1540:11-22.) The  
22 same repair does not necessarily cost the same amount for each customer because the service advisor  
23 has discretion to adjust. (*Id.*, 1540:23-1541:1.) Although Putnam uses the word “estimate,” these flat-  
24 rate charges are determined before labor is performed and are not tied to the hours it takes to perform  
25 the repair (or even the hours in the time guide). It is based on a pre-determined dollar amount set at  
26 the discretion of the service advisor. These examples are evidence of repair orders in which the sold  
27 hours did not generate the final labor charge.

**F. Exclusion of Related Qualified Repairs**

67. Generally, Ford reimburses together as a single repair all qualified repair lines related to the same covered warranty repair. (*See, e.g.,* Becic: 9/18/23, 75:14-76:24; Kanouse: 9/19/23, 312:24-314:9.)

68. There are several instances where Putnam did not combine charges or actual or sold hours associated with related repairs, which if combined like a warranty repair, the hourly rate would have changed. This evidence includes:

- RO 10048 [B1795], Line A – Should be included with Lines D and E, all related to replacing vehicle battery (Becic: 73:12-21, 75:9-76:24)
- RO 10305 [B1867], Line A – Actual hours=5.05, Sold hours=0, customer charge=0; 5.05 technician hours should be added to 7.69 technician hours on Line D for total of 12.74 Actual hours. When added, changes rate based on Actual hours for the combined single repair from \$138.18985, repeating, to \$83.41 (Becic: 9/18/23, 78:1, 79:9-81:17 (would “markedly change” the rate calculation in Putnam spreadsheet if Line A had been included with Line D))
- RO 10362 [B1977], Line A – Actual hours=3.62, Sold hours= 1.0, customer charge=\$440; Line F – (combining the two technician repairs on Line F) Actual hours=9.44. Sold hours=3.5, total customer charge=\$1,549.63; Line A is diagnostic for repair on Line F; actual and sold hours and customer charges on Line A should be added to those on Line F for total of 13.06 Actual hours and 4.5 Sold hours. (Becic: 9/18/23, 86:6-90:7)
- RO 10251 [B1371], Line B – Line B is the diagnostic for Line F; Line B Actual hours=5.42, Sold hours=0, customer charge=0; Actual hours of 5.42 should be added to Actual hours on Line F before calculating rate on Line F (Becic: 9/18/23, 94:11-20, 95:17-96:17 (adding the 5.42 hours to Line F would “definitely change the rate [on Line F] significantly”)).<sup>13</sup> Also, diagnostic on Line B would never take technician 5.42 hours, yet Actual hours on Line F, where repair done= 0, and no time clocking by technician (Kanouse: 9/19/23, 312:23-317:6)

69. These examples are evidence of repair orders in which the sold hours did not generate the final labor charge.

**G. Accounting of Technician Hours**

70. Mr. Kanouse identified numerous accounting irregularities and inconsistencies outside of the qualified repairs, relating to accounting for “internal shop policy,” or ISP, repairs, an alternative to designation as a warranty or customer-pay repair.

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<sup>13</sup> Per Mr. Korenak, FrogData did not include Line B in its spreadsheet or analysis because it deleted all lines with sold hours of zero. (Korenak: 9/27/23, 1428:3-1429:13.) Consequently, the 5.42 technician hours on Line B were lost in the ether.

71. Evidence of these accounting irregularities includes RO 10415 [B2103]. The repair order states it is a “Shop Ticket Only – Due (sic) Not Use for Service,” with Line A for two technicians’ actual hours and various parts and Line B for five additional technicians’ actual hours; all sold hours are zero. (*Id.*) All of the technician’s labor charges on Lines A and B are labeled “ISP.” (Kanouse: 9/19/23, 323:23-324:12.) Those technician’s hours, totaling \$890.70, however, are not posted to Account 77500 at the bottom of the repair order, which is the account for ISP expenses. (*Id.*, 325:13-326:7.) Nor are they posted to the technician training account, which would be account 77400, which would be used if they were truly technician training costs. (*Id.*, 326:14-21.) Rather, they are posted to account 57300, which is the labor sales account—the account where all labor charges for customer-pay repairs would be posted, as on other repair orders reviewed. (*Id.*, 326:5-7, 326:25-327:14.)

72. It appears Putnam took some of each of these technician’s high number of actual hours from qualified repair lines on other repair orders to minimize discrepancies in actual versus sold hours, so that those actual hours do not look so large on those qualified repairs, in order to obtain the benefit of accounting for the expense of the technician’s total hours. (*Id.*, 327:25-328:14.) Because of these discrepancies, RO 10415 is inaccurate, and the information contained therein is untrustworthy. (*Id.*, 328:15-329:2.)

73. Other examples of Putnam using ISP accounts to expense technician costs of labor other than a customer-pay repair (Kanouse: 9/19/23, 428:2-12, 457:16-17), include:

- RO 10239[B1399], Line C – Actual hours=.02 to check and set tire pressure coded as ISP account, not to customer charge (Kanouse: 9/19/23, 321:17-322:2)
- RO 10248 [B1381], Line E – Actual hours=.46 for multi-point inspection, at cost of labor of \$16.10, where Line B already was for 100,000 mile maintenance, which included multi-point inspection; .46 hours and \$16.10 went into ISP account; customer charge=0; dollar amount of cost of labor blocked out (\*\*\*\*\*)<sup>14</sup> (Kanouse: 9/19/23, 329:3-16, 336:11-338:9 (“makes no sense”))
- RO 10248 [B1381], Line F – Actual hours=1.24 for “check and set tire pressure,” where Line B already was for 100,000-mile maintenance, which included tire pressure; cost of labor=\$43.30, technician hours went into ISP account; dollar amount blocked out (\*\*\*\*\*) (Kanouse: 9/19/23, 329:3-16, 335:16-336:10)

<sup>14</sup> Series of stars (\*\*\*\*\*) in account 77500 for cost of labor totals from ISP entries means the amount is manually blocked out, which is unusual on an accounting copy of a repair order. (Kanouse: 9/19/23, 354:25-355:6.)

1           74.     Mr. Kanouse confirmed that as a service manager for 20 years, he never accounted for  
2 time in this manner. Nor are the irregularities and inconsistencies explained away by how different  
3 dealers do their accounting. (*Id.*, 490:7-21, 496:2-6.)

4           75.     Mr. Martinez, Putnam's former service manager, confirmed Mr. Kanouse's analysis—  
5 if the technician's actual time for a customer-pay repair line was high, some of those hours would be  
6 moved to a second line, like multi-point inspection where the customer charge was \$0, or to an internal  
7 policy line and labeled ISP. (Martinez: 9/20/23, 693:9-694:2, 695:14-696:7, 759:5-17; Ex. AA  
8 [B1227] ¶ 11.)

9           76.     As to all of these discrepancies and anomalies identified in this Section V., the  
10 testimony of Mr. Becic, Mr. Kanouse, Mr. Sweis, and Mr. Martinez went unrebutted; in several  
11 instances, noted above, Mr. Kamenetsky agreed with Ford's witnesses' testimony.<sup>15</sup>

12           77.     The testimony of these witnesses is credible.

13           78.     These examples are evidence that the Submission as a whole is inherently unreliable  
14 and untrustworthy.

## 15 **VI. PUTNAM USED A NON-AUTHORIZED LOCATION FOR REPAIRS**

16           79.     At the time of the Submission, Putnam's only Ford-authorized facilities were at 885  
17 North San Mateo Drive, San Mateo, CA.

18           80.     Ford has never consented to any other facilities for any of Putnam's operations.  
19 (Swann: 9/21/23, 806:18-807:6.)

20           81.     Putnam is precluded from conducting any dealership operations at any facilities other  
21 than those authorized by its SSA including vehicle and parts sales, warranty service, customer-pay  
22 service, in short, all dealership operations. (Murphy-Austin: 9/18/23, 185:6-20, 186:10-23; Swann:  
23 9/21/23, 817:8-19, 820:17-821:2.)

24 \_\_\_\_\_  
25 <sup>15</sup> No Putnam service manager, service advisor, or technician, or even Mr. Vasquez, Putnam's General  
26 Manager who is charged with overseeing its service operations, testified for Putnam to rebut the  
27 evidence Ford presented regarding the repair order's inaccuracies and anomalies. Putnam also did not  
28 call Kevin Lindner, Putnam's service manager during the Submission period (and on its witness list),  
or, Rick Saroff, a former Putnam service advisor also during the Submission period (and whose  
deposition Ms. Heinemann, Ford's expert witness, in part relied upon), both of whom worked with  
these and all other repair orders daily.



1           82.     During the hearing, Ford counsel cross-examined Mr. Kamenetsky on his investigation  
2 into when Putnam began to use the Barn, a building on Mr. Putnam's Nissan of Burlingame facilities,  
3 for Ford repairs. Putnam claimed an environmental report ("KPA Report") (Ex. 4 [A15]) revealed the  
4 Barn was only used for repairs after the date of the Submission. The KPA report was not produced to  
5 Ford until the day after Mr. Kamenetsky's deposition on March 8, 2023. However, during Mr.  
6 Kamenetsky's cross-examination, it became clear that Putnam had asked for a copy of the report from  
7 KPA in November 2022, and received it in February 2023, but delayed producing it until after Mr.  
8 Kamenetsky's deposition.

9           83.     The timing of Putnam's request and receipt of the KPA report was revealed through  
10 emails produced on September 27, which also should have been produced during discovery.

11           84.     Ford moved for evidentiary sanctions against Putnam for the failure to timely produce  
12 the KPA report, and particularly in advance of Mr. Kamenetsky's deposition. (Tr.: 9/27/23, 1574:15-  
13 1575:5.) The Administrative Law Judge heard argument from the parties on Ford's motion on  
14 September 27 and 28 (Tr.: 9/27/23, 1575:6-1577:13; 9/28/23, 1611:3-1623:12.)

15           85.     After oral argument, as a sanction for Putnam's misconduct during discovery regarding  
16 its belated, and potentially strategic failure to timely disclose the KPA Report, Administrative Law  
17 Judge van Rooyen entered the following finding of fact against Putnam:

18           [S]ome of the repairs in Putnam Ford's warranty labor rate request submission were  
19 performed at a facility other than Putnam Ford's authorized facility at 885 North  
20 San Mateo Drive, San Mateo, California. And . . . order[ed] that Putnam Ford is  
precluded from arguing or speculating as to the location where any repair reflected  
in any specific repair order in the submission was performed.

21 (Hearing: 9/28/23, 1620:3-11.)

22           86.     Throughout discovery, Putnam, through Mr. Putnam, Mr. Kamenetsky, and counsel,  
23 made numerous misrepresentations to Ford and the Board regarding the location at which it serviced  
24 customer-pay vehicles. Although the Administrative Law Judge van Rooyen made the above-  
25 referenced finding of fact, facts regarding the location issue are relevant to the credibility of Mr.  
26 Putnam, Mr. Kamenetsky, and the entire Putnam organization.

27           87.     In the Fall of 2022, Ford learned from Mr. Sweis, a Ford field service engineer, that  
28 Putnam had performed repairs on Ford vehicles at a facility a few blocks from its authorized facilities

1 that its employees colloquially called the “Barn.” As a field service engineer, Mr. Sweis routinely  
2 visited about 13 northern California Ford dealers to consult with their management and assist their  
3 technicians on diagnostics and repair procedures; Putnam was one of those 13 dealerships. (Sweis:  
4 9/20/23, 516:7-519:3, 521:11-17.). During his visits, there were six or seven of Putnam’s Ford  
5 technicians at the Barn, all working on Ford vehicles. (*Id.*, 523:15-22, 526:3-11.)

6 88. During discovery in Fall 2022, Ford sought documentation on where each repair was  
7 performed. (*See* Respondent’s Mot. to Compel Production of Documents, Ex. A (Respondent’s  
8 Request for Identification and Production of Documents) at 9 (Request No. 40).) The Board overruled  
9 Putnam’s objections to this request and ordered production of documents. (October 13, 2022, Rulings  
10 on Objections to Requests for Production of Documents at 2.)

11 89. Shortly after the October 2022 discovery hearing, and after Putnam’s counsel became  
12 aware that Ford was probing facts related to location, Mr. Putnam requested a meeting with LaShawne  
13 Swann, the San Francisco Regional Manager, to discuss possible relocations. (Swann: 9/21/23, 792:3-  
14 4, 805:2-8.) During the tour, Mr. Putnam made a comment that “Ford knew they were servicing  
15 vehicles at the Nissan facility,” that “caught [Ms. Swann] off guard.” (*Id.*, 805:1-807:3.) The comment  
16 was “out of the blue[.]” and Ms. Swann believes Mr. Putnam “was actually saying it to kind of sneak  
17 it in as if [she] knew, and [she] didn’t.” (*Id.*, 807:23-25.)

18 90. The pre-hearing deadline for the parties to exchange documents was November 18,  
19 2022. (1st Am. Pre-Hr’g Conf. Order at 2.) Putnam did not produce documents relating to location  
20 responsive to Request No. 40. (Resp. Mot. to Extend Deadlines (12/12/22) ¶ 4.) Ford began the  
21 conferral process to obtain these documents.

22 91. On December 14, 2022, Mr. Putnam signed a declaration under penalty of perjury. (K.  
23 Putnam: 9/25/23, 1092:8-14.) In the Declaration, Mr. Putnam testified: “Through discussions with  
24 dealership staff and third parties, I have confirmed that during the time period covered by the repair  
25 order submission, all Ford service work was performed at the authorized Ford location.” (*Id.*, 1093:1-  
26 6.) However, through impeachment, it was revealed he only spoke with Mr. Kamenetsky and Mr.  
27 Vasquez; he did not speak to a single service advisor or any third parties. (*Id.*, 1093:7-1094:19.)

28 92. During his deposition, Mr. Putnam testified that he did not consult any documents or

1 emails in advance of preparing his sworn declaration, but at the hearing, he testified he reviewed emails  
2 from an environmental service company. (*Id.*, 1094:23-1096:22.) Mr. Putnam also swore in his  
3 declaration that the address stamped on the repair orders was evidence the repair was performed at the  
4 authorized location (*id.*, 1098:7-16); but at trial he contradicted himself and agreed that Ford could not  
5 rely on the address on a repair order to know where the repair was done (*id.*, 1102:11-16).

6 93. Mr. Putnam signed a declaration without asking for further information, observing any  
7 repairs, or speaking with any individual who actually performs repairs. (*Id.*, 1097:7-23.) He admitted  
8 that his declaration was not accurate. (*Id.*, 1102:23-1103:1.)

9 94. The parties had numerous conferrals throughout December 2022 and January 2023  
10 regarding documents that could demonstrate the location of the repairs identified in the Submission.  
11 During the conferrals, Putnam continuously argued it had no documents to produce and the repairs  
12 were not performed at the Barn or Nissan facility and called Ford's position unreasonable. (Ex. O  
13 [B1169] at 2; Ex. Q at 2 [B1177]; Ex. S [B1186] at 5; K. Putnam: 9/25/23, 1108:10-22, 1114:19-  
14 1115:25 (admitting this statement is wrong).) Putnam proceeded to make the same representations to  
15 the Board. (*See* Ex. T [B1197], at 10; K. Putnam: 9/25/23, 1116:11-1117:25 (admitting statement in  
16 pleading was untrue).)

17 95. Putnam also made misrepresentations relating to location directly to Ford. In January  
18 2023, Ms. Swann toured Mr. Putnam's Nissan facility pursuant to Putnam's request for a relocation.  
19 (Swann: 9/21/23, 808:16-21, 809:2-9.) Ms. Swann observed Ford vehicles being serviced at both the  
20 Barn and inside Nissan's main service area. (*Id.* 809:12-25.) Ms. Swann mentioned to Mr. Putnam  
21 "you are not supposed to service these vehicles here." (*Id.* 810:8-10.) Putnam responded that it was  
22 "Nissan customer-pay" or "retail work." (*Id.* 810:9-12.)

23 96. At the hearing, Mr. Putnam testified he never told Ms. Swann that the Ford vehicles at  
24 the Nissan dealership were brought to Nissan to be repaired by Nissan techs, because "there is no Ford  
25 customers [sic] driving into a Nissan dealership." (K. Putnam: 9/25/23, 1047:5-1048:4.) But the  
26 question posed to Mr. Putnam and his response addressed only vehicles she saw in the Barn, not the  
27 two vehicles she saw being serviced inside the Nissan main service department. (*Id.*) He also admitted  
28

1 “it is possible,” “sometimes can happen” that Ford vehicles would be brought over to the main Nissan  
2 service facility to have repairs done, by Ford technicians. (*Id.*, 1078:9-1079:10.)

3 97. On February 10, 2023, Ford disclosed the expert report of Ms. Heinemann (Ex. MM)  
4 which discussed facts learned from Mr. Sweis regarding the limited capabilities of the Putnam Ford  
5 facility and why, based on those limitations and the nature of certain repairs, specific repairs could not  
6 or would not have been performed at Ford’s main service facilities. (*Id.* at ¶¶ 3, 9, 18, 20, 21, 24, 25.)  
7 Specifically, Mr. Sweis reviewed the repair orders in Putnam’s submission (Joint Ex. 7) and identified  
8 three repairs that could only have been performed at the Barn, at trial he testified to two others. Those  
9 repairs include:

- 10 • RO 10049 (B1792-93), Line A—major engine repair, requiring removal of engine; RO  
11 indicates the vehicle was at Putnam’s from March 17 to April 22, 2021, so both engine  
12 and parts that were torn out of it had to be sitting on the floor of the service area where  
13 no one would touch it for over a month; in Mr. Sweis’s experience, it was done at the  
14 Barn with “almost 100% certainty.” (Sweis: 9/20/23, 557:11-559:16.) Per Line A, the  
15 customer was charged \$4,654.89 for this repair.
- 16 • RO 10206 [B1467-69], Lines A and E—left side turbo, which requires removal of the  
17 turbo from the sides of the engine, requiring a lot of space to keep the disassembled  
18 parts for the 11 days the car was down waiting for parts. Mr. Sweis was “nearly 100  
19 percent” certain it was done at the Barn, as he had previously assisted the technician at  
20 the Barn on the exact same model vehicle. (*Id.*, 570:2-571:13.) Per Lines A and E, the  
21 customer was charged \$440 and \$1,503.52, respectively, for a total of \$1,943.38 for  
22 this repair.
- 23 • RO 10239 [B1399-1400], Line D—replace crank shaft, requires removal of  
24 transmission, seven days in shop, so had to take up space on floor or rack. Mr. Sweis  
25 “almost 100%” certain done at the Barn. (*Id.*, 575:5-579:4.) Per Line D, the customer  
26 was charged \$1,442.50 for this repair.
- 27 • RO 10305 [B1868], Line D—replace left-hand turbo charger assembly, down for 13  
28 days, requires more than one service bay to complete. (*Id.*, 579:5-581:1.) Per Line D,  
the customer was charged \$1,062.68 for this repair.<sup>16</sup>
- RO 10362 [B1978-80], Line F—major engine repair to replace cylinder head, spark  
plugs, and related parts, requires removal of top part of engine, air duct boxes, valve  
cover, exhaust and intake, would fill up an 8 by 3-foot bench while vehicle there for  
almost two months. (*Id.*, 581:2-583:5.) Per Line F, the customer was charged a total of  
\$1,549.63, combining the charges of two technicians that worked on this repair.

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<sup>16</sup> Mr. Sweis also identified a non-qualified repair that could not possibly have been done at the Barn  
or Putnam’s main service area—RO 10091 (B1705), Line B—four-wheel alignment; neither Putnam’s  
main service facility nor the Barn has the necessary alignment machine. (Sweis: 9/20/23, 560:8-  
562:15.) Per Line B, the customer was charged \$190 for this repair.

1           98.     In about April 2023, after receiving Ms. Heinemann’s report, Putnam attempted to  
2 covertly add the Barn as an authorized location. While Ms. Swann was going over documentation for  
3 Ford, she learned that Mr. Putnam had not yet signed and returned a certain contract. (Swann: 9/21/23,  
4 812:13-25.) A Ford employee informed Ms. Swann that Mr. Putnam had submitted a request to change  
5 the address on the contract to include the Nissan building as an authorized location. (*Id.*, 812:2-7.) Ms.  
6 Swann believed Mr. Putnam was trying to get in a change of address without Ford noticing. (*Id.*,  
7 813:20-23.)

8           99.     Mr. Putnam and Mr. Kamenetsky testified at the hearing that Ms. Swann expressly  
9 gave her approval for Putnam to do customer-pay work at the Barn. (K. Putnam: 9/25/23, 1050:24-  
10 1051:4; Kamenetsky: 9/27/23, 1459:7-16.) But Ms. Swann confirmed that she never gave such  
11 approval. (Swann: 9/28/23, 1638:4-24.)

12           100.    Mr. Putnam was impeached with inconsistent statements 15 times during his hearing  
13 testimony. (K. Putnam: 9/25/23, 1068:3-1069:6 (describe policies and procedures as rules), 1069:10-  
14 24 (no rules for how technicians track their time), 1070:6-1072:4 (have to perform repairs at authorized  
15 location to be qualified), 1075:15-1076:22 (Nissan pays for expenses related to the Barn), 1079:14-  
16 1080:3 (no oral agreement between Nissan and Putnam for the Barn), 1088:22-1091:8 (when Barn  
17 was in use), 1093:7-1094:22 (who he spoke with about use of the Barn), 1095:16-1096:18 (allegedly  
18 looked at documents regarding timing of use of the Barn), 1096:23-1097:13 (what he was told about  
19 repairs at the Barn), 1104:10-23 (timing of use of the Barn), 1120:7-17 (whether other dealerships  
20 serviced vehicles at the Barn), 1121:1-9 (when Chevrolet dealership stopped servicing vehicles at the  
21 Barn), 1124:3-18 (service advisor did not have discretion over hourly labor rate), 1127:9-1128:1 (no  
22 dealership process for technicians tracking work on a repair), 1129:11-1130:1 (track effective labor  
23 rate of service advisor).)

24           101.    Mr. Putnam feigned confusion over the word “accurate.” (*Id.*, 1146:1-10.) He  
25 intentionally, and repeatedly, misheard the word “defies.” (*Id.*, 1144:15-24.) He also contradicted  
26 himself over the timing of the repairs at the Barn throughout his testimony. (*See, e.g., id.*, 1107:13-21,  
27 1109:18-1110:25.)

28           102.    For all of these reasons, the Board finds Mr. Putnam is not credible.

103. Mr. Kamenetsky was impeached with inconsistent statements eight times. (Kamenetsky: 9/27/23, 1500:15-151:22 (not involved in management of the dealership), 1511:3-1512:11 (service advisors enter the sold hours on a repair order), 1513:4-9 (don't know names of all service advisors), 1522:8-1524:25 (manufacturer has to approve facility location), 1526:24-1527:20 (discussion with Mr. Putnam about location of service work), 1538:16-1539:6 (basis for sold hours), 1539:24-1540:22 (service advisor prices the job based on his discretion), 1542:24-1543:17 (Putnam might use Ford's time guide, so long as not using a multiplied time guide).) And Mr. Kamenetsky betrayed his deceit by fearing he would be impeached before he even answered a question. (*Id.* 1505:7-15.)

104. For all of these reasons, the Board finds that Mr. Kamenetsky is not credible.

**VII. A FORENSIC ACCOUNTANT FOUND NUMEROUS MATERIAL INACCURACIES IN THE PUTNAM SUBMISSION**

105. Suzanne Heinemann, Ford's expert forensic accountant and economic consultant, testified at the hearing regarding her review of the Submission and her opinions concerning material inaccuracies and indicia of fraud. (Heinemann: 9/25/23, 1003:3-24; Ex. MM [starting at B1253] at 2, 11, 11 n. 29, 16, 24- 28.)

106. Ms. Heinemann has nearly 30 years of experience as a forensic accountant and economic consultant across a variety of industries. (Heinemann: 9/25/23, 875:10-20, 882:22-885:11, 884:9-21, 886:4-888:3, 894:11-897:11.) She is a Certified Public Accountant by the state of California and accredited in business valuation through the American Institute of Certified Public Accountants; she is a member of the AICPA specifically in their forensic services section, as well as a member of other professional organizations. (*Id.*, 876:12-877:16, 881:5-25.) Ms. Heinemann has testified in over 15 cases in arbitrations, state and federal courts, and motor vehicle agencies and been deposed in 30 or more cases, and worked in a support role, as a case manager, in numerous other cases for testifying experts. (*Id.*, 898:15-23, 899:12-900:4; *see generally*, Ex. MM at B1291 (summary of her credentials), and B1292-B1301 (list of her select cases).) She has worked extensively on cases involving the automotive industry for over 15 years, mostly on analyzing dealership operations in a variety of types of dealer/manufacturer disputes. (*Id.*, 891:23-892:22.)

107. As a forensic accountant, Ms. Heinemann analyzes business records (here, repair orders) and related data, such as financial statements or data from market competitors, to find trends. (*Id.*, 882:1-21.)

108. Ford asked Ms. Heinemann to consider the requirements of Section 3065.2 in the context of the sales data, the repair order data, and calculations from the data Putnam and Ford provided, provide an assessment of the accuracy of Putnam's claimed hourly rate, consider alternative methods of calculating that rate, and provide opinions on these issues. (*Id.*, 875:21-876:8.)

109. Ms. Heinemann relied on Section 3065.2, the repair orders Putnam provided and the FrogData spreadsheet included in Putnam's Submission, various letters and correspondence, Putnam's dealer financial statements, market-related data of the 13 surrounding dealers, and composite financial information of those dealers. (*Id.*, 901:23-903:7.) She also spoke numerous times to Ford employees John Becic and Mike Sweis, and Ford contractor Tonya Gill to understand this aspect of the auto industry better, and after issuing her report, reviewed various depositions in the case and Putnam's CDK system to review a limited set of its repair orders. (*Id.*, 903:8-904:3.)

110. The Board finds Ms. Heinemann qualified to offer the opinions described herein. Further, the Board finds Ms. Heinemann's testimony credible.

**A. Ms. Heinemann Opines the Sold Hours Did Not Generate the Charges**

111. Ms. Heinemann's identified 74 qualified repairs Putnam's Initial and Supplemental Submission. (*Id.*, 915:10-916:5, 917:8-16; Ex. MM [B1267], ¶ 34 at 13, Figure 5 [B1268] at 14 (adding Line D of Repair Order 10048 of battery replacement directly related to a failed starter on a different line, and a rear bar repair on Line B of Repair Order 10287, after consulting with Ford's labor rate analyst).) Putnam did not rebut her findings, and, as such, the Board finds that the qualified repairs identified by Ms. Heinemann are the totality of the qualified repairs in the Submission.

112. Ms. Heinemann was concerned about the small sample size because anomalies in even a single repair line can have a significant impact. (Heinemann: 9/25/23, 910:18-911:18, 914:21-915:9.)

113. Ms. Heinemann concluded that that the Submission's sold hours were not a meaningful measure of the labor hours that generated the charges. (*Id.*, 933:6-12; *see also* 933:13-934:21



(summary of reasons).) Her opinion was based on the following six observations. The Board finds her opinions credible and adopts her opinions as facts.

1. The Sold Hours Are Designed to Derive a Rate Close to \$440 per Hour After the Repair Order is Closed

114. Ms. Heinemann discerned that sold hours are often inserted into the repair orders after the labor charge had been determined and the repair order is closed. (Heinemann: 9/25/23, 933:19-22.) Of the 74 qualified repair lines, about 50% of them calculate out to exactly \$440. (*Id.*, 935:5-7.)<sup>17</sup> The other 50% calculate to something other than \$440, and many do not calculate out to a whole dollar amount. (*Id.*, 935:15-19.) The rate often includes decimals into infinity, which is mathematically impossible if a pure sold hour multiplied by \$440 (or any number to two decimal places) generated the charges. (*Id.*, 935:19-24.)

115. These anomalies were “a clear indication that the . . . sale hour is really an after-the-fact metric. It is a hypothetical that is in the repair order that is independent of the total charges.” (*Id.*, 936:1-8.)

116. Ms. Heinemann also found other indicators that the sold hours were calculated after the charge was determined. For example, RO 10365 [B1989], Line H, has a customer charge of \$644.30, the actual hours are .8, but the sold hours are 10.4. (*Id.*, 939:10-13.) The rate based on the sold hours is \$61.95, with extending decimals. (*Id.*, 939:16-18.) Ms. Heinemann observed that among the nonqualified repair set, there were numerous repair order lines with a rate of \$61.95, typically for oil pan type maintenance. (*Id.*, 939:19-25.) The rate in RO 10365 indicated to Ms. Heinemann that the service advisor simply looked up the wrong rate, decided that this repair was general maintenance and not a warranty-like repair. (*Id.*, 939:25-940:16.) The sold hours were inserted after the fact to obtain close to the desired hourly rate, albeit the wrong rate for this repair in this instance. (*Id.*, 940:9-16.)

2. Sold Hours are Zero but the Customer was Charged for Labor

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<sup>17</sup> Many of these charges are flat-rate charges, which, as addressed *infra*, should not be used to calculate a labor rate under Section 3065.2. (Heinemann: 9/25/26, 943:8-20.)

1 117. Ms. Heineman observed that “[t]here are instances where sales hour are zero, yet there  
2 are total charges . . . . [T]hat is a clear indication that sale hours in the CDK system are independent of  
3 total charges . . . . You mathematically cannot have zero hours and still get total charges if those two  
4 are related to each other.” (*Id.*, 937:14-19.) Putnam service advisor Rick Saroff confirmed her  
5 observation when he testified in his deposition that he input sold hours after he closed the repair order.  
6 (*Id.*, 937:20-938:18; RO 10071 [B1748].)

7 3. The Large Discrepancies Between Higher Actual Hours and Lower Sold  
8 Hours Indicates the Sold Hours are Hypothetical

9 118. Ms. Heinemann observed a significant difference between actual hours and sold hours.  
10 She learned from Mr. Becic, Mr. Sweis, and Ms. Gill during her investigation that these discrepancies  
11 were highly unusual. (Heinemann: 9/25/23, 940:22-941:10.) “There is not a lot of credibility to sale  
12 hours if they don’t relate to or are even close to on balance the amount of actual time the dealership is  
13 spending to repair vehicles.” (*Id.*, 941:17-20.) Ms. Heinemann had “concerns about the manipulability  
14 of sale hours as well as the manipulability of the rate if, at the end of the day, the only information that  
15 we know to be totally accurate is the amount the customer paid and, where it is logged, the technician  
16 hours on the vehicle.” (*Id.*, 942:4-9.)

17 119. This repeated discrepancy in particular led her to conclude that sold hours are not a  
18 good proxy for actual time spent when the population of qualified repairs is viewed as a whole. (*Id.*,  
19 941:11-943:7.)

20 4. Flat Rate Repairs Should Not be Included

21 120. Ms. Heinemann testified that “[a] flat rate is not an expression of an hourly rate . . . .”  
22 (*Id.*, 943:23-24.) To Ms. Heinemann, the sold hours are not persuasive evidence of a meaningful proxy  
23 to determine the overall effective labor rate. (*Id.*, 943:8-944:6.)

24 121. Of the 74 qualified repair lines, at least 25% are for diagnoses, and are always  
25 associated with one sold hour for a rate of exactly \$440, regardless of the actual hours recorded to  
26 make that diagnosis. (*Id.*, 943:8-18.)

27 122. Ms. Heinemann’s observation is supported by the deposition testimony of Putnam’s  
28 service advisor, Rick Saroff, who testified diagnostics are typically set at this flat rate of one sold hour,

1 as well as an example from the qualified population where the sold hours are 0, with the same charge  
2 of \$440. (*Id.*, 944:7-19.) This also led her to conclude that the sold hours do not generate the charges  
3 in Putnam's submission. (*Id.*, 944:20-24.)

4 5. Putnam Only Accounts for Actual Hours to Document Labor Expenses

5 123. Labor charges to the customer flow directly into Putnam's accounting system as  
6 revenue. (*Id.*, 946:23-947:1.) Only the technician hours, not the sold hours, carry down to the dealer's  
7 accounting of labor costs, or its expenses against that revenue, that actually flows into their financial  
8 statements. (*Id.*, 946:1-947:2.) It is the actual time of the technicians that is reported and accounted for  
9 at the bottom of the repair orders in the cost of labor section, which then goes into the dealer's general  
10 accounting ledger. (*Id.*) Ms. Heinemann testified that this is basic accounting, internal controls  
11 associated with the total charges to the customer. (*Id.*, 947:19-22.)

12 124. In contrast, the sold hours do not appear anywhere on the bottom of the repair orders  
13 as cost of labor, nor on Putnam's financial statements. (*Id.*, 948:9-14.) Putnam's own reliance on actual  
14 hours, and not sold hours, to track expenses is indicative of the fact that actual hours generate the  
15 customer charges.

16 6. \$436.76 is Inconsistent with and Unreasonable in Relation to the San  
17 Francisco Area Market

18 125. Ms. Heinemann compared Putnam's requested rate to the warranty labor rates of the  
19 13 surrounding Ford dealers in the San Francisco area, namely those within the Census Bureau's San  
20 Francisco Metropolitan Statistical Area ("MSA"), which includes San Mateo. (*Id.*, 950:22-951:22.)  
21 Such benchmarking of competitors is one of the most effective ways to assess both the reasonableness  
22 and accuracy or reliability of Putnam's claimed rate based on its sold hours. (*Id.*, 951:23-952:15,  
23 953:9-12; *see also* 934:18-21 ("If sales hours are used, the result is wholly inconsistent with market  
24 rates for the 13 other competitors that are in the San Francisco area.")) Ms. Heinemann graphically  
25 captured this discrepancy in her Report (Ex. MM [B1278], Figure 11 at 24).

1 126. Per Ms. Heinemann's analysis, Putnam's claimed rate is twice the average of the 13  
2 other dealers, and 72% higher than that of the dealer with the highest rate (Dealer 8, \$256 per hour).  
3 (*Id.*, 952:16-953:12; Ex. MM [B1278], Figure 11 at 24; ¶¶ 57-59 at 23-24.)<sup>18</sup>

4 127. To Ms. Heinemann, it also is not reasonable that a start-up dealership like Putnam could  
5 secure a customer-pay rate that is 70 to 100% greater than its competitors. (*Id.*, 953:13-20.)

6 128. Putnam argued that the MSA rates were not a useful benchmark because Ms.  
7 Heinemann had not verified whether any of those dealers had updated their warranty labor rates  
8 through a Section 3065.2 submission. Ms. Heinemann disagreed, explaining that "it would not be  
9 economically rational that these dealerships hadn't updated their rate since the rates we see on this  
10 chart, and it wouldn't be economically rational that they could take their existing customer base and  
11 substantially increase prices such that it would have a material impact on these blue lines that we see  
12 on the chart." (*Id.*, 954:2-14.)<sup>19</sup>

13 **B. Putnam's Gross Profit Margin Indicates It is Not Charging \$440 per Hour**

14 129. Ms. Heinemann also compared Putnam's gross profit margins to composite financial  
15 data of the 13 other San Francisco MSA dealers. (Heinemann: 9/25/23, 955:9-956:1.) The gross profit  
16 margin is "the difference between revenue from repairs and the costs associated with technicians and  
17 providing service. . . . It really is an expression of really price minus cost." (*Id.*, 956:7-13).

18 130. Ms. Heinemann determined that Putnam's gross profit margins in its service  
19 department is actually lower than the average of the gross profit margins of the 13 surrounding dealers.  
20 (*Id.*, 956:3-5.) If Putnam were really charging customers twice as much per hour on customer repairs  
21 as those other dealers, one would expect that its gross profit margin would be greater. (*Id.*, 957:5-9.)  
22

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23 <sup>18</sup> Ms. Heinemann did not adjust the February 2023 rates into September 2021 dollars, which was  
24 when Putnam made its Submission. If this had been done, Putnam's rate would have been  
25 comparatively higher.

26 <sup>19</sup> Section 3065.2 was approved by the Governor on October 12, 2019, with an effective date of January  
27 1, 2020, nearly three years before the November 2022 rates of the surrounding dealers in Ms.  
28 Heinemann's Figure 11. Ms. Heinemann's testimony about the economic rationality of surrounding  
dealers is based in part on her observation that warranty work is an "incredibly lucrative" and  
substantial part of a dealer's service department; it is a guaranteed revenue stream from a guaranteed  
payor, Ford. (*Id.*, 953:21-954:23.)

131. To Ms. Heinemann, Putnam's lower gross profit margin is additional evidence that Putnam does not have a labor rate of \$440 per hour. (*Id.*, 957:24-958:11.)

**C. The Qualified Repair Population Lacks Reliability Due to Location**

132. Ms. Heinemann does not opine on the legal issue of whether customer-pay repairs performed at an unauthorized facility are "qualified." However, if location is relevant, the fact that the repair order does not reflect the location where a repair was done raises a "red flag," rendering some portion of the repair order population unreliable. (*Id.*, 918:13-15, 918:16-920:4.) This is also evidence that Putnam's submission was riddled with issues and unreliable. (*Id.*, 917:17-920:4; Ex. MM [B1262], Section 5.A., ¶¶ 18-19 at 8.)

**D. Putnam's Labor Rate is Not \$440 an Hour**

133. Notwithstanding the inconsistencies and discrepancies in the data, Ms. Heinemann, as a forensic accountant, calculated effective rates for the Board in her report's Exhibits 2 and 3, based on both sold and the available actual hours. (Heinemann: 9/25/23, 960:19-961:4; Ex. MM [B1285-1286], Exs. 2&3.) Exhibit 2 to Ms. Heinemann's report is based on qualified lines on repair orders based on the closed repair order dates and Exhibit 3 to her report is based on the date those repair orders were opened. (*Id.*, 961:7-19.)<sup>20</sup>

134. In each of the tables, Ms. Heinemann calculated rates based on every potential set of 90 consecutive days of repair orders from the 120 days of repair orders in the Submission.<sup>21</sup> (*Id.*, 962:2-

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<sup>20</sup> The statute requires that the rate be based on "[a]ll repair orders **completed** in any 90-consecutive-day period." Veh. Code § 3065.2(a)(1)(B) (emphasis added). The 90-day set of repair orders that FrogData used to calculate Putnam's labor rate does not conform to the statute because it includes only repair orders opened on March 10, 2021. (*See, e.g.*, Joint Ex. 3, Putnam for Labor Tab, spreadsheet row 1010 (FrogData's earliest, RO 10036, which was opened on March 10, 2021).) The Submission is incomplete. It is possible there are repair orders that were opened before March 10, but closed on or after March 10, that are not included in the population. Likewise, there are repair orders opened on or before June 7, but closed after that day that should not have been included. (Heinemann: 9/25/23, 928:15-929:23; Ex. MM [B1265-66], ¶¶ 27-30 at 11-12.) Ms. Heinemann correctly concluded that, since those additional "completed" repair orders were not provided, their financial impact on Putnam's claimed labor rate cannot be known; those omissions still affect the quality and accuracy of Putnam's calculation. (*Id.*, 9/20/23, 929:19-932:2; Ex. MM [B1266], ¶ 30 at 12 & n. 33.)

<sup>21</sup> Section 3065.2(d)(5) allows a manufacturer to calculate an adjusted rate based on "any set of the qualified repair orders submitted by the franchisee."

6.) The red boxes on each table represent the repair set that optimizes rates in Putnam's favor, with the darkest red box being the most optimized, and the green boxes optimize the rates for Ford, again with the darkest green boxes the most favorable rate to Ford. (*Id.*, 964:8-20.)

135. Using the closed-date repair orders in Exhibit 2, the optimal rate for Ford is \$198.02 per hour.

136. Ms. Heinemann rejects Putnam's requested rate of \$436.76, based on sold hours. (*Id.*, 958:3.) She concludes that the actual, technician hours are the more reliable metric of the labor that generated the customer charges, despite the problems with this data. (*Id.*, 949:21-950:22.) Specifically, there are repair lines missing actual hours or the actual hours were moved, in whole or in part, to other accounts, like ISP or training as Mr. Kanouse testified, all of which reduces the clocked actual hours and thereby raises the hourly rate when based on actual hours. (*Id.*, 949:20-950:21, 971:5-972:17, 1003:13-24.) Consequently, no single calculation adequately sets a firm rate.

137. Ms. Heinemann then concluded that Putnam's submission based on sold hours is substantially and materially inaccurate because those hours are not generating the customer charges. Putnam is not charging \$440 per hour. (*Id.*, 957:24-958:11.) It is charging a lower rate and then artificially manipulating sold hours to give the appearance of \$440 per hour. (*Id.*, 957:24-958:11, 960:4-18, 1002:10-1003:24.)

138. Ms. Heinemann defined "materially" inaccurate, from an accounting perspective (of, for example, accounting audits). In that context, it means "rising to the level where an omission or an error or inaccuracy would really change the decision of the users of the financial data." (*Id.*, 1002:10-1003:4.) Given primarily the rates calculated between using sold hours versus technician hours and the comparable market data, "the difference is so vast as to just clearly meet that threshold." (*Id.*)

139. Ms. Heinemann's testimony went un rebutted. Edward Stockton, Putnam's rebuttal expert, did not provide any opinions on the appropriate labor rate, the accuracy of Putnam's Submission, or conformance with 3065.2. (*See generally*, Stockton: 9/26/23, 1159:5-1340:24.) In fact, it was obvious from his testimony that he did not know how to read a repair order. (*See, e.g., id.*, 1260:19-1262:8, 1262:16-1263:23, 1264:21-1265:6, 1281:25-1284:9 (regarding RO 10043 [B1806]), 1297:5-1298:18.) Based on his inability to read a repair order and his reliance on data provided in a

1 data file, and not the actual repair orders, the Board finds Mr. Stockton is not credible and disregards  
2 his opinions.

### 3 RELEVANT LAW

4 140. Section 3065.2(a) of the Vehicle Code governs the procedure to determine a reasonable  
5 warranty labor rate request. Under the statute, the dealer<sup>22</sup> submits 100 consecutive repair orders which  
6 reflect “qualified” repairs, with or without nonqualified repairs completed in the same period, or,  
7 alternatively, all repair orders completed in any 90 consecutive days, whichever series generates the  
8 fewer repair orders. Veh. Code § 3065.2(a)(1). A “qualified repair” is defined as “a repair order, closed  
9 at the time of submission, for work that was performed outside of the period of the manufacturer’s  
10 warranty and paid for by the customer, but that would have been covered by a manufacturer’s warranty  
11 if the work had been required and performed during the period of warranty.” *Id.*, § 3065.2(j).

12 141. The dealer then calculates the requested retail labor rate by “determining the total  
13 charges for **labor** from the **qualified** repair orders, **dividing by** the total number of hours **that**  
14 **generated those charges.**” *Id.* § 3065.2(a)(2) (emphasis added). The dealer’s submission must include  
15 the repair orders and the dealer’s requested rate that it determined from those repair orders.  
16 § 3065.2(a)(1).

17 142. If the rate requested is substantially higher than the dealer’s current warranty labor rate,  
18 the manufacturer has 30 days from the submission to request all repair orders closed within 30 days  
19 immediately preceding or 30 days immediately following the set of repair orders submitted by the  
20 dealer. *Id.* § 3065.2(d)(4). The manufacturer then has 30 days from receipt of the supplemental repair  
21 orders to provide its response contesting the dealer’s requested rate. § 3065.2(d)(1):

22 The grounds on which the manufacturer may contest the dealer’s rate are limited to the  
23 requested rate being materially inaccurate or fraudulent. A manufacturer may only  
24 provide one response notice, which must provide: a full explanation of all reasons for  
25 the finding, evidence substantiating the franchisor’s position, a copy of all calculations  
26 used by the franchisor in determining the franchisor’s position, and a proposed adjusted  
27 retail labor rate or retail parts rate, as applicable, on the basis of the initial or  
28 supplemental repair orders requested by the manufacturer. The manufacturer thereafter  
cannot add to, expand, supplement, or otherwise modify any element of that  
notification, without justification.

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28 <sup>22</sup> The statute uses the terms “franchisee” for dealer and “franchisor” for manufacturer.



1 *Id.*

2 143. “If a franchisee disputes the franchisor’s proposed adjusted retail labor rate or retail  
3 parts rate, the franchisee may file a protest with the board for a declaration of the franchisee's retail  
4 labor rate or retail parts rate.” *Id.*, § 3065.4(a). Pursuant to Section 3065.4, the manufacturer has the  
5 burden to prove “it complied with Section 3065.2 and that the franchisee’s determination of the retail  
6 labor rate or retail parts rate is materially inaccurate or fraudulent.” *Id.*

7 144. Section 3065.4(b) instructs the Board to determine whether a manufacturer has met its  
8 burdens under subpart (a), and then allows the Board, at its discretion, to conduct an independent  
9 review and calculation under Section 3065.2:

10 Upon a decision by the board pursuant to subdivision (a), the board may determine  
11 the difference between the amount the franchisee has actually received from the  
12 franchisor for fulfilled warranty obligations and the amount that the franchisee  
13 would have received if the franchisor had compensated the franchisee at the retail  
labor rate and retail parts rate as determined in accordance with Section 3065.2 for  
a period beginning 30 days after receipt of the franchisee's initial submission under  
subdivision (a) of Section 3065.2.

14 *Id.* § 3065.2(b). Thus, the Board has the discretion to engage in an independent calculation and is not  
15 bound to accept the calculation of either the manufacturer or the dealer. *See generally id.*

16 145. There are three questions the Board must answer under Section 3065.2:

- 17 a). Did Ford meet its burden to show that the requested labor rate of \$436.76 was  
18 materially inaccurate and/or fraudulent?
- 19 b). Did Ford meet its burden to show that it complied with the notification  
20 provision in Section 3065.2(d)(1)?
- 21 c). If the Board exercises its discretion to engage in its own independent  
22 calculation, what should the rate be?

23 146. Because the Board answers “yes” to both the first and second questions, and because  
24 at the second question, the Board finds that the fraud has rendered the Submission too unreliable to be  
25 used to calculate a rate, it will not exercise its discretion to calculate a rate.<sup>23</sup> Because the Submission

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<sup>23</sup> In other cases in which a manufacturer meets its burdens, but the Board finds the submission as a whole is still amenable to an accurate declaration of the dealer’s actual retail rate, it may still exercise

1 is too unreliable to be used to calculate a rate, Putnam's pre-Submission rate of \$177 is still in effect,  
2 retroactive to 30 days after Putnam's Initial Submission.

### 3 CONCLUSIONS OF LAW

#### 4 I. FORD HAS PROVEN PUTNAM'S SUBMISSION IS MATERIALLY INACCURATE 5 AND FRAUDULENT

6 147. Section 3065.2 does not define "materially inaccurate" or "fraudulent." However, the  
7 Board must give these terms their plain, ordinary meaning, and may consult dictionary definitions.  
8 *Halbert's Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 Cal. App. 4th 1233, 1240, 8 Cal. Rptr. 2d 298,  
9 302 (there, using Webster's Dictionary to interpret the meaning of "furnish").

10 148. "Accurate" is defined as "free from error," "conforming exactly to truth or to a  
11 standard," or "exact." See "Accurate" Miriam-Webster Dictionary, *available at* [https://www.merriam-](https://www.merriam-webster.com/dictionary/accurate)  
12 [webster.com/dictionary/accurate](https://www.merriam-webster.com/dictionary/accurate), (last visited 12/12/23).

13 149. The ordinary meaning of the adjective "material" is "[o]f such a nature that knowledge  
14 of the item would affect a person's decision-making; significant; essential." *County of Kern v. Alta*  
15 *Sierra Holistic Exchange Service* (Ct. App. 5th Dist. 2020). 46 Cal. App. 5th 82, 101, 259 Cal. Rptr.  
16 3d 563, 580 (citing (Black's Law Dict. (8th ed. 2004)). "If an objectively reasonable person would  
17 consider the new circumstances significant or important in making a decision about the subject matter  
18 of the ordinance, the change in circumstances is material." *Id.* Materially inaccurate from an  
19 accounting perspective means "rising to the level where an omission or an error or inaccuracy would  
20 really change the decision of the users of the financial data." (Heinemann: 9/25/23, 1002:10-1003:4.)

21 150. "Fraudulent," as in a fraudulent misrepresentation, is defined as "a false statement that  
22 is known to be false or is made recklessly — without knowing or caring whether it is true or false —  
23 and that is intended to induce a party to detrimentally rely on it. Also termed *fraudulent representation*;  
24 *deceit*." MISREPRESENTATION, Black's Law Dictionary (11th ed. 2019); *see also Graham v. Bank*  
25 *of America, N.A.* (2014) 226 Cal. App. 4th 594, 605-06, 172 Cal. Rptr. 3d 218, 228 (defining a  
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27 \_\_\_\_\_  
28 its discretion to calculate and declare a reasonable rate based on the repair order data provided. That  
is not necessary or prudent here because the Submission is too unreliable to be used to calculate a rate.

1 fraudulent misrepresentation as (1) . . . an important fact was true; (2) that representation was false;  
2 (3) the defendant knew that the representation was false when the defendant made it, or the defendant  
3 made the representation recklessly and without regard for its truth; (4) the defendant intended that the  
4 plaintiff rely on the representation . . .”).

5 151. Putnam’s Submission meets these definitions of materially inaccurate and, in some  
6 instances, fraudulent in at least three ways: the sold hours Putnam used to calculate its rate did not  
7 “generate” the customer charges, as required by Section 3065.2; the repair orders are riddled with  
8 accounting anomalies that call into question the reliability of the entire Submission; and the  
9 Submission contains some non-qualified repairs, specifically those performed at the Barn, that are not  
10 identifiable with any certainty, rendering it nearly impossible to calculate a reliable rate from any set  
11 of Putnam’s Submission.

12 152. Each of these deficiencies, which are discussed below, constitute material inaccuracies  
13 that resulted in grossly inflating Putnam’s proposed labor rate. As such, each of these deficiencies,  
14 standing alone, is a basis for finding that the Submission is unreliable.

15 153. Because the evidence shows that Putnam knowingly and/or recklessly submitted  
16 materially inaccurate information to Ford with the intent that Ford rely on it when calculating the labor  
17 rate, each of the deficiencies is also proof of fraud.

18 **A. The Sold Hours Did Not Generate the Labor Charges**

19 154. A warranty labor rate request is a creature of statute; as such, the Board must start with  
20 the statute and apply its plain and commonsense meaning. *Coalition of Concerned Communities, Inc.*  
21 *v. City of Los Angeles* (2004) 34 Cal.4th 733, 737. Section 3065.2 is very specific—to arrive at the  
22 requesting dealer’s effective labor rate, “[t]he franchisee shall calculate its retail labor rate by  
23 determining the **total charges for labor** from the qualified repair orders submitted and dividing that  
24 amount by the **total number of hours that generated those charges.**” Veh. Code § 3065.2(a)(2)  
25 (emphasis added). Not only must the customer charges be based on the “labor” that it took to do the  
26 repairs, but the “hours” of labor must be those that “generated those charges.”

27 155. “Labor” is defined as the “expenditure of physical or mental effort,” and more  
28 specifically to this context, “human activity that provides the goods or services in an economy.”

1 “Labor,” Merriam-Webster Dictionary *available at* <https://www.merriam->  
2 [webster.com/dictionary/labor](https://www.merriam-webster.com/dictionary/labor) (last visited 12/12/23). To “generate” something likewise has a common  
3 sense meaning: “to bring into existence,” “to create by means of a defined process,” or “to be the cause  
4 of” something, such as an action or situation.” “Generate,” Merriam-Webster’s Dictionary *available*  
5 *at* <https://www.merriam-webster.com/dictionary/generate> (last visited 12/12/23).

6 156. Section 3065.2’s plain language requires that, in calculating a labor rate, it is necessary  
7 to use the hours that factored into the final labor charge calculation.

8 1. Time Guide Hours Do Not Generate The Charges

9 157. Putnam has argued both in its Protest and during the hearing that the final labor charge  
10 to its customers is the product of Ford’s time guide hours multiplied by \$440. The undisputed evidence  
11 at the hearing, however, demonstrated that Putnam did not use Ford’s time guide hours to calculate  
12 the customer labor charges. Mr. Putnam testified service advisors had discretion to use or not Ford’s  
13 time guide as sold hours; Mr. Kamenetsky testified they are not required to use the time guide on  
14 customer-pay repairs.<sup>24</sup> Both Mr. Becic and Mr. Kanouse testified that sold hours in repair orders they  
15 reviewed did not match Ford’s time guide.<sup>25</sup>

16 158. Further, the use of a manufacturer’s time guide hours is not supported by the plain  
17 language of Section 3065.2 or the legislative history of that section. Section 3065.2 was initially passed  
18 by the legislature in the 2018 session as AB 2109<sup>26</sup>; it expressly stated that the customer charges should  
19 be divided by the total number of hours “allowed pursuant to the franchisor’s time allowances . . . .”.  
20 (*Id.*) Governor Brown vetoed that bill, specifically because of the warranty provisions included in the  
21 bill. (*See* Tab 2 to Ford’s prehearing brief.) When the bill was introduced again in the 2019 session (as  
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23 <sup>24</sup> *See, e.g.*, Findings of Fact Nos. 10-12 and 14-15.

24 <sup>25</sup> Specifically, Mr. Becic testified that, based on a review of a sample set of the repair lines, the sold  
25 hours did not match the time guide hours. (Becic: 9/18/23, 109:18-110:8.) Mr. Kanouse testified that  
26 sold hours in specific repair orders did not match the Ford time guide. (Kanouse: 9/19/23, 315:10-16  
27 (Putnam lists zero sold hours but time guide is 0.3), 320:14-321:16 (sold hours of 3.2 when time guide  
would be around 4); *see also id.* 452:4-7 (same).)

28 <sup>26</sup> *See* legislative passage and text of AB 2107 at  
[https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201720180AB2107](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB2107).

AB 179), it contained the same language; however, AB 179 was amended before its passage to replace that time guide language with the current language: taking the “total charges for labor” dividing by the “total number of hours that generated those charges,” thereby rejecting the requirement that time guides should govern the calculation.<sup>27</sup>

159. Putnam’s argument that its sold hours are based on Ford’s time guide is rejected.

2. Putnam Impermissibly Included Flat Rate Charges in its Calculation

160. Inherent in the plain language of Section 3065.2 is the requirement that the charge for labor be the product of some quantity of time. There is a direct, mathematical relationship between time and the charge. A flat rate, by definition, has no correlation to the time it takes to perform a repair. (Heinemann: 9/25/23, 943:23-24 (“A flat rate is not an expression of an hourly rate . . .”).) That is a flat rate’s very purpose: the customer will pay a fixed fee regardless of the time spent on the service item; the charge is determined before any labor is performed and is not tied to the hours it takes to perform the repair. Thus, where Putnam charges a flat rate, regardless of time spent, no amount of time “generated the charges.” Because no time generated the charges, the repair cannot be used to calculate the labor rate.

161. The evidence shows that at least 25% of the Submission contains flat rate charges for diagnostic work..<sup>28</sup>

162. These flat rate charges should have been excluded from the subset qualified repairs before calculating the requested labor rate. The inclusion of flat rate diagnostic charges, which was 25% of the total Submission, had an outsized influence on Putnam’s overall calculation, rendering their impact materially inaccurate.

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<sup>27</sup> See legislature’s comparison of AB 179 as introduced to the bill as passed at [https://leginfo.legislature.ca.gov/faces/cambrsionsCompareClient.xhtml?bill\\_id=201920200AB179&cversion=20190AB17999INT](https://leginfo.legislature.ca.gov/faces/cambrsionsCompareClient.xhtml?bill_id=201920200AB179&cversion=20190AB17999INT)

(2) (A) -The franchisee shall calculate its retail labor rate by determining the total charges for labor from the qualified repair orders submitted and dividing that amount by the total number of hours allowed pursuant to the franchisor’s time allowances that ~~would be used to compensate the franchisee for the same work, had it been performed under warranty.~~ that generated those charges.

<sup>28</sup> See, e.g., Findings of Fact Nos. 65 and 121-22.

1 163. Putnam’s use of “estimates” also appears to be the use of flat rate charges.<sup>29</sup> Based on  
2 the evidence, the service advisors would treat the estimate as a flat-rate and would add in sold hours  
3 after the order was closed. In this case, the use of estimates was more akin to a flat rate because the  
4 final charge stayed fixed, regardless of the time to perform the repair. As such, these should not have  
5 been included in the Submission. It is impossible to know which repair orders impermissibly use these  
6 flat rate charges.

7 164. Because Putnam reported these flat-rate charges as labor charged based on hours, as  
8 opposed to indicating the charge was a flat-rate charge with zero hours, it knowingly misrepresented  
9 the use of sold hours in its calculation, constituting evidence of fraud.

10 3. Putnam Manipulated Sold Hours to Reach a Rate Near \$440

11 165. Ford has identified seven categories of evidence that all show that Putnam’s sold hours  
12 did not generate the charges.

13 *i. Category One: Putnam admits to “tinkering” with the repair orders*

14 166. Mr. Putnam admitted that the sold hours are artificial. He told Ms. Murphy-Austin that  
15 the price the customer paid would still be comparable to the neighboring dealers because the labor  
16 times they used to calculate the customer charge would be lower than what the job would take, which  
17 would offset the higher labor rate. (Murphy-Austin: 9/18/23, 191:22-192:16 (emphasis added).)

18 167. At the hearing, Mr. Kamenetsky believed that service advisors were “tinkering” with  
19 repair orders. (Kamenetsky: 9/27/23, 1600:25-1601:3.) This tinkering was baked into the Putnam  
20 process—Mr. Putnam testified that rather than have hours generate charges, Putnam systematically  
21 used algebra to “back into the [\$440/hour] rate.” (K. Putnam: 9/25/23, 1044:2-11.) Putnam never  
22 “rais[ed] the price to the customer. The price to the customer is not going to change . . . so we backed  
23 into it. We did basic algebra and we backed into the [\$440] rate.” (*Id.*, (emphasis added).)

24 168. Mr. Martinez confirmed Putnam’s service advisors manipulated sold hours. They  
25 changed sold hours after the fact by using a third-party time guide or no time guide at all and selecting  
26

27 \_\_\_\_\_  
28 <sup>29</sup> See, e.g., Findings of Fact No. 66.

1 any number of hours to get to produce a rate of \$440. There was no consistent mechanism by which  
2 they manipulated the hours to get as close to \$440 as they could.<sup>30</sup>

3 169. All of this “tinkering” is evidence the affected repairs were materially inaccurate and  
4 fraudulent, giving the illusion Putnam’s customer-pay rates were \$440.

5 *ii. Category Two: Repeating decimals prove rates are fake*

6 170. The math to arrive at customer charges on a repair is simple: hours (whether actual or  
7 sold hours) multiplied by the hourly rate (in dollars, even with cents added). Even if the hourly rate  
8 includes cents, with hours to the tenth of an hour, the arithmetic will always end with no more than  
9 dollars and cents.<sup>31</sup> Reversing that process, i.e., dividing the customer charge by the number of hours,  
10 will result in dollars and possibly cents, but no more. If sold hours were actually multiplied by \$440,  
11 everything would be divisible by \$440, without additional decimals. (Kamenetsky: 9/27/23, 1557:11-  
12 24, 1598:2-25.)

13 171. As demonstrated throughout the hearing, many of the Submission’s repair lines do not  
14 match that simple math. Instead, when the final customer labor charge is divided by the sold hours the  
15 resulting rate is a nonsense rate, extending even beyond four decimal places, and often one with a  
16 repeating decimal.<sup>32</sup>

17 172. As Mr. Kanouse and Mr. Becic testified, Putnam’s CDK system simply cannot be  
18 programmed with an hourly rate with decimals beyond cents to calculate a charge, that the sold hours  
19 had to be manually entered.<sup>33</sup>

20 173. To explain the presence of repeating decimals, Mr. Kamenetsky speculated that the  
21 dollar amount of the labor may have been manually adjusted to accommodate a higher charge for parts  
22 after the fact in order to keep the customer estimate the same. (Kamenetsky: 9/27/23, 1598:25-  
23

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24 <sup>30</sup> See Findings of Fact No. 15.

25 <sup>31</sup> Even in the unusual case of hours tracked to the hundredth of an hour, the arithmetic would not  
26 extend beyond four decimal places.

27 <sup>32</sup> See Findings of Fact Nos. 48-50 with examples.

28 <sup>33</sup> See comments to examples in Finding of Fact No. 48, fn. 10.



1 1600:16.) This post-hoc theory only reinforces that one cannot rely on the data in the Submission and  
2 that the sold hours do not generate the charges. These examples are all additional evidence of Mr.  
3 Putnam's admission—"so we backed into it. We did basic algebra and we backed into the [\$440] rate,"  
4 so as to keep the customer charges comparable to those of other dealers. (K. Putnam: 9/25/23, 1044:2-  
5 11 (emphasis added).)

6 174. Putnam's theory that the uneven rates were the result of discounts was convincingly  
7 rebutted. (Kanouse: 9/19/23, 363:13-366:11.) Mr. Kanouse rejected that speculation, explaining that  
8 the full amount for labor would still be billed, and the discounted portion would be documented  
9 separately. (*Id.*, 365:8-16.) Further, Mr. Korenak testified that there were only two repair lines in which  
10 a customer received a discount (as indicated by the fact that they read "discount"), which is  
11 considerably less than the number of repairs in which the resulting rate was nonsense. (Korenak:  
12 9/27/23, 1424:17-23.) A discount cannot explain the repair orders discussed by Mr. Kanouse.  
13 (Kanouse: 9/19/23, 494:12-14.)

14 175. The sold hours did not generate the customer charges. They are mathematically  
15 unrelated to the charges, manufactured to deceive Ford, and are consistent with Mr. Putnam's  
16 admission that Putnam "backed into the [\$440] rate." As such, they cannot be used under Section  
17 3065.2 to calculate a warranty labor rate.

18 *iii. Category Three: Large discrepancies between sold hours and actual*  
19 *hours prove sold hours are artificial*

20 176. As Mr. Becic, Mr. Kanouse, and Mr. Sweis testified, based on their decades of  
21 reviewing repair orders, the sold hours and the actual hours on any given repair are identical or at  
22 most, close together, differing by maybe .1 hour, maybe .2 hours. However, the discrepancies between  
23 the sold hours and actual hours in many of Putnam's repair lines are huge, with actual hours ranging  
24 from over 200% to 3,000% above the sold hours, leading all three witnesses to comment the  
25 discrepancies are highly or extremely unusual, even "wildly off."<sup>34</sup>

26  
27  
28 <sup>34</sup> See Findings of Fact Nos. 52-54, with examples.

177. Discrepancies of this magnitude between its sold and technician hours indicated to Ford's witnesses what Putnam admitted: once the repair was completed, Putnam employees manually changed the sold hours after the fact to be much lower in order to give the appearance of a higher hourly rate, essentially "back[ing] into" the rate from fictitious sold hours.<sup>35</sup>

178. The technician hours, where available, produce a competitive market rate. (*Compare* Ex. MM [B1285-86], Exhibits 2 & 3 (Column entitled "Technician Hours Alt2" yields hourly rates between \$170s to \$220s), *with* Ex. MM [B1278] Figure 11 at 24 (showing rates for San Francisco MSA). This is further evidence that the sold hours are not generating the customer charges.

*iv. Category Four: Repair could not have been completed in the Sold Hours Reported*

179. Another issue with Putnam's stated sold hours is that, in some cases, they are not even close to the time necessary to complete the described repair. Mr. Sweis testified to one example, RO 10049 [B1792], Line A, which involved a complete engine removal and teardown to fix a broken timing chain guide. Putnam claimed 10.6 in sold hours and zero actual hours<sup>36</sup> and charged the customer \$4,654.89. Based on his extensive experience in such repairs, Mr. Sweis testified it would take at least 17 hours or more to complete the repair, not the 10.6 sold hours appearing on the repair line. (Sweis: 9/20/23, 559:18-560:7.)

180. Repair Order 10049 has additional accounting anomalies that, while not directly pertinent to Putnam's math in its calculation based on sold hours, nonetheless brings Putnam's submission into serious question. As Mr. Kanouse testified, there is no identifiable technician on repair line A; rather, the technician number identified is "999," which is not a real or valid technician, but a "house technician." (Kanouse: 9/19/23, 346:24-347:6.) In addition to no recorded technician time, the cost of labor on Line A was zero and no dollar amounts were entered in either of the labor sale accounts 57000 or 57300. (Kanouse: 9/19/23, 345:17-349:6.) Mr. Kamenetsky, Putnam Auto Group's CFO who

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<sup>35</sup> See Findings of Fact Nos. 13 and 54.

<sup>36</sup> This repair is also an example of why it was essentially impossible for Ford to calculate a rate using technician hours, and with such a substantial customer charge of \$4,654.89. \$4,654.89 divided by zero is, like any number divided by zero, undefined.

1 obviously and inherently as a CFO must deal with accounting of labor expenses on Putnam's books  
2 and ultimately its tax returns, did not know what was going on in this repair line. (Kamenetsky:  
3 9/27/23, 1590:17-1591:15, 1593:10-1595:9.) To Mr. Kanouse, the repair order "makes no sense"  
4 (Kanouse: 9/19/23, 348:3-4, 17-20), is not a "valid" repair order (*id.*, 349:2-3), and he would not rely  
5 on this repair order (*id.*, 349:4-6).

6 181. The fact that Putnam removed an entire engine to complete a repair, and charged the  
7 customer \$4,654.89, but failed to track who performed the repair, the technician time it took to  
8 complete the repair, and the labor cost to Putnam for the repair might be excused as an oversight if  
9 this were the only anomaly in the Submission. But this type of substantial error, in context, is yet more  
10 proof that the sold hours are artificial.

11 v. *Category Five: Missing actual hours*

12 182. There are several qualified repair lines where no technician hours at all are reflected,  
13 despite the fact that some time had to have been spent by some technician to perform the repair.<sup>37</sup> The  
14 lack of actual hours makes calculating an accurate hourly rate from Putnam's submission impossible.

15 183. The omission of any technician hours is further indication that the sold hours are  
16 entirely disconnected from the actual hours necessary to perform the repair. It is also an indication of  
17 an accounting anomaly which taints the entire set of repair orders.

18 vi. *Category Six: Vastly different rates in the same repair order*

19 184. Putnam grossly inflated rates on different lines in the same repair order in order to uplift  
20 the average hourly rate requested.<sup>38</sup> Rates on the repair lines identified were as high as \$756 per hour.

21 185. Mr. Kanouse also pointed out additional repair orders in which two different  
22 technicians worked on a single repair, and where the hours had to have been manipulated (or omitted  
23 entirely) so that their combined hours resulted in a perfect total hourly rate of \$440.<sup>39</sup>

24  
25  
26 <sup>37</sup> See examples at Finding of Fact No. 60.

27 <sup>38</sup> See examples at Finding of Fact No. 56.

28 <sup>39</sup> See Finding of Fact No. 57.

186. In both of these examples, the customer is charged a labor charge where there are zero sold hours, which is a clear indicator that the hours do not generate the charges. Then, the obvious material inaccuracies are compounded because the two technicians' different rates implausibly add up to exactly \$440 per hour. The odds of this happening in reality, let alone happening twice, are miniscule.

187. These disparate rates are further proof that Putnam does not have a set rate. Rather, Putnam's goal was to manipulate sold hours to achieve the specter of a \$440 per hour rate. There is no other explanation as to why Putnam would use sold hours to create rates of \$501, \$756, and \$641, or why it would have two technicians differing rates improbably result in exactly \$440 per hour. This circumstantial evidence indicates Putnam was engaging in post hoc arithmetic to pull up the overall mean of its Submission.

188. Even if there are other explanations (like service advisors boosting customer charges to increase their commissions, like Mr. Martinez testified about), the repair order data is materially inaccurate and fraudulent in the apparent manipulations.

*vii. Category Seven: Related repairs with zero or low sold hours inflate the rate*

189. Qualified repairs are defined in part as repairs that would have been covered by warranty if performed during the warranty period. Section 3065.2(j). Generally, Ford will reimburse all qualified repairs related to a covered warranty repair. (*See, e.g.,* Becic: 9/18/23, 75:14-76:24; Kanouse: 9/19/23, 312:24-314:9.) However, there are several instances where Putnam did not list charges or hours associated with related qualified repairs to a single line in its Submission, leaving the reported qualified repair line with fewer hours, thus inflating the average hourly rate.<sup>40</sup>

190. The examples Ford witnesses testified about in this category are evidence of material inaccuracies in Putnam's Submission.

191. The evidence in each of these seven different categories was not rebutted by Putnam. Putnam called two witnesses, Mr. Putnam and Mr. Kamenetsky, who gave only self-serving testimony,

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<sup>40</sup> See Finding of Fact No. 68 with examples.

1 on which they were often impeached. Neither of them had any personal knowledge of how repair  
2 orders were actually created and never priced out a single repair to support Putnam's \$440 rate. Neither  
3 witness was credible.

4 192. The documentary evidence and the testimony of Putnam employees, Ford employees  
5 with years of experience reviewing repair orders, and a forensic accountant prove that Putnam's  
6 effective retail labor rate is not \$440.

7 193. Putnam's Submission is materially inaccurate and fraudulent because the sold hours  
8 listed are not the hours that generate the customer labor charge. The charges were generated in various  
9 and inconsistent ways, including impermissibly including flat rate charges (where one hour or no  
10 amount of hours generate the charges) and manipulating the sold hours after the labor charge was  
11 provided to the customer.

12 **B. Accounting Anomalies Further Taint the Submission**

13 194. Repair orders are important documents kept and maintained in the ordinary course of  
14 business. They play a critical role in a service department, and their accuracy is key to successful  
15 service management. (Kanouse: 9/19/23, 277:4-25.) To ensure their accuracy, everything must be  
16 recorded and billed properly. (*Id.*, *e.g.*, 276:13-277:25.)

17 195. As Ms. Heinemann testified, the repair orders are the primary source for documenting  
18 the revenue and expenses that necessarily flow into the dealer's financial statements. (Heinemann:  
19 9/25/23, 946:19-947:2, 947:25-948:5.) The customer charges must accurately reflect the dealer's gross  
20 revenue, while the labor charges must accurately reflect the cost of those expenses, as well as the parts  
21 charges, against that revenue. (*See id.*, 944:20-947:9.) This is basic accounting: there should be internal  
22 controls associated with the total charges to the customer. (*Id.*, 947:19-22.) The revenues and expenses  
23 that flow into the financial statements become the source for the dealer's tax obligations.

24 196. Accounting integrity and accuracy of the repair order data is key to a dealer's  
25 operations. (Kanouse: 9/19/23, 277:4-25.)

26 197. Messrs Becic, Kanouse, and Sweis, and Ford's expert Ms. Heinemann, as well as  
27 Putnam's Messrs Putnam and Kamenetsky, testified to the many types of inconsistencies,  
28 discrepancies, and clear manipulation of sold hours. Their testimony is replete with the Ford witnesses'

1 observations that the information in the repair orders is “not normal,” not “accurate,” “unreliable,” and  
2 “could not be trusted,” as noted in the Findings of Fact. Even Mr. Stockton, Putnam’s own expert,  
3 indicated that the repair orders were not reliable. (Stockton: 9/26/23, 1296:12-21 (admitting to relying  
4 on the downstream data file over the accounting copies of the repair orders because it was more “up-  
5 to-date” than the actual repair orders).)

6 198. There are also numerous accounting irregularities and inconsistencies within given  
7 repair orders in Putnam’s Submission. Those anomalies include removing excessive technician hours  
8 from repair orders and burying those hours in either apparently fake “training” accounts or designating  
9 the repair as “ISP” (instead of a warranty or customer-pay repair) to hide those technician hours.<sup>41</sup>  
10 From his personal knowledge, Mr. Martinez confirmed Mr. Kanouse’s assessment with respect to the  
11 ISP designation practice.<sup>42</sup>

12 199. These irregularities led Mr. Kanouse to question the authenticity of all of the repair  
13 orders: “there is nothing consistent across the body of these ROs except they are a mess.” (Kanouse:  
14 9/19/20, 489:17-490:6.) Mr. Kanouse also confirmed that as a service manager for 20 years, he never  
15 accounted for time in these manners. Nor are the irregularities and inconsistencies explained away by  
16 how different dealers do their accounting. (*Id.*, 490:7-21, 496:2-6.)

17 200. Section 3065.2 assumes that the repair orders in a dealer’s submission are accurate.  
18 Accurate information is essential to deriving an accurate and sound effective warranty labor rate.  
19 When the repair orders fail to reflect the repairs actually performed, accurate work by the service  
20 department, or accurate accounting, they are, at minimum, materially inaccurate.

21 201. Ford has demonstrated through undisputed testimony that Putnam’s repair orders are  
22 the farthest from a true representation of the data of the repairs performed, repair orders the likes of  
23 which Ford’s experienced witnesses have never seen before. That is precisely what Section 3065.2  
24 anticipated when it provided manufacturers with the opportunity to challenge a dealer’s claimed

25  
26  
27 <sup>41</sup> See Findings of Fact Nos. 70-74, with examples.

28 <sup>42</sup> See Finding of Fact No. 75.

1 customer-pay labor rate as materially inaccurate or fraudulent. Ford has proven these thresholds in  
2 Putnam's submission.

3 202. Because Putnam's Submission contains unreliable repair orders, the entire Submission  
4 is nonconforming and cannot be used to calculate a rate.

5 **C. Repairs Performed at the Barn are not "Qualified Repairs" and Their Inclusion**  
6 **Renders the Submission Materially Inaccurate and Fraudulent**

7 203. Putnam's submission is materially inaccurate and fraudulent for another independent  
8 reason—any repairs reflected in Putnam's submission that were not performed at its authorized  
9 location at 885 N. San Mateo Drive, San Mateo are, by definition, not "qualified repairs" that can be  
10 included in the calculation of its customer-pay labor rate.

11 204. Under 3065.2(a)(2), only "qualified repair orders" can be used to calculate a labor rate.  
12 A "qualified repair order" is specifically defined in the Vehicle Code as:

13 a repair order, closed at the time of submission, for work that was performed outside  
14 of the period of the manufacturer's warranty and paid for by the customer, **but that**  
15 **would have been covered by a manufacturer's warranty if the work had been**  
**required and performed** during the period of warranty.

16 Veh. Code § 3065.2(j) (emphasis added).

17 205. To determine what "would have been covered by a manufacturer's warranty," the  
18 Board should look to the plain language of the SSA.

19 206. Paragraph 5(a) of the Standard Provisions of Putnam's SSA requires Putnam to  
20 "establish and maintain at the DEALERSHIP LOCATION approved by [Ford] DEALERSHIP  
21 FACILITIES . . . .". \*Joint Ex. 1 [B21] at 21.) Pursuant to Paragraph 5(b), the DEALERSHIP  
22 LOCATION and DEALERSHIP FACILITIES are to be identified in the Dealership Facilities  
23 Supplement. (*Id.*) Putnam's SSA identifies only its facility at 885 N. San Mateo Drive as its authorized  
24 facility, and no other.

25 207. Paragraph 5(c) of the Standard Provisions is unambiguous—Putnam "shall not move  
26 or substantially modify or change the usage of any of the DEALERSHIP LOCATION or FACILITIES  
27 for COMPANY PRODUCTS, nor shall Dealer or any person named in subparagraphs F(i) or F(ii)  
28 hereof directly or indirectly establish or operate in whole or in part any other locations or facilities for



1 the sale or service of COMPANY PRODUCTS . . . without the prior written consent of [Ford].” (*Id.*  
2 (emphasis added).)

3 208. Ford has never consented to any other facilities for any of Putnam’s operations.<sup>43</sup>

4 209. Section 1.1.03 of Ford’s 2021 Warranty Manual provides “[w]arranty repairs must be  
5 performed at an authorized Ford or Lincoln dealership” to be reimbursable warranty repairs; work  
6 performed elsewhere is not warranty work. The Barn and the Nissan dealership are not part of an  
7 “authorized Ford or Lincoln dealership.” (Ex. A [B946], at 005.) Under both Putnam’s SSA and under  
8 Ford’s Warranty Manual, the only valid repairs that would have been “covered by [Ford’s] warranty”  
9 if “**performed** during the period of warranty” would be work performed at Putnam’s authorized  
10 facility. Consequently, any repairs done at the Barn, or any other unauthorized location, are not  
11 “qualified repairs,” and cannot be included in the calculation of Putnam’s proposed warranty labor  
12 rate.

13 210. Even Mr. Putnam agreed that for a repair to be qualified it must take place at an  
14 approved facility. (K. Putnam: 9/25/23, 1070:6-1072:4.)<sup>44</sup>

15 211. Some number of the Submission repairs were performed at the Barn.<sup>45</sup>

16 212. It is impossible, however, to identify with any reasonable degree of certainty all of the  
17 repairs that were performed there. Even if relatively small in number, it is not an insignificant amount  
18 given the size of the Submission. The five repairs identified by Mr. Sweis represent total labor charges  
19 of \$10,597.98. This is 30.5% of the total charges in the Submission of \$34,963. (*See* Ex. MM [B1269]  
20 at 15 (Figure 6 listing net labor charge of \$34,963).) This would certainly have a material impact on  
21 any calculation of Putnam’s rate if they were removed.

22 213. Looking at only Putnam’s Initial Submission, of which the Sweis-identified repairs on  
23 ROs 10049, 10206 and 10239 were a part, the total charges in these three repairs are \$8,040.77, which

24 \_\_\_\_\_  
25 <sup>43</sup> *See* Findings of Fact Nos. 80-81; *see also* Findings of Fact Nos. 89, 95, 98-99.

26 <sup>44</sup> Putnam was impeached with his testimony at the hearing on this matter. (K. Putnam: 9/25/23,  
27 1070:6-1072:4.) During the hearing, he attempted to change his answer.

28 <sup>45</sup> *See* Findings of Fact Nos. 87, with examples, and 97; evidentiary sanctions (Hr’g Tr.: 9/28/23,  
1620:1-11.)

1 is 39.3% of the \$20,440.55 total qualified repairs in that submission. (*See* Joint Ex. 3, Putnam Ford  
2 Labor Tab, first row (most recent RO included is RO 10277), last row (total charges=\$20,440.55).)

3 214. Given Putnam's multiple attempts to cover up the facts surrounding location (in Mr.  
4 Putnam's December 2023 declaration, the various communications from his attorneys, or the delays  
5 in producing pertinent documents), the evidence shows that Putnam intentionally, or, at the very least,  
6 recklessly, misrepresented the location of certain, significant repairs in its Submission.

7 215. Putnam's inclusion of repairs performed at an unauthorized location was fraudulent.

8 216. Because neither Ford nor the Board can ferret out and exclude all of the repairs  
9 performed at the Barn with any degree of confidence, the whole Submission is materially inaccurate  
10 and fraudulent and does not conform to Section 3065.2.

## 11 **II. FORD'S DENIAL LETTER COMPLIED WITH SECTION 3065.2(d)**

### 12 **A. The Denial Letter was Timely**

13 217. During the hearing, Putnam did not dispute that Ford's Denial Letter was timely in  
14 accordance with the 30-day time periods in subsection (d)(1) and (4).

15 218. Ford received Putnam's Submission on August 24, 2021, despite its request letter being  
16 dated July 28, 2021.<sup>46</sup>

17 219. Within 30 days of August 24, Ford requested 30 additional days of repair orders, per  
18 subsection (d)(4) of 3065.2, because Putnam's requested labor rate was substantially higher than its  
19 current rate. (Joint Ex. 5 [B49].)<sup>47</sup>

20 220. Ford received the supplemental repair orders on September 27, 2021. Within 30 days  
21 of the Supplemental Submission, Ford served its Denial Letter on October 26, 2021.<sup>48</sup>

### 22 **B. The Denial Letter Contained all Necessary Components**

23 221. Under Section 3065.2(d)(1), a manufacturer shall provide written notice to a dealer  
24 should it find a labor rate request materially inaccurate or fraudulent. It states, in relevant part:

25 \_\_\_\_\_  
26 <sup>46</sup> *See* Findings of Fact No. 26.

27 <sup>47</sup> *See* Findings of Fact No. 28.

28 <sup>48</sup> *See* Findings of Fact Nos. 29, 38.

1 If the franchisor seeks to contest the retail labor rate, retail parts rate, or both, the  
2 franchisor shall submit no more than one notification to the franchisee. The  
3 notification shall be limited to an assertion that the rate is materially inaccurate or  
4 fraudulent, and shall provide a full explanation of any and all reasons for the  
5 allegation, evidence substantiating the franchisor's position, a copy of all  
6 calculations used by the franchisor in determining the franchisor's position, and a  
7 proposed adjusted retail labor rate or retail parts rate, as applicable, on the basis of  
the repair orders submitted by the franchisee or, if applicable, on the basis provided  
in paragraph (5). After submitting the notification, the franchisor shall not add to,  
expand, supplement, or otherwise modify any element of that notification,  
including, but not limited to, its grounds for contesting the retail labor rate, retail  
parts rate, or both, without justification.

8 Veh. Code § 3065.2(d)(1) (hereafter "Notification Provision").

9 222. Ford's Denial Letter (Joint Ex. 6 [B50-51]) met each of the statutory requirements  
10 enumerated in Section 3065.2(d)(1).

11 1. "[A]n assertion that the rate is materially inaccurate or fraudulent, and shall  
12 provide a full explanation of any and all reasons for the allegation[.]"

13 223. The Denial Letter clearly asserted that the Submission was materially inaccurate or  
14 fraudulent. (Joint Ex. 6 at 1 [B50] ("Unfortunately, your request for a labor rate adjustment must be  
15 denied because it is materially inaccurate or fraudulent.").) The Denial Letter provided reasons for its  
16 determination:

- 17 • **Ford was unable to verify the requested labor rate of \$436/hour based on the ROs**  
18 **provided.** (*Id.* ("After a review of the provided documentation and the additional repair  
19 orders (ROs) provided pursuant to our request, we are unable to verify the labor rates you  
20 are charging at your dealership.").)
- 21 • **Based on the ROs, Ford could not identify a consistent pricing practice.** (*Id.* ("While  
22 we have been able to verify some of the repairs included in your analysis, there are others  
23 that do not seem to follow a consistent pricing practice[.]").)
- 24 • **The customer (sold) hours are not appropriate for the repair identified.** (*Id.* ("[M]any  
25 of the provided labor hours (customer estimate hours) do not seem appropriate for the  
26 repair[.]"); *Id.* at 2 [B51] ("[T]here is a considerable disconnect between the amount of  
27 work this repair required and what is being reported on the repair order copy.").)
- 28 • **There is a discrepancy between the actual (technician) hours and the sold hours.** (Joint  
Ex. 6 at 1 ("Many of the provided labor hours (customer estimate hours) . . . [are not]  
consistent with the technician clocked hours being shown."); Joint Ex. 6 at 2 ("As described  
in this letter, given the inconsistency in rates being charged and the hours being shown, we  
have no alternative but to contest your calculation because the rate you calculated is  
materially inaccurate or fraudulent.").)
- **The sold hours do not reflect the reality of the time worked, and instead appear**  
**designed to generate a charge of \$440 per hour.** (*Id.* ("Rather than reflect reality, the

1 hours assigned to the repair appear designed to demonstrate a \$440 per hour labor rate.”);  
2 *id.* (“[T]here is a considerable disconnect between the amount of work this repair required  
3 and what is being reported on the repair order copy.”); *id.* at 2 [B51] (“In sum, the requested  
4 rate seems not to be based on customer quoted hours, or technician recorded time, but  
rather on a desire to attempt to demonstrate an inordinately high labor rate of approximately  
\$440.00 per hour, which is generally around double the rate being charged in the market  
by other dealers of any other brand.”).)

- 5 • **A concern that the ROs submitted were not the final version.** (*Id.* at 2 [B51] (“These  
6 disconnects aggravate a concern that many of the ROs you submitted are listed as  
duplicates, which may not be the final version.”).)

7 2. “[S]hall provide . . . evidence substantiating the franchisor’s position . . .”

8 224. Ford’s Denial Letter provided specific examples as evidence of the reasons provided  
9 for believing the submission was materially inaccurate or fraudulent. Specifically, it cited and analyzed  
10 several specific repair orders (ROs 10239, 10305, 10283, 10287, 10048, 10251, 10206, 10248, 10216,  
11 10319, 10365). It further clarified that “[t]he examples above are just examples; the evidence  
12 substantiating Ford Motor Company’s position contesting your request is all the documentation you  
13 submitted as part of your request, including the additional repair orders.” (Joint Ex. 6 at 2 [B51].)

14 225. The statute does not require that Ford’s Denial Letter provide all possible evidence.  
15 Rather, Ford only needs to identify its reasoning (*e.g.* there is a significant discrepancy between sold  
16 hours and actual hours), and evidence of that reason (*e.g.* RO 10305 (12.74 hours actual time, but 2.4  
17 sold hours)).

18 226. There also is no requirement that Ford identify all evidence of fraud. Ford identified  
19 inconsistencies that led it to believe there was fraud. It would have been nearly impossible for Ford to  
20 provide further evidence because the only documentation it was permitted under the statutory scheme  
21 at that time was the fraudulent documents themselves. To read the statute to require all possible  
22 evidence would effectively render the statute’s permission to raise fraud as an objection meaningless.

23 3. “[A] copy of calculations used by the franchisor in determining the  
24 franchisor’s position”

25 227. Under the plain language of this provision, the manufacturer must provide a copy of  
26 calculations “used” to determine its position. The requirement to provide calculations turns on whether  
27 such calculations were ultimately “used” by Ford in evaluating its position.

28 228. Putnam incorrectly reads this provision to require that Ford must create and must use

1 calculations to determine its “position” on an adjusted retail labor rate. However, the statute contains  
2 no such directive. Nor could it.

3 229. Requiring a manufacture to employ calculations in every instance would conflict with  
4 the ability of a manufacturer to object to a proposed rate as either materially inaccurate or fraudulent.  
5 *See In re Rochelle B.* (1996) 49 Cal. App. 4th 1212, 1216 (a statute must be read to harmonize all  
6 provisions). By including the ability to reject a submission due to material inaccuracies or fraud, the  
7 legislature considered that a submission might contain inaccurate or fraudulent repair orders, thus  
8 impeding the accuracy and usefulness of any calculations. Likewise, there is no requirement that a  
9 manufacturer independently gather data to use in calculations. The statute simply does not support  
10 Putnam’s position.

11 4. “[A] proposed adjusted retail labor rate or retail parts rate, as applicable, on  
12 the basis of the repair orders submitted by the franchisee . . .”

13 Ford provided an adjusted retail labor rate of \$220 based on “the most common customer-pay  
14 rate [Putnam’s] documentation shows,” explaining in its Denial Letter:

15 The inconsistencies and excessive customer charges in the ROs you provided,  
16 including the examples discussed above, **make it unreasonable, if not effectively**  
17 **impossible, for Ford Motor Company to use your ROs to calculate a labor rate.**  
18 As such, we have no choice but to propose an adjusted retail labor rate of \$220.00  
per hour which seems to be the most common customer-pay rate your  
documentation shows in repairs where we see what appears to be valid  
documentation.

19 (Joint Ex. 6 [B51] at 2 (emphasis added).)

20 230. Putnam’s Submission was so riddled with inconsistencies and inaccuracies as to make  
21 it “unreasonable if not effectively impossible” for Ford to perform calculations to reach its proposed  
22 adjusted labor rate, also as stated in Ford’s Denial letter. Ford’s Denial Letter satisfied this element of  
23 Section 3065.2(d)(1).

24 231. That Ms. Heinemann, Ford’s expert forensic accountant, was able to calculate several  
25 possible rates only after an extensive review of the entire Submission also does not render the Denial  
26 Letter defective. As Ms. Heinemann testified, it made sense why Ford was unable to do the same:

27 Q.. Was Ford wrong in its denial when it said, “unreasonable, if not  
28 effectively impossible, for Ford to use the ROs to calculate a labor rate”

1 A. Well, I can appreciate their position, right? If they are accustomed to  
2 receiving submissions where sale hours comport with actual hours and the  
3 data for repair lines generally make sense with what they understand the  
4 time it takes for a repair, if that -- the data submission from Putnam looked  
5 more like that, and if the data submission from Putnam had values for all  
6 the technician hours, I think that it might have been a more straightforward  
7 thing for Ford to say, "Hey, look, you know, your sale hours don't look right.  
8 I am going to do technician hours." But the fact of the matter is even  
9 technician hours are not perfect. There is missing data there as well. . . . So  
10 does it make sense that they maybe threw their hands up? It makes sense to  
11 me . . . .

12 Q. I guess, do they both make sense? Does it make sense for Ford to say,  
13 "This data is so messed up I can't do it," and also for you to say, "All right.  
14 This data is messed up, but I am going to go ahead and come up with  
15 calculations as best I can," all at the same time?

16 A. I think that's right, and I think, you know, what really sort of highlights  
17 that is, you know, the calculations we just walked through on Exhibit 2 and  
18 3, there is a wide range of values, but there is information that I use to help  
19 guide us to the right point. That is very different than my understanding of  
20 what persons at Ford, or frankly other manufacturers, typically do. I mean,  
21 I think that -- my sense is they take data and they calculate. And I think here  
22 there is a lot of reasons why I am here doing a broader forensic look to try  
23 to get to an answer that makes sense.

24 (Heinemann: 9/25/23, 975:12-977:5.)

25 232. Ford endeavored to propose a reasonable rate based on what Putnam's customers  
26 actually paid per hour, and it expressly stated the basis for its rate in the Denial Letter. Ford's Denial  
27 Letter satisfied this and all other elements of Section 3065.2(d)(1).

28 **C. Any Supplementation to the Denial Letter Was Justified**

29 233. Section 3065.2(d)(1) expressly permits changes or additions to the manufacturer's  
30 response where there is "justification." "Justification" is not defined in the statute. Its common  
31 definition is a "an acceptable reason for doing something." "Justification, Merriam-Webster's  
32 Dictionary, *available at* <https://www.merriam-webster.com/dictionary/justification> (last visited  
33 12/13/23).

34 234. Notably, subsection (d)(1) does not say "material" or "substantial" justification, as is  
35 common in so many other California statutes. "Substantial justification" has been defined by courts,  
36 as "justification that is clearly reasonable because it is well grounded in both law and fact"; simple  
37 "justification" must mean something less, which is consistent with the dictionary definition above.  
38 *Farnum v. Iris Biotechnologies, Inc.* (2022) 86 Cal. App. 5th. 602, 611 (noting "substantial

1 justification” definition in prior cases but ruling that it was not necessary to decide definition of  
2 “without justification” in statute at issue, just that it must mean something less weighty); *see also*  
3 *White Winston Select Asset Fund Series Fund Mp-18 v. Musclempharm Corp.* (2021) 2021 Cal. Super.  
4 LEXIS 65347 at \*4-\*6 (Super. Ct, Los Angeles County) (ruling under same shareholder records  
5 demand statute, “without justification” means “not reasonably supported by California law or by the  
6 evidence”).

7       235. Subsection (d)(1) also does not limit how or when the manufacturer can modify or  
8 supplement its reasons for finding that a submission is materially inaccurate or fraudulent. In the  
9 absence of any express deadline or means of notification, it reasons that notification at any time before  
10 the hearing is appropriate so long as the supplementation is justified.<sup>49</sup> Certainly, additional facts that  
11 were revealed during discovery beyond those discernable from the face of the repair orders and not  
12 known at the time of the notice are “justifications” for expanding the bases for demonstrating a  
13 submission is materially inaccurate or fraudulent at trial.

14       236. The record is rife with evidence of Putnam’s manipulations, falsifications, and evasive  
15 behavior, all of which justify supplementation. Ford stated that it denied the rate because the  
16 Submission was materially inaccurate or fraudulent. It provided evidence in its Denial Letter, thus  
17 meeting its obligations. Through its investigation, it later learned of additional examples of the  
18 inaccuracies and fraud, such as testimony that some repairs were not qualified because they were  
19 performed at the Barn and evidence of inconsistencies buried in the almost 900-page Submission.

20       237. Putnam, through argument at the hearing, has suggested that, to the extent Ford points  
21 to accounting anomalies apparent from the face of the repair orders, those arguments are forfeited  
22

23 \_\_\_\_\_  
24 <sup>49</sup> This approach is consistent with the holding in *Subaru of Am., Inc. v. Putnam Auto., Inc.* (2021) 60  
25 Cal. App. 5th 829, 833. This termination case was brought by one of Mr. Putnam’s other entities under  
26 a statute that precluded the manufacturer from raising any additional grounds in the litigation beyond  
27 those in the termination notice. The statute did not contain a “justification” provision. The arbitrator  
28 allowed Subaru to introduce additional grounds during the hearing, finding no due process violation  
of the Putnam entity’s due process rights, because it had actual notice of those new grounds in the  
course of discovery. Thus, if introduction of new arguments during a hearing is acceptable when the  
statute has no justification provision, then supplementation during a hearing where the statute allows  
supplementation, but has no stated time limit, is certainly permissible.



1 because they were not in the Denial Letter. However, the issues could not have reasonably been  
2 identified by October 26, 2021.

3 238. The 74 purportedly qualified repairs were buried in a Submission of 1,673 individual  
4 repairs that had to be manually reviewed. (Heinemann: 9/25/23, 914:14-16.) Not even Putnam's  
5 vendor, FrogData, or its economist, Mr. Stockton, reviewed these repair orders manually.<sup>50</sup> As  
6 demonstrated through the testimony of Ms. Heinemann, many of the accounting inconsistencies and  
7 irregularities only became apparent by reviewing the totality of the Submission. (Heinemann: 9/25/23,  
8 939:10-940:21 (explaining why a qualified repair line with a rate of \$61.95 is indicative of entering  
9 sales hours after-the-fact based on the reoccurrence of this rate in the non-qualified set).) Ford does  
10 not often need a forensic accountant to probe every entry in a dealer's 900-page warranty labor rate  
11 submission; here, though, given the volume of the Submission and the forensic accountant expertise  
12 needed to identify the hidden inconsistencies, Ford unsurprisingly supplemented its list of material  
13 inaccuracies and fraud that it discovered during the course of litigation. (*See, e.g., id.*, 975:12-977:5,  
14 979:20-980:1 (testimony that Ford would not have this expertise).)

15 239. To the extent any evidence or argument presented during the hearing was not contained  
16 in the four corners of the Denial Letter, Ford's supplementation of its evidence and argument was  
17 justified and statutorily permissible.

### 18 **III. FORD MET ITS BURDENS UNDER SECTION 3065.4(a)**

19 240. Ford has met its burdens under Section 3065.4(a) of proving the Submission is  
20 materially inaccurate and fraudulent and that Ford complied with the notification requirements of the  
21 timing and content requirements of the Denial Letter.

22 241. Having met its burdens, the Board concludes that Putnam's Protest be overruled. While  
23 the Board has the discretion to independently calculate "the labor rate . . . as determined in accordance

24 \_\_\_\_\_  
25 <sup>50</sup> Neither Mr. Korenak nor Mr. Stockton analyzed the repair orders in any meaningful way. Mr.  
26 Korenak testified that he uses a software system that runs reports and pulls data into spreadsheets and  
27 allows for a "quick[]" analysis of qualified repairs. (Korenak: 9/27/23, 1359: 9-25.) After populating  
28 a spreadsheet, they "let the math do what it does." (*Id.* 1359:23-25; *see also* 1370:14-1371:8.) Mr.  
Stockton relied on a data file prepared by Putnam that did not contain all of the same information as  
the repair orders themselves. (Stockton: 9/26/23, 1297:5-1298:16.) He testified that he preferred the  
data file over the repair orders. (*Id.*, 1297:2-4.)

1 with Section 3065.2” under Section 3065.4(b), the evidence presented clearly demonstrates that the  
2 inconsistencies, discrepancies, and various anomalies in Putnam’s Submission, as well as the inability  
3 to identify and exclude repairs performed at the Barn, are so great and pervasive that, as Ford stated  
4 in its Denial Letter, it is “unreasonable, if not effectively impossible” to use the repair orders in the  
5 Submission to calculate an accurate labor rate. The Board therefore will declare that Putnam’s initial  
6 rate of \$177, which was its warranty rate at the time of its Submission, is still in effect.

7       242. Even if Ford had not met its burden, which it has here, the outcome would be the same.  
8 The Board may exercise its discretion to conduct an independent review of all the evidence presented  
9 at the hearing under Section 3064.4(b). Under this independent review, the Board would reach the  
10 same end result—the rate of \$177 is still in effect because the rate request is unreasonable and the  
11 submission is too materially inaccurate and fraudulent to be used to reliably calculate a new rate.

12       243. In interpreting a statute, the Board must enforce the plain meaning of the text. *People*  
13 *v. Verduzco* (2012) 210 Cal. App. 4th 1406, 1414. Similarly, no portion of a statute may be rendered  
14 superfluous. *Klein v. United States of Am.* (2010) 50 Cal. 4th 68, 80-81 [112 Cal. Rptr. 3d 722, 731,  
15 235 P.3d 42, 50]). Language in a statute should be read in the context of the statutory framework as a  
16 whole to harmonize various parts (*Coalition. of Concerned Cmtys.*, 34 Cal. 4th at 737), and statutes  
17 should not be read to lead to an absurd result (*id.*).

18       244. Under the plain language Section 3065.2, all requests must be “reasonable.” Veh. Code  
19 § 3065.2(a) (“A franchisee seeking to establish or modify its retail labor rate, retail parts rate, or both,  
20 **to determine a reasonable warranty reimbursement** schedule shall, no more frequently than once  
21 per calendar year, complete the following requirements[.]” (emphasis added)). Not only must the rate  
22 be reasonable, but the requirements of Section 3065.2 should be used to “determine a reasonable  
23 warranty reimbursement schedule.” *Id.*

24       245. This interpretation is consistent with the Vehicle Code as a whole. Section 3065, which  
25 governs warranty compensation and requires that franchisors are to “fairly” compensate franchisees  
26 for labor when performing warranty repairs. Veh. Code § 3065(a) (“Every franchisor shall properly  
27 fulfill every warranty agreement made by it and adequately and **fairly compensate** each of its  
28 franchisees for labor and parts used to satisfy the warranty obligations[.]” (emphasis added)). The

1 Board cannot ignore the plain language of the statute and render the mandate that rates be “reasonable”  
2 and “fair” meaningless.

3         246. The legislative history supports this interpretation. The California legislature  
4 emphasized this directive in its findings and declarations at the outset of AB 179 when it stated:  
5 “California franchise laws require manufacturers to provide **reasonable reimbursement to dealers**  
6 **for warranty work**, but fail to establish a clear procedure to determine whether a reimbursement is  
7 reasonable.” (Tab A, Section 1(c) at 2 (emphasis added).) It went on to state that “It is the intent of  
8 this act to ensure that new motor vehicle dealers are treated fairly by their franchisors, that dealers are  
9 **reasonably compensated for performing warranty repairs** on behalf of their franchisors, . . .” (*Id.*,  
10 Section 1(i) at 3 (emphasis added).)

11         247. It is also consistent with California’s policy interest in protecting consumers from  
12 unnecessarily high prices. *See, e.g., Josten v. Rite Aid Corp.*, No. 18-CV-0152-AJB-JLB, 2018 WL  
13 6062415, at \*5 (S.D. Cal. Nov. 20, 2018) (charging consumer higher prices violates public policy);  
14 *Smith v. State Farm Mut. Auto. Ins. Co.* (2001) 93 Cal. App. 4th 700, 719 (“Examples of unfair  
15 business practices include: charging a higher than normal rate for [a service].”)

16         248. The absence of a threshold reasonableness requirement would lead to an absurd, and  
17 impermissible, result. Untethering a labor rate from a reasonableness standard would incentivize  
18 franchisees to price-gouge consumers for 90 days, in order to inflate their purported customer-pay  
19 labor rate, for the purpose of forcing Ford to pay for warranty labor in gross excess of market rates.  
20 This would not only harm the consumer (both during the 90-day period and in the long term by  
21 impacting the warranty program), but it would be contrary to the purpose of the statute, which is to  
22 allow franchisees to obtain a market rate for the warranty repairs the manufacturer pays for

23         249. Reasonableness is a question of fact. *E.g., Great W. Distillery Prods. v. John A. Wathen*  
24 *Distillery Co.* (1937) 10 Cal. 2d 442, 446 (“What is a reasonable price is a question of fact dependent  
25 on the circumstances of each particular case.”); *accord House v. Lala* (1960) 180 Cal. App. 2d 412,  
26 418. The “reasonable value” of a service is the same as the “going rate” for the services, *Maglica v.*  
27 *Maglica* (1998) 66 Cal. App. 4th 442, 446, or the “reasonable market value at the current market  
28 prices,” *Punton v. Sapp Bros. Constr. Co.* (1956) 143 Cal. App. 2d 696, 701. Reasonable market value,

1 or fair market value, is the price that “a willing buyer would pay to a willing seller, neither being under  
2 compulsion to buy or sell, and both having full knowledge of all pertinent facts.” *Alameda Cty. Flood*  
3 *Control & Water Conservation Dist. v. Dep’t of Water Res.* (2013) 213 Cal. App. 4th 1163, 1174–75,  
4 fn. 9.

5 250. Here, the evidence shows that the rate was not reasonable. Ford employees testified the  
6 rate was double what they had seen in the same region. This was confirmed by evidence of other  
7 dealers’ rates in the San Francisco MSA and the testimony of Putnam’s own witness, Mr. Korenak.  
8 This evidence went un rebutted. In fact, Mr. Kamenetsky testified that their labor rate was not priced  
9 to be “competitive.” (Kamenetsky: 9/27/23, 1541:12-14.)

10 251. Even if the Putnam’s were reasonable, because of the evidence of the unreliability of  
11 the submission as a whole, the Board would have independently concluded that it could not use the  
12 Submission to calculate a rate under Section 3065.2 because it is not apparent from the repair orders  
13 whether any hours actually generated the charges.

14 252. The Board also concludes that Ford is permitted to recover from Putnam the difference  
15 between \$177 and the \$220 Ford has paid Putnam per hour of its warranty labor claims since about  
16 October 2021, when Ford began paying the adjusted rate in its Denial Letter.

### 17 DECISION

18 Putnam’s Protest is overruled. Ford has met its burdens under Section 3065.4(a) of proving the  
19 Submission is materially inaccurate and fraudulent and that Ford complied with the notification  
20 requirements of the timing and the content requirements of the Denial Letter.

21 Putnam’s initial rate of \$177, which was its warranty rate at the time of its Submission, is still  
22 in effect. The Board determines that Ford is permitted to recover from Putnam the difference between  
23 \$177 and the \$220 that Ford has paid Putnam per hour of Putnam’s warranty labor claims since about  
24 October 2021, when Ford began paying the \$220 adjusted rate in its Denial Letter.

1 Dated: January 18, 2024

2 GREENBERG TRAURIG, LLP

3 By: /s/ Elayna M. Fiene  
4 H. Camille Papini-Chapla  
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**PROOF OF SERVICE**

CAPTION: KPAuto, LLC, dba Putnam Ford of San Mateo v. Ford Motor Company

BOARD: NEW MOTOR VEHICLE BOARD

PROTEST NO.: **PR-2759-21**

I am employed in the City and County of Denver, State of Colorado. I am over the age of 18 years and not a party to this action. My business address is 1144 15th Street, Suite 3300, Denver, CO 80202.

On January 18, 2024, I served the foregoing **Respondent Ford Motor Company's Proposed Findings of Fact and Conclusions of Law** on each party in this action, as follows:

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- ☐ (BY MAIL) I caused such envelope to be deposited in the United States mail at Denver, Colorado, with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing documents for mailing. It is deposited with the United States Postal Service each day and that practice was followed in the ordinary course of business for the service herein attested to.
- ☐ (BY FACSIMILE) The facsimile machine I used complied with California Rules of Court, Rule 2003, and no error was reported by the machine. Pursuant to California Rules of Court, Rule 2006(d), I caused the machine to print a transmission record of the transmission, a copy of which is attached to this Affidavit.
- ☐ (BY FEDERAL EXPRESS) I caused such envelope to be delivered by air courier, with the next day service.
- ☒ (BY EMAIL) at the email address listed above.

Executed on January 18, 2024, at Denver, Colorado.

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

/s/ Elayna M. Fiene  
Elayna M. Fiene

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**STATE OF CALIFORNIA**

**NEW MOTOR VEHICLE BOARD**

In the Matter of the Protest of:

KPAUTO, LLC, dba PUTNAM FORD OF SAN  
MATEO,

Protestant,

v.

FORD MOTOR COMPANY,

Respondent.

**PROTEST NO: PR-2759-21;  
OAH NO. 2023050701**

**PROTESTANT'S POST HEARING  
BRIEF**



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INTRODUCTION

The protest before the Office of Administrative Hearings (“OAH”) and the New Motor Vehicle Board (“Board”) is a matter of first impression that requires the interpretation of an imperfect statute. On its face, Vehicle Code section 3065.2<sup>1</sup> requires the simple application of a mathematical formula to determine the average labor rate charged to dealership service customers. Section 3065.2 requires the determination of qualified repairs of which the total charges are divided by the hours that generate those charges. Unfortunately, the “hours generating those charges” is not defined by statute.

Historically, new car franchise car dealerships have relied on various third-party commercial guides as the source of hours used in generating service charges to customers. There are a number of third-party guides available for dealers to choose from, but there is not a single standard used nor is there a specific guide that is required. It is important to note franchisee dealers are required to rely on guide hours because California law requires upfront pricing to the customer.<sup>2</sup> It is unlawful to charge a service customer after the fact for the actual hours employed on a repair job. As a result, the Legislature could not have intended actual hours to be those hours generating the charges under Section 3065.2 because this practice is prohibited.

A Franchisor, in this instance Ford, creates and maintains its own time guide for the purpose of determining the appropriate number of hours it believes are reasonable for each repair covered by warranty. Ford dealers are not prohibited from using the Ford Guide to price customer pay repairs, as Putnam has endeavored to do here. Nevertheless, Ford argues Putnam’s use of Ford’s factory time guide is fraudulent and Putnam’s sold hours are unreasonably low. Ford also argues it should be inferred Section 3065.2 prohibits the use of a factory time guide simply because the Legislature declined to make its use mandatory and instead used the ambiguous language “hours that generated those charges.”

Ford claims this matter is about an unreliable dealer submission, but the reality is Ford does not want its dealers to adopt the uniform practice of using the Ford Factory Time Guide (“Ford Guide”) to

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<sup>1</sup> Unless otherwise indicated, all statutory references are to the California Vehicle Code.

<sup>2</sup> California Business and Professions Code section 9884.9 requires dealers provide an upfront estimate of the service repair and the final price shall not exceed the estimated or posted price.



1 price customer pay repairs. As Putnam's submission demonstrates, the use of the Ford Guide's lower  
2 hours in place of higher third-party guide hours results in a higher effective labor rate ("ELR"). Ford  
3 does not want to pay Ford dealers the same amount for a warranty repair that a customer would pay for  
4 the same repair not covered by Ford's warranty. There is no support the Legislature intended to maintain  
5 a system where Franchisors could continue to reimburse Franchisees for warranty repairs at a lower rate  
6 than what is charged for customer pay repairs.

7 Ford claims Putnam did not use the Ford Guide hours to generate the charges to service  
8 customers. However, Ford refused to present evidence of its Factory Guide hours. Ford could have  
9 presented a side-by-side comparison of the qualified ROs showing the Putnam sold hours as compared  
10 to the Ford Guide—it did not. It made this decision because it is well aware Putnam's sold hours are the  
11 same or similar to Ford's Guide. Instead, Ford offered anecdotal evidence from Ford employee  
12 witnesses regarding how long they *think* certain repairs should have taken. If Ford genuinely believed  
13 Putnam's sold hours were unreasonably low, at the very least, it should have attempted to show these  
14 hours were less than the Ford Time Guide allowances as determined by Ford's commissioned time  
15 studies. Ford could have presented evidence of the Ford Guide hours to show any deviation, where  
16 Putnam's sold hours were less than Ford's Guide, should be considered presumptively unreasonable  
17 because they would be below those hours Ford has determined to be reasonable. Ford did not make this  
18 comparison despite having the ability to do so.

19 Ford then argues Putnam manipulated the data to demonstrate a \$440 hourly rate. Ford alleges  
20 the sold hours were added after the fact. However, even Ford's witness, David Martinez, Putnam's  
21 former Service Manager, testified the Putnam service advisors were instructed to apply the Ford Guide  
22 hours and apply an hourly rate of \$440. Mr. Martinez complained the \$440 hourly rate was causing  
23 some customers to seek service from another location. Moreover, more than half of the qualified repairs  
24 show an hourly rate of exactly \$440 an hour.

25 Ford next takes aim at the qualified repairs that do not show an ELR of exactly \$440, arguing  
26 this shows inconsistencies that render the entirety of Putnam's submission to be unreliable. This ignores  
27 the fact that Section 3065.2 requires the determination of an *average*. This presumes there will be varied  
28 ELRs from repair order to repair order ("RO"). The statute does not require a dealer to demonstrate it

1 applied the precise hourly rate in every instance—there will always be some variation.

2 Finally, Ford argues the fact that some of the repairs included in the Putnam’s 2021 Labor Rate  
3 Submission (“Submission”) may have been completed at the “Barn” location renders the entire  
4 submission noncompliant. Ford claims any repair completed at the Barn would not be eligible for dealer  
5 reimbursement and therefore it cannot be a qualified repair under Section 3065.2. However, Section  
6 3065.2 speaks to a repair that would “otherwise be covered by warranty.” It is intended to define the  
7 *type* of customer pay RO that should be deemed qualified. Section 3065.2 does not speak to whether the  
8 dealer would be eligible for factory reimbursement. The question of whether Ford is required to  
9 reimburse Putnam for warranty repairs completed at the Barn is not to be determined in this matter.  
10 Instead, this question is squarely before the Board in Protest PR-2826-23.

11 In addition, in the event the Board adopts a decision declaring a rate higher than the current rate  
12 of \$220 per hour, this would provide Putnam the opportunity to seek retroactive payment for the  
13 difference between the old and new rates. Because the Board cannot award damages, Putnam would be  
14 required to bring an action in a court of competent jurisdiction. Ford would have the opportunity to seek  
15 a determination finding warranty repairs completed at the Barn are not subject to payment and therefore  
16 any retroactive payment should be reduced or not required. There are currently available two separate  
17 forums that should properly determine the issue of whether Ford is required to reimburse Putnam for  
18 warranty repairs completed at the Barn—this determination is not before the Board in the instant matter.

19 Most importantly, Section 3065.2 places two separate burdens on Ford. Ford must first  
20 demonstrate it complied with Section 3065.2 in its response to the Submission before it can attempt to  
21 meet its second burden to demonstrate the Submission to be materially inaccurate or fraudulent. Ford  
22 failed to meet the threshold burden to show it complied with Section 3065.2 in issuing the October 26,  
23 2021, Denial Letter (“Denial”). Ford’s Denial failed to provide any calculations supporting its proposed  
24 adjusted retail labor rate of \$220 per hour and failed to provide a full explanation for any and all reasons  
25 for its position. Ford claims it did not do any calculations and that the additional reasons for the Denial  
26 were not known to Ford at the time of the Submission.

27 Despite claiming Ford was hamstrung by the statutory time period limited to 30 days, the record  
28 reflects Ford had more than twice this amount of time. Ford availed itself of its right to request an

1 additional 30 days of ROs. This provided Ford 30 days from the Submission, plus an additional 30 days  
2 from receipt of the supplemental ROs as well as seven (7) days required by Putnam to submit the  
3 supplemental ROs. Ford had more than two months to examine the Submission. Ford chose to delay its  
4 review of the Submission while it pressured Putnam to withdraw its request. Ford's willful refusal to  
5 comply with Section 3065.2 and its belated efforts to adequately review the Submission do not justify  
6 Ford's significant expansion of the reasons set forth in the Denial.

7 Ford offered a range of calculations from its expert forensic accountant, Sue Heinemann. Ford  
8 asks the Board to select one these calculated rates. Leaving aside the problems with Ms. Heinemann's  
9 calculations, these could have been done in response to the Putnam submission and set forth in the  
10 Denial. Ford claims it was impossible to perform the calculations Ms. Heinemann subsequently  
11 performed. This cannot be true. Ms. Heinemann had little to no experience in reviewing ROs, little  
12 knowledge of how the warranty process works, and no prior knowledge of the fact the industry relies on  
13 hourly time guides because it is unlawful to charge service work by actual technician hours. Ms.  
14 Heinemann relied on discussions with Ford employees and could not have performed her analysis  
15 without their guidance.

16 The evidence shows Ford failed to meet its burden to show it complied with the requirements of  
17 Section 3065.2 when it issued the Denial to Putnam. Should there be a determination Ford satisfied this  
18 initial burden, the evidence also showed Ford failed to meet its burden to show the Submission to be  
19 materially inaccurate or fraudulent.

#### 20 STANDARD

21 This protest was filed pursuant to Vehicle Code section 3065.4. Section 3065.4 provides the  
22 Board jurisdiction over a franchisee protest alleging the franchisor failed to comply with the rate setting  
23 provisions of Section 3065.2. In any protest under this section, the franchisor shall have the burden of  
24 proof that it complied with Section 3065.2 and that the franchisee's determination of the retail labor rate  
25 or retail parts rate is materially inaccurate or fraudulent.

26 Section 3065.2 sets forth the exclusive formula to determine a retail labor rate as a determination  
27 of the total customer charges from a set of qualified repairs divided by the total number of hours that  
28 generated those charges. If the Board determines Ford complied with the requirements of Section 3065.2

in responding to Putnam’s Submission, the central issue in this matter of first impression is how the hours that generated those charges should be interpreted.

**ARGUMENT**

**I. FORD FAILED TO DEMONSTRATE IT COMPLIED WITH THE REQUIREMENTS OF SECTION 3065.2 IN RESPONDING TO PUTNAM’S SUBMISSION.**

Section 3065.2 required Ford to provide with its Denial “a full explanation of any and all reasons for the allegation, evidence substantiating [Ford’s] position, a copy of all calculations used by the [Ford] in determining [Ford’s] position, and a proposed adjusted retail labor rate or retail parts rate, as applicable, on the basis of the repair orders submitted by the franchisee or, if applicable, on the basis provided in paragraph (5).” (Cal. Veh. Code, § 3065.2, subd. (d)(1).) Ford failed to provide any calculations, failed to demonstrate how the alternative hourly rate of \$220 is calculated, and failed to even offer testimony from the Ford employee identified as the individual charged with reviewing Putnam’s Request.

**A. Ford failed to perform any meaningful analysis of the Submission.**

1. *Ford determined a \$220 hourly rate but failed to provide any evidence in support of this determination.*

Ford failed to provide any evidence to support its determination of a \$220 hourly rate. Ford’s Denial states: “As such, we have no choice but to propose an adjusted retail labor rate of \$220.00 per hour which seems to be the most common customer pay rate your documentation shows in repairs where we see what appears to be valid documentation.” (Exh. J-6 – 002 [B51].) However, Ford’s Denial fails to provide any basis for how Ford made this determination or what it considered to be valid documentation from Putnam. Ford willfully failed to comply with its obligations set forth in Section 3065.2.

2. *Ford acknowledged it would need to determine the effective labor rate for the Submission but chose to ignore Section 3065.2.*

In an email from Rick Reibel dated August 27, 2021, Mr. Reibel advises Matt Watson to review the Submission “as normal.” Mr. Reibel went on to explain Ford would “probably need to give them a market appropriate rate, but we will need to know what the actual effective rate is regardless.”

[A29].) This email confirms Ford had no intention of acting in compliance with Section 3065.2—Ford would do the calculation, but would offer a market appropriate rate. Despite this clear instruction to determine the ELR, Ford failed produce any analysis performed by Mr. Watson or Mr. Reibel.

In another email from Mr. Reibel to Mr. Watson dated September 1, 2021, Mr. Reibel again instructs Mr. Watson to review the Putnam Submission “Matt we’re going to need to have you do the review on this request so we know what was skipped or included and get a final rate.” (Exh. 8 – 001 [A34].) It is plain to see the inquiry about what was “skipped or included” can only refer to a determination of qualified repairs. This is the last documentation we see from Mr. Reibel and Mr. Watson. What happened to the analysis these Ford employees were working on? What rate did they determine? Why did Ford fail to include any of this in the Denial?

These witnesses did not appear at the hearing to testify to their efforts. Ford claims these witnesses had retired from Ford and were no longer available. This claim rings hollow given Ford’s efforts to contact *all* of Putnam’s former service employees. It should be presumed these witnesses would confirm they performed calculations that were not included with the Denial. This inference is entirely consistent with the email exchanges in Exhibits 6 and 8.

Mr. Becic testified it was Ford’s option to either offer a labor rate based on the requirements of Section 3065.2 or opt to offer a market appropriate rate. (RT Vol. I, 126:7-10 [Becic].) Section 3065.2 offers no such option. Section 3065.2 provides a single and clearly defined formula for determining a dealer’s retail labor rate.

Mr. Becic testified Mr. Reibel determined the “market appropriate” rate of \$220 offered to Putnam in the Denial. (RT Vol. I, 135:23-136:18; 140:13-15 [Becic].) Mr. Becic parroted the Denial language that the \$220 per hour rate is the most common rate supported by the repair orders. (RT Vol. I, 136:1-8 [Becic]; Exh. J-6 – 002 [B51].) However, Mr. Becic has no idea how Mr. Reibel actually determined this rate. (RT Vol. I, 142:21-25 [Becic].) Regardless, it is certain the \$220 rate was *not* determined by the formula required by Section 3065.2.

3. *Ford could have calculated, or did calculate, an alternative rate.*

Despite Mr. Reibel’s instruction that Mr. Watson go ahead and review the Putnam Submission as normal on August 27, 2021, and again on September 1, 2021, Ford now claims it was impossible to

1 calculate an alternative rate from the information Putnam provided. Ford provided no evidence Mr.  
2 Reibel and Mr. Watson were unable to calculate an ELR from the Putnam Submission. If this were true,  
3 Ford should have secured some testimony from these individuals directly involved with Ford's efforts  
4 to calculate a rate. There should be some evidence of the purported difficulties Mr. Reibel or Mr. Watson  
5 encountered in their efforts to determine a labor rate. The evidence Ford offered at hearing was an after  
6 the fact justification for why Ford did not provide a rate in conformity with the requirements of Section  
7 3065.2.

8 Ford claimed it only had 30 days to reply to Putnam's Submission, but this obviously is not the  
9 case since Ford requested an additional 30 days of ROs. (Exh. J-5 [B49]; *see also* RT Vol. I, 44:21-22  
10 and 47:12-16 [Becic] (showing Putnam submitted the original request on August 24, 2021, and submitted  
11 the supplemental ROs on September 27, 2021; Ford had from August 24, 2021, to October 27, 2021, to  
12 review Putnam's submission or approximately 64 days).) Ford claimed it was impossible to calculate  
13 an alternative rate because some ROs did not include actual hours, nevertheless, this does not explain  
14 why Ford failed to calculate a rate with the ROs that did include actual hours.<sup>3</sup>

15 Approximately two years later, Ford now claims only a specialized forensic accountant could  
16 understand the information on the repair orders, despite the fact Ford employees were required to instruct  
17 Ms. Heinemann how to read a repair order. (Respondent Ford Motor Company's Post-Hearing Brief  
18 ("Ford's Brief") at 55:19-22 (an example of Ford's claim); Exh. MM – 004-005 [B1256-B1257] and RT  
19 Vol. V, 903:12-20, 908:14-18, 941:4-10, and 988:11-17 (showing Ms. Heinemann relied on Mr. Becic,  
20 Ms. Gil, and Mr. Sweis for her opinion that actual hours and sold hours should be the same or  
21 approximately the same) [Heinemann].) Ford's varied explanations for why it did not attempt to  
22 calculate an alternative rate are not credible and contrary to the evidence. Ford could have examined the  
23 qualified ROs and calculated the ELR.

24 Ford's witness, John Becic, walked through the process for how to calculate an ELR. Mr. Becic  
25

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26  
27 <sup>3</sup> There is no support for Ford's claim Section 3065.2 permits the determination of a retail labor rate  
28 using actual technician hours. The automotive industry does not operate by actual hours because all  
charges must be authorized in advance. (Cal. Bus. & Prof. Code, § 9884.9, subd. (a).)

1 demonstrated how the charges to the customer are divided by the sold hours to determine the ELR several  
2 times throughout his testimony. (RT Vol. I, 57:18-58:25 [Becic] (calculating an ELR for a nonqualified  
3 routine maintenance repair).) Mr. Becic did the same for RO 10277 calculating an ELR of \$660. (RT  
4 Vol. I, 61:25-63:17 [Becic].) This simple exercise demonstrates Ford employees were capable of  
5 calculating an ELR for every qualified repair included in the Submission.

6 Ford did not offer the individual responsible for reviewing the Putnam Submission, Rich Reibel.  
7 Mr. Reibel retired from Ford and was replaced by Mr. Becic. (RT Vol. I, 70:16-19 and 112:6-9 [Becic].)  
8 Mr. Becic's ability to calculate an ELR suggests the more experienced Mr. Reibel would have had the  
9 same ability to calculate an ELR. If Mr. Reibel was incapable of calculating an ELR from Putnam's  
10 Submission, Ford should have provided testimony from Mr. Reibel explaining why. Instead, Ford  
11 offered Mr. Becic's speculative testimony about what Mr. Reibel actually did or did not do in reviewing  
12 the Submission. (RT Vol. I, 70:9-22 [Becic].)

13 Mr. Becic discussed RO 10048 as a purported example of a qualified repair that should have been  
14 included in the Submission but was not. Mr. Becic testified Ford could not use this RO in its calculation  
15 of an ELR because it did not include sold hours for a battery replacement. (RT Vol. I, 75:9-76:24  
16 [Becic].) However, the replacement of batteries is a routine maintenance item specifically excluded by  
17 Section 3065.2 (c)(3). The battery replacement is not related to the replacement of a starter and should  
18 not therefore be included as part of the starter replacement. A battery replacement is not "provided in  
19 the course of" a starter replacement. (See Cal. Veh. Code, § 3065.2, subd. (c)(3) (providing an exception  
20 only if routine maintenance items are (1) provided in the course of the repair *and* (2) related to the  
21 repair).) Even if related, replacement of the battery is not part of the starter repair.

22 4. *Ford could have selected the most optimal 90 day range from the 120 days of ROs*  
23 *provided.*

24 Section 3065.2 presumes there will be variation among ROs and provides the franchisor the  
25 ability to request 30 days of supplemental ROs for the time period either before or after the time period  
26 of the original franchisee submission. (Cal. Veh. Code, § 3065.2, subd. (d)(4).) This is further evidence  
27 the Legislature contemplated the fact there will be materially different variation between ELRs on  
28 individual ROs.



Further, this provided Ford yet another opportunity to calculate a retail labor rate most favorable to its interests. Nevertheless, Ford determined it would ignore the requirements of Section 3065.2 and simply offer what it considered to be a market appropriate rate—an option not permitted by Section 3065.2.

5. *Ford's Denial failed to provide a full explanation of its reasons for its denial because it chose to provide some examples of its position and omit others.*

Ford's Denial rejected Putnam's requested labor rate because "it is materially inaccurate or fraudulent." (Exh. J-6 – 001 [B50].) However, Ford was also required to "provide a full explanation of any and all reasons for the allegation, evidence substantiating the franchisor's position, a copy of all calculations used by the franchisor in determining the franchisor's position, and a proposed adjusted retail labor rate or retail parts rate, as applicable, on the basis of the repair orders submitted by the franchisee or, if applicable, on the basis provided in paragraph (5)." (Cal. Veh. Code, § 3065.2, subd. (d)(1).) Ford's Denial failed to comply with the requirements to provide a *full* explanation of any and all reasons for its allegations and a copy of all calculations used by the franchisor in determining the franchisor's position.

Ford's Denial acknowledged Ford was able to verify some of the repairs in Putnam's analysis. (Exh. J-6 – 001 [B50].) Ford disputed if Putnam was following a consistent pricing practice, the appropriateness of sold hours for repairs, and inconsistency between actual hours and sold hours on the ROs.

However, Ford failed to include any calculations in its Denial except concerning ROs 10239, 10305, 10283, 10287, 10048, and 10251. (Exh. J-6 [B50-B51].) Ford did not support its proposed adjusted retail labor rate with a spreadsheet. (RT Vol. I, 143:1-5 [Becic]; *see also* Exh. J-6 [B50-B51].) Mr. Reibel used some draft spreadsheets but did not use them for a final determination. (RT Vol. I, 143:6-15 [Becic].) Ford did not make an actual calculation to get the \$220 proposed adjusted retail labor rate. (RT Vol. I, 162:24-163:5 [Becic].)

These failures show Ford did not comply with Section 3065.2, subdivision (d)(1) in issuing the Denial because providing examples from Ford's review failed to provide the required "full explanation." Providing only examples in support of Ford's position is inconsistent with the requirement. Ford should

1 have instead provided a spreadsheet analysis in support of its position similar to the spreadsheet provided  
2 by Putnam (*see* Exh. J-3 [B45]) or the spreadsheet prepared by Mr. Walsh (Exh. 23 -001-002 [A81-  
3 A82]).

4 Similarly, Ford failed to provide a copy of all calculations used by the franchisor in determining  
5 the franchisor's position. Ford's use of examples shows it provided some calculations it performed while  
6 omitting others. This is inconsistent with Section 3065.2, subdivision (d) because "all calculations" used  
7 by the franchisor in determining its position (and not only those that support its position) must be  
8 provided with the Denial. (Cal. Veh. Code, § 3065.2, subd. (d)(1).) Mr. Becic admitted Mr. Reibel used  
9 some draft spreadsheets but did not use them for a final determination. (RT Vol. I, 143:6-15 [Becic].)  
10 These spreadsheets should have been provided with Ford's Denial because they were calculations used  
11 to determine Ford's position. Ford's failure to provide spreadsheets from Mr. Reibel shows Ford  
12 violated Section 3065.2, subdivision (d)(1).

13 Moreover, Ford's Denial states its proposed adjusted retail labor rate of \$220.00 per hour is based  
14 on "the most common customer pay rate your documentation shows in repairs where we see what appears  
15 to be valid documentation." (Exh. J-6 – 002 [B51].) This determination is itself both a reason for Ford's  
16 position requiring a full explanation and a calculation used by the franchisor in determining its position.  
17 First, Ford failed to provide a full explanation because the \$220.00 per hour rate was admittedly based  
18 on some subset of repairs in Putnam's submission where Ford agreed there was valid documentation.  
19 Disclosing the subset of repairs which fully explained the \$220.00 per hour rate Ford was proposing was  
20 required by Section 3065.2, subdivision (d)(1).

21 Second, a determination of a "most common" rate is itself a calculation—it is the determination  
22 of a mathematical mode among the submitted repair orders.<sup>4</sup> Ford's determination of a mode for a  
23

24  
25 <sup>4</sup> The mode is the most frequent value of a set of data. (Merriam-Webster Dictionary available at  
26 <https://www.merriam-webster.com/dictionary/mode> (last visited March 27, 2024).) Here, Ford  
27 determined \$220.00 per hour to be the most frequent value for Putnam's customer pay rate where there  
28 was "what appears to be valid documentation." The only way to reach that conclusion is to compare  
(i.e., calculate) the number of instances of certain labor rates in Ford's data set for each discreet labor  
rate. The rate with the most frequent value will have instances of the labor rate mathematically greater  
than other rates.

proposed adjusted retail labor rate fails to comply with Section 3065.2, subdivision (d) in two ways:

(1) The calculation fails to comply with Section 3065.2, subdivision (d)(5) because a franchisor's proposed adjusted retail labor rate cannot be based on a mode calculation and must be based on "the formula to calculate retail labor rate ... as provided in subdivision (a)." (Cal. Veh. Code, § 3065.2, subd. (d)(5).)

(2) Ford failed to provide a list of repairs which it considered and from which it determined the mode to be \$220.00 per hour.<sup>5</sup> Ford could not just reach the conclusion \$220.00 was the most common rate without a list from which to make its mode calculation.

Considering the examples Ford provided in the Denial also shows a failure to comply with Section 3065.2, subdivision (d). Ford's first example considers RO 10239. (Exh. J-6 – 001 [B50].) The Denial agrees the relevant lines on the repair are Line A concerning a diagnostic with 0.5 sold hours and Line D replacing the rear main seal with sold hours of 3.2. (*Id.*) Ford disputes these are consistent with Ford's published service labor time of 3.7 hours. (*Id.*) However, 3.2 plus 0.5 are a total of 3.7 hours. While a warranty repair may not need to provide a customer the option of declining the repair after the diagnostic (because both the diagnostic and repair will be covered by the warranty), in pricing a diagnosis for customer pay repairs, a customer might choose not to proceed with the final repair if the repair price is too high for the customer. (RT Vol. II, 453:19-24 [Kanouse].) As a result, in the customer pay context, Putnam must allocate the 0.5 from the repair to a charge for diagnostic and then the remainder of the time to Line D in performing the repair if the customer agrees to proceed with the repair.

Additionally, when impeached at the hearing, Mr. Kanouse was presented with the Ford time guide printout for the repair described in RO 10239, Line B with code 6701A which showed 3.3 hours (and not 3.7 as alleged in the Denial) as well as an additional 0.5 hours for diagnostic associated with

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<sup>5</sup> The actual labor rate mode in Putnam's submission is \$440 per hour. (See Exh. J-3 [B45] (showing 24 out of 41 repair lines with an effective labor rate of \$440 per hour).) As a result, it is unclear (even after the hearing) what subset of repairs Ford relied on when it suggested the mode of \$220 based on "repairs where [Ford sees] what appears to be valid documentation." (Exh. J-6 – 002 [B51].) A859

6007D (for a total of 3.8).<sup>6</sup> (RT Vol. II, 450:22-452:7 [Kanouse].) The repair order reflects 0.5 sold hours of diagnostic time on Line A and 3.2 sold hours for the repair—within 0.1 of the Ford Guide for the diagnostic and repair. (Exh. J-7 – 095 [B1399]; *see also* RT Vol. II, 453:25-454:15 [Kanouse] (further supporting the customer paid for both repair lines).) The first example Ford relies on in its Denial fails to provide a full explanation of Ford’s reasons for its allegations because Putnam’s pricing in the example is consistent with Ford’s published service labor time.

Ford’s second example concerns RO 10305 and the difference between sold hours of 2.4 and actual hours of 12.74. (Exh. J-6 – 001 [B50].) However, in clear contrast to Ford’s first example, Ford makes no effort to compare the 2.4 sold hours to Ford’s Guide.

The next paragraph proposes review of repairs excluded under the California statutory procedure (RO 10283 and 10287). (Exh. J-6 – 001 [B50].) Ford states, “If we review some of the repairs that are excludable under the California statutory procedure, we see the effective rates are more market appropriate” discussing repairs in RO 10283, Line A and RO 10287. (*Id.*) Ford’s consideration of these excluded repairs is in violation of Section 3065.2, subdivision (c) because these repairs are to be omitted from the franchisor’s calculation of a retail labor rate. (Cal. Veh. Code, § 3065.2, subd. (c) (stating the repairs “shall be omitted” and not that they are “excludable”).) Section 3065.2, subdivision (c) excludes these types of repairs (including the fuel filter replacement) because they are not representative of the type of work necessary in the warranty context and for which a franchisor will reimburse a dealership. These types of repairs predictably have a lower labor rate and require lower technician skill sets than the types of repairs considered to be qualified repairs in Section 3065.2. Ford’s “review” of omitted repairs in the Denial violates the express provisions of Section 3065.2, subdivision (c).

Ford’s next example disputes Putnam’s ability to independently determine a charge to a customer (RO 10048). (Exh. J-6 – 002 [B51].) However, Section 3065.2, subdivision (i)(1) precludes Ford from attempting to influence a franchisee to implement or change its prices for its labor because the franchisee

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<sup>6</sup> Exhibit K further shows the diagnostic and repair from lines A and D on RO 10239 should sum to 3.8 as the factory guide for the described repair and not the 3.7 described in Ford’s Denial nor the 4 hours described in Mr. Kanouse’s testimony. (Exhibit K – 001 [B1162]; *see also* RT Vol. VIII, 1627:25-1630:25 [Kamenetsky].)

1 is seeking compensation or exercising any right pursuant to this section. (Cal. Veh. Code, § 3065.2,  
2 subd. (i)(1).) The customer agreed to (and did) pay \$792.63 for the labor necessary for the repair.  
3 Alleging the customer should have received a further discount is inconsistent with the statutory  
4 prohibition against attempting to influence Putnam's prices to its retail customers—the Denial shows  
5 Ford is attempting to influence Putnam's pricing by suggesting the customer on this RO paid too much  
6 for the repair. Ford's statement concerning pricing was a further effort to influence Putnam's pricing in  
7 addition to Ms. Murphy-Austin's unlawful attempt to influence Putnam's prices for labor. (*See, infra*,  
8 Part I.C.) Ford violates Section 3065.2, subdivision (i)(1) in the same way concerning RO 10251  
9 discussed in the Denial. Ford fails to consider or compare to the applicable Ford factory guide for any  
10 of the repairs after the first example. Ford only references the Ford Guide times when it supports its  
11 position.

12 Ford then directs Putnam to ROs 10206, 10248, 10216, 10204, 10319, and 10362 “and others.”  
13 (Exh. J-6 – 002 [B51].) These references fail to provide a full explanation of Ford's reasons for its  
14 Denial or the calculations Ford used when it determined these ROs were additional examples in support  
15 of its position (in contrast to the calculations included in Ford's examples discussed above). Instead,  
16 Ford broadly claims the “technician hours shown are often twice or more than the customer hours.”

17 Moreover, Section 3065.2, limits the review of ROs to one of two groups for determining a  
18 franchisee's retail labor rate, either (1) the set of ROs as submitted by the franchisee (the original 90-day  
19 set in this case) (Cal. Veh. Code, § 3065.2, subd. (a)) or (2) the set of ROs selected by the franchisor  
20 pursuant to subdivision (d)(5) which may include some subset of the original submission ROs and the  
21 supplemental ROs (here, Ford never selected such a subset but had the statutory option to choose a 90-  
22 day set from the 120 days of ROs) (Cal. Veh. Code, § 3065.2, subd. (d)(5)). Section 3065.2 provides  
23 for no other use for the supplemental ROs. (*See* Cal. Veh. Code, § 3065.2, subd. (d)(5); *see also* Cal.  
24 Veh. Code, § 3065.2, subd. (d)(1) (providing for the proposed adjusted retail labor rate on the basis of  
25 paragraph (5) but only referring to the rate as requested by the franchisee in the foregoing requirements).)

26 Here, Ford references two ROs that are part of the supplemental ROs. (Exh. J-6 – 002 [B51].)  
27 Ford's Denial seeks to rely on the earliest RO of 10048 and the latest RO of 10362. Exh. J-6 – 001-002  
28 [B50-B51].) RO 10048's open date is March 17, 2021. (Exh. J-7 – 491 [B1795].) RO 10362's open date is  
A861

1 date is June 21, 2021. The ROs are separated by a period of 96 days. Both ROs cannot possibly be part  
2 of any statutory set of ROs in any 90-consecutive-day period. (Cal. Veh. Code, § 3065.2, subd.  
3 (a)(1)(B).) Ford's Denial and its arguments at hearing seek to lump all the ROs into a 120-day set and  
4 impermissibly select whatever RO supports Ford's arguments in the moment. This directly interferes  
5 with Putnam's due process right to be able to respond to a concrete set of ROs selected by the franchisor  
6 (or respond to criticisms of its own 90-day set) as required by Section 3065.2.

7 Ford's lumping of ROs into a 120-day set also violates Section 3065.2 because the supplemental  
8 ROs only become relevant to Section 3065.2 if they are used to calculate a proposed adjusted retail labor  
9 rate. (Cal. Veh. Code, § 3065.2, subd. (d)(5).) Ford failed to provide an alternative 90-consecutive-day  
10 period described by Section 3065.2, subdivision (a)(1)(B). Purported errors or alleged discrepancies in  
11 actual and sold hours in the supplemental ROs cannot show Putnam's requested rate of \$436.76 is  
12 materially inaccurate because Putnam's requested rate is based on the original set of ROs (RO 10286 to  
13 RO 10036). (Exh. J-2 [B44]; *see also* Exh. J-3 [B45].)

14 Additionally, Ford relies on the rates being charged in the market by other dealers of any other  
15 brand. (Exh. J-6 – 002 [B51].) However, as described more fully, below (*see, infra*, Part VII.C), the  
16 California legislature specifically replaced any consideration of other factors in determining a reasonable  
17 reimbursement rate with the formula set forth in Section 3065.2. Ford's insistence on relying on  
18 information not relevant to Section 3065.2, subdivision (a) violates Section 3065.2, subdivision (h)(3)  
19 because it attempts to calculate a retail labor rate in a way other than as provided in subdivision (d) (in  
20 (d)(5), referencing the procedure in subdivision (a)).<sup>7</sup> (Cal. Veh. Code, § 3065.2, subd. (h)(3).)

21 Ford disputes the Denial failed to comply with Section 3065.2. (Ford's Brief at 50:13-53:21.)  
22 Ford argues the statute did not require Ford "provide *all* possible evidence. Rather, it need only identify  
23 its reasoning (*e.g.* there is a significant discrepancy between sold hours and actual hours), and evidence  
24 of that reasons (*e.g.* RO 10305 [B1867-68] (12.74 hours actual time, but 2.4 sold hours))." (Ford's Brief  
25

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26  
27 <sup>7</sup> The Denial also references a concern some of the ROs are listed as duplicates. Ford abandoned this  
28 argument at hearing and in its briefing. Ford also failed to provide a full explanation of or identify the  
ROs which allegedly supported this concern.

1 at 17-19.)

2 Ford's argument is inconsistent with Section 3065.2, subdivision (d)(1). Section 3065.2,  
3 subdivision (d)(1) does not just provide a franchisor must "only identify its reasoning"—it instead  
4 requires "a full explanation of any and all reasons for the allegation." (Cal. Veh. Code, § 3065.2, subd.  
5 (d)(1).) Ford would have the Board ignore the statutory requirement of a full explanation associated  
6 with Ford's reasoning. The statutory language shows just providing Ford's reasoning with examples is  
7 insufficient—a full explanation of each reason is required.<sup>8</sup> (*Id.*)

8 Ford further disputes, "Under the plain language of this provision, the franchisor must provide a  
9 copy of calculations 'used' to determine its position. Thus, the requirement to provide calculations turns  
10 on whether such calculations were ultimately "used" by Ford in evaluating its position." (Ford's Brief  
11 at 52:3-5.) Ford claims it is not required to proceed by way of calculations. (*Id.* at 52:5-7.)

12 However, in addition to failing to provide the full explanation of its reasons for Denial discussed  
13 above, Ford violated Section 3065.2, subdivision (d) by not including calculations it actually used in  
14 determining its position as described above. Mr. Becic admitted Mr. Reibel used some draft spreadsheets  
15 but did not use them for a final determination. (RT Vol. I, 143:6-15 [Becic].) These spreadsheets were  
16 still "used by the franchisor in determining the franchisor's position." The statute does not require the  
17 calculation be "ultimately used" only that they be part of the franchisor's process of determining its  
18 position. Vehicle Code section 3065.2 required the spreadsheets be disclosed with the Denial. (Cal.  
19 Veh. Code, § 3065.2, subd. (d)(1).)

20 The spreadsheet prepared by Mr. Walsh was also a calculation Ford failed to provide. (Exh. 23  
21 – 002 [A82]; *see also* RT Vol. II, 409:18-410:7 [Kanouse] (agreeing Mr. Walsh's spreadsheet was a  
22 calculation of an effective labor rate).) Similarly, Ford's determination of a mode in Putnam's retail  
23 labor rate to be \$220.00 based on some subset of ROs was a calculation Ford was required to provide  
24 with its Denial.

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26  
27  
28 <sup>8</sup> Ford also has a further obligation to provide evidence substantiating its position but it must also and  
independently provide a full explanation for its reasoning. (Cal. Veh. Code, § 3065.2, subd. (d)(1).)



**B. Suzanne Heinemann's analysis demonstrates Ford would have been capable of performing an analysis.**

1. *Ms. Heinemann was dependent on Ford employee guidance in preparing her analysis.*

Prior to this protest, Ms. Heinemann had not really looked at repair orders. (RT Vol. V, 904:4-10 [Heinemann].) Prior to this protest Ms. Heinemann had never calculated a retail labor rate. (RT Vol. V, 982:4-9 [Heinemann].) Prior to this protest Ms. Heinemann had never offered an opinion based upon her review of repair orders. (RT Vol. V, 982:20-24 [Heinemann].) Similarly, prior to this protest, Ms. Heinemann did not even know whether a Ford Time Guide existed. (RT Vol. V, 982:25-983:23 [Heinemann].) Ms. Heinemann was unaware a California dealer is required to provide the customer an upfront price before any work is completed. (RT Vol. V, 991:22-992:22 [Heinemann].)

2. *Ms. Heinemann relied on Ford's representation Putnam's sold hours were unreasonably low, but failed to compare Putnam's sold hours to Ford's Guide or any other common time guide.*

At some point Ms. Heinemann became vaguely aware California dealers rely on time guides to provide upfront pricing to service customers. (RT Vol. V, 993:5-994:4 [Heinemann].) Ms. Heinemann also learned Putnam may have been using the Ford Guide, but "there was, I think, some confusion as to which guide Putnam might use in regard to retail work to the extent it was used to set total charges." (RT Vol. V, 996:8-997:4 [Heinemann].) Despite this recently developed knowledge of industry time guide usage, Ms. Heinemann did not attempt to do any comparison of Putnam's sold hours to the Ford Guide or any commonly used third-party time guide. (RT Vol. V, 996:24-997:4 [Heinemann].) Instead, Ms. Heinemann compared the Putnam sold hours to the actual technician hours. This analysis is of little value to the Board's determination of the issues in this protest because it is not possible to generate customer charges based upon actual hours—it is legally impossible in California.

3. *Ford failed to offer testimony from the Ford employee who reviewed the Putnam submission.*

Ford offered testimony from Mr. Becic who admitted he did not know what analysis Mr. Reibel performed. (RT Vol. I, 113:10-18 [Becic] (testifying he would need to speculate in order to say why Mr. Reibel did not do an analysis of Putnam's submission using actual hours and he never discussed

1 such an analysis with Mr. Reibel).) Ms. Heinemann confirmed she had no knowledge of what analysis  
2 Mr. Reibel performed. (RT Vol. V, 998:17-999:3 [Heinemann] (testifying she did not remember Mr.  
3 Reibel's name and did not seek to contact Mr. Reibel instead performing "an independent assessment").)  
4 It was Ford's burden to demonstrate it complied with Section 3065.2—Ford declined to provide the only  
5 two witnesses, Mr. Reibel and Mr. Watson, with direct knowledge of Ford's efforts to comply with  
6 Section 3065.2 when responding to the Submission. Speculative Ford witness testimony about what  
7 Messrs. Reibel and Watson may have done or were incapable of doing is not sufficient to meet Ford's  
8 burden. Ford's argument it was impossible to perform the analysis required by Section 3065.2 is refuted  
9 by the record evidence.

10 4. *A spreadsheet prepared by Bill Walsh shows Ford could and did perform an*  
11 *analysis and calculation of a potential proposed adjusted retail labor rate using*  
12 *actual hours in the submission and supplemental ROs at or around the time of*  
*Ford's Denial.*

13 Ford's argument it could not perform an analysis of Putnam's Submission pursuant to the  
14 requirements of Section 3065.2 fails for at least two important reasons. First, Ford does not calculate  
15 dealer labor rates using actual hours and the industry does not price jobs based upon actual hours.  
16 Second, Ford did perform a calculation using actual hours at or around the time of the Denial.

17 Mr. Walsh prepared a spreadsheet which considered the actual hours in Putnam's supplemental  
18 ROs and calculated a \$173.06 per hour labor rate.<sup>9</sup> (Exh. 23 – 002 [A82]; *see also* RT Vol. II, 409:18-  
19 410:7 [Kanouse] (agreeing Mr. Walsh's spreadsheet was a calculation of an effective labor rate).) When  
20 Mr. Walsh encountered repairs without actual hours, he removed those repairs from his calculation.  
21 (Exh. 23 – 002 [A82] (showing 10319D and 10448B are not included in Mr. Walsh's calculation).)  
22 Ford's claim is also not credible because Mr. Walsh, Ford's North America Warranty Manager at the  
23 time, did a calculation using actual hours and omitting instances where no actual hours were recorded  
24 (albeit for a non-statutory time-period; *see* Cal. Veh. Code, § 3065.2, subd. (d)(5)(B) (requiring the same  
25

26  
27 <sup>9</sup> Dividing instead by Putnam sold hours in Mr. Walsh's spreadsheet calculates a labor rate of \$369.85  
28 per hour (\$23,873.58 divided by 64.55 hours). (Exh. 23 – 002 [A82]; *see also* RT Vol. II, 409:18-  
410:7 [Kanouse].)

1 90-day period as specified in subdivision (a)).

2 Mr. Kanouse's report-out meeting with Mr. Walsh concerning Mr. Walsh's spreadsheet occurred  
3 after the Denial was sent out. By the time Ford provided Mr. Kanouse the repair orders for review, it  
4 was too late to include any of his review in the Denial. (RT Vol. II, 289:21-290:5 [Kanouse].) Mr.  
5 Walsh's late meeting with Mr. Kanouse is not justification for Ford's failure to provide Mr. Walsh's  
6 spreadsheet as a calculation in support of Ford's Denial nor is it justification to "add to, expand,  
7 supplement, or otherwise modify any element of" the Denial. Ford had over 60 days to review and  
8 respond to Putnam's submission and Mr. Walsh's contact email did not change over that period of time.  
9 (RT Vol. II, 497:13-23 [Kanouse].) Moreover, Ford had thirty days after September 27, 2021, (RT Vol.  
10 I, 47:12-16 [Becic] (describing September 27, 2021, as the date Ford received the supplemental ROs))  
11 to issue the Denial. The letter could have been issued after the meeting between Mr. Kanouse and Mr.  
12 Walsh—Ford chose not to do so. Ford could have asked Mr. Walsh to perform his analysis earlier as  
13 well. Ford's belated efforts do no justify its failure to comply with the requirements of Section 3065.2.

14 C. **Ford unlawfully attempted to influence Putnam's pricing to its retail customers in**  
15 **response to the Request.**

16 Ford also failed to comply with Section 3065.2, subdivision (i) when it attempted to influence  
17 Putnam's pricing to its retail customers in response to Putnam's Request. Ms. Murphy-Austin, who did  
18 not review or analyze repair orders for any reason (RT Vol. I, 177:9-11 [Murphy-Austin]) nor review,  
19 analyze, or approve customer repair rates (RT Vol. I, 177:12-14 [Murphy-Austin]), called and met with  
20 Kent Putnam to discuss Putnam's Request. In her words she told Mr. Putnam and Mr. Vasquez she was  
21 "concerned that the customer would be paying an uncompetitive price, obviously not good for the  
22 customer, compared to a neighboring Ford dealer." (RT Vol. I, 190:2-16 [Murphy-Austin].)

23 Ms. Murphy-Austin's communications were attempts to influence a change to Putnam's pricing  
24 of retail repairs in response to the Request, in violation of Section 3065.2, subdivision (i)(1). Similar to  
25 when she told Putnam it was paying its technicians too much and criticized Putnam for driving up  
26 technician wages (RT Vol. I, 216:17-217:21 [Murphy-Austin; RT Vol. V, 1052:16-1053:12 [K.  
27 Putnam]]), her communications were intended to effect change in Putnam's operations beyond Ford's  
28 contractual and statutory authority.

**D. Ford's Denial failed to include any reference to its purported concern over the occurrence of repeating decimals when calculating the ELR of specific repairs.**

Ford did not include this purported concern in the Denial, did not raise this issue at any deposition, did not include this issue in its expert's analysis, and did not even mention this issue in Ford's Prehearing Brief. Ford did not raise this issue until the hearing itself—almost two years after Ford issued its Denial; and approximately one year and nine months from the filing of this protest. If this was ever a basis for Ford's Denial, it was not disclosed to Putnam until the middle of the hearing.

At the hearing, Ford's counsel used the Wolfram Alpha website to calculate several ELR's from individual repairs where the calculation would result in an ELR with a repeating decimal. At most, this exercise demonstrated how easily Ford could have, or perhaps did, calculate an ELR for each of the qualified repairs in the Submission. The Board's decision should not be based on an argument raised for the first time at the hearing. Ford failed to identify this issue in its Prehearing Brief or at any other time prior to the start of the hearing.

**II. THE BOARD SHOULD REJECT FORD'S ARGUMENT THE HOURS GENERATING THE CUSTOMER CHARGES SHOULD BE INTERPRETED AS THE ACTUAL TECHNICIAN HOURS EMPLOYED IN EACH REPAIR.**

The automotive industry does not use actual hours to determine charges to customers. It is unlawful in California to determine customer charges after the completion of a repair. The customer must agree to the price, prior to any work being completed as required by California Business and Professions Code section 9884.9 (a):

(a) The automotive repair dealer shall give to the customer a written estimated price for labor and parts necessary for a specific job, except as provided in subdivision (e). No work shall be done and no charges shall accrue before authorization to proceed is obtained from the customer. No charge shall be made for work done or parts supplied in excess of the estimated price, or the posted price specified in subdivision (e), without the oral or written consent of the customer that shall be obtained at some time after it is determined that the estimated or posted price is insufficient and before the work not estimated or posted is done or the parts not estimated or posted are supplied. Written consent or authorization for an increase in the original estimated or posted price may be provided by electronic mail or facsimile transmission from the customer. The bureau may specify in regulation the procedures to be followed by an automotive repair dealer if an authorization or consent for an increase in the original estimated price is provided by electronic mail or facsimile transmission. If that consent is oral, the dealer shall make a notation on the work order of the date, time, name of person authorizing the additional repairs, and telephone number called, if any, together with a specification of

1 the additional parts and labor and the total additional cost, and shall do either of the  
2 following:

3 (Cal. Bus. & Prof. Code, § 9884.9, subd. (a).)

4 There is no support for the proposition the Legislature intended “those hours generating the  
5 charges” to refer to actual technician hours. Well before the enactment of Section 3065.2, the Legislature  
6 required all dealers to determine customer repair charges upfront—before any work is performed. It  
7 necessarily follows some sort of labor time guide must be used to price customer pay repairs. Most Ford  
8 witnesses agree this is how the industry operates.<sup>10</sup> Similarly, based on his experience, Mr. Korenak has  
9 never relied on actual hours when calculating a labor rate submission and factories have not requested  
10 actual hours be used in his calculations. (RT Vol. VII, 1387:14-1388:18 [Korenak]; *see also* RT Vol.  
11 VI, 1339:13-18 [Stockton] (the motor vehicle repair industry uses billing hours to determine customer-  
12 pay charges over actual technician hours).)

13 None of Kent Putnam’s franchises charge customers for customer pay repairs based on actual  
14 hours. They have never done so. Mr. Putnam was not aware of any franchise owned by someone else  
15 that prices customer pay repairs based on actual hours. (RT Vol. V, 1041:20-1042:8 [K. Putnam].)

16 Nevertheless, Ford argues Putnam’s sold hours are “hypothetical.” (Ford’s Brief at 22:13-16  
17 (citing the testimony of Ms. Heinemann).) Because the use of time guide hours are required to determine  
18 charges to service customers in advance of any work being completed, in that sense they are hypothetical.  
19 They are intended to approximate how much time is required for a specific repair, irrespective of the  
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22 <sup>10</sup> To Mr. Becic’s knowledge, no other California dealer’s labor rate submission has been reviewed by  
23 Ford using actual hours. (RT Vol. I, 153:14-17 [Becic]; RT Vol. I, 161:23-162:6 [Becic].) Similarly,  
24 in Mr. Becic’s experience no California Ford dealer has submitted a labor rate request calculated and  
25 submitted using actual hours instead of sold hours. (RT Vol. I, 162:9-13 [Becic].) Mr. Kanouse  
26 further admitted it was common practice in the automotive industry to price customer-pay work using  
27 a guide and it is general industry custom for customers to receive upfront pricing for customer-pay  
28 repairs before the repair is performed. (RT Vol. II, 360:24-361:1 and 361:24-362:2 [Kanouse].) When  
Mr. Sweis operated his independent shop, he provided customers up-front pricing and would not adjust  
the cost of the job based on the actual hours it required to repair the vehicle. (RT Vol. III, 630:16-25  
[Sweis].) Mr. Sweis agreed it is industry practice to provide up-front pricing and any changes to the  
repair cost must be made in advance of the repair being completed. (RT Vol. III, 631:1-632:2  
[Sweis].)

1 skill and experience of the technician performing the repair. There are a number of third-party hourly  
2 time guides available to dealers' service departments. Each of these guides starts with the factory time  
3 guide and applies a multiple. It is widely understood the factory time guides include guide hours that  
4 are less than those in third-party time guides.

5 The Board's understanding of the common industry practice of using time guides to determine  
6 upfront pricing to service customers is fundamental to determining the Legislature's intent concerning  
7 the language of Section 3065.2 and the "hours that generated those charges." If the Legislature intended  
8 a departure from the common industry practice of using time guides to provide upfront pricing to service  
9 customers, it would have said so.<sup>11</sup>

10 Mr. Stockton's expert testimony further reinforced actual hours should not be used to calculate a  
11 warranty labor reimbursement rate. In Mr. Stockton's experience and review of common repairs with a  
12 comparison of warranty billed hours versus technician hours, billed hours are not the same as technician  
13 hours. (RT Vol. VI, 1200:17-1201:20 [Stockton].) Among the dozens if not hundreds of dealers Mr.  
14 Stockton has consulted, none of them starts with the assumption that billed hours and technician hours  
15 would be the same.<sup>12</sup> (RT Vol. VI, 1201:22-1202:15 [Stockton]; *see also* Exh. 40 – 005 [A799] ("In  
16 consulting for many dozens of dealerships, I have never encountered a dealership whose management  
17 expected billed hours and technician hours to be the same.")) Both in the warranty and customer pay  
18 contexts, billed hours and technician hours are not the same. (RT Vol. VI, 1202:16-1203:17 [Stockton].)

19 Applying Ford's argument that Putnam's labor rate should be determined based on actual hours  
20 is inconsistent with Ford reimbursing Putnam based on its factory guide hours. Mr. Stockton calculated  
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22

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23 <sup>11</sup> Because Section 3065.2, subdivision (a)(2) refers to sold hours and not actual hours when it  
24 references the "total number of hours that generated those charges," all of Ford's arguments that  
25 depend on actual hours are inapplicable to this Protest. For example, Ford's discussion of how much  
26 of a difference there is between actual and sold hours is immaterial when actual hours are not those  
27 hours that generate the charges. (*See* Ford's Brief at 39:3-21.) Similarly, repair orders that do not  
28 contain actual hours do not support Ford's argument because the actual hours are not part of the  
calculation as specified in Section 3065.2, subdivision (a)(2).

<sup>12</sup> Mr. Stockton noted the only exception was in the context of truck dealerships near an interchange  
concerning broken-down commercial vehicles who might bill based on actual time. The exception is  
not relevant here. (RT Vol. VI, 1203:18-1204:18 [Stockton].)



1 the rate per technician hour or actual hour compared to the rates per sold hour for a list of Putnam  
2 warranty repairs. Applying technician hours results in an hourly rate of \$82.01 compared to \$177 for  
3 sold hours. (RT Vol. VI, 1250:17-1252:10 [Stockton]; Exh. 40 – 044-045 [A838-A839].)

4 In the warranty repairs in Tab 3 of Mr. Stockton's report, the average ratio of a technician's actual  
5 hours to the sold hours (the hours based on Ford's factory time guide) is 2.1583 to 1 or more than 2.1  
6 times the number of actual technician hours per sold hour.<sup>13</sup> (RT Vol. VI, 1252:11-1253:5; Exh. 40 –  
7 046 [A840].) Assuming the ratio in the range of ROs Mr. Stockton considered is approximately  
8 consistent over time, applying actual hours to calculate Putnam's labor rate will result in Putnam  
9 receiving approximately half the reimbursement for warranty repairs compared to the same customer  
10 pay repair. (*See id.*) Working backward from the "best box" rate provided by Ms. Heinemann of \$246.52  
11 per hour (*see* RT Vol. V, 973:22-974:21 [Heinemann]), in order to receive the same reimbursement from  
12 Ford as an equivalent customer pay repair, Putnam labor rate would need to be \$532.06 per hour (\$246.52  
13 multiplied by the ratio 2.1583) (RT Vol. VI, 1256:21-1257:20 [Stockton]). The analysis shows for each  
14 hour of Ford factory guide time Ford pays, Putnam Ford technicians are employing actual technician  
15 time that is approximately twice the factory guide time.

16 Ford reimbursing Putnam for warranty labor based on its factory guide is inconsistent with  
17 calculating Putnam's labor rate based on actual technician hours. Applying Ford's flawed methodology  
18 of calculating Putnam's labor rate using actual technician hours, Putnam's labor rate would need to be  
19 approximately twice what Ford calculates based on actual hours to result in Putnam receiving the same  
20 labor reimbursement for a warranty repair compared to a similar customer pay repair.

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23 <sup>13</sup> Counsel for Ford cross-examined Mr. Stockton concerning his Tab 3 calculating the 2.1583  
24 including that the repair orders were not in the same range as Putnam's submission (RO 10029-10271  
25 in Tab 3 compared to RO 10036 to 10286) (RT Vol. VI, 1273:13-1274:16) and outliers (or what  
26 counsel referred to as "aberrant data") in the data set (RT Vol. VI, 1284:10-1294:6 (discussing ROs  
27 10038, 10044, and 10208). However, the range of ROs concerned the ratio of Putnam's actual hours  
28 to sold hours in warranty repairs—the range of repairs is used for purposes of comparison and was not  
required to cover the same ROs in Putnam's submission. Moreover, even removing ROs 10038,  
10044, and 10208 from Mr. Stockton's calculation as outlier would result in a ratio of approximately  
1.7 to 1 (actual hours to sold hours) (RT Vol. VI, 1335:16-1336:8 [Stockton]; *see also* Exh. 40 – 044-  
045 [A838-A839].)



1 III. FORD FAILED TO DEMONSTRATE PUTNAM'S SUBMISSION TO BE MATERIALLY  
2 INACCURATE.

3 A. A disparity between actual hours and sold hours is normal and should be expected—  
4 it does not support finding Putnam's sold hours to be materially inaccurate.

5 There is no reason to expect prospective sold hours to match actual hours. There will be variation  
6 between the initial estimate and the actual time each repair takes to complete. This variation depends on  
7 several factors including the skill and experience of the technician assigned to the repair. The use of  
8 guide hours to determine the price to customers is independent of the specific experience and skill of the  
9 technician completing the repair. The customer is responsible for the agreed to price of the repair  
10 regardless of how long it takes the technician to complete the repair.

11 Mr. Sweis provided an example where a technician could not diagnosis a repair because a chafed  
12 wire was touching a metal bracket behind the steering column cover and causing a fuse to short out when  
13 the vehicle was put in gear. While the technician could not figure it out, Mr. Sweis indicated he "was  
14 able to figure it out in a few minutes." (RT Vol. III, 519:6-19 [Sweis].) This underscores that prices in  
15 the motor vehicle repair industry are not based on actual hours because a customer pays the same price  
16 for a repair regardless of the experience of the technician, as illustrated by Mr. Sweis's example.<sup>14</sup>

17 Most important to the Board's understanding in this protest is the fact that Putnam's use of the  
18 Ford Guide should be expected to result in lower sold hours than actual hours by a significant amount.  
19 All witnesses agreed the Ford Guide provides lower guide hours for repairs than third party commercial  
20 guides.

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24 <sup>14</sup> There is a broad range of skill, experience, training, and resulting actual time between the technician  
25 Mr. Sweis described and his expertise. Regardless of the individual technician, pricing in the vehicle  
26 repair industry ensures the customer does not participate in the circumstances which may affect actual  
27 technician hours. As Mr. Martinez testified, the actual hours on repairs at Putnam Ford also take into  
28 account technicians having to go look for his car, technicians carrying parts to the Barn, and  
technicians moving between the facilities. (RT Vol. III, 713:13-21 [Martinez].) The price to the  
customer is not affected by these additional factors which may require more actual time on a repair  
than originally expected.

1 Mr. Martinez testified the Ford factory guide is “soft” because it provides fewer labor hours than  
2 industry standard guides. (RT Vol. III, 672:19-673:17 [Martinez] (testifying Ford guide provides fewer  
3 hours than All Data, which he considers the industry standard) and 680:21-24 (“confirming he considers  
4 the Ford Guide as “soft”).) Mr. Becic testified Ford’s guide hours are lower than the third-party guides  
5 which apply a multiple to Ford’s Time Guide hours. (RT Vol. I, 117:1-13 [Becic].) Mr. Korenak  
6 testified Ford’s Guide is lower than third-party time guides. RT Vol. VII, 1390:11-1392:6 [Korenak].)  
7 Andrey Kamenetsky testified Ford’s Guide hours are lower than third-party guides because they apply  
8 a multiple to the factory time (RT Vol. VII, 1461:11-23 [Kamenetsky] (explaining the goal of Putnam’s  
9 use of Ford Guide).)

10 Ford offered testimony from Mr. Sweis downplaying the magnitude of the difference between  
11 Ford’s Guide time values and the time values in All Data. (RT Vol. III, 589:20-590:18 [Sweis]  
12 (explaining he expects a difference between guides of between 10% to 20%).) However, Mr. Sweis’  
13 testimony should be viewed with skepticism because his hearing testimony was completely different  
14 from what he testified to in his deposition. (RT Vol. III, 586:11-589:17 [Sweis] (attempting to explain  
15 why he said in his deposition he never used All Data and why he was now testifying at the hearing he  
16 was familiar with the time values of the All Data guide relative to Ford’s Guide).) It is evident between  
17 the time of his deposition and the time of his hearing testimony Mr. Sweis became aware of the  
18 importance to support Ford’s position by minimizing the differential between the Ford Guide and All  
19 Data. Moreover, Mr. Sweis’ hearing testimony that he rarely used All Data to price jobs hardly supports  
20 his basis for knowing anything about the time values of Ford’s Guide compared to All Data or any third-  
21 party commercial Guide.

22 **B. Variations in labor rates for different repairs are normal and should be expected.**

23 It is common for a dealer to show different ELR’s for different repairs. Ford’s proffered  
24 assumption that all ELR’s should be precise to the dollar and exactly the same is not the industry norm.  
25 Ford is using this false premise to create a standard entirely inconsistent with the language of Section  
26 3065.2. Section 3065.2 requires the determination of an average rate. It does not require a dealer  
27 demonstrate the exact and exclusive use of a single hourly rate.

28 ///

1 Mr. Korenak testified in the approximate 1,100 submissions he prepared, he has never seen one  
2 where each individual labor rate was the same. (RT Vol. VII, 1375:2-1376:15 [Korenak] (testifying to  
3 the normal variation) and 1356:14-24 (testifying to the number of labor rate submissions he has worked  
4 on).) Further, the language of the Section 3065.2 presumes there will be variation as evidenced by the  
5 fact it permits the franchisor to expand the relevant time period and select a preferred range for  
6 calculation from the expanded set. Moreover, the Legislature would not have prescribed a specific  
7 formula to determine an *average* if the standard were intended for a dealer to demonstrate a uniform rate  
8 for all repair orders.

9 C. **Ford failed to present reliable evidence Putnam's use of Ford's Guide was**  
10 **materially inaccurate.**

11 Ford uses the Ford factory time guide to reimburse dealers for most warranty repairs. (RT Vol.  
12 I, 147:5-9 [Becic].) The repair times are determined by Ford. Ford contracts technicians to conduct time  
13 studies to determine how much time should be allotted to a repair. (RT Vol. I, 113:9-115:9 [Becic]; *see*  
14 *also* RT Vol. II, 262:10-263:1 [Kanouse].) The use of Ford's own time guide to price customer pay  
15 repairs should be presumed to be reasonable. If Ford had evidence showing Putnam used sold hours that  
16 are less than what Ford had determined to be reasonable, it should have presented this evidence. Ford  
17 should be estopped from arguing the Ford Guide values are unreasonably low when it uses these same  
18 values to reimburse dealers for warranty repairs.

19 Ford's counsel objected to Putnam's introduction of evidence of Ford's Guide hours offered in  
20 response to Ford witnesses' testimony that Putnam's sold hours were unreasonably low. (RT Vol. VII,  
21 1487:22-1490:19.) The Board should understand that if Putnam was in fact using sold hours that were  
22 fewer than Ford's Guide, Ford could have demonstrated this to be the case by offering evidence of its  
23 guide hours—it chose to avoid this evidence and instead offered anecdotal evidence of what the actual  
24 hours *might* be.

25 The record reflects Mr. Becic actually compared Putnam's sold hours to Ford's Guide hours at  
26 the request of counsel. (RT Vol. I, 110:1-112:1 [Becic].) It should be presumed Ford and its counsel  
27 determined the comparison of Putnam's sold hours to the Ford Guide did not support Ford's claim that  
28 Putnam's sold hours were unreasonably low, in this protest where Ford bears the burden. Ha ~~A873~~ ~~been~~

1 permitted to do so, Putnam would have provided evidence showing its sold hours were the same or  
2 similar to Ford's Guide hours.

3 **D. Ford admitted Putnam could rely on Ford's Guide to price customer pay repairs;**  
4 **pricing all repairs using Ford's Guide is consistent with the legislative history.**

5 Mr. Becic confirmed it is an acceptable practice for any Ford dealer to use the Ford Guide to  
6 price customer pay repairs. (RT Vol. I, 116:13-25 [Becic].) Despite this admission, Ford presented no  
7 evidence regarding Putnam's conformity or lack of conformity with the Ford Guide and objected to  
8 Putnam's introduction of this evidence. (RT Vol. VII, 1487:22-1490:19.)

9 In its Brief, Ford claims it presented evidence Putnam did not follow the Ford Guide. (Ford's  
10 Brief at 33:5-10.) However, the record does not support Ford's misstatements. Mr. Besic did not testify  
11 "the sold hours did not match the time guide hours." Mr. Becic actually testified "I would say in most  
12 of the cases we looked at, [Putnam is] not adhering exactly to the Ford time guide's hours." (RT Vol. I,  
13 109:18-110:8 [Becic].) When asked how many comparisons of Putnam's sold hours to Ford guide he  
14 did, he answered "A handful." (RT Vol. I, 110:9-111:20 [Becic].) Not exactly matching Ford guide  
15 hours in a handful of examples, done at the direction of counsel, is hardly reliable evidence of Putnam's  
16 alleged failure to follow Ford's Guide. Again, why didn't Ford produce its guide? Why did Ford choose  
17 not to present evidence of Putnam's sold hours as compared to Ford's Guide hours? By refusing to  
18 present this evidence, Ford failed to demonstrate Putnam's sold hours to be unreasonably low, materially  
19 inaccurate, or fraudulent.

20 Ford's next two examples are from the testimony of Mr. Kanouse. (Ford's Brief at 33:7-10.) The  
21 first involves Mr. Kanouse's assertion that a thermostat pressure check repair was .3 of an hour and that  
22 Putnam did not include any sold hours for line B of repair order 10251. (RT Vol. II, 315:6-16 [Kanouse].)  
23 This was an error by the Putnam service advisor and because there were no sold hours it was not included  
24 as a qualified repair in the Putnam Submission. However, this example fails to show Putnam was not  
25 using the Ford Guide to price jobs—it is merely an example of a service writer error whereby a *single*  
26 *repair line* was not individually priced to the customer.

27 The next example Ford cites from Mr. Kanouse is a brazen misstatement of the record. Ford  
28 claims Mr. Kanouse pointed out a repair where the Putnam sold hours were 3.2 hours and the Ford Guide

Hours were “around 4.” (Ford’s Brief at 33:9-10.) The record actually reflects Mr. Kanouse’s acknowledgment the Putnam sold hours for this repair are 3.7 (after the .5 of an hour diagnostic time is included), while the Ford Guide hours for this repair are 3.8—not 4. (RT Vol. II, 450:22-456:1 [Kanouse].) A discrepancy of .1 of an hour does not establish Putnam failed to use the Ford Time Guide to price customer pay repairs. Moreover, when the customer charges of \$1,662.50 are divided by the precise guide hours of 3.8, an ELR of \$437.50 is the result. (RT Vol II, 455:10-456:4 [Kanouse].) Ford’s claim “[t]he issue of whether a dealer may rely on time guide hours instead of actual, technician hours has been largely rendered moot by the hearing” is not supported by the record.

**E. Ford failed to demonstrate the amounts paid by customers were materially inaccurate.**

Ford does not allege the customer pay amounts are inaccurate. The record reflects the customer charges were actually paid by customers as represented in the Putnam Submission. (Exh. 39 – 001-068 [A727-A794] (the receipts supporting the amounts paid by the customers concerning the qualified ROs).) [Section 3065.2 requires the total customer charges be divided by the hours that generate those charges. Because Ford does not challenge the customer charges, the Board’s decision in this protest rests upon its findings concerning the sold hours Putnam used and whether they are properly considered the hours generating the customer charges within the meaning of Section 3065.2.

**IV. FORD FAILED TO DEMONSTRATE THE SUBMISSION TO BE FRAUDULENT.**

**A. Ford failed to show the Sold Hours on Putnam ROs were determined after the repairs were completed.**

Ford did not offer a single witness to corroborate its assertion Putnam service advisors determined Sold Hours after the repairs were completed.<sup>15</sup> The only percipient witness Ford chose to present, David Martinez, testified Putnam service advisors were instructed to use the Ford Guide to price customer pay repairs and to apply the hourly rate of \$440. (RT Vol. III, 672:13-20 and 679:17-21

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<sup>15</sup> Ms. Heinemann made reference to a Putnam service employee deposition wherein an unidentified witness purportedly testified to entering the sold hours after the fact. This vague and unattributed hearsay testimony should be disregarded. (Ford’s Brief at 22:9-10.)

1 [Martinez].)

2 Mr. Martinez confirmed Putnam was actually advising customers of its \$440 per hour rate when  
3 he testified about the customer complaints he purportedly dealt with. (RT Vol. III, 674:17-675:9 and  
4 702:16-19 [Martinez].) If Putnam was not charging \$440 per hour, why would its service staff continue  
5 to quote an hourly rate of \$440?

6 In his declaration, Mr. Martinez alleged Putnam was manipulating sold hours to show an ELR of  
7 \$440. (Exh. AA – 002, ¶ 10 [B1228].) However, when asked to explain his basis for this statement Mr.  
8 Martinez offered an entirely contrary explanation. Mr. Martinez did not even allege Putnam was  
9 manipulating sold hours to affect the hourly rate. Instead, he explained service advisors consistently  
10 applied the \$440 hourly rate but would sometimes use guide hours higher than Ford's Guide to increase  
11 the total cost to customers in order to pad their commissions. (RT Vol. III, 683:23-684:13 and 686:1-9  
12 [Martinez].) Mr. Martinez's testimony plainly shows he had no knowledge of anyone at Putnam  
13 manipulating the sold hours in an attempt to demonstrate a \$440 hourly rate. It also shows he did not  
14 understand the declaration drafted by Ford's counsel in support of its narrative in this litigation.

15 Mr. Martinez's hearing testimony was consistently inconsistent with the declaration drafted by  
16 Ford's counsel. Mr. Martinez repeatedly confirmed he had no knowledge of Putnam manipulating sold  
17 hours to demonstrate a \$440 hourly rate. For example, at Paragraph 12 of his declaration, Mr. Martinez  
18 alleged Putnam was manipulating sold hours down to show a higher ELR, but at the hearing he testified  
19 service advisors were adjusting the hours up to increase commissions. (RT Vol. III, 696:25-698:10  
20 [Martinez].)

21 The accuracy of Mr. Martinez's declaration was further contradicted by his testimony when  
22 explaining Paragraph 15 of his declaration. Mr. Martinez testified to at least three different versions of  
23 events at hearing. He indicated the technicians threatened Mr. Vasquez and Mr. Martinez they would  
24 quit if the dealership went to a flat rate payment system; then he indicated they were previously paid  
25 based on their skill but said "that is not true either"; and then he indicated the technicians were paid a lot  
26 of money per hour and did not have a lot of certifications to do repairs because Putnam needed more  
27 technicians. (RT Vol. III, 713:10-714:18 [Martinez].)

28 ///

Mr. Martinez also admitted he made a mistake in Paragraph 16 of his declaration. Putnam technicians were always paid based on hours of attendance and not based on hours spent on individual repairs. (RT Vol. III, 716:21-718:8 [Martinez].) Mr. Martinez agreed the information he provided in Paragraph 17 of his declaration had no impact on the effective labor rate the dealership was charging. (RT Vol. III, 722:22-724:10 [Martinez].) Mr. Martinez similarly agreed Paragraph 19 included information that did not have an impact on the effective labor rate the dealership was charging. (RT Vol. III, 724:21-24 [Martinez].) Mr. Martinez agreed again when discussing Paragraph 22 of his declaration he was referring to service advisors manipulating sold hours to get larger commissions (similar to the testimony described above). (RT Vol. III, 734:21-735:5 [Martinez].)

The repeated inconsistencies between Mr. Martinez's declaration and Mr. Martinez's testimony cannot be reconciled. As described during his testimony, "[T]he declaration says one thing, but his testimony to [Administrative Law Judge Wim van Rooyen] says a different thing today." (RT Vol. III, 692:20-21.) The Board should reject Mr. Martinez's declaration as not credible.

**B. Ford's argument the appearance of repeating decimals creates the inference of fraud is outside the reasons asserted in the Denial.**

1. *Ford failed to assert repeating decimals as a reason for its denial of Putnam's requested labor rate and is therefore precluded from relying on them as a matter of law.*

Ford's Denial was required to contain "a full explanation of any and all reasons for the allegation [of material inaccuracy or fraud]" and "a copy of all calculations used by the franchisor in determining the franchisor's position." (Cal. Veh. Code, § 3065.2, subd. (d)(1).) Ford is precluded by law from "add[ing] to, expand[ing], supplement[ing], or otherwise modify[ing] any element of" the Denial without justification. (*Id.*)

Ford argued for the first time at hearing as well as in its post hearing briefing that sold hours were not generating Putnam's charges because dividing the charge to the customer by sold hours on certain lines of certain qualified repair orders resulted in infinitely repeating decimals. (*See, e.g.*, Ford's Brief at 11:9-16 and 36:15-38:23 (claiming the "math does not lie.")) However, Ford failed to state any issue with repeating decimals as a reason for its allegation in the Denial. (*See* Exh. J-6 [B50-B51].) Moreover, the mathematical divisions that underly Ford's repeating decimal argument are unduly



1 “calculations” Ford is using to determine its position; however, Ford did not provide Putnam a copy of  
2 the calculations at any time prior to the hearing. Ford did not even raise this issue in its Prehearing Brief.

3 Ford’s failure to provide proper notice of its reasons for its allegations and a copy of its  
4 calculations violated Vehicle Code section 3065.2, subdivision (d) because the inclusion of the repeating  
5 decimal argument added to, expanded, supplemented, or otherwise modified the elements of: (1)  
6 explanation of any and all reasons for Ford’s allegations and (2) a copy of all calculations used by the  
7 franchisor in determining the franchisor’s position. (Cal. Veh. Code, § 3065.2, subd. (d)(1).) Vehicle  
8 Code section 3065.2, subdivision (d) precludes Ford from relying on a new reason for its allegation for  
9 the first time at hearing. (*Id.*)

10 Ford failed to show “justification” required to add to, expand, supplement, or otherwise modify  
11 its Denial to include the repeating decimal argument as an explanation or calculation in support of its  
12 position. (*See* Cal. Veh. Code, § 3065.2, subd. (d)(1).) Ford received all the ROs associated with each  
13 of the ROs listed in Putnam’s spreadsheet supporting the Submission. (Exh. J-3 [B45]; Exh. J-7 [B1305-  
14 B1830].) Ford could see the sold hours and charges to customers on each line of the spreadsheet. (Exh.  
15 J-3 [B45].) Further, Ford could edit the submitted spreadsheet to show more than two decimal places.  
16 (*See* RT Vol. I, 84:14-85:3 [Becic].) The Submission contained all the information that was necessary  
17 to perform any and all of the calculations belatedly offered at the hearing.

18 As a result, Ford has no legitimate justification for why it did not provide notice of its repeating  
19 decimal argument prior to the hearing. Ford could have, if it wished to rely, calculate and state as an  
20 explanation its repeating decimal argument at any time from August 24, 2021, through October 26, 2021,  
21 when it issued the Denial. Moreover, Ford could have amended its Denial to include this additional  
22 reason in the approximately two years from the issuance of the Denial to the start of the hearing. Ford  
23 chose not to amend its Denial. (Exh. J-6 [B50-B51].) Ford’s desire to ambush Putnam with the repeating  
24 decimal argument at hearing is not a legitimate justification to include this new argument as a stated  
25 reason for Ford’s denial.

26 Ford admits it could have issued a supplemental notification stating “Section 3065.4(b) defines  
27 the scope of the Board’s review and does not limit the scope of review to arguments contained in a  
28 Section 3065.2(d)(1) notification (or supplemental notification)....” (Ford’s Brief at ~~A878~~ 8

(emphasis added).) Ford also could have issued its described supplemental notification anytime from October 27, 2021, (the day after Ford issued the Denial) through September 17, 2023, (the day before the hearing). Ford never did so. Ford cannot justify its failure to provide proper notice for its repeating decimal argument when it could have made the explanation and calculation at any time for a period of over two years. Again, Ford did not even raise this issue in its Prehearing Brief.

2. *The record evidence shows Ford also rounded repeating decimal figures without comment in its Denial and elsewhere.*

Ford further calculated labor rates for individual repairs in the Denial that contained more than two decimals. (Exh. J-6 [B50-B51].) Ford calculated a rate for RO 10239 as follows: “At \$1,662.50 for 3.7 total hours, this customer repair would seem to show an effective labor rate of \$449.32 per hour.” (*Id.*) However, the labor rate as stated by Ford is rounded; the actual calculation is 449 and 12/37 or 449. $\overline{324}$ . (*See id.*)

Similarly, concerning RO 10305, \$1,062.68 divided by 2.4 customer hours is 442 and 47/60 or 442.78 $\overline{3}$ . Ford’s Denial rounds this figure and states: “Based on this the effective rate on this repair would seem to be \$442.78.” (Exh. J-6 [B50].)

Ford failed to raise the issue that individual repair lines showed effective labor rates with repeating decimals as a reason for its denial in its letter denying Putnam’s Request. (Exh. J-6 [B51-B51].) Despite calculating repeating decimals itself, Ford did not raise any issue and instead rounded the figures. (*Id.*)

Similarly, in the spreadsheet Mr. Walsh prepared dividing labor paid by the customer by the A/HRS in Putnam’s repair order, he rounded calculations to the nearest cent. (RT Vol. II, 408:15-409:3 [Kanouse] (showing rounding 87.50 divided by 3.74 to \$23.40 – the division actually calculates to 23.3957219...); *see also* Exh. 23 – 001 [A81].) Mr. Walsh and Mr. Kanouse had no issues with calculating labor rates using actual hours that resulted in repeating decimals. (*See* Exh. 22 – 001 [A70] (Mr. Kanouse agreeing Mr. Walsh’s spreadsheet makes sense); Exh. 23 – 001-002 [A81-A82] (Mr. Walsh’s spreadsheet showing rounded effective labor rates for the majority of the entries).)

Ford’s Denial and Mr. Walsh’s spreadsheet show Ford was aware of the occurrence of repeating decimals at the time of the Denial. Ford knew some of the ELR calculations resulted in repeating

1 calculations but knowingly did not raise the repeating decimal argument Ford now relies on as a basis  
2 for its denial.

3 3. *Small changes in the sold hours or price from an initial estimate can create the*  
4 *repeating decimals Ford relies on for its argument.*

5 The presence of repeating decimals as calculated on individual repair lines in the repairs order  
6 should also be expected because any small variation from the estimate to the final write up can create a  
7 repeating decimal division.

8 For example, as discussed during the hearing, repeating decimals in calculating a labor rate for  
9 an individual repair line can arise when a customer receives a discount for the repair. If a customer is  
10 charged \$300 for 3 sold hours (and 3 actual hours), and receives a \$20 discount, the total charges to the  
11 customer are \$280 and the hours that generated those charges are 3 hours (whether using sold or actual  
12 hours in this example). Calculating a labor rate using Vehicle Code section 3065.2, for such a repair  
13 results in a \$93.33, with the 3 repeating, labor rate.<sup>16</sup> (See RT Vol. II, 364:2-366:21 [Kanouse]; see also  
14 Cal. Veh. Code, § 3065.2, subd. (a)(2) (providing the total charges for labor must be divided by the total  
15 number of hours that generated those charges).)

16 There are two repairs in the submission that included discounts: RO 10048 and 10042. (Exh. J-  
17 3 [B45].) In addition, a dealer may discount a customer-pay repair in the dealer's sole discretion. (RT  
18 Vol. II, 363:24-364:1 [Kanouse].)

19 The dealer may not record a discount but instead negotiate a lower price when discussing the  
20 repair with the customer. Both ways of accounting for the discount can result in labor rates as calculated  
21 on individual repair lines that have a repeating decimal. However, the repeating decimal does not show  
22 the charge to the customer or the total number of hours that generated those charges is somehow  
23

24  
25 <sup>16</sup> Mr. Kanouse attempted to dispute 93.33, with the 3 repeating, would be the labor rate for this  
26 hypothetical repair. (RT Vol. II, 365:1-16.) He suggested the full amount should be billed with the  
27 discount accounted for in an advertising and promotions expense or something similar. (*Id.*)  
28 However, when calculating a labor rate pursuant to Section 3065.2, *total charges* are the relevant  
number (across all ROs in the submission); how a dealership accounts for the discount is not relevant  
to Section 3065.2. (Cal. Veh. Code, § 3065.2, subd. (a)(2).) As a result, \$280 would contribute to the  
overall labor rate when calculated using Vehicle Code section 3065.2 in this example and not \$300.

1 materially inaccurate or otherwise invalid.

2       Additionally, if a dealer prices a repair using the middle of the range provided by a factory guide  
3 but later determines the factory guide hours should be either 0.1 higher or lower, this can result in  
4 repeating decimals for the individual repair lines calculated effective labor rate. The overall price as  
5 estimated to the customer cannot be changed if this is discovered after the specific repair. (Cal. Bus. &  
6 Prof. Code, § 9884.9, subd. (a) (“No charge shall be made for work done or parts supplied in excess of  
7 the estimated price ... without the oral or written consent of the customer that shall be obtained at some  
8 time after it is determined that the estimated or posted price is insufficient and before the work not  
9 estimated or posted is done or the parts not estimated or posted are supplied”).)

10       As discussed as an example during the hearing, a job priced with a factory guide range of 1.5 to  
11 1.7 to be the middle of that range (1.6 hours) would generate a labor estimate of \$704 using a \$440 rate.  
12 (RT Vol. VI, 1216:8-24 [Stockton].) However, if after the job was performed, it is discovered the repair  
13 should have been 1.7 sold hours (the high end of the range), dividing \$704 by 1.7 hours results in an  
14 approximate \$414.11 rate with a repeating decimal with a period of 16;<sup>17</sup> a repeating decimal also results  
15 if the sold hours should be 1.5 (the low end of the range). (RT Vol. VI, 1216:25-1220:7 [Stockton].)

16       As Mr. Stockton described, “this is division and sometimes that is going to be a whole number,  
17 sometimes it is going to be a well-behaved number with one or two decimals, and sometimes it is going  
18 to be a repeating decimal. But obviously it follows, if you change the denominator, or in the example, if  
19 the billed hours, once they are known, are different from the anticipated billed hours when the job is  
20 quoted, then it is going to change the result, and sometimes that gives you a decimal, sometimes it  
21 doesn’t.” (RT Vol. VI, 1219:18-1220:7 [Stockton].)

22       To take an example from the ROs discussed during the hearing, Mr. Kanouse discussed what  
23 factory guide hours should have applied to RO 10239, Lines A and D. Line A documents a diagnosis  
24 related to a customer concern about an oil leak. (Exh. J-3 [B45]; Exh. J-7 – 095 [B1399].) The customer  
25

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26  
27 <sup>17</sup> The repeating decimal is the result of the division of 2/17. The division can be stated rationally as  
28 414 and 2/17. 2 divided by 17 results in a repeating decimal with a period of 17 because “that is how  
decimals and fractions work.” (RT Vol. VI, 1217:22-25 [Stockton].)

1 paid \$220.00 for labor on the repair line for 0.5 sold hours. (*Id.*)

2 RO 10239, Line D documents a replacement of the crankshaft rear main seal. (Exh. J-3 [B45];  
3 Exh. J-7 – 095-096 [B1399-B1400].) The customer paid \$1442.50 for labor on the repair line for 3.2  
4 sold hours. (*Id.*)

5 During the hearing, Mr. Kanouse testified the Ford warranty time allowance for line D of this  
6 repair would be “right around four hours with diagnostics included.” (RT Vol. II, 321:10-13 [Kanouse].)  
7 Mr. Kanouse was impeached with the Ford time guide printout for the repair described in RO 10239 line  
8 B with code 6701A which showed 3.3 hours as well as an additional 0.5 hours for diagnostic associated  
9 with 6007D (for a total of 3.8). (RT Vol. II, 450:22-452:7 [Kanouse].) Applying 3.3 instead of 3.2 sold  
10 hours on Line D would result in an approximate \$437.12 labor rate—even closer to \$440 than applying  
11 the 3.2 listed on the RO.

12 This difference of 3.3 and 3.2 could also account for the occurrence of a repeating decimal.  
13 Adding together the total amount paid for labor in lines A and D (\$1,662.50) by the 3.7 (3.2 plus 0.5)  
14 sold hours between lines A and D reflects a \$449.324 with the 324 repeating rate but dividing by the 3.8  
15 (3.3 plus 0.5) sold hours reflects a \$437.50 (with no repeating decimal) rate. (RT Vol. II, 455:3-456:1  
16 [Kanouse].)

17 The presence of repeating decimals in individual repair lines in Putnam’s submission are not  
18 evidence of material inaccuracy or fraud. Small changes to the sold hours or price to the customer based  
19 on subsequent knowledge of having completed the repair can cause the occurrence of a repeating  
20 decimal.

21 C. **Ford’s claim it would be denied due process if its reasons for Ford’s Denial are**  
22 **limited to those contained in the Denial in the instance of fraud is inconsistent with**  
23 **Ford never amending its Denial prior to the merits hearing.**

24 Ford argues it would violate Ford’s due process rights if it was required to comply with Section  
25 3065.2, subdivision (d) and limited to those reasons for its denial as it stated in its Denial. (Ford’s Brief  
26 at 61:1-64:2.) Ford argues some of its evidence of alleged material inaccuracy or fraud could not be  
27 included in the Denial and so it should have the opportunity to present any arguments, including its  
28 repeating decimal argument, now in support of its allegation the submission was materially inaccurate  
or fraudulent. (*See id.*; *see also id.* at 63:24-64:1 (“Section 3065.2, in conjunction with Section A882.4

and 3066, must be construed to all the Board to consider all evidence presented by Ford which proves Putnam's submission was materially inaccurate or fraudulent or both. Only then will Ford's fundamental due process rights be preserved."))

However, Ford ignores it had a statutory obligation to notify Putnam of its reasons and calculations supporting its denial and the statutory prohibition to not add to or expand to those reasons or calculations without justification. (Cal. Veh. Code, § 3065.2, subd. (d)(1).) Ford cannot argue it has the due process right to ambush Putnam with arguments at hearing without violating Putnam's due process rights. To the extent Ford determined there were arguments it intended to present at the hearing concerning alleged fraud, other analogous contexts support these could not simply be raised for the first time at hearing. Ford's due process rights (as well as Putnam's) would have been served if Ford provided a supplemental notification prior to the hearing. Ford failed to do so.

1. *In other civil contexts, fraud allegations are required to meet a heightened pleading standard.*

In the context of a civil case, California generally only requires pleadings which are plead "with particularity sufficient to acquaint a defendant with the nature, source, and extent of [Plaintiff's] cause of action." (*Doheny Park Terrace Homeowners Assn. Inc. v. Truck Ins. Exchange* (2005) 132 Cal.App.4th 1076, 1099.) In the cause of allegations of fraud (as Ford is alleging here), however, a higher pleading standard is required.

Plaintiffs are required to plead allegations of fraud "with particularity." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 216.) Every element of a cause of action for fraud<sup>18</sup> must be pled factually and specifically. (*Id.*) General and conclusory allegations are insufficient. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645; *see also Glaski v.*

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<sup>18</sup> The elements of fraud are (1) misrepresentation, (2) knowledge of falsity, (3) intent to induce reliance on the misrepresentation, (4) justifiable reliance on the misrepresentation, and (5) resulting damages. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) The elements of fraudulent misrepresentation are (1) representation, (2) falsity, (3) knowledge of falsity, (4) intent to deceive, and (5) reliance and resulting damages. (*Cooper v. Equity Gen. Insurance* (1990) 219 Cal.App.3d 1252, 1262.)

1 *Bank of America, N.A.* (2013) 218 Cal.App.4th 1079, 1090 (the elements of fraud “may not be pleaded  
2 in a general or conclusory fashion).) “It is bad for courts to allow and lawyers to use vague but artful  
3 pleading of fraud simply to get a foot in the courtroom door.” (*Wilhelm v. Pray, Price, Williams &*  
4 *Russell* (1986) 186 Cal.App.3d 1324, 1331 (citing *Hall v. Department of Adoptions* (1975) 47  
5 Cal.App.3d 898, 904).)

6 Consideration of the heightened pleading standard for fraud in civil cases is relevant to Section  
7 3065.2 because Section 3065.2 allows a franchisor to allege a requested rate is fraudulent. (Cal. Veh.  
8 Code, § 3065.2, subd. (d)(1).) However, the fraud allegations in the franchisor’s denial must similarly  
9 be stated with particularity, including “a full explanation of any and all reasons for the allegation,  
10 evidence substantiating the franchisor’s position, a copy of all calculations used by the franchisor in  
11 determining the franchisor’s position....” (*Id.*)

12 It is no more a violation of due process to require a plaintiff meet a heightened pleading standard  
13 in a civil case than it is to require Ford to comply with its statutory obligations if it alleges Putnam’s  
14 requested rate is fraudulent. Ford notifying Putnam it was retaining its right to argue the requested rate  
15 was fraudulent without the specific reasons for the position is akin to the general or conclusory  
16 allegations or “artful pleading” of fraud precluded in any California civil action. (*Lazar, supra*, 12  
17 Cal.4th at p. 645; *Glaski, supra*, 218 Cal.App.4th at p. 1090; *Wilhelm, supra*, 186 Cal.App.3d at p. 1331.)

18 2. *In other proceedings before the Board, including termination proceedings,*  
19 *franchisors have properly been limited to the allegations within the four corners*  
20 *of their operative and statutorily required notice.*

21 Other statutes relevant to the Board’s protest jurisdiction also properly restrict a franchisor’s  
22 ability to raise new arguments at hearing where the franchisor was previously required to issue a statutory  
23 notice. For example, Vehicle Code section 3060 requires a franchisor to issue a written notice of  
24 termination (“NOT”) prior to any proposed termination of a new motor vehicle franchise. (Cal. Veh.  
25 Code, § 3060, subd. (a).) The NOT must set “forth the specific grounds for termination or refusal to  
26 continue.” (*Id.* at subd. (a)(1)(A); *see also* subdivision (a)(1)(B).)

27 California courts have interpreted this language to limit a franchisor to those specific reasons for  
28 termination in the NOT and the franchisor could not later raise reasons for termination not contained in  
the NOT to show purported good cause for termination. “The Vehicle Code unambiguously requires



1 that notice be given of the *specific grounds* for termination of a franchise. When appellant cited to  
2 particular provisions of the agreement as those grounds, it limited its position to those stated grounds.  
3 To permit a franchisor to later raise additional unspecified grounds at the hearing would be to deny the  
4 franchisee the notice prior to hearing guaranteed under the statute; such denial infringes on the  
5 franchisee's right to procedural due process and cannot be allowed." (*American Isuzu Motors, Inc. v.*  
6 *New Motor Vehicle Bd.* (1986) 186 Cal.App.3d 464, 477 ("Isuzu").)

7 Similarly, "A franchisor may not assert 'good cause' for a franchise termination at the hearing  
8 on any ground not asserted in its notice of termination." (*British Motor Car Distributors, Ltd. v. New*  
9 *Motor Vehicle Bd.* (1987) 194 Cal.App.3d 81, 91 ("British Motor Car") (citing *Isuzu*).) In the *British*  
10 *Motor Car* case, the manufacturer communicated only that "we do not intend to renew your Agreement  
11 and hereby notify you that your termination will be effective 30 days from receipt of this letter." (*Id.* at  
12 p. 86.) "It was undisputed that Maserati's notice to British Motors stated no reasons for its action." (*Id.*  
13 at pp. 90-91.) "Maserati's failure to comply with the notice requirements of section 3060 subd. (a) was  
14 itself sufficient to establish adequate grounds for upholding British Motors' protest and sustaining the  
15 decision of the Board."<sup>19</sup> (*Id.* at p. 91.)

16 Compared to Vehicle Code section 3060 subdivision (a), Section 3065.2, subdivision (d) is even  
17 more specific in limiting a franchisor to arguments raised in its statutory notice. In section 3060,

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19 <sup>19</sup> Ford's Brief cites to *Subaru of Am., Inc. v. Putnam Auto., Inc.* (2021) 60 Cal. App. 5th 829, 833 for  
20 the position that the court there permitted the manufacturer to raise additional grounds in the litigation  
21 beyond those in the termination notice. (Ford's Brief at 54: fn. 35.) However, the *Subaru of Am., Inc.*  
22 case Ford cites concerned review of a court's judgment confirming an arbitration award. (See *Subaru*  
23 *of Am., Inc., supra*, 60 Cal.App.5th at p. 833.) As a result, the standard of review applicable in that  
24 case was incomparable to the standard of review *Isuzu*, *British Motor Car*, or here. There, regardless  
25 of whether the arbitrator correctly applied the law, Putnam was required to show it was one of those  
26 "limited and exceptional circumstances justifying judicial review of an arbitrator's decision" to protect  
27 a party's statutory rights—a very high bar set in instances of courts reviewing an arbitrator's decision.  
28 (*Id.* at p. 852.) The same standard does not apply here. Moreover, the court of appeal in *Subaru of*  
*Am., Inc.* reached its decision based on "the parties had engaged in 'extensive back-and-forth ...  
regarding adequacy of the San Francisco Downtown service facility to accommodate customers in the  
market area,' which meant that Putnam already had actual notice of the reasons for the termination."  
Here, Putnam did not have actual notice of Ford's additional reasons for its denial prior to the hearing.  
Ford raised for the first time at hearing arguments it did not raise in the Denial or its Pre-Hearing  
Briefing, including but not limited to Ford's repeating decimal argument.

subdivision (a), the language “specific grounds for termination” was enough to limit a franchisor to only those grounds in its NOT. (Cal. Veh. Code, § 3060, subd. (a)(1)(A); *see also Isuzu, supra*, 186 Cal.App.3d at p. 477 and *British Motor Car, supra*, 194 Cal.App.3d at pp. 90-91.) Vehicle Code section 3065.2, subdivision (d)(1) specifies a franchisor must provide “a full explanation of any and all reasons for the allegation, evidence substantiating the franchisor’s position, [and] a copy of all calculations used by the franchisor in determining the franchisor’s position...” in its notification. (Cal. Veh. Code, § 3065.2, subd. (d)(1).) Section 3065.2, subdivision (d)(1) is even more specific in requiring a franchisor’s grounds for its denial than Section 3060’s requirements for specific grounds for a notice of termination. Moreover, Section 3065.2, subdivision (d)(1) specifically prohibits amendments to the notification “without justification.” (Cal. Veh. Code, § 3065.2, subd. (d)(1).)

Ford should be limited to those reasons for its denial specified in the Denial as a franchisor would be limited to its reasons for a proposed termination in its NOT. Similar to the NOT procedure, “[t]o permit a franchisor to later raise additional unspecified grounds at the hearing would be to deny the franchisee the notice prior to hearing guaranteed under the statute; such denial infringes on the franchisee’s right to procedural due process and cannot be allowed.” (*Isuzu, supra*, 186 Cal.App.3d at p. 477.)

3. *To the extent Ford is permitted to rely on its repeating decimal argument, Putnam should be permitted to rely on evidence of Ford’s Guide hours.*

Putnam attempted to introduce copies of Ford’s factory time guide during the hearing. (RT Vol. VII, 1487:22-1490:19.) Ford objected and Administrative Law Judge van Rooyen sustained Ford’s objection to introducing the documents because they were not designated as an exhibit prior to the hearing. (*Id.*)

However, as shown above, Putnam was not on notice Ford would (1) rely on its repeating decimal argument, (2) dispute in general without specifics that Ford’s time guide hours were allegedly not equivalent to or approximate to Putnam’s sold hours, or (3) rely on similar reasons for denial not contained in Ford’s Denial. To the extent the Board allows Ford to rely on reasons and calculations for its denial outside the four corners of its Denial, Putnam should have the due process right to respond to those additional reasons and calculations by reference to Ford’s factory guide hours applicable to the

1 qualified repairs.

2 The documents are printouts from Ford's *own* factory guide. To the extent Ford is claiming  
3 Putnam's sold hours are not in conformity with any of Ford's factory guide hours, Ford had the burden  
4 to introduce proof of such a claim. Proof of Ford's claim cannot reasonably be resolved without  
5 reference to the applicable Ford factory guide hours. Copies of applicable Ford factory guide hours were  
6 produced in discovery in this Protest and are Bates labeled KPA 001387-001534.<sup>20</sup> If Ford's arguments  
7 are not rejected as failing to conform to Vehicle Code section 3065.2, subdivision (d)'s requirements,  
8 the record should be reopened to admit the applicable Ford factory time guide hours.

9 V. THE "BARN" ISSUE IS A WELL-ORCHESTRATED DISTRACTION.

10 A. **The question of whether Ford is required to reimburse Putnam for warranty**  
11 **repairs completed at the Barn is not a determination within the Board's**  
**jurisdiction in this protest.**

12 Ford persists in its misleading characterization of the actual language of Section 3065.2 by  
13 continuing to claim a qualified repair is one that would be payable by Ford as opposed to the statutory  
14 language "...work that was performed outside of the period of the manufacturer's warranty and paid for  
15 by the customer, but that would have been covered by the manufacturer's warranty if the work had been  
16 required and performed during the period of warranty." Repairs may be covered by warranty but not  
17 subject to dealer reimbursement by the manufacturer. This is the very reason why Section 3065 provides  
18 franchisee's the right to challenge a manufacturer's denial of payment for warranty work performed.  
19 (*See* Cal. Veh. Code, § 3065.) The issue of whether Ford is entitled to charge-back warranty payments  
20 for repairs performed at the Barn is exclusively before the Board's jurisdiction in PR-2826-23—this  
21 issue should not be decided in this matter because the Board and OAH do not have jurisdiction over that  
22 issue in the instant protest.

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23  
24  
25 <sup>20</sup> Ford disputed reference to its own time guide was a simple process. (*See* RT Vol. VII, 1488:19-  
26 1489:1.) However, during the examination of Mr. Kanouse, it was made clear the applicable repair he  
27 testified to on direct as having a time guide of 4.0 hours actually had a total of 3.8 hours (0.5 for  
28 diagnostic and 3.3 for the repair) as compared to 3.7 hours reflected on the RO (0.5 diagnostic on Line  
A and 3.2 for the repair on Line B). (RT Vol. II, 450:22-452:7 [Kanouse]; Exh. J-7 – 095 [B1399]  
(RO 10239).)

1 In addition, the location of the repairs contained in the Submission is irrelevant to the Board's  
2 determination because Vehicle Code section 3065.2, subdivision (j) provides for the type of repairs  
3 subject to a Section 3065.2 submission and not whether those repairs would have been paid for by the  
4 franchisor if they had been warranty repairs. Subdivision (j) describes repairs outside the period of  
5 warranty, paid for by the customer, but "would have been covered by a manufacturer's warranty if the  
6 work had been required and performed during the period of warranty." (Cal. Veh. Code, § 3065.2, subd.  
7 (j).) The definition is framed from the perspective of the customer and whether the work would have  
8 been covered not if the work would have been subject to reimbursement from the franchisor.

9 Reading subdivision (j) in the way suggested by Ford would impermissibly allow franchisors to  
10 apply requirements from their warranty manuals over and in addition to the requirements of Section  
11 3065.2 when responding to a franchisee's Section 3065.2 request. For example, Ford's argument also  
12 implies Section 1.3.04 of its Warranty and Policy Manual must be met to consider a repair order a  
13 qualified repair order.<sup>21</sup> (Exh. A – 013 [B953].) Ford's argument implies the same result for the whole  
14 of Ford's Warranty and Policy Manual because if the repair must be subject to reimbursement from the  
15 franchisor to be considered a qualified repair order under subdivision (j), including each part of Ford's  
16 manual especially Section 5. (*See, generally*, Exh. A – 001-202 [B941-B1142] (Section 5 is titled "Labor  
17 Reimbursement Policies" and is contained on pages 148-160 [B1088-1100] generally providing  
18 limitations on when and how much Ford will reimburse a franchisee).) Ford's argument should be  
19 rejected. Vehicle Code section 3065.2, subdivision (j) defines the *type* of repair order that is considered  
20 a "qualified repair order" and does not base the definition on whether the repair would be subject to  
21 reimbursement.

22 In addition, should the Board adopt an order declaring Putnam's labor rate to be in excess of  
23 \$220 per hour, Ford would have the opportunity to argue it should be entitled to refuse payment based  
24 upon its claim warranty repairs completed at the Barn are not subject to payment. This issue would then  
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26  
27 <sup>21</sup> Despite Mr. Kanouse testifying, at the time of Putnam's Request, the requirements for tracking of  
28 technician time for warranty reimbursement were more than what a dealer might track for customer-  
pay work. (RT Vol. II, 439:1-9 [Kanouse].)

1 be properly before the court where any such action might be filed.

2 **B. Ford representatives visited the Barn location routinely prior to this litigation.**

3 Ford misplaces the significance of Putnam's inability to pinpoint to a precise date it began  
4 conducting Ford repairs in the Barn. Putnam conceded in its Opening Brief that Ford repairs were  
5 conducted at the Barn at least in June 2022. If the time Putnam started repairs at the Barn was actually  
6 critical to Ford's presentation of evidence in this matter, it would be expected Ford would have contacted  
7 Mr. Sweis' predecessor, Vincent Demico, who according to Mr. Sweis, routinely advised Putnam service  
8 technicians at the Barn location, prior to Mr. Sweis's arrival. (RT Vol. III, 605:19-22 [Sweis].) Mr.  
9 Sweis agreed Putnam was not concealing its use of the Barn for Ford service. (RT Vol. III, 607:4-8  
10 [Sweis] (Putnam's service manager drove Mr. Sweis and Mr. Demico to the Barn location).) Moreover,  
11 Mr. Sweis confirmed Ford documents would exist to show visits to the Putnam service department. (RT  
12 Vol. III, 607:9-608:17 [Sweis].)

13 Ford relies on the Barn issue as a straw man argument to suggest the whole of the Putnam  
14 submission should be deemed unreliable and materially inaccurate or fraudulent. However, these two  
15 issues should be viewed separately. Pursuant to the evidentiary sanction levied against Putnam for its  
16 failure to timely produce a report showing the Barn was in use by at least July 2021, Putnam is precluded  
17 from arguing the location of any repair in the Submission.<sup>22</sup> Pursuant to Administrative Law Judge van  
18 Rooyen's order, Putnam does not offer any such arguments. Instead, Putnam argues the Judge's ruling  
19 on this discovery issue should not color the consideration of Putnam's actual submission and the  
20 application of Section 3065.2.

21 **C. Ford's Dealer Agreement fails to govern the location where customer pay repairs**  
22 **are performed.**

23 Ford argues repairs performed at the unauthorized Barn location are not qualified repairs because  
24 Ford's warranty manual and dealer agreement do not allow for such repairs to occur unless at an  
25 approved location. (Ford's Brief at 47:10-12.) However, both Ford's warranty manual and dealer  
26

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27  
28 <sup>22</sup> Putnam conceded in its Prehearing brief it began using the Barn in early June 2021.

1 agreement do not govern the location where customer pay repairs, the type of repairs considered in this  
2 protest, occur.

3 Ford's Warranty and Policy Manual provides, "Warranty repairs must be performed at an  
4 authorized Ford or Lincoln dealership." (RT Vol. II, 287:19-25; Exh. A – 006 [B946].) However, the  
5 provisions of Ford's Warranty and Policy Manual apply only to (1) warranty repairs, (2) Ford/Lincoln  
6 Protect repairs, (3) In-transit loss and damage claims, (4) Policy repairs, (5) Customer Satisfaction  
7 repairs, (6) After-Warranty Assistance repairs, and (7) recall repairs. (Exh. A – 004 [B944].)

8 Mr. Kanouse admitted without reservation that warranty repairs, in-transit loss and damages  
9 claims, policy repairs, customer satisfaction repairs, and recall repairs are not customer pay repairs. (RT  
10 Vol. II, 379:15-380:1 [Kanouse].) Ford/Lincoln Protect repairs are extended service plan repairs  
11 excluded from consideration in this Protest by Vehicle Code section 3065.2, subdivision (c)(11). (Cal.  
12 Veh. Code, § 3065.2, subd. (c)(11) (excluding repairs for service contract providers).) After-Warranty  
13 Assistance repairs include repairs for which Ford will pay as a warranty claim or portions thereof (RT  
14 Vol. II, 380:11-23 [Kanouse]) and are therefore excluded from consideration in this Protest by Vehicle  
15 Code section 3065.2, subdivision (c)(10). (Cal. Veh. Code, § 3065.2, subd. (c)(10) (excluding  
16 manufacturer approved goodwill or policy repairs).) As a result, none of the categories of repairs  
17 described as covered by Ford's Warranty and Policy Manual are at issue in this Protest and the provision  
18 of the manual do not apply to customer pay repairs.

19 Ford cites Ms. Murphy-Austin and Ms. Swann to support its suggestion that "Putnam is, and has  
20 always been, precluded from conducting any dealership operations at any facilities other than those  
21 authorized by its SSA including vehicle and parts sales, warranty service, customer-pay service, in short,  
22 all dealership operations." (Ford's Brief at 48:8-11.) However, neither witness could identify a  
23 provision of the Ford Sales and Service Agreement in support of the position. (RT Vol. I, 185:6-9 (Ms.  
24 Murphy-Austin agreeing the information she testified to would be in the dealer sales and service  
25 agreement; however, not identifying such a provision in her testimony); RT Vol. IV, 820:17-821:7 (Ms.  
26 Swann testifying she had seen the requirement a Ford dealer cannot do customer-pay work anywhere  
27 else other than its authorized location in the sales and service agreement but she could not identify  
28 where).) The parties deferred further discussion of whether the sales and service agreement is a

1 provision precluding customer pay repairs from an unauthorized location until the post-hearing briefing.  
2 (*See* RT Vol. IV, 826:10-827:22.)

3 In its briefing, Ford relies on paragraph 5(c) of the sales and service agreement to support its  
4 position. (Ford's Brief at 47:23-48:11.) However, paragraph 5(c) states, Putnam

5 shall not move or substantially modify or change the usage of any of the DEALERSHIP  
6 LOCATION or FACILITIES **for COMPANY PRODUCTS**, nor shall the Dealer or any  
7 person named in subparagraphs F(i) and F(ii) hereof directly or indirectly establish or  
8 operate in whole or in part any other locations or facilities for the sale or service **of**  
**COMPANY PRODUCTS** or the sale of used vehicles without the prior written consent  
of the Company.

9 (Exh. J-1 – 021 [B21] (emphasis added).)

10 The provision restricts modifying or changing the DEALERSHIP LOCATION or FACILITIES  
11 but limits these terms to those “for COMPANY PRODUCTS.” (*Id.*) COMPANY PRODUCTS could  
12 have been defined to mean any Ford branded vehicle, however, the definition Ford selected is instead:

13 (1) **new** passenger cars

14 (2) **new** trucks and chassis, excluding all trucks and chassis of series 850 or higher designations,  
15 and

16 (3) **parts and accessories** therefor

17 (Exh. J-1 – 014 [B14] (emphasis added).) The definition limits COMPANY PRODUCTS to **new** cars  
18 or trucks. (*Id.*)

19 None of the vehicles receiving qualified customer pay repairs in this proceeding can be  
20 considered new cars or trucks. For example, RO 10277, the first RO listed in Exhibit J-3, concerns a  
21 2005 Ford F-150 with approximately 153,000 miles. (Exh. J-7 – 021 [B1325].) The vehicle is not a  
22 COMPANY PRODUCT as defined in the sales and service agreement. Similarly, RO 10259, the second  
23 RO listed in Exhibit J-3, concerns a 2012 Ford Focus with approximately 98,000 miles. (Exh. J-7 – 048  
24 [B1352].) The pattern continues.<sup>23</sup> None of the vehicles at issue are “new passenger cars” or “new  
25 trucks and chassis” and cannot be considered COMPANY PRODUCTS.

26 \_\_\_\_\_  
27  
28 <sup>23</sup> To take just one more example, RO 10239 concerns a 2004 Ford Focus with over a quarter million  
miles. (Exh. J-7 – 095 [B1399].)



1 The provision precluding “directly or indirectly establish[ing] or operat[ing] in whole or in part  
2 any other locations or facilities for the sale or service of COMPANY PRODUCTS” is also limited by  
3 the same definition. The vehicles at issue are not COMPANY PRODUCTS and limitations on the  
4 locations or facilities for the sale or service of COMPANY PRODUCTS does not apply.

5 Finally, the provision independently precluding the “sale of used vehicles without the prior  
6 written consent of the Company” further supports the term COMPANY PRODUCTS does not cover  
7 used vehicles. If it did, it would be redundant with the phrase “the sale ... of COMPANY PRODUCTS”  
8 just before it in paragraph 5(c).

9 Because the dealer agreement prohibits the move, modification, change of usage, establishment,  
10 or operation of any other location for COMPANY PRODUCTS – meaning new Ford vehicles – the  
11 provision does not apply to the used vehicles that are repaired in the qualified repairs relevant in this  
12 Protest. Paragraph 5(c) further precludes the sale of used vehicles at any other location or facilities but  
13 is *silent* as to the service of used vehicles. The sales and service agreement does not govern the location  
14 where customer pay repairs are permitted.

15 In addition, the Barn location was not branded as a Ford facility and was not open to the public  
16 or “customer facing.” Putnam service customers conducted all Ford franchise business at the authorized  
17 location. This included pick up and drop off of vehicles as well as making payment. (RT Vol. V,  
18 1026:23-1027:11 [K. Putnam] (describing customers do not visit the Barn and it is not branded with Ford  
19 elements).) Ford did not take issue with this practice until this litigation was initiated.

20 VI. FORD’S BRIEF CONTAINS NUMEROUS MISSTATEMENTS OF THE RECORD.

21 A. **Ford claims Putnam manipulated the sold hours to reach a rate near \$440.**

22 In support of this misstatement Ford offers seven categories for consideration. However, Ford’s  
23 arguments are unsupported by incorrect, incomplete, or misleading citations to the record.

24 **Category One:** In the first category, Ford incorrectly asserts Putnam admits to “tinkering” with  
25 the repair orders. (Ford’s Brief at 35:15.) Ford misstates the actual testimony on this subject. Putnam  
26 witnesses testified they backed into the rate to be charged customers, \$440 per hour, not that repair orders  
27 were manipulated to demonstrate a \$440 hourly rate. (RT Vol. V, 1044:2-19 [K. Putnam]; RT Vol. VII,  
28 1469:7-15 [Kamenetsky].)

1 Similarly, Ford's citations to Mr. Martinez's testimony are simply wrong. (Ford's Brief at 36:6-  
2 14.) Mr. Martinez consistently testified Putnam service advisors charged a \$440 hourly rate and that he  
3 disagreed with the practice. (*See* RT Vol. III, 674:17-675:9 [Martinez]; *see also* RT Vol. III, 679:17-21  
4 and 683:23-684:13 [Martinez].) This is contrary to the declaration Ford drafted for Mr. Martinez's  
5 signature, which, not surprisingly, is consistent with Ford's narrative in this case. (*See, supra*, Part  
6 IV.A.) Instead, Mr. Martinez testified service advisors used higher guide hours in an effort to secure  
7 higher commissions—he never testified different guides were used to demonstrate a \$440 hourly rate.  
8 (*See id.*; *see also* RT Vol. III, 696:25-698:10 [Martinez].)

9 **Category Two:** Ford next argues the repeating decimals from a handful of repairs proves rates  
10 are fake. (Ford's Brief at 36:15.) Ford did not raise this concern in the Denial. It did not preview this  
11 concern in its Prehearing Brief, and it went completely unaddressed in its Expert's report. Protestant  
12 was denied a fair opportunity to investigate this issue and adequately prepare for the hearing. (*See,*  
13 *supra*, Part IV.B.) The Board should not consider this evidence because of the actual prejudice to  
14 Protestant resulting from Ford's failure to raise this issue prior to hearing. (*See, supra*, Part IV.C.2 and  
15 3.) However, even if the Board does consider this evidence the significance is of little weight.

16 Any change in the values of the repair orders is likely to result in repeating decimals. (*See, supra,*  
17 Part IV.B.3.) The record is clear that Putnam cannot change a repair price quoted to a customer. (*See,*  
18 *e.g.*, RT Vol. VII, 1468:5-19 [Kamenetsky]; *see also* Cal. Bus. & Prof. Code, § 9884.9, subd. (a).) If the  
19 price of the parts changes from the time of the estimate to the time of the repair, the total quoted price  
20 must remain the same. Mr. Kamenetsky attempted to explain this at hearing, but he lacked the specific  
21 knowledge to provide more meaningful testimony on this subject. (RT Vol. VII, 1598:22-1601:8  
22 [Kamenetsky].) Again, had Protestant been aware of this issue prior to the hearing, it would have had  
23 an opportunity to prepare a former or current Putnam Service Manager to provide testimony on this  
24 subject.

25 In addition, there is a human interaction in the writing of the repair order estimates. There are  
26 errors that occur. There is sometimes a negotiation in regard to the final price. Despite Mr. Kanouse's  
27 assumptions (*see* RT Vol. II, 365:10-16 and 492:5-11 [Kanouse]), the Service Writers can apply  
28 discounts without entering a discount in the CDK system.

1       **Category Three:** Ford argues the discrepancy between the sold hours and the actual hours prove  
2 the sold hours are artificial. (Ford’s Brief at 38:24-25.) The record is replete with consensus testimony  
3 that Ford’s Guide hours are lower than those used in commercial guides. When Putnam began using the  
4 Ford Guide hours it was expected there would be a divergence between the actual hours of repairs  
5 compared to the sold hours. As Mr. Becic testified, Ford’s guide hours are lower than the third-party  
6 guides which apply a multiple to Ford’s Time Guide hours. (RT Vol. I, 117:1-13 [Becic]; *see also* RT  
7 Vol. VII, 1390:11-1392:2 [Korenak] (providing similar testimony); RT Vol. VII, 1461:11-23  
8 [Kamenetsky] (describing third-party time guide multiply the factory rate resulting in a diluted effective  
9 labor rate and explaining the goal of Putnam’s use of Ford Guide).) Putnam’s actual hours being greater  
10 than the sold hours is entirely consistent with the use of Ford’s lower guide hours.

11       Further, the actual hours bear no relationship to the cost of any repair. The repair is priced upfront  
12 as required by California law. (Cal. Bus. & Prof. Code, § 9884.9, subd. (a).) The price the customer  
13 pays is entirely independent of the actual hours it takes to complete the repair.

14       Ford’s statement “once the repair was completed the technician manually change to sold hours  
15 to be much lower in order to give the appearance of a higher hourly rate (citation omitted),” is brazenly  
16 false. (*See* Ford’s Brief at 39:22-25.) The testimony Ford cites involves Mr. Kamenetsky theorizing  
17 that the technician may have adjusted the labor charge to account for a difference in the parts cost—he  
18 did not testify about any change to the sold hours. (RT Vol. VII, 1600:11-1601:8 [Kamenetsky].)

19       **Category Four:** Ford alleges the repairs could not have been completed in the sold time.  
20 (Ford’s Brief at 40:4.) Ford consistently argues Putnam did not apply the Ford Guide hours, but this  
21 begs the question *why did Ford decide it would not put evidence of its actual guide hours before the*  
22 *Board?* Instead, Ford offered the testimony of Mr. Sweis questioning how long he believed a repair  
23 would take to complete. Ford uses the example RO 10049 showing actual charges to the customer of  
24 \$4,654.89 based on 10.6 sold hours (Ford’s Brief at 40:6-11.) Ford then relies on Mr. Sweis’ opinion  
25 that such a repair would have taken at least 17 hours to complete. Reliable evidence would have included  
26 the Ford Time Guide hours for this specific repair as determined by Ford.

27       The answer to the question for why Ford would rely on the opinion of Mr. Sweis instead of its  
28 own Time Guide is obvious—Ford recognized the Putnam sold hours of 10.6 to be consistent with its

1 Guide hours for this repair. In rebuttal to Mr. Sweis' testimony, Putnam attempted to present evidence  
2 showing the Ford Factory time for repairs, but was denied the opportunity to do so. (RT Vol. VII,  
3 1487:24—1490:19.)

4 **Category Five:** Ford argues ROs lacking actual technician hours made it impossible for Ford to  
5 calculate a labor rate based upon actual technician hours. (Ford's Brief at 41:3.) Ford points to five ROs  
6 that contained sold hours but were missing actual technician hours.<sup>24</sup> While it is correct these ROs did  
7 not show actual technician hours, the significance of this is not relevant. There is no merit to Ford's  
8 claim Section 3065.2 requires the use of actual technician hours in calculating a retail labor rate. (*See*,  
9 *supra*, Part II.)

10 The tracking of actual technician hours is optional on customer pay repairs. A dealer can track  
11 technician hours to monitor productivity—or it can decline to do so. Warranty work is a different story.  
12 Ford requires technicians to track actual time on warranty repairs. (*See* RT Vol. II, 439:1-9 [Kanouse]  
13 (describing at the time of Putnam's Request, Ford had more requirements for tracking technician actual  
14 time compared to customer-pay work.) Ford may decline to pay a warranty repair completed by the  
15 dealership if the technician fails to punch in and out of warranty repair jobs. (*See* Exh. A – 013-014  
16 [B953-B954] (Sections 1.3.04 requiring time recording requirements for all labor for which  
17 reimbursement is claimed).) There is no such requirement for customer pay repairs.

18 Again, the industry standard is to rely on sold hours to price customer pay repairs to customers.  
19 (*See* RT Vol. II, 360:24-361:1 and 361:24-362:2 [Kanouse]; RT Vol. III, 631:1-632:2 [Sweis]; RT Vol.  
20 VII, 1387:14-1388:18 [Korenak]; RT Vol. VI, 1339:13-18 [Stockton].) California law requires upfront

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21  
22 <sup>24</sup> Ford's reference to these ROs suggest the actual or sold hours are zero. (Ford's Brief at 11:26-12:2.)  
23 However, RO 10036, Lines E&F [B1829-1830]; RO 10049, Line A [B1792]; RO 10251, Line F  
24 [B1372]; and RO 10277, Line A [B1325] all contain sold hours. RO 10048, Line A [B1795] is the  
25 only repair without actual hours or sold hours but concerns a battery replacement which should be  
26 excluded from the calculation as routine maintenance pursuant to Vehicle Code section 3065.2,  
27 subdivision (c)(3). Replacement of a starter does not provide for the replacement of a battery in the  
28 course of the repair. Moreover, including Line A of RO 10048 in the calculation of Putnam's retail  
labor rate and applying a 1.0 sold hour figure consistent with the general quote the dealership provides  
for diagnostics (RT Vol. VII, 1468:21-25 [Kamenetsky]), would have resulted in a higher requested  
labor rate (including an additional 1 hour at \$440 per hour would have increased the requested \$436.76  
per hour labor rate).

pricing. (Cal. Bus. & Prof. Code, § 9884.9, subd. (a).) It is not possible to charge customer pay repairs by the use of actual hours. Moreover, it is not Ford's practice to use actual hours to calculate a retail labor rate. (RT Vol. I, 153:14-17 [Becic]; RT Vol. I, 161:23-162:6 [Becic]; *see also* RT Vol. I, 162:9-13 [Becic] (no California Ford dealer has submitted a labor rate request relying on actual hours instead of sold hours).) Ford's argument Section 3065.2 should be interpreted to mean actual hours are to be considered those hours generating the charges to customers is without support.

**Category Six:** Ford claims different retail labor rates in the same RO are evidence Putnam does not have a set rate. (Ford's Brief at 41:19.) Ford ignores the fact that Section 3065.2 requires a calculation to determine the average. (Cal. Veh. Code, § 3065.2, subd. (a)(2) (dividing a total of labor charges by a total number of hours generating those charges and resulting in an average).) Section 3065.2 does not require the franchisee demonstrate a precise hourly rate charged for all repairs. The statute presumes there will be variation among different repairs. Ford asks the Board to the shift burden to the franchisee to meet a standard not set forth in Section 3065.2.

In addition, Section 3065.2 permits the franchisee to select the highest yield time period for its submission. (*Compare* Cal. Veh. Code, § 3065.2, subd. (a)(1)(B) (requiring at most a 90-consecutive-day period of ROs) *with* Cal. Veh. Code, § 3065.2, subd. (b) (allowing the franchisee to select the range of qualified ROs from a period occurring not more than 180 days before the submission).) Similarly, the franchisor is provided the ability to request 30 days of ROs immediately preceding or following the date range of the submission. (Cal. Veh. Code, § 3065.2, subd. (d)(4).) The franchisor then has the ability to select its own optimal range from the combined original and supplemental ROs provided. (Cal. Veh. Code, § 3065.2, subd. (d)(5) (requiring the franchisor use the same requirements applicable to the franchisee in (a)(1) and use the same formula provided in subdivision (a)).) Again, this demonstrates the presumption there will be variation in the rates charged for different repairs.

**Category Seven:** Ford cites four ROs as examples in support of its claim Putnam was misapplying hours to different repairs. (Ford's Brief at 42:21.)

RO 10048 [B1795], Line A: Ford claims this repair line should have been included with Lines D and E because they related to the replacement of a battery. (Ford's Brief at 43:1-2 (citing Becic: 9/18/23, 73:12-21, 75:9-76:24).) However, a battery replacement is a routine maintenance item excluded from

1 consideration under Section 3065.2 (c)(3). (Cal. Veh. Code, § 3065.2, subd. (c)(3) (omitting routine  
2 maintenance charges from the calculation “including, but not limited to, the replacement of ... batteries  
3 ... not provided in the course of, and related to, a repair”).) Line D is for a battery replacement not  
4 provided in the course of a starter repair and is excluded. Line A represents the diagnostic charge. As  
5 noted above, this was not included with the Submission because the service writer failed to include the  
6 sold hours. Nevertheless, the amount charged to the customer was \$440, which is consistent with  
7 Putnam’s practice of charging \$440 for an hour of diagnostic time. (*See* RT Vol. VII, 1468:21-25  
8 [Kamenetsky].) Line E is the only qualified repair line that was appropriately included in the  
9 Submission. Line E documents the replacement of the starter—a qualified repair.

10 Putnam’s exclusion of Lines A and D was proper. While Line A would be considered a qualified  
11 repair, the lack of documented sold hours required it be excluded from the Submission. Including Line  
12 A with one sold hour would have increased Putnam’s overall requested labor rate. Mr. Becic and Ford  
13 are simply wrong to claim the Line D battery replacement is a qualified repair. As addressed above (*see*,  
14 *supra*, Part I.A.3), a starter replacement is independent of a battery replacement. A starter replacement  
15 does not require the replacement of a battery.

16 RO 10305 [B1867], Line A: Ford appears to argue the actual hours from the Line A diagnostic  
17 should be added to the actual hours in Line D. (Ford’s Brief at 43:3-5.) However, the customer charges  
18 are not determined by actual hours. Section 3065.2 cannot be interpreted to require the use of actual  
19 hours in place of sold hours. The qualified repair on Line D shows sold hours of 2.4 and customer labor  
20 charges of \$1,062.68. Moreover, this RO is from the supplemental set and not part of the Submission.

21 RO 10362 [B1977], Line A: This RO is from the set of supplemental ROs. This RO was not  
22 included with Putnam’s Submission and Putnam consequently did not omit consideration of Line A (or  
23 rely on any of the Lines from the RO) in Exhibit J-3. (*See* Exh. J-3 [B45].) Ford had the option to  
24 calculate an alternative rate based upon a selection of a 90-day set of ROs from the total 120 days of  
25 ROs provided. (Cal. Veh. Code, § 3065.2, subd. (d)(5).) Had Ford chosen to do so, it could have  
26 included this RO in the calculation of an alternative rate. It would have been appropriate for Ford to use  
27 sold hours of 1 from Line A and 3.5 from Line F and divide the total customer charges of \$1,989.63 by  
28 the sold hours of 4.5. (*See* Exh. J-7 – 673-677 [B1977-B1981].) Ford declined to perform this



1 calculation and instead proposed a rate of \$220 based upon some unidentified set of repairs.

2 Ford appears to argue the actual hours should be used to calculate the rate and the combined  
3 actual hours from the two technicians that worked on this repair should also be included. (Ford's Brief  
4 at 43:6-9.) Again, there is no support the Legislature intended actual hours to be those generating the  
5 charges to the customer. By law, the charges must be determined before any work is performed. (Cal.  
6 Bus. & Prof. Code, § 9884.9, subd. (a).) These charges persist regardless of how many technicians work  
7 on the repair or how many hours are ultimately required.

8 RO 10251 [B1371] Line B: Ford appears to argue actual hours from line B should be included in  
9 a rate calculation. (Ford's Brief at 43:10-12.) Again, the customer price is independent of actual hours.  
10 The Submission identified line C as a qualified repair showing .5 of an hour sold and charges of \$110.  
11 The resulting \$220 ELR from this qualified repair was properly included in the Submission. The  
12 resulting \$220 rate is the same rate Ford proposed in the Denial.

13 The four examples Ford points to are each dependent on the Board's acceptance of the false  
14 premise Section 3065.2 requires the determination of a labor rate using the actual technician hours. Ford  
15 fails to show why Section 3065.2 should be interpreted this way. Ford pays warranty reimbursement  
16 claims based upon the Ford Guide. (*See* RT Vol. I, 113:19-23 [Becic]; *see also* RT Vol. I, 115:1-6  
17 [Becic].) Ford does not calculate any other dealer's retail labor rate by the use of actual technician hours.  
18 (*See* RT Vol. I, 153:14-17, 161:23-162:6 and 162:9-13 [Becic].) California law prohibits dealers from  
19 charging customers for service repairs based on actual technician hours. (*See* Cal. Bus. & Prof. Code, §  
20 9884.9, subd. (a).) There is no support for the claim the Legislature intended actual technician hours  
21 should be considered those hours generating the charges.

22 **B. Ford's briefing contains additional misrepresentations and errors in citation.**

23 In addition to failing to apply Vehicle Code section 3065.2 and 3065.4 appropriately to the facts  
24 of this Protest as discussed in the other sections of Putnam's Brief, Ford's briefing contains numerous  
25 other misrepresentations of the evidence, exaggerated statements, and erroneous citations. A complete  
26 discussion of all aspects of Ford's 72-page Post-Hearing Brief and 58-page Proposed Findings of Fact  
27 and Conclusions of Law with which Putnam disagrees is impractical because it would require about as  
28 many pages as Ford's pleadings—as well as the pages Putnam requires for the affirmative arguments.



herein. Putnam instead highlights other notable errors in Ford’s briefing not discussed elsewhere in the chart attached as Appendix 1 hereto.

VII. FORD’S ARGUMENT THE BOARD SHOULD DISREGARD THE REQUIREMENTS OF SECTION 3065.2 AND APPLY A REASONABLENESS STANDARD EVEN IF FORD FAILED TO MEET ITS BURDEN WOULD HAVE THE BOARD IGNORE AND REWRITE IMPORTANT PORTIONS OF SECTIONS 3065.2 AND 3065.4.

The Legislature enacted Section 3065.2 to eliminate the then existing reasonableness standard. In its place, the Legislature set forth the discrete formula to be followed in determining a franchisee’s retail labor rate. Ford’s evidence of other dealer’s retail labor rates is not relevant to the Board’s determination in this protest.

**A. The Board must consider the legislative history and statutory framework as a whole when interpreting provisions of Section 3065.4.**

In interpreting the meaning of a statute, Ford agrees, “[T]he first step in statutory construction is to examine the statutory language and give it a plain and commonsense meaning.” (Ford’s Brief at 56:17-18 (quoting *People v. Verduzco* (2012) 210 Cal.App.4th 1406, 1414).) However, the Second District Court of Appeal goes in the very next sentence, “We do not examine the language in isolation, but consider it in the context of the statutory framework as a whole in order to determine the purpose of the statute and harmonize various parts of the enactment. If the statutory language is clear, we must ‘generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend.’” (*Id.* (quoting from *Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737).)

Ford further agrees with considering the legislative history and statutory framework in interpreting Sections 3065.2 and 3065.4 when it quotes from the following language:

We must give the statutory provisions at issue a reasonable and common sense interpretation, consistent with the apparent purpose and intention of the Legislature. If possible, we will give significance to the plain meaning of every word, phrase, and sentence of a statute in pursuance of the legislative purpose, harmonizing the various parts of an enactment by considering each particular clause or section in the context of the statutory framework as a whole. In this process, we must take into account the context, object, and history of the legislation, as well as public policy and contemporaneous construction in our attempt to arrive at a construction that is practical rather than technical in nature.

(*In re Rochelle B.* (1996) 49 Cal.App.4th 1212, 1216 (emphasis added); *see also* Ford's Brief at 58:8-13.)

Similarly, the Board should look “to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.” (*Cal. Disability Servs. Ass'n v. Bargmann* (2020) 52 Cal. App. 5th 911, 916 (quoting *Lincoln Unified School Dist. v. Superior Court* (2020) 45 Cal.App.5th 1079, 1090; *see also* *Coal. of Concerned Cmty's., Inc. v. City of L.A.* (2004) 34 Cal.4th 733, 737 (requiring the same interpretive procedure).)

As a result, in considering Ford's proposed interpretation of Vehicle Code sections 3065.2 and 3065.4, the Board must not ignore the overall framework of the two sections or the underlying legislative history. Instead, the Board should reach an interpretation that harmonizes the language and legislative purpose.

**B. Ford's proposed interpretation of Section 3065.4 would render other important parts of the Sections 3065.2 and 3065.4 framework meaningless.**

In the event the Board finds Ford failed to meet either of its burdens pursuant to Section 3065.4, Ford argues the Board should ignore Ford's failure and reject Putnam's submission as unreasonable or set a rate based on the Board's independent review. (*See* Ford's Brief at Part III.) Ford primarily<sup>25</sup> relies

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<sup>25</sup> Ford also cites Vehicle Code section 3066. (Ford's Brief at 58:23-59:15.) However, Vehicle Code section 3066 concerns the procedures the Board must generally follow as to any protest pursuant to Sections 3060, 3062, 3064, 3065, 3065.1, 3065.3, or 3065.4. (Cal. Veh. Code, § 3066.) The procedures predated enactment of Sections 3065.2 and 3065.4 and do not assist the statutory interpretation as much as the other provisions of both Section 3065.2 and 3065.4 which were enacted at the same time. Ford argues, “If the intent of the legislature was to limit the manufacturer to the arguments raised in the notification and evidence submitted with the notification, there would be no need to allow for discovery at all. At most, it could permit limited discovery for the franchisee to probe the evidence and arguments presented by the manufacturer.” (Ford's Brief at 59:12-14.) Ford ignores the same procedures also apply in contexts where the franchisor is expressly limited to the four corners of its relevant notification, including the notice of termination context, as discussed above. (*See, supra*, Part IV.C.2.) Moreover, Ford's view on the relevance of the authorized discovery is exceedingly narrow. For example, Ford ignores the discovery further permits a franchisor to confirm customers paid for the repairs through receipts (as relevant to this Protest and shown by Exhibit 39), to phrase discovery requests in an effort to determine the franchisee's likely evidence at hearing, and

on the following language from Section 3065.4(b) to support its argument the Board has the authority to ignore Ford's failure to meet in burdens and conduct an independent review:

Upon a decision by the board pursuant to subdivision (a), the board may determine the difference between the amount the franchisee has actually received from the franchisor for fulfilled warranty obligations and the amount that the franchisee would have received if the franchisor had compensated the franchisee at the retail labor rate and retail parts rate as determined in accordance with Section 3065.2 for a period beginning 30 days after receipt of the franchisee's initial submission under subdivision (a) of Section 3065.2.

(See Ford's Brief at 58:17-22; Cal. Veh. Code, § 3065.4, subd. (b).)

Ford asks the Board to interpret this sentence in isolation as apparent authority to consider all the evidence as part of its review and ignore whether Ford has met its burdens of proof. (Ford's Brief at Part III; *see, e.g.*, Ford's Brief at 56:56:7-9 ("However, even if the Board determines Ford has not met its burden, the Board need not adopt Putnam's outrageous rate of \$436.76. Rather, it may conduct an independent review of the evidence and set a rate, if possible.") and 58:5-6 ("To be certain, any supplementation of the Denial Letter is justified. But, even if it were not, this would have no functional impact. The Board may consider all evidence as part of its review."))

Ford's proposed interpretation of the first sentence of Section 3065.4 subdivision (b) is inconsistent with at least the following five (5) parts of Sections 3065.2 and 3065.4:

1. The burdens of proof expressed in Vehicle Code section 3065.4, subdivision (a). (Cal. Veh. Code, § 3065.4, subd. (a).) Ford's proposed interpretation asks the Board to essentially ignore whether Ford has failed to comply with Section 3065.2 and place no burden on Ford concerning the issue by conducting an independent review regardless. This would render a franchisor's burdens of proof as expressed in Vehicle Code section 3065.4, subdivision (a) meaningless.
2. The next sentences of Vehicle Code section 3065.4, subdivision (b) following Ford's citation. (Cal. Veh. Code, § 3065.4, subd. (b).) The sentences that follow the sentence Ford cites show the subdivision is designed as a way to authorize the Board to determine the shortfall of a

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discovery for other purposes consistent with still requiring Ford to comply with its burdens of proof and Section 3065.2(d).

franchisor's reimbursement to the franchisee. They provide: "The franchisee may submit a request to the franchisor to calculate the unpaid warranty reimbursement compensation and the franchisor shall provide this calculation to the franchisee within 30 days after receipt of the request. The request for the calculation will also be deemed a request for payment of the unpaid warranty reimbursement compensation." (*Id.*) The plain language of the statute does not support Ford's interpretation.

3. The explicit requirements of Vehicle Code section 3065.2, subdivision (d). (Cal. Veh. Code, § 3065.2, subd. (d)(1).) Vehicle Code section 3065.2, subdivision (d)(1) provides a franchisor's notification "shall not add to, expand, supplement, or otherwise modify any element of that notification, including, but not limited to, its grounds for contesting the retail labor rate, retail parts rate, or both, without justification." (*Id.*) Ford's proposed interpretation would render this entire provision meaningless, as Ford itself admits: "To be certain, any supplementation of the Denial Letter is justified. But, even if it were not, *this would have no functional impact.*" (Ford's Brief at 58:5-6 (emphasis added).) Interpreting Section 3065.4, subdivision (d) as proposed by Ford would render an explicit requirement in Section 3065.2 to have "no functional impact." Ford's interpretation is wholly inconsistent with the statutory framework.
4. The statutory results of a franchisor's failure to contest a franchisee's requested labor pursuant to submission (d). (Cal. Veh. Code, § 3065.2, subd. (e).) Section 3065.2, subdivision (e) defines the ramification of a franchisor's failure to either contest (entirely or timely) or contest pursuant to subdivision (d). "[W]ithin 30 days after receiving the notice submitted by the franchisee pursuant to subdivision (a), the uncontested retail labor rate or retail parts rate shall take effect on the 30th day after the franchisor's receipt of the notice and the franchisor shall use the new retail labor rate or retail parts rate, or both, if applicable, to determine compensation to fulfill warranty obligations to the franchisee pursuant to this section." (*Id.*) Ford's proposed interpretation is inconsistent with Section 3065.2, subdivision (e) because it would have the Board ignore these statutory results of Ford's failure to contest Putnam's requested rate pursuant to the requirements of subdivision (d). A902

5. The statutory prohibition on calculating a retail labor rate for a franchisee except as provided in Section 3065.2, submission (d). (Cal. Veh. Code, § 3065.2, subd. (h)(3).) Ford would have the Board independently “reject the entire Submission as unreasonable and decline to set a rate” (Ford’s Brief at 56:11-12) and consider the reasonableness of Putnam’s requested rate in the context of a reasonable or fair market rate (Ford’s Brief at 66:6-68:21). In doing so, Ford would have the Board do what Ford is statutorily prohibited from doing: “Unilaterally calculating a retail labor rate ... for a franchisee, except as provided in subdivision (d).” (Cal. Veh. Code, § 3065.2, subd. (h)(3).) The Board cannot ignore Ford’s burdens of proof and then calculate a rate based on reasonable or fair market rates while also respecting the statutory framework.

Any of the foregoing inconsistencies is sufficient to show Ford’s proposed interpretation is unworkable. The Board should not “interpret the statute in a way that renders a provision meaningless.” (Ford’s Brief at 58:14-16 (citing *Shah v. Dep’t of Human Res.* (2023) 92 Cal. App. 5th 590, 595, *review denied* (Sept. 13, 2023)).) Each of the foregoing provisions would be rendered meaningless if Ford’s proposed interpretation is adopted. Instead, the sentence Ford cites should properly be understood in its context as authorization for the Board to calculate the shortfall in the compensation a franchisor has provided to a franchisee and the compensation the franchisee should have received under the higher labor rate as determined by the Board.

**C. Ford’s argument the Board should independently determine Putnam’s requested rate is unreasonable is inconsistent with the legislative history.**

Ford argues Putnam’s submission “is patently unreasonable and should be denied.” (Ford’s Brief at Part III.C.) Ford relies on the first sentence of Section 3065.2, “A franchisee seeking to establish or modify its retail labor rate, retail parts rate, or both, to determine a reasonable warranty reimbursement schedule shall, no more frequently than once per calendar year, complete the following requirements[.]” (Ford’s Brief at 64:15-21.)

The sentence is instead intended to define how a reasonable warranty reimbursement schedule shall be calculated and goes on to specify how retail labor rates are to be calculated including how many repair orders to consider and which repairs cannot be considered. (Cal. Veh. Code, § 3065.2, A903(a))

1 and (c).) A retail labor rate calculated in compliance with the statute cannot be considered unreasonable.  
2 The legislative history supports Putnam’s interpretation.

3 The Assembly Committee on Transportation comment on AB 179 recites AB 179 “...reverses  
4 the existing power dynamic between dealers and manufacturers by allowing dealers to set the labor and  
5 parts rate through an established formula outlined in this bill instead of having those rates dictated by  
6 the manufacturers and judged on a ‘reasonableness’ standard by NMVB.” (2019 Cal. Assemb. Bill No.  
7 179, Cal. 2019-2020 Reg. Sess., Assemb. Comm. on Trans. – April 18, 2019, at p. 7.)

8 In further support, in enacting AB 179, the legislature removed the following provision from  
9 Section 3065:

10 (b) In determining the adequacy and fairness of the compensation, the franchisee’s  
11 effective labor rate charged to its various retail customers may be considered together  
12 with other relevant criteria. If in a protest permitted by this section filed by any franchisee  
13 the board determines that the warranty reimbursement schedule or formula fails to  
14 provide adequate and fair compensation or fails to conform with the other requirements  
15 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.

16 (Cal. Veh. Code, § 3065, subd. (b) (Prior version effective January 1, 2017, to December 31, 2019).)

17 Similarly, subdivision (a) provided “The reasonableness of the warranty reimbursement schedule  
18 or formula shall be determined by the board if a franchisee files a protest with the board.” (Cal. Veh.  
19 Code, § 3065, subd. (a) (Prior version effective January 1, 2017, to December 31, 2019).)

20 The current version of Section 3065 removed the protest right from section 3065, subdivision (a)  
21 based on the reasonableness of the warranty reimbursement schedule or formula and instead provided in  
22 subdivision (b):

23 In determining what constitutes a reasonable warranty reimbursement schedule under this  
24 section, a franchisor shall compensate each of its franchisees for parts and labor at rates  
25 equal to the franchisee’s retail labor rate and retail parts rate, as established pursuant to  
Section 3065.2.

26 (Cal. Veh. Code, § 3065, subd. (a) and (b) (Version effective January 1, 2020).)

27 The statutory history shows the legislature intended to and did move from a reasonableness  
28 framework for warranty reimbursement to a formula as set by Section 3065.2. This reversed the

1 “existing power dynamic” where a manufacturer would argue a dealer’s requested labor rate was  
2 unreasonable in light of the warranty labor rates of surrounding dealers. Ford is not permitted to ignore  
3 and wholly undercut the reasons Section 3065.2’s formula was enacted by asking this Board to revert to  
4 a reasonableness standard intentionally *removed* from Section 3065 by the Legislature.

5 **D. To the extent Ford relies on the veto of AB 2109 and the subsequent change to the**  
6 **language of Section 3065.2 subdivision (a)(2) in its Reply Brief, neither the veto nor**  
7 **the amendment precluded Putnam from using Ford’s factory guide to price**  
8 **customer pay repairs.**

9 Respondent Ford Motor Company’s Proposed Findings of Fact and Conclusions of Law (Ford’s  
10 Proposed Findings”) (but not its Post Hearing Brief) references Governor Brown’s veto of AB 2109 (a  
11 prior version of AB 179 which enacted Section 3065.2) as being due to “the warranty provisions included  
12 in the bill.” (Ford’s Proposed Findings at 158; 36:15-37:3 and fn. 27.) Ford posits the legislature rejected  
13 the requirement that time guides should govern the calculation. (*Id.* at 37:2-3.) To the extent Ford relies  
14 on the argument in its Reply Brief, neither the veto nor the amendment show Putnam is prohibited from  
15 pricing service repairs uniformly using Ford’s factory guide.

16 Governor Brown’s message accompanying his veto of AB 2107 stated “This bill modifies the  
17 statutory framework governing the relationship between new car dealers and manufacturers, including  
18 establishing a complex formula to determine the rate manufacturers will reimburse dealers for warranty  
19 and recall repairs. Under current law, manufacturers are required to reimburse dealers for warranty and  
20 recall repairs at a ‘reasonable’ rate negotiated between the two parties. This framework appears to be  
21 working reasonably well and I see no reason to adopt the rather complicated formula authorized in this  
22 bill--with perhaps unintended consequences.” (2019 Cal. S. Bill No. 179, Cal. 2019-2020 Reg. Sess., S.  
23 Comm. on Trans. – August 15, 2019, at p. 5.)

24 Govern Brown’s veto of AB 2107 was not directed toward the “total number of hours allowed  
25 pursuant to the franchisor’s time allowances that would be used to compensate the franchisee for the  
26 same work had it been performed under warranty” but was instead directed at the bill more generally in  
27 that it replaced a reasonableness determination in the first place. (2019 Cal. S. Bill No. 179, Cal. 2019-  
28 2020 Reg. Sess., S. Comm. on Trans. – August 15, 2019, at p. 5.) Govern Brown’s veto message would  
have applied equally to AB 179 as enacted as AB 2107.



1 In addition, as introduced, AB 179 continued to include the “total number of hours allowed  
2 pursuant to the franchisor’s time allowances that would be used to compensate the franchisee for the  
3 same work had it been performed under warranty” language. The language was replaced in the May 20,  
4 2019, version of the bill with “total number of hours that generated those charges.” (Amended Assembly  
5 AB 179 – May 20, 2019, Proposed language 3065.2, subd. (a)(2).)

6 The legislative history does not explain the intent of the language “total number of hours that  
7 generated those charges” replacing “total number of hours allowed pursuant to the franchisor’s time  
8 allowances that would be used to compensate the franchisee for the same work had it been performed  
9 under warranty” except to say it was less controversial.<sup>26</sup> However, neither version of the language  
10 describes dividing total charges for labor from qualified repair orders by actual technician time incurred  
11 in performing the repair. Nothing in the legislative history for either AB 2107 or AB 179 supports using  
12 actual hours for any of the described calculations.

13 Instead, the Board should interpret the change to the statutory language to make use of the  
14 factory’s time guide hours an option for how a dealership may price customer pay repairs. Under the  
15 previous version of the statute, “total number of hours allowed pursuant to the franchisor’s time  
16 allowances that would be used to compensate the franchisee for the same work had it been performed  
17 under warranty” meant a franchisee could price its labor using a multiplied time guide but would  
18 calculate its warranty labor reimbursement rate under Section 3065.2 using the hours from the  
19 franchisor’s time guide. Under the language as enacted, “total number of hours that generated those  
20 charges” means the franchisee can choose what set of guide hours it uses to price customer pay repairs,  
21 however, whatever hours the franchisee uses to generate the charges will be used to calculate the  
22 warranty labor reimbursement rate.

23 \_\_\_\_\_  
24  
25 <sup>26</sup> “The basis for this bill [AB 179] is a similar bill by the same author last year (AB 2107), which was  
26 approved by this committee but vetoed. Most of the provisions of this bill are similar or identical to  
27 those contained in AB 2107. The biggest difference between the bills is the calculation of the  
28 reimbursement rates charged to manufacturers for the warranty work performed by dealers. This  
provision was fought over last year and was the basis of its veto. The reimbursement rate calculation  
contained in this bill is less controversial.” (2019 Cal. S. Bill No. 179, Cal. 2019-2020 Reg. Sess., S.  
Comm. on Trans. – August 15, 2019, at pp. 3-4.)

1 The plain meaning of Section 3065.2, subdivision (a)(2) allows a franchisee the freedom to use  
2 a franchisor's factory guide hours or a third-party guide as the source of the hours generating the charges  
3 to retail customers. Ford does not have a policy concerning what time guide hours a Ford dealer must  
4 use in pricing customer-pay jobs. (RT Vol. I, 116:9-12 [Becic].) A Ford dealer, including Putnam, may  
5 use the Ford time guide to price customer-paid repairs. (RT Vol. I, 116:13-25 [Becic].) Mr. Becic  
6 admitted that if Putnam were using Ford's factory guide hours as its sold hours, Ford would accept the  
7 use of those hours and not need to calculate using actual hours. (RT Vol. I, 160:5-11 [Becic].)

8 VIII. THERE IS NO SUPPORT FOR THE BOARD TO DETERMINE A RATE LOWER THAN  
9 FORD'S PROPOSED ADJUSTED RETAIL LABOR RATE IN THE DENIAL; THE LOWEST  
10 RATE THE BOARD SHOULD EVEN CONSIDER IS THE \$246.52 RATE SUGGESTED BY  
11 FORD'S EXPERT.

12 A. **Statutory interpretation does not support a determination of a \$177 or a \$198.02**  
13 **labor rate after Ford voluntarily provided a \$220 proposed adjusted retail labor**  
14 **rate.**

15 Ford argues the Board should declare Putnam's initial labor rate or \$177<sup>27</sup> is still in effect or  
16 select a rate of \$198.02. (Ford's Brief at Part III.) However, there is no statutory authority in support of  
17 Ford's position the Board declare a labor rate lower than what Ford agreed to pay Putnam at the time of  
18 Putnam's submission.

19 Ford was under no obligation to include in its Denial a proposed adjusted retail labor rate. Ford  
20 had the discretion to provide a proposed adjusted retail labor rate pursuant to Vehicle Code section  
21 3065.2, subdivision (d)(5). (Cal. Veh. Code, § 3065.2, subd. (d)(5) ("... the franchisor *may* calculate a  
22 proposed adjusted retail labor rate ....") (emphasis added).) Ford chose to do so and proposed an adjusted  
23 retail labor rate of \$220 per hour. (Exh. J-6 – 002 [B51].)

24 Moreover, even though Ford did not comply with the requirements for calculating this rate as  
25 discussed above, Ford supported its proposed adjusted retail labor rate based on it seeming "to be the  
26 \_\_\_\_\_

27 <sup>27</sup> Putnam's \$177 per hour rate was the warranty labor rate Ford had been paying the previous Ford  
28 dealer who went out of business. (RT Vol. V, 1053:19-24 [K. Putnam].) \$177 per hour is lower than  
any other Ford dealer's warranty labor rate in the San Francisco MSA. (Exh. MM – 026 [B1278]  
(showing the current minimum warranty rate is \$182).) There is no support the labor rate of the prior  
Ford dealer should remain in effect over three years after Putnam's initial enfranchisement. A907

1 most common customer pay rate your documentation shows in repairs where we see what appears to be  
2 valid documentation.” (Exh. J-6 – 002 [B51].) As a result, Ford admitted the \$220 rate was supported  
3 by an undisclosed set of repairs with documentation Ford believed to be valid.

4 Ford understood by proposing this as an adjusted retail labor rate it would be required to pay  
5 Putnam “at the franchisor’s proposed adjusted retail labor rate or retail parts rate until a decision is  
6 rendered upon any Board protest filed pursuant to Section 3065.4 or until any mutual resolution between  
7 the franchisor and the franchisee. The franchisor’s proposed adjusted rate shall be deemed to be effective  
8 as of the 30th day after the franchisor’s receipt of the notice submitted pursuant to subdivision (a).” (Cal.  
9 Veh. Code, § 3065.2, subd. (d)(3).) Ford determined and approved a retail rate \$220 per hour based  
10 upon its independent analysis.

11 Unlike the provisions of Vehicle Code section 3065.4, subdivision (b) which sets forth a process  
12 for a franchisee to obtain unpaid warranty reimbursement compensation (Cal. Veh. Code, § 3065.4, subd.  
13 (b)), there is no similar provision to reduce and require repayment of a proposed adjusted retail labor  
14 rate offered by a franchisor. Setting a rate lower than Ford’s proposed adjusted retail labor rate would  
15 conflict with the context and statutory scheme created by Sections 3065.2 and 3065.4.

16 Further, setting a rate lower than \$220 per hour would be in direct conflict with Ford’s argument  
17 the Board should set a “reasonable” rate based on the neighboring dealers. (Ford’s Brief at 66:6-68:21.)  
18 Ford’s argument Putnam’s rate can be based on reasonable or fair market rates for warranty  
19 reimbursement should be outright rejected as discussed above. However, Ford’s proposed rates are  
20 inconsistent with its own argument. Applying a \$177 per hour rate to Putnam would result in Putnam  
21 having the lowest warranty labor rate in the San Francisco MSA. (Exh. MM – 026 (B1278) (noting in  
22 footnote 57 “the minimum warranty rate for other dealerships in the SF MSA is \$182”).)

23 In addition, Ford selects the \$198.02 rate based on its mistaken belief Vehicle Code section  
24 3065.2 requires a determination based on a selection of ROs with closed dates in a 90-day period. (Ford’s  
25 Brief at 70:3-5; *see also* Exh. MM – 014 and 033 [B1266 and B1285].) The word “completed” appears  
26 in both Section 3065.2, subdivision (a)(1) (A) and (B). (Cal. Veh. Code, § 3065.2, subd. (a)(1)(A) and  
27 (B).) It should be given a similar meaning in both definitions of the ROs to be submitted. Subdivision  
28 (a)(1)(A) requires the submission of 100 consecutive qualified repair order and that those ~~A908~~ be

1 “completed”—i.e., closed. (*Id.* at subd. (a)(1)(A).) Considering a repair order which was not completed  
2 would result in a determination based on a repair which may not yet reflect the final repairs or charges;  
3 as a result, the legislature properly excepted ongoing repairs in the 100 consecutive set of repair orders  
4 even if it might ultimately be a qualified repair order when completed. (*Id.*) The use of the word  
5 “completed” in subdivision (a)(1)(B) means the same thing. The dealership submits a consecutive 90-  
6 day period of ROs based on their open date and only those repairs which are “completed” are considered  
7 for purposes of the statutory formula. (*See id.* at subd. (a)(1)(B).)

8 As Mr. Stockton described, ROs could be grouped based on when initiated (open date), when  
9 completed (closed date), and consecutively. All three are very unlikely to be accomplished  
10 simultaneously because there are delays on parts and some repairs take longer. Mr. Stockton favored  
11 grouping them based on open date because “the same conditions, the same pricing, the same behaviors  
12 would have applied. It leaves less room for a change into the future. (RT Vol. VI, 1195:2-1196:6  
13 [Stockton].) A dealer may have ROs open for potentially large periods of time before they become  
14 closed. (RT Vol. VI, 1196:7-15 [Stockton].) Mr. Korenak testified to the approximate 1,100  
15 submissions he prepared. When submitting labor or parts increase requests, FrogData consistently relies  
16 on 90-day periods for the submission based on open date because FrogData must submit every RO in  
17 sequence. (RT Vol. VII, 1360:16-23 [Korenak].)

18 The testimonies of Mr. Stockton and Mr. Korenak reinforce the understanding “completed”  
19 should not be interpreted to mean a set of ROs grouped by closed date in a 90-day time period. Grouping  
20 by closed date is extremely unlikely to result in a consecutive set of ROs and would force the  
21 reorganization of ROs from a sequential series of RO numbers to a sporadic sequencing of RO numbers.  
22 Moreover, such an interpretation would create an inconsistency between subdivision (a)(1) (A) and (B)  
23 where one requires a consecutive set based on RO number and initiation date and require a grouping  
24 based on closed date for the other. Ford’s proposed interpretation of the word “completed” in  
25 subdivision (a)(1)(B) should be rejected.

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1           **B.     The lowest rate the Board should consider is \$246.52, but only if it accepts Ford's**  
2           **claim Section 3065.2 requires the use of actual technician hours.**

3           As supported and discussed extensively above, Putnam does not agree actual hours should be  
4           used when calculating a labor rate pursuant to Section 3065.2. The lowest sold hour based labor rate as  
5           calculated in Ms. Heinemann's Exhibits 2 and 3 is \$369.63 per hour. (Exh. MM – 033-034 [B1285-  
6           B1286].) Ford failed to select this RO date range in conformity with Section 3065.2, subdivision (d)(5)  
7           at the time of the Denial. Nevertheless, if the Board excuses Ford's failure to select an RO date range,  
8           the lowest sold hour based labor rate Ford's evidence supports is \$369.63 per hour. (RT Vol. V, 968:16-  
9           18 [Heinemann] (describing the \$369.63 as the optimized rate for Ford under the fifth column of her  
10          report's Exhibit 3).)

11          The Board should reject Ford's proposed labor rates and set the \$436.76 labor rate as requested  
12          by Putnam and as supported above. However, even if the Board were to accept the arguments advanced  
13          by Ford to apply actual hours to calculate Putnam's labor rate, the lowest labor rate the Board should  
14          consider is \$246.52 per hour.

15          Ms. Heinemann offered approximately 496 different proffered calculated rates. (See Exh. MM –  
16          033-034 [B1285-B1286] (showing 496 boxes with different calculated rates).) During her direct  
17          testimony, Ford's counsel insisted on pinning Ms. Heinemann down to a retail labor rate based on her  
18          expert opinion. (RT Vol. V, 972:18-20 [Heinemann] (Q. So what sets are we talking about here? A. I  
19          mean, you are going to pin me down? Q. Yeah. ...).) Ford's counsel asked Ms. Heinemann, "So help  
20          a fellow out. If he [referring the Administrative Law Judge] has got to declare a rate, if that is where he  
21          thinks the law takes him, point him to, based on your analysis, what he should pick? (RT Vol. V, 973:4-  
22          7 [Heinemann].) Ford's counsel disclaimed the answer as a legal opinion but added, "But you are an  
23          expert. You are a forensic accountant. And you are balancing a lot of things, including the accuracy  
24          implied by market rates and the reasonableness implied by market rates. Where should he go?" (RT  
25          Vol. V, 973:16-21 [Heinemann].)

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1 Mr. Heinemann answered the “best box”<sup>28</sup> resulting from her analysis: the box for \$246.52. (RT  
2 Vol. V, 973:22-974:21 [Heinemann].) After performing all her analysis, she directed the Board to those  
3 ROs initiated during a 90-day period and based on the “Technician Hours” column. (Exh. MM – 034  
4 [B1286].)

5 In its brief, Ford attempts to distance itself from Ms. Heinemann’s answer. (*See* Ford’s Brief at  
6 70: fn. 41 (“Ms. Heinemann testified that that [sic] she would select a date range favorable to Putnam  
7 based on personal preferences. Her testimony, while demonstrative of her good faith and credibility,  
8 should not be given legal weight, as she was not endeavoring to apply Section 3065.4 and 3065.2.”))  
9 However, Ford chose to ask Mr. Heinemann which box, in her expert opinion, was the best box to “help  
10 a fellow out” and assist the Administrative Law Judge’s analysis. It cannot so easily escape her answer.

11 Moreover, Ms. Heinemann’s testimony was not based on her personal opinion. She compared  
12 the \$246.52 to the rates on Exhibits 2 and found “a lot of different sets that would really cover and  
13 compliment the \$246 rate from the initiated.” (RT Vol. V, 973:25-974:7 [Heinemann].) Ms. Heinemann  
14 continued:

15 And so I guess I would say somewhere around that rate would be consistent with market  
16 comparables and would be supported by these touch points for looking at different sets  
17 of dates and different approaches to thinking about whether a report -- a repair is initiated  
18 or completed. It almost is like sort of the ultimate sort of forensic culmination, which is,  
19 look, there is a lot of stuff to look at. It is all pointing around the 240 being a reasonable  
20 rate. And we will just -- you know, the 246.52 was the number on Exhibit 3.  
21 (RT Vol. V, 974:8-17 [Heinemann].)

22 In summary, Ms. Heinemann supported her answer with market comparables, different sets of  
23 dates, and different approaches to thinking. Her answer was “like sort of the ultimate sort of forensic  
24 culmination.” “It is all pointing around the 240 being a reasonable rate.” (*Id.*) Ms. Heinemann’s  
25 statement of the “best box” was her expert opinion—it cannot be construed as a personal opinion.  
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27 <sup>28</sup> *See* RT Vol. V, 971:5-7 (Ford’s counsel asking the prior question: “So you have done all this work.  
28 You have done all these calculations. Which box is the -- which column, which set, which box is the  
best box?”)

1 Ford suggests the Board select a range of RO's most favorable to Ford because "Putnam deprived  
2 Ford of an opportunity to calculate a rate most favorable to Ford because it provides [sic] such a  
3 bafflingly inaccurate submission, which took a literal expert forensic accountant to sift through." (Ford's  
4 Brief at 70:13-23.) However, Ford ignores it did not select *any* range of ROs which would comply with  
5 Vehicle Code section 3065.2, subdivision (d)(5) (Exh. J-6 – 001-002 [B50-B51]) and demonstrated it  
6 could perform an analysis using actual hours and omitting those repairs without actual hours (Exh. 23 –  
7 001-002 [A81-A82]).

8 Ford cannot be permitted to select a range of ROs and accompanying labor rate for the first time  
9 in post-hearing briefing years after it was required to support its proposed adjusted retail labor rate.  
10 Ford's selection failed to provide Putnam any notice Ford would be advocating specifically for the  
11 \$198.02 rate either by way of the Denial, in Ms. Heinemann's expert report, in Ford's pre-hearing brief,  
12 or during Ms. Heinemann's testimony during the hearing. As discussed above, selecting the \$198.02  
13 rate would be a violation of Putnam's due process rights and has forced Putnam to litigate against an  
14 ever-evolving sequence of repair orders that the Board might consider.

15 The lowest labor rate the Board should determine if using actual hours to make the calculation is  
16 the \$246.52 suggested by Ford's expert. There is no statutory authority supporting Ford's request for a  
17 labor rate lower than \$220 and repayment of the difference to Ford.

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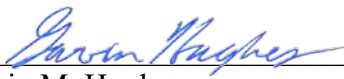
**CONCLUSION**

Ford failed to meet its initial burden to demonstrate its consideration and response to the Putnam submission was done in compliance with the requirements of Section 3065.2. Ford admits it did not perform the required analysis of Putnam's submission, claiming it lacked the time and the skill to do so. Nevertheless, Ford witnesses were able to easily calculate labor rates during the hearing and presented an expert witness with approximately 496 different proffered calculated rates for individual repairs. The evidence shows Ford willfully disregarded the requirement of Section 3065.2, choosing to instead, offer an unsupported "market appropriate" rate it believed to be reasonable.

Ford also failed to meet its burden to demonstrate Putnam's submission to be materially inaccurate or fraudulent. The Board and OAH should reject Ford's arguments to rewrite the language and intent of Section 3065.2.

Dated: April 4, 2024

LAW OFFICES OF  
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By   
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# APPENDIX 1

<b><u>Ford's Statement in Briefing</u></b>	<b><u>Ford's Citation</u></b>	<b><u>Ford's Misrepresentation<sup>1</sup></u></b>
"Putnam had been 'tinkering' with the data in the repair orders...." (Ford's Brief at 1:20-21.)	A. Kamenetsky: 9/27/23, 1600:25-1601:3	The cited testimony concerns instances where a change is made to match a customer estimate – not as to all the repair orders.
"More specifically, Putnam had been 'backing into' the so-called sold hour figure after finalizing the customer labor total." (Ford's Brief at 1:22-23; <i>see also</i> Ford's Proposed Findings at 4: fn. 6.)	K. Putnam: 9/25/23, 1044:2-11	Kent Putnam's testimony concerned the one pricing policy at Putnam Automotive Group overall. Mr. Putnam determined the labor rate by keeping the rate to the customer the same while removing any multipliers. He did not testify they "backed into" the rate at the individual repair level. In addition, Mr. Putnam testified the \$440 an hour rate was applied to all Putnam franchises and not just the Ford franchise. (RT Vol. V, 1044:12-19 [K. Putnam].)
"The price was based on the service advisor's discretion." (Ford's Brief at 5:13.)	Kamenetsky: 9/27/23, 1540:11-22.	The citation further describes when a service advisor is unsure, they are directed to look up the repair and use Ford's labor guide as opposed to a third-party guide. The prices were not based solely on service advisor discretion.
"Prior to Putnam's acquisition of the subject Ford dealership, in 2019 or 2020, Mr. Putnam put a plan into place to increase the warranty labor rate at all of his dealerships." (Ford's Brief at 5:26-27; <i>see also</i> Ford's Proposed Findings ¶ 19; 6:2-3.)	Kamenetsky: 9/27/23, 1473:6-23.	The cited testimony only concerns why Mr. Putnam changed from Armatus to FrogData (describing a difference in pricing from taking a percentage to flat fee). No "plan" is discussed in the cited testimony.
"It [FrogData] does not question the data in the repair orders, such as the variation of labor rates, because it is 'completely irrelevant to [FrogData],' and '[t]he repair order is the source document so that's that.'" (Ford's Brief at 6:13-15.)	[J. Korenak: 9/27/23,] 1375:16-24, 1374:7-8.	The citation to page 1374 references the following: "A. It would be the same 90-day set, yes. Q. Okay." The citation is inapplicable to the statement in Ford's Brief. Neither page contains the quote concerning the repair order as the source document.

<sup>1</sup> Unless otherwise noted, testimony discussed in this column is the testimony as cited by Ford in the second column.

<p>“Mr. Reibel observed that the Submission contained numerous accounting red flags and highly unusual data.” (Ford’s Brief at 8:4-5; <i>see also</i> Ford’s Proposed Findings ¶ 31; 7:20-21.)</p>	<p><i>See, e.g.</i> Joint Ex. 6 [B50-51].</p>	<p>The Denial Letter focuses on the difference between the actual hours and sold hours in the ROs—the phrases “accounting red flags” or “highly unusual data” are not used nor are phrases similar thereto.</p>
<p>“They explained that the customer charge would remain comparable to that of surrounding dealers <u>because the sold hours Putnam used to calculate the customer charge would be lower than what the job would take, which would offset the higher labor rate.</u>” (Ford’s Brief at 9:1-4 (emphasis in original); <i>see also</i> Ford’s Proposed Findings ¶ 36; 8:18-20 and ¶ 166; 38:14-17.)</p>	<p>[Murphy-Austin:9/18/23,] 191:22-192:16 (emphasis added).</p>	<p>The actual testimony at page 192 lines 4-11 states Mr. Putnam and Mr. Vasquez “explained that the end price to the customer would be comparable to the surrounding dealers because the labor times that would be matched up with that higher rate -- the labor times would be lower which would then offset the higher labor rate and create a competitive price point in the market. So, in fact, the labor and the sold labor hours don’t reflect reality.” (RT Vol. I, 192:4-11 [Murphy-Austin].) When asked “how could the labor time be lower?” she answered, she was not sure and then described her impression of what could be happening. (RT Vol. I, 192:12-16 [Murphy-Austin].) Mr. Putnam and Mr. Vasquez did not explain the sold hours Putnam was using were “lower than what the job would take.” They were instead explaining they were using Ford’s lower time guide to offset a higher labor rate. Ford’s statement and citation are misleading.</p>
<p>“Mr. Putnam admitted the same at the hearing; he testified Putnam manipulated the sold hours on repair orders in order to ‘back into the [\$440/hour] rate.’” (Ford’s Brief at 9:7-9; <i>see also</i> Ford’s Proposed Findings ¶ 37; 8:22-23; Ford’s Brief at 35:21-36:3 (“This tinkering was baked into the Putnam process at a conceptual level—Mr. Putnam testified that rather than have hours generate charges, Putnam set up their system by using algebra to ‘back into the</p>	<p>K. Putnam: 9/25/23, 1044:2-11.</p>	<p>Kent Putnam’s testimony concerned the one pricing policy at Putnam Automotive Group and how he settled on an overall rate of approximately \$440 for each of his franchises – he did not testify they “backed into” the rate at the individual repair level.</p>

<p>[\$440/hour] rate.”); 36:3-5 (“Putnam never ‘rais[ed] the price to the customer. The price to the customer is not going to change . . . so we backed into it. We did basic algebra and we backed into the [\$440] rate.”) and 38:7-11 (similar statement and quotation); Ford’s Proposed Findings ¶ 167; 38:19-21; 167; 38:21-23; and ¶ 173; 40:1-5.)</p>		
<p>“Mr. Becic testified Mr. Reibel found it ‘effectively impossible’ to calculate a rate because it is ‘difficult to interpret the repair orders and to determine what an actual rate might be’ from all the discrepancies in the repair orders Ford examined, making it ‘difficult to figure out exactly what was going on.’” (Ford’s Brief at 10:8-12; <i>see also</i> Ford’s Proposed Findings ¶ 41; 9:24-25.)</p>	<p>Becic: 9/18/23, 112:10-17.</p>	<p>Mr. Becic’s answer starts: “I think -- and this is speculating, ....” (RT Vol. I, 112:12 [Becic].) Ford cannot rely on Mr. Becic’s speculations.</p>
<p>“His [John Becic] current responsibilities include managing the entire complex processing and analysis of all Ford dealer warranty labor and parts rate increase requests with his team of analysts and ultimately validating the requested rate, all within the tight state time deadlines to approve or deny a request.” (Ford’s Brief at 10:17-20; <i>see also</i> Ford’s Proposed Findings ¶ 44; 10:6-9.)</p>	<p>[Becic: 9/18/23,] 36:5-37:3.</p>	<p>The cited testimony discusses Mr. Becic’s administrative roles to help, manage, and run and support Ford’s salespeople in regional offices. He describes his function in managing the administrative budget for those field offices and other administrative tasks. Ford’s dealer warranty labor and parts rate increase requests are not discussed in the cited testimony.</p>
<p>“Consequently, he [Mr. Becic] has extensive</p>	<p>[Becic: 9/18/23,] 37:19-39:10.</p>	<p>The cited testimony shows he manages two other analysis “at a higher level,” assists with</p>

experience in reviewing repair orders and addressing complex issues that may arise in those submissions.” (Ford’s Brief at 10:21-22; <i>see also</i> Ford’s Proposed Findings ¶ 44; 10:9-10.)		any issues, helps the analysts deal with any difficult cases, and overall manages the administrative process. He only took on the warranty rate management in the past two years. (RT Vol. I, 37:19-23 [Becic].) Ford overstates Mr. Becic experience, especially given the breadth of assignments where he has responsibility (warranty labor and parts rate increase requests were the third area of responsibility Mr. Becic described during his testimony).
“During the tour, Mr. Putnam made a comment that ‘Ford knew they were servicing vehicles at the Nissan facility,’ that ‘caught [Ms. Swann] off guard.’” (Ford’s Brief at 15:4-5 (emphasis added); <i>see also</i> Ford’s Proposed Findings ¶ 89; 20:14-15.)	[Swann: 9/21/23,] 805:21-807:3	The testimony shows the described discussion occurred at Kent’s office and not during the tour. (RT Vol. IV, 806:16-17 [Swann].) Moreover, Ford citation shows the context of Mr. Putnam’s statement concerning use of the Barn was related to the discussion because they were discussing the need to expand the size of the current facility; Mr. Putnam’s reference to the use of the Barn was relevant to the size of Putnam’s current facility (Putnam would need at least as much capacity as it was currently using at the main facility and the Barn).
Mr. Putnam responded that it was “Nissan customer-pay” or “retail work.” (Ford’s Brief at 16: fn. 9; <i>see also</i> Ford’s Proposed Findings ¶ 95 and 96; 21:17-27.)	[Swann: 9/21/23,] 810:9-12.	Ms. Swann testified, “And he [Mr. Putnam] said, ‘Oh, no. That’s Nissan customer-pay,’ or, ‘It is retail work’ is what he said.” The statement “is what he said” shows Ms. Swann was correcting her statement from Mr. Putnam saying Nissan customer-pay to retail work. The testimony shows only that Mr. Putnam told her it was retail work. The subsequent testimony reinforces this interpretation. (RT Vol. IV, 810:13-811:5 [Swann] (testifying at page 811, line 5, “Yes. He said it was retail work.”))
“A Ford employee informed Ms. Swann that Mr. Putnam had submitted a request to change the address on the contract to include the Nissan building as an authorized location.” (Ford’s Brief at 18:10-11; <i>see also</i> Ford’s Proposed Findings ¶ 98; 23:4-6.)	[Swann: 9/21/23,] 812:2-7.	The cited testimony concerns whether it was okay that Putnam was servicing Ford vehicles at the Nissan Facility or the Barn. The citation is unrelated to Ford’s statement in the brief.

<p>“Ms. Swann believed Mr. Putnam was trying to get in a change of address without Ford noticing.” (Ford’s Brief at 18:11-13; <i>see also</i> Ford’s Proposed Findings ¶ 98; 23:5-7.)</p>	<p>[Swann: 9/21/23,] 813:20-23.</p>	<p>The cited testimony begins, “Well, ultimately I don’t know what was going on.” The testimony thereafter cannot be relied upon.</p>
<p>“Mr. Putnam’s credibility was demonstrated to be nonexistent during the hearing. He was <b>impeached with inconsistent statements 15 times.</b>” Ford then goes on to cite 15 areas of testimony. (Ford’s Brief at 18:20-19:8 (emphasis in original); <i>see also</i> Ford’s Proposed Findings ¶ 100; 23:12-23.) Putnam discusses each of the citations with clear inaccuracies when compared to the record in the third column in this row.</p>		<p>9/25/23, 1068:3-1069:6 – is not an impeachment – Mr. Putnam said he could use the word rules to describe a policy or procedure which was consistent with the deposition testimony.</p> <p>1079:14-1080:3 – the answer is not inconsistent with the deposition transcript (Mr. Putnam couldn’t build a 100-story building on his property presumably by local regulations).</p> <p>1088:22-1091:8 – mostly reading of the deposition transcript without impeachment; Mr. Putnam agreed to conceding The Barn was in use by Putnam in mid-June 2021 (RT Vol. V, 1088:22-1089:2 [K. Putnam]).</p> <p>1093:7-1094:22 – is a refreshing of recollection and not impeachment.</p> <p>1096:23-1097:13 – is a refreshing of recollection and not impeachment.</p> <p>1120:7-17 – not a proper impeachment – his answer at hearing was “I don’t think so” relative to “no” in the deposition transcript – they are consistent answers.</p> <p>1121:1-9 – is a refreshing of recollection and not impeachment.</p> <p>1124:3-18 – is a refreshing of recollection and not impeachment.</p> <p>1127:9-1128:1 – the answers are consistent. At hearing Mr. Putnam said there was no particular procedure for technician tracking following by “I am not sure.” In the deposition, he answered “I don’t know” but</p>



		<p>also clarified there is not one overarching Putnam dealership process.</p> <p>1129:11-1130:1 – Mr. Putnam’s answer is consistent with the deposition testimony; he testified they do track effective labor rate both at his deposition and at the hearing.</p>
<p>“Mr. Putnam feigned confusion over the word ‘accurate.’” (Ford’s Brief at 19:9; <i>see also</i> Ford’s Proposed Findings ¶ 101; 23:24.)</p>	<p>[K. Putnam: 9/25/23,] 1146:1-10.</p>	<p>The confusion in the testimony (late that day) was whether the question was asking whether accurate meant as applied to the hourly rate as calculated or the repair order for line E. The confusion is clarified in the following testimony. (RT Vol. V, 1146:21-1147:4 [K. Putnam].) The original question to which Mr. Putnam asked for clarification was in full: “Is it accurate?” without the clarifications in the questions on pages 1146 and 1147.</p>
<p>“He intentionally, and repeatedly misheard the word ‘defies.’” (Ford’s Brief at 19:9-10; <i>see also</i> Ford’s Proposed Findings ¶ 101; 23:24-25.)</p>	<p>[K. Putnam: 9/25/23,] 1144:15-24.</p>	<p>The hearing was being held by Zoom. Mr. Putnam did not intentionally mishear the word. “Defies” and “defines” sound similar, especially over a remote connection.</p>
<p>“Similarly, Mr. Kamenetsky was <b>impeached with inconsistent statements eight times.</b>” (Ford’s Brief at 19:13-20 (emphasis in original); <i>see also</i> Proposed Findings ¶ 103; 24:1-7.) Ford then goes on to cite 8 areas of testimony. Putnam discusses each of the citations with clear inaccuracies in the third column in this row.</p>		<p>9/27/23, 1500:15-1501:22 – there was no initial answer to the question inconsistent with the deposition testimony. Moreover, the question at hearing was “at all” (1500:16) compared to a qualified answer in response to “management of most (1501:5-6 and 1501:16-20).</p> <p>1511:3-1512:11 – Mr. Kamenetsky’s answers are not inconsistent (he has never seen the whole process but has seen parts of it).</p> <p>1513:4-9 – not an inconsistent statement (he knows some names but not all). Moreover, not an impeachment; no deposition testimony is relied on.</p> <p>1522:8-1524:25 – the answers are not inconsistent given the deposition answer was in terms of “generally familiar with the concept” compared to “a manufacture has to approve.”</p>

		<p>1526:24-1527:20 – there is no impeachment on these pages. No prior statement by Mr. Kamenetsky is reference at all on the cited pages.</p> <p>1539:24-1540:22 – the question was inconsistent with the answer provided at the deposition. This was not a proper impeachment. There is a “but if...” in the deposition that is absent in the question during the hearing.</p> <p>1542:24-1543:17 – the questions are inconsistent – one asks if Putnam Ford did not instruct service advisors to use the Ford warranty time allowances while the other is Putnam Ford might use Ford’s own factory time guide with the answer being yes; the only instruction is to not use multiplied time guides.</p>
<p>“And Mr. Kamenetsky betrayed his deceit by fearing he would be impeached before he answered a question.” (Ford’s Brief at 19:19-20; <i>see also</i> Ford’s Proposed Findings ¶ 103; 24:7-9.)</p>	<p>[Kamenetsky: 9/27/23,] 1505:7-15.</p>	<p>Not a fair retelling of the testimony. The question raised prior direct testimony. Mr. Kamenetsky was seeking clarification.</p>
<p>“Ms. Heinemann discerned that sold hours are often inserted into the repair orders after the labor charge had been determined and the repair order is closed.” (Ford’s Brief at 21:14-15; <i>see also</i> Ford’s Proposed Findings ¶ 114; 26:5-7.)</p>	<p>[Heinemann: 9/25/23,] 933:19-22.</p>	<p>The cited testimony does not support the sold hours are “often” inserted after the charge is determined and the repair closed; cited testimony states instead:</p> <p>“There is the information that sale hours are put in after the fact, when the RO is closed. And sale hours can be zero, which indicates that they are totally independent of the total charges on a repair order.”</p> <p>The cited testimony does not express any opinion about the frequency of the described occurrences only that they “can be” zero.</p>
<p>“It [Putnam] is charging a lower rate and then artificially manipulating sold hours to give the appearance of \$440 per hour.” (Ford’s Brief at</p>	<p>[Heinemann: 9/25/23,] 957:24-958:11, 960:4-18; 1002:10-1003:24.</p>	<p>The cited testimony does not support the statement offered by Ford. The testimony instead focuses on issues of material accuracy in view of comparable dealership rates and the balance of Ms. Heinemann’s analysis.</p>

26:21-22; <i>see also</i> Ford's Proposed Findings ¶ 137; 31:15-17.)		
"This testimony went rebutted. Edward Stockton, Putnam's rebuttal expert, did not provide any opinions on the appropriate labor rate, the accuracy of Putnam's Submission, or conformance with 3065.2." (Ford's Brief at 27:1-3; <i>see also</i> Ford's Proposed Findings ¶ 139; 31:23-25.)	<i>See generally</i> , E. Stockton: 9/26/23, 1159:5-1340:24.	All of Mr. Stockton's testimony was rebuttal testimony. He was not retained nor required to reach affirmative opinions on the topics Ford suggests in its briefing.
"Specifically, Mr. Becic testified that, based on a review of a sample set of the repair lines, the sold hours did not match the time guide hours." (Ford's Brief at 33:6-7; <i>see also</i> Ford's Proposed Findings 36: fn. 25.)	<i>See</i> Becic: 9/18/23, 109:18-110:8.	As Mr. Becic testified, he only looked at time guide hours at the direction of counsel and not at the time of the Putnam submission. Mr. Becic's review of the time guide hours was part of privileged communications that should not be considered because Putnam could not effectively examine Mr. Becic due to the asserted attorney-client privilege. (RT Vol. I, 110:9-112:5 [Becic].)  Moreover, the testimony was "in most of the cases we looked at, you are not adhering exactly to the Ford time guide's hours." (RT Vol. I, 110:4-8 [Becic].) To the extent Putnam's sold hours did not exactly match Ford's factory guide, the sold hours were approximately equal to Ford's factory guide.
"Half of the lines that had a rate of \$440 were associated with diagnostic work which is a flat-rate charge, regardless of the time it took to perform the diagnosis." (Ford's Brief at 34:13-17; <i>see also</i> Ford's Proposed Findings ¶ 18; 5:22-24 and ¶ 64; 15:3-5 and ¶ 65; 15:15-17.)	Kamenetsky: 9/27/23, 1468:24-1469:3 (diagnostics done on a flat-rate basis); Korenak: 9/24/23 [sic], 1429:5-13 (same); Heinemann: 9/25/23, 943:16-18 (relying on deposition testimony of	The testimony from Mr. Kamenetsky states normally diagnostic is billed at 1 hour at \$440, however if it is simpler or more complicated, there is discretion to price more or less time.  The testimony from Mr. Korenak is specific to the RO being discussed in the testimony (RO 10048).  Ford's statement is further inconsistent with other record evidence. For example, Exhibit J-3 shows diagnostics associated with 10251C, 10248D, 10244A, 10239A, and 10216A shows pricing for diagnostics other than one hour for \$440. (Exh. J-3 [B45].) These examples are consistent with Mr. Kamenetsky's testimony

	Putnam service advisor).	and inconsistent with the overgeneralization offered by Ford.
<p>“For example, taken as a whole, there are 90.3 sales hours in the Submission, for a net labor charge of \$34,963. This is an average labor charge of \$387.19 when using sold hours. But, if we exclude diagnostic repairs, which are estimated to be about 25% of the repair lines, or 18 lines, that reduces the total hours by 18 hours and the total charges by \$7,920. The effect is to lower the labor rate to \$374.04. The difference may be even greater depending on the 90-day period selected. This \$13/hour difference is material given the volume of warranty repair work for which Ford pays Putnam in a year.” (Ford’s Brief at 35: fn. 21.)</p>	<p>Ford does not offer a citation in support these statements.</p>	<p>In addition to not being supported by citation, the statements are inaccurate because they include sold hours outside Putnam’s original submission. It is unclear what time range of ROs Ford is relying on for its calculation. The calculations appear to also be based on extrapolation and not the actual ROs.</p> <p>Applying Ford’s calculation to the actual submission ROs from Exhibit J-3 shows a different result:</p> <p>There are eight repairs with one sold hour for \$440 relied on by Ford from Putnam’s submission. (See Ford Brief at 34:17-22 (referencing RO 10259A, 10206A, 10148A, RO 10118A, 10106C, 10094A, 10091A, 10036B).) Reducing the totals in the spreadsheet (sixth and tenth column) by 8 hours and \$3,520 (8 time \$440) reduces 46.8 hours to 38.8 and \$20,440.55 to \$16,920.55. Dividing \$16,920.55 by 38.8 hours would instead result in a \$436.10 (436.9664948...) labor rate—approximately 66 cents less than Putnam’s requested rate. As a result, the difference is not material and is almost twenty times less than the difference as calculated by Ford (\$13/hour divided by \$0.66/hour for purposes of comparison).</p>
<p>“According to Mr. Kanouse, this rate cannot be entered into the CDK system and the sale total would have had to be manually entered into the system (as opposed to the final charge being automatically populated by CDK by multiplying hours by a set rate.” (Ford’s Brief at 37:7-9; see also Ford’s Proposed Findings ¶ 48; 11:8-11.)</p>	<p>Kanouse: 9/19/23, 345:17-23.</p>	<p>The citation does not support Mr. Kanouse’s described testimony. The cited testimony states in full: “Q. I want to draw your attention to repair order 10049. And I think that begins on Exhibit J7-488, which is B1792. A. Okay. Q. Line A is one of the repairs that Putnam Ford claims is a qualified repair for their warranty labor rate submission. I want to ask you about line A then.” The only word Mr. Kanouse states in the citation is “Okay” and only in response to the beginning of an RO in Exhibit J-7.</p>
<p>“Putnam’s CDK computer system is pre-programmed</p>	<p>Kanouse: 9/19/23, 343:25-</p>	<p>The cited testimony from 343:25-344:16 does not discuss any pre-programmed calculation in</p>

to calculates [sic] the customer charge from the sold hours for a given repair coded in its system and the default hourly rate the dealer sets.” (Ford’s Brief at 37: fn. 26; <i>see also</i> Ford’s Proposed Findings ¶11: fn. 11.)	344:16, 465:14-17, 470:1-16.	CDK. The cited testimony from 465:14-17 describes that CDK can populate by parameters that are set up or defined (Mr. Kanouse does not describe pre-programmed calculations). The cited testimony from 470:1-16 disagrees with whether \$117.68 could be automatically displayed using actual hours. None of the cited testimony supports the conclusion Putnam’s CDK computer system is pre-programmed to run the described calculation—none of Mr. Kanouse testimony could confirm if the parameters he described were in fact set up or defined.
“These ‘giant,’ ‘extreme’ discrepancies between its sold hours and its ultimate technician hours indicated to Ford’s witnesses what Mr. Putnam admitted; once the repair was completed the technician manually change to sold hours to be much lower in order to give the appearance of a higher hourly rate.” (Ford’s Brief at 39:22-25; <i>see also</i> Ford’s Proposed Findings ¶ 54; 13:6-8.)	Kamenetsky: 9/27/23, 1600:25-1601:3.	The “tinkering” in the quote concerns the price for labor and is unrelated to the statement by Ford concerning sold hours (“...once the repair was completed the technician manually change to sold hours to be much lower in order to give the appearance of a higher hourly rate”). Ford’s statement following the semicolon is unsupported by the citation.
“This comports with Mr. Putnam’s admission to Ms. Murphy-Austin—the total charge to the customer, when considering actual hours, is competitive with the market.” (Ford’s Brief at 40:1-3.)	Murphy-Austin: 9/18/23, 191:22-192:16.	Ms. Murphy-Austin does not describe Mr. Putnam admitting any type of consideration of actual hours. As described by the testimony, Mr. Putnam said Putnam would be using a lower number of guide hours relative to those used elsewhere. No evidence shows the other dealers in the market price customer pay jobs using actual hours.
“Even Mr. Stockton, Putnam’s own expert, indicated that the repair orders were not reliable.” (Ford’s Brief at 44:28-45:3; <i>see also</i> Ford’s Proposed Findings ¶ 197; 45:2-5.)	Stockton: 9/26/23, 1296:12-21 (admitting to relying on the downstream data file over the accounting copies of the repair orders because it was more “up-to-date” than the	Mr. Stockton does not testify the repair orders were not reliable. He testified the data file would have the “Most up-to-date information. There could be comebacks or additional encounters that I would expect to be captured in the downstream file. I wouldn’t expect there to be major differences, but that is a -- if there were differences, that is where I would expect them to be.” (RT Vol. VI, 1296:21-1297:1.) Moreover, Mr. Stockton confirmed he and his staff checked the repair orders compared to the data file. (RT Vol. VI, 1294:7-19.) Duplicates were removed and only <u>one</u> minor correction as noted on Mr.

	actual repair orders).	Stockton's Tab 3, page 2 needed to be made. (RT Vol. VI, 1278:5-9; <i>see also</i> Exh. 40 – 045 [A839] (noting 1.27 was corrected to 1.25 for RO 10125 operation code 19S54B using Dealer Repair Order Invoices).)
“While reviewing repair orders with qualified repairs on various lines, Mr. Kanouse also noted the additional anomaly that actual technician hours were being designated as internal shop policy repairs, as opposed to customer-pay or warranty repairs, and accounted for in accounts other than the expected cost of labor accounts at the bottom of the repairs orders. This apparently was a way to expense technician costs of labor other than a customer pay repair.” (Ford's Brief at 46:7-12.)	Kanouse: 9/19/23, 428:2-12, 457:16-17.	The citations describe the policy account (shop policy or account 77500) and payment of training to the 77500 account for shop policy. The “additional anomaly” as described by Ford is not supported by the cited testimony.
“Although Putnam identified only 72 qualified repairs among the repair orders (there are 74 by Ford's count), these were buried among 1,673 individual repairs that had to be manually reviewed because of the extensive fraud and misrepresentations.” (Ford's Brief at 55:11-14; <i>see also</i> Ford's Proposed Findings ¶ 238; 54:3-4.)	(Heinemann: 9/25/23, 914:14-16.)	The ROs supporting Putnam's requested rate were identified in the excel spreadsheet submitted therewith. (Exh. J-3 [B45].) Moreover, each of the qualified repair lines in the ROs were highlighted in green to make them stand out. ( <i>See, e.g.</i> , Exh. J-7 – 021 [B1325] (concerning RO 10277, line A).) The qualified repairs relied on by Putnam were not “buried”—they were clearly identified.  Ford's citation does not support its statement. The citation only identifies the number of repair lines in total. There is no reference to “extensive fraud.”
“Neither Mr. Korenak nor Mr. Stockton analyzed the repair orders in any meaningful way. Mr. Korenak testified that he uses a software system that runs reports and pulls data into spreadsheets and allows for a “quick[]”		Ford's first reference ignores Mr. Korenak's testimony, “And then we look at the repair order to make sure that the spreadsheet and the repair order line up.” (RT Vol. VII, 1359:20-22 [Korenak].)  Similarly, Mr. Korenak testified, “Once we get to a point where we are looking at the specific qualified repair orders, it is a combination of



analysis of qualified repairs. (Korenak: 9/27/23, 1359: 9-25.) After populating a spreadsheet, they “let the math do what it does.” ( <i>Id.</i> 1359:23-25; <i>see also id.</i> 1370:14-1371:8.) Mr. Stockton relied on a data file prepared by Putnam that did not contain all of the same information as the repair orders themselves. (Stockton: 9/26/23, 1297:5-1298:16.) He testified that he preferred the data file over the repair orders. ( <i>Id.</i> , 1297:2-4.)” (Ford’s Brief at 55: fn. 36; <i>see also</i> Ford’s Proposed Findings 54: fn. 50.)		<p>eyeballs on the actual repair order and make sure everything lines up in the spreadsheet so that the two documents stay the same. The source document is always the repair orders.” (RT Vol. VII, 1371:2-7 [Korenak].) Mr. Korenak and Frogdata utilized the ROs in a meaningful way.</p> <p>Moreover, while Mr. Stockton worked with the data file, he notes he and his staff “<b><u>did check them to the repair orders.</u></b> There were items that Mr. Kelso asked me about that I didn’t look for that, in my experience, I would expect to find in a certain place. And I was not seeing them.” (RT Vol. VI, 1297:18-21 [Stockton]; <i>see also</i> RT Vol. VI, 1298:10-14 (describing the sources he looked at were “[m]ainly the file. And the repair was a double-check to the file.”)) Mr. Stockton and his staff also utilized the ROs in a meaningful way.</p>
“Additionally, California has an interest in ‘conserving judicial resources and promoting judicial economy by minimizing repetitive litigation, preventing inconsistent judgments which undermine the integrity of the judicial system, and avoiding the harassment of parties through repeated litigation.’” (Ford’s Brief at 60:14-19.)	<i>Meridian Fin. Servs., Inc. v. Phan</i> (2021) 67 Cal. App. 5th 657, 686–687, <i>review denied</i> (Nov. 10, 2021); <i>accord Ghaderi v. United Airlines, Inc.</i> (N.D. Cal. 2001) 136 F.Supp.2d 1041, 1043 (“Public policy favors avoiding waste of both litigants’ and judicial resources”).	<p>Ford fails to identify <i>Meridian Fin. Servs., Inc. v. Phan</i> (2021) 67 Cal. App. 5th 657, 686–687, <i>review denied</i> (Nov. 10, 2021) is an issue preclusion case. Repeated litigation over the same issues is not an issue in this Protest. The statement of California’s policy in the case is wholly inapplicable here.</p> <p>Similarly, <i>Ghaderi v. United Airlines, Inc.</i> (N.D. Cal. 2001) 136 F.Supp.2d 1041, 1043 is in the context of diversity of citizenship for purposes of federal diversity jurisdiction and is wholly inapplicable here.</p>
Further, Ford’s interpretation is consistent with California’s policy interest in protecting consumers from unnecessarily high prices. (Ford’s Brief at 65:16-20;	<i>See, e.g., Josten v. Rite Aid Corp.</i> (S.D. Cal. Nov. 20, 2018) 2018 WL 6062415, at *5 (charging consumer higher prices violates	The <i>Josten</i> case concerns allegations where the defendant was alleged to have charged insurance customers a different and higher rate than cash-customers. The case was at the pleading stage and concerned different prices for insurance customers. The case does not support Ford’s statement of policy.



<p><i>see also</i> Ford’s Proposed Findings ¶ 247; 56:11-15</p>	<p>public policy); <i>Smith v. State Farm Mut. Auto. Ins. Co.</i> (2001) 93 Cal. App. 4th 700, 719 (“Examples of unfair business practices include: charging a higher than normal rate for [a service].”)</p>	<p>In addition, Ford removes the relevant context in its citation to <i>Smith</i> by using “[a service]” edit. The actual case describes something much for specific as the issue: “Examples of unfair business practices include: charging a higher than normal rate for copies of deposition transcripts (by a group of certified shorthand reporters), where the party receiving the original is being given an undisclosed discount as the result of an exclusive volume-discount contract with two insurance companies [citation] ...” (<i>Smith v. State Farm Mut. Auto. Ins. Co.</i> (2001) 93 Cal. App. 4th 700, 719.)</p>
<p>Reasonableness is a question of fact. (Ford’s Brief at 66:7-10; <i>see also</i> Ford’s Proposed Findings ¶ 249; 56:23-26.)</p>	<p><i>E.g., Great W. Distillery Prods. v. John A. Wathen Distillery Co.</i> (1937) 10 Cal. 2d 442, 446 (“What is a reasonable price is a question of fact dependent on the circumstances of each particular case.”); <i>accord House v. Lala</i> (1960) 180 Cal. App. 2d 412, 418.</p>	<p>In <i>Great W. Distillery Prods.</i> The court is quoting directly from Civil Code section 1729 (4) inapplicable here: “This rule was adopted in the Uniform Sales Act and has been incorporated into our law by section 1729 (4) of the Civil Code, which provides as follows: ‘Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. <u>What is a reasonable price is a question of fact dependent on the circumstances of each particular case.</u>’” (<i>Great W. Distillery Prods. v. John A. Wathen Distillery Co.</i> (1937) 10 Cal. 2d 442, 446 (emphasis added).)</p> <p>In <i>House v. Lala</i>, the court is similarly concerned with Civil Code section 3391 subdivision (1) not applicable here: “<i>Cushing v. Levi</i>, 117 Cal.App. 94, at page 101 [3 P.2d 958] says: ‘Adequate consideration,’ as used in section 3391, subdivision 1, of the Civil Code, does not necessarily mean the highest price obtainable, but a price that is fair and reasonable under all the circumstances; it is always peculiarly a question of fact for the trial court to determine, in the light of all the facts and circumstances of each particular case.’ ” (<i>House v. Lala</i> (1960) 180 Cal. App. 2d 412, 418.)</p>
<p>“In fact, Kamenetsky testified that Putnam’s rate for warranty-like, qualified, customer pay repairs was intentionally not priced to be competitive.” (Ford’s Brief at 68:17-18.)</p>	<p>(Kamenetsky: 9/27/23, 1541:12-14.)</p>	<p>No such intent is supported by the testimony. The cited testimony is as follows: “Q. Does that mean that you are not trying to price the qualified repairs competitively? A. Yes, I agree with that.” Putnam is not considering other dealership’s customer pay rates with respect to warranty-like repairs; there</p>

		is no intent to not price competitively. In fact, Ford's Proposed Findings paragraph 250 states the testimony accurately unlike Ford's Brief: "In fact, Mr. Kamenetsky testified that their labor rate was not priced to be 'competitive.'" (Ford's Proposed Findings ¶ 250; 57:8-9.)
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**DECLARATION OF SERVICE BY ELECTRONIC MAIL**

I, Robert A. Mayville Jr., declare that I am employed in the County of Sacramento, State of California, that I am over 18 years of age, and that I am not a party to the proceedings identified herein. My business address is 4360 Arden Way, Suite 1, Sacramento, California 95864.

I declare that on April 4, 2024, I caused to be served a true and complete copy of:

***PROTESTANT'S POST HEARING BRIEF***

***and***

***PROTESTANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW***

***KPAuto, LLC, dba Putnam Ford of San Mateo***

***v.***

***Ford Motor Company***

***Protest No. PR-2759-21; OAH NO. 2023050701***

By Electronic Mail:

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

Executed this 4 April 2024 Sacramento, California.

  
Robert A. Mayville Jr.

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ATTORNEYS FOR PROTESTANT

**STATE OF CALIFORNIA**

**NEW MOTOR VEHICLE BOARD**

In the Matter of the Protest of:

KPAUTO, LLC, dba PUTNAM FORD OF SAN  
MATEO,

Protestant,

v.

FORD MOTOR COMPANY,

Respondent.

**PROTEST NO: PR-2759-21;  
OAH NO. 2023050701**

**PROTESTANT’S PROPOSED FINDINGS  
OF FACT AND CONCLUSIONS OF LAW**

Pursuant to the Order Approving Second Stipulated Request to Amend Briefing Schedule of the Office of Administrative Hearings (“OAH”) dated March 22, 2024, Protestant, KPAuto, LLC, dba Putnam Ford of San Mateo (“Putnam”), submits Protestant’s Proposed Findings of Fact and Conclusions of Law.

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**PROCEDURAL BACKGROUND****I. STATEMENT OF THE CASE**

1. Putnam submitted to Respondent, Ford Motor Company (“Ford”), a request to increase its warranty labor rate from \$177.00 to \$436.76 per hour pursuant to Vehicle Code section 3065.2<sup>2</sup> on August 24, 2021 (“Request”). The Request was submitted with a cover letter dated July 28, 2021, (Exh. J-2 – 001 [B44]), a spreadsheet showing the calculation of Putnam’s requested rate (Exh. J-3 [B45], and repair orders (also referred to as “ROs”) numbered 10286 through 10036 from 6/7/2021 through 3/10/2021 (Exh. J-7 – 001-526 [B1305-B1830]).

2. On September 20, 2021, Ford provided Putnam a letter dated September 17, 2021, requesting Putnam submit accounting copies of all repair orders closed within the period of 30 days immediately following the set of repair orders submitted by Putnam, pursuant to California Vehicle Code section 3065.2, subdivision (d)(4). (Exh. J-5 [B49].)

3. Putnam submitted the additional repair orders on September 27, 2021, numbered 10287 through 10455. (Exh. J-7 – 527-889 [B1831-B2193].)

4. On October 26, 2021, Ford issued a letter denying Putnam’s requested labor rate pursuant to Vehicle Code section 3065.2, subdivision (d)(1) claiming the requested rate was materially inaccurate or fraudulent (“Denial Letter”). (Exh. J-6 – 001-002 [B50-B51].) The Denial Letter included a proposed adjusted retail labor rate of \$220.00 per hour. (*Id.* at 002 [B51].)

5. On December 30, 2021, Putnam filed a protest with the California New Motor Vehicle Board (“Board”) pursuant to Vehicle Code section 3065.4 (“Protest”). The Protest alleged, among other facts, that Ford willfully disregarded the requirements of Section 3065.2 and that Ford would be unable to present evidence showing Putnam’s request labor rate is materially inaccurate nor fraudulent. (Protest, ¶¶ 11 and 15.)

6. The Board issued a Pre-Hearing Conference Order on July 25, 2022, with subsequent amendments. The Pre-Hearing Conference Order provided a schedule for the Parties to conduct discovery pursuant to the Board’s authority under Vehicle Code section 3050.1, subdivision (b).

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<sup>2</sup> Unless otherwise indicated, all statutory references are to the California Vehicle Code.

1           7.       On May 18, 2023, the Board referred the case to the State Office of Administrative  
2 Hearings for a merits hearing. Administrative Law Judge Wim van Rooyen was assigned to hear the  
3 case.

4           8.       A Prehearing and Mandatory Settlement Conference was held on August 11, 2023, in  
5 advance of the merits hearing set to commence on September 18, 2023. Following the conferences,  
6 Administrative Law Judge van Rooyen granted Ford's motion in limine regarding technology procedures  
7 for Zoom hearing and Ford's motion in limine to exclude evidence and argument that Ford engaged in  
8 adverse conduct towards Putnam. Administrative Law Judge van Rooyen denied Ford's motion to  
9 compel and for evidentiary sanctions.

10          9.       The merits hearing was held via Zoom on September 18 through 21 and September 25  
11 through 28, 2023.

12          10.      During the merits hearing and after argument on September 27 and 28, Administrative  
13 Law Judge van Rooyen granted Ford's motion for evidentiary sanctions against Putnam as follows:

14               some of the repairs in Putnam Ford's warranty labor rate request submission were  
15 performed at a facility other than Putnam Ford's authorized facility at 885 North San  
16 Mateo Drive, San Mateo, California ... [and] Putnam Ford is precluded from arguing or  
speculating as to the location where any repair reflected in any specific repair order in the  
submission was performed.

17 (RT Vol. VIII, 1620:1-11.) As Administrative Law Judge van Rooyen noted, the sanction "doesn't seem  
18 to be all that different from what the evidence so far has shown in this hearing." (RT Vol. VIII, 1620:12-  
19 15.)

20          11.      At the conclusion of the merits hearing, Administrative Law Judge van Rooyen issued a  
21 post-hearing briefing schedule that was subsequently amended. The record closed upon the completion  
22 of the post-hearing briefing on May 2, 2024.

23 II.     PARTIES AND COUNSEL

24          12.      Protestant is an authorized Ford "franchisee" within the meaning of Vehicle Code  
25 sections 331.1, 3065.2, and 3065.4. At the hearing, Putnam was represented by Gavin M. Hughes, Esq.  
26 and Robert A. Mayville, Jr., Esq. of the Law Offices of Gavin M. Hughes.

27          13.      Respondent is a "franchisor" within the meaning of Vehicle Code sections 331.2, 3065.2,  
28 and 3065.4. Ford was represented by Steven M. Kelso, Esq., Elayna M. Fiene, Esq., and A1022.

1 Connally, Esq. of Greenberg Traurig LLP.

2 III. SUMMARY OF WITNESS TESTIMONY AND EXHIBITS INTRODUCED

3 14. Ford called the following witnesses during the merits hearing:

4 John Michael Becic, a Field Operations Analyst for Ford;

5 Megan Murphy-Austin, Ford's San Francisco Regional Manager at the time of Putnam's Request;

6 Allen Kanouse, a Ford auditor at the time of Putnam's Request;

7 Maher "Mike" Sweis, a Field Service Engineer for Ford;

8 David Martinez, Putnam's former Service Manager from September 1, 2021, through February 10, 2023;

9 LaShawne Swann, the current San Francisco Regional Manager for Ford; and

10 Suzanne Engel Heinemann, Ford's forensic accountant expert witness.

11 15. Putnam called the following witnesses during the merits hearing:

12 Kent Thomas Putnam, Putnam's dealer principal;

13 Edward "Ted" Stockton, Putnam's expert witness;

14 Jeffrey J. Korenak, the Director of Implementation for FrogData LLC, the company which provided data  
15 analysis for Putnam's Request; and

16 Andrey Kamenetsky, Group Operations Manager and Chief Financial Officer for the broader Putnam  
17 organization.

18 16. The Parties admitted into evidence approximately 44 exhibits including all of Joint  
19 Exhibits J-1 through J-7.

20 **BURDEN OF PROOF**

21 17. Pursuant to Vehicle Code section 3065.4, subdivision (a), Ford bears the burden of proof  
22 to show (1) it complied with Section 3065.2 in responding to Putnam's Request and (2) Putnam's  
23 determination of the retail labor rate is materially inaccurate or fraudulent. (Cal. Veh. Code, § 3065.4,  
24 subd. (a).)

25 **ISSUE PRESENTED**

26 18. The issue presented in this protest is whether Ford sustained its burden of proof to show  
27 it complied with Section 3065.2 in responding to Putnam's Request and Putnam's determination of the  
28 retail labor rate is materially inaccurate or fraudulent. The Board may determine the difference between

the amount the franchisee has actually received from the franchisor for fulfilled warranty obligations and the amount that the franchisee would have received if the franchisor had compensated the franchisee at the retail labor rate and retail parts rate as determined in accordance with Section 3065.2. (Cal. Veh. Code, § 3065.4, subd, (b).) In the alternative, the franchisee may submit a request to the franchisor to calculate the unpaid warranty reimbursement compensation. (*Id.*)

**APPLICABLE LAW**

19. Vehicle Code section 3065.4 provides in relevant part the following:

(a) If a franchisor fails to comply with Section 3065.2, or if a franchisee disputes the franchisor's proposed adjusted retail labor rate or retail parts rate, the franchisee may file a protest with the board for a declaration of the franchisee's retail labor rate or retail parts rate. In any protest under this section, the franchisor shall have the burden of proof that it complied with Section 3065.2 and that the franchisee's determination of the retail labor rate or retail parts rate is materially inaccurate or fraudulent.

(b) Upon a decision by the board pursuant to subdivision (a), the board may determine the difference between the amount the franchisee has actually received from the franchisor for fulfilled warranty obligations and the amount that the franchisee would have received if the franchisor had compensated the franchisee at the retail labor rate and retail parts rate as determined in accordance with Section 3065.2 for a period beginning 30 days after receipt of the franchisee's initial submission under subdivision (a) of Section 3065.2. The franchisee may submit a request to the franchisor to calculate the unpaid warranty reimbursement compensation and the franchisor shall provide this calculation to the franchisee within 30 days after receipt of the request. The request for the calculation will also be deemed a request for payment of the unpaid warranty reimbursement compensation.

(Cal. Veh. Code, § 3065.4, subd. (a) and (b).)

20. Vehicle Code section 3065.2 provides in relevant part the following:

(a) A franchisee seeking to establish or modify its retail labor rate, retail parts rate, or both, to determine a reasonable warranty reimbursement schedule shall, no more frequently than once per calendar year, complete the following requirements:

(1) The franchisee shall submit in writing to the franchisor whichever of the following is fewer in number:

(A) Any 100 consecutive qualified repair orders completed, including any nonqualified repair orders completed in the same period.

(B) All repair orders completed in any 90-consecutive-day period.

(2) The franchisee shall calculate its retail labor rate by determining the total charges for labor from the qualified repair orders submitted and dividing that amount by the total number of hours that generated those charges.

...

(c) Charges included in a repair order arising from any of the following shall be omitted

1 in calculating the retail labor rate and retail parts rate under this section:

2 ...

3 (3) Routine maintenance, including, but not limited to, the replacement of bulbs,  
4 fluids, filters, batteries, and belts that are not provided in the course of, and related  
5 to, a repair.

6 ...

7 (d) (1) A franchisor may contest to the franchisee the material accuracy of the retail labor  
8 rate or retail parts rate that was calculated by the franchisee under this section within 30  
9 days after receiving notice from the franchisee or, if the franchisor requests supplemental  
10 repair orders pursuant to paragraph (4), within 30 days after receiving the supplemental  
11 repair orders. If the franchisor seeks to contest the retail labor rate, retail parts rate, or  
12 both, the franchisor shall submit no more than one notification to the franchisee. The  
13 notification shall be limited to an assertion that the rate is materially inaccurate or  
14 fraudulent, and shall provide a full explanation of any and all reasons for the allegation,  
15 evidence substantiating the franchisor's position, a copy of all calculations used by the  
16 franchisor in determining the franchisor's position, and a proposed adjusted retail labor  
17 rate or retail parts rate, as applicable, on the basis of the repair orders submitted by the  
18 franchisee or, if applicable, on the basis provided in paragraph (5). After submitting the  
19 notification, the franchisor shall not add to, expand, supplement, or otherwise modify any  
20 element of that notification, including, but not limited to, its grounds for contesting the  
21 retail labor rate, retail parts rate, or both, without justification. A franchisor shall not deny  
22 the franchisee's submission for the retail labor rate, retail parts rate, or both, under  
23 subdivision (a).

24 ...

25 (3) In the event the franchisor provides all of the information required by paragraph (1)  
26 to the franchisee, and the franchisee does not agree with the adjusted rate proposed by the  
27 franchisor, the franchisor shall pay the franchisee at the franchisor's proposed adjusted  
28 retail labor rate or retail parts rate until a decision is rendered upon any board protest filed  
pursuant to Section 3065.4 or until any mutual resolution between the franchisor and the  
franchisee. The franchisor's proposed adjusted rate shall be deemed to be effective as of  
the 30th day after the franchisor's receipt of the notice submitted pursuant to subdivision  
(a).

(4) If the franchisor determines from the franchisee's set of repair orders submitted  
pursuant to subdivisions (a) and (b) that the franchisee's submission for a retail labor rate  
or retail parts rate is substantially higher than the franchisee's current warranty rate, the  
franchisor may request, in writing, within 30 days after the franchisor's receipt of the  
notice submitted pursuant to subdivision (a), all repair orders closed within the period of  
30 days immediately preceding, or 30 days immediately following, the set of repair orders  
submitted by the franchisee. If the franchisee fails to provide the supplemental repair  
orders, all time periods under this section shall be suspended until the supplemental repair  
orders are provided.

(5) If the franchisor requests supplemental repair orders pursuant to paragraphs (1) and  
(4), the franchisor may calculate a proposed adjusted retail labor rate or retail parts rate,  
as applicable, based upon any set of the qualified repair orders submitted by the  
franchisee, if the franchisor complies with all of the following requirements:

(A) The franchisor uses the same requirements applicable to the franchisee's  
submission pursuant to paragraph (1) of subdivision (a).

(B) The franchisor uses the formula to calculate retail labor rate or retail parts as

provided in subdivision (a).

(C) The franchisor omits all charges in the repair orders as provided in subdivision (c).

(e) If the franchisor does not contest the retail labor rate or retail parts rate that was calculated by the franchisee, or if the franchisor fails to contest the rate pursuant to subdivision (d), within 30 days after receiving the notice submitted by the franchisee pursuant to subdivision (a), the uncontested retail labor rate or retail parts rate shall take effect on the 30th day after the franchisor's receipt of the notice and the franchisor shall use the new retail labor rate or retail parts rate, or both, if applicable, to determine compensation to fulfill warranty obligations to the franchisee pursuant to this section.

...  
(h) When a franchisee submits for the establishment or modification of a retail labor rate, retail parts rate, or both, pursuant to this section, a franchisee's retail labor rate or retail parts rate shall be calculated only using the method prescribed in this section. When a franchisee submits for the establishment or modification of a retail labor rate, retail parts rate, or both, pursuant to this section, a franchisor shall not use, or require a franchisee to use, any other method, including, but not limited to, any of the following:

...  
(3) Unilaterally calculating a retail labor rate or retail parts rate for a franchisee, except as provided in subdivision (d).

...  
(i) A franchisor shall not do any of the following:

(1) Attempt to influence a franchisee to implement or change the prices for which the franchisee sells parts or labor in retail repairs because the franchisee is seeking compensation or exercising any right pursuant to this section.

...  
(j) As used in this section, a "qualified repair order" is a repair order, closed at the time of submission, for work that was performed outside of the period of the manufacturer's warranty and paid for by the customer, but that would have been covered by a manufacturer's warranty if the work had been required and performed during the period of warranty.

(Cal. Veh. Code, § 3065.2.)

21. The Business and Professions Code section 9884.9(a) provides in relevant part the following:

(a) The automotive repair dealer shall give to the customer a written estimated price for labor and parts necessary for a specific job, except as provided in subdivision (e). No work shall be done and no charges shall accrue before authorization to proceed is obtained from the customer. No charge shall be made for work done or parts supplied in excess of the estimated price, or the posted price specified in subdivision (e), without the oral or written consent of the customer that shall be obtained at some time after it is determined that the estimated or posted price is insufficient and before the work not estimated or posted is done or the parts not estimated or posted are supplied. Written consent or authorization for an increase in the original estimated or posted price may be provided by electronic mail or facsimile transmission from the customer. The bureau may specify in regulation the procedures to be followed by an automotive repair dealer if an

1 authorization or consent for an increase in the original estimated price is provided by  
2 electronic mail or facsimile transmission. If that consent is oral, the dealer shall make a  
3 notation on the work order of the date, time, name of person authorizing the additional  
4 repairs, and telephone number called, if any, together with a specification of the additional  
5 parts and labor and the total additional cost, and shall do either of the following:

6 (Cal. Bus. & Prof. Code, § 9884.9, subd. (a).)

7 **SUMMARY OF RESPONDENT'S CONTENTIONS**

8 22. Ford argues it complied with Section 3065.2 in handling Putnam's Request and Putnam's  
9 Request is either materially inaccurate or fraudulent.

10 23. Ford claims the following anomalies, discrepancies, and inaccuracies are present in the  
11 ROs:

- 12 • In some instances, dividing the RO labor charges by the RO sold hours yields repeating  
13 decimal figures;
- 14 • A number of the Putnam ROs show large discrepancies between the actual hours and sold  
15 hours on the ROs;
- 16 • There are instances of different rates on different repairs on the same RO;
- 17 • The ROs show instances where actual or sold hours are zero;
- 18 • Diagnostic charges are "almost always" charged a flat rate of one hour for \$440;
- 19 • Certain additional lines of qualified repairs should be combined with others before  
20 calculating the rate; and
- 21 • Technician hours are improperly characterized as "internal shop policy" repairs.

22 24. Ford further asserts Putnam's requested labor rate is materially inaccurate or fraudulent  
23 because some of the relevant repairs occurred at a location not authorized by Ford's dealer agreement  
24 with Putnam.

25 25. Ford argues Putnam's requested labor rate is not reasonable when compared to  
26 surrounding Ford dealers. Ford claims the Board must apply a reasonableness standard as a "veritable  
27 code" to a request. (Respondent Ford Motor Company's Post-Hearing Brief at 64:15.)

28 26. Ford claims it complied with Section 3065.2 because the Denial Letter is not required to  
"provide *all* possible evidence. Rather, it need only identify its reasoning (*e.g.* there is a significant



discrepancy between sold hours and actual hours), and evidence of that reason (*e.g.* RO 10305 [B1867-68] (12.74 hours actual time, but 2.4 sold hours)).” Further, Ford states it was not required to perform any calculations in responding to Putnam’s Request.

27. Ford argues to the extent Ford’s Denial Letter needs to be added to, expanded, supplemented, or otherwise modified, the changes are justified.

28. Ford asserts it would be a violation of Ford’s due process rights if the Board were not to consider its arguments not contained in the Denial Letter.

29. Ford claims the Board is empowered to conduct an independent review of the evidence and set a rate regardless of whether Ford meets its burdens of proof. Ford suggests the Board set a labor rate for Putnam of \$177 or, in the alternative, \$198.02 below Ford’s proposed adjusted retail labor rate of \$220.00 per hour.

### **SUMMARY OF PROTESTANT’S CONTENTIONS**

30. Putnam argues Ford failed to comply with Section 3065.2 in responding to Putnam’s Request in at least the following ways:

- Ford’s Denial Letter and evidence from certain ROs fail to omit routine maintenance in calculating a retail labor rate, including, but not limited to, the replacement of bulbs, fluids, filters, batteries, and belts that are not provided in the course of, and related to, a repair;
- Ford’s Denial Letter failed to provide a full explanation of any and all reasons for Ford’s allegations;
- Ford’s Denial Letter failed to include a copy of all calculations used by Ford in determining Ford’s position;
- Ford’s Denial Letter failed to propose an adjusted retail labor rate on the basis provided in subdivision (d)(5) and using the same requirements applicable to Putnam’s submission pursuant to subdivision (a)(1);
- Ford has impermissibly sought to add to, expand, supplement, or otherwise modify elements of its Denial Letter without justification;
- Ford’s Denial Letter unilaterally calculated a retail labor rate for Putnam in a way other

1 than provided for in subdivision (d); and

- 2 • Upon receipt of Putnam's Request, Ford attempted to influence Putnam's pricing to its  
3 retail customers because Ford believed Putnam's retail labor rate was too high.

4 31. As a result of Ford's failure to show it complied with Section 3065.2, Putnam's requested  
5 labor rate is deemed approved by operation of Vehicle Code sections 3065.4 and 3065.2, subdivision  
6 (e).

7 32. Ford's claimed "anomalies, discrepancies, and inaccuracies," to the extent they are  
8 inconsistent and not contained within Ford's Denial Letter, are attempts to impermissibly add to, expand,  
9 supplement, or otherwise modify elements of its Denial Letter without justification.

10 33. Ford is precluded from relying on its arguments that dividing the total labor charge by the  
11 sold hours yields repeating decimals, instances in the ROs show actual or sold hours are zero, diagnostic  
12 repairs are charged at a flat rate, and technician hours are improperly characterized as "internal shop  
13 policy" repairs because these reasons for Ford's denial were not contained in the Denial Letter despite  
14 this information having been timely provided to Ford in the ROs accompanying the Request.

15 34. The location where the repairs documented by Putnam's ROs accompanying Putnam's  
16 Request occurred is irrelevant to the Board's determination because Vehicle Code section 3065.2,  
17 subdivision (j) provides for the *type* of repairs subject to a Section 3065.2 submission and not whether  
18 those repairs would have been paid for by the franchisor if they had been warranty repairs. Moreover,  
19 Ford's Dealer Agreement does not govern the location where customer-pay repairs occur on the used  
20 vehicles at issue in this Protest.

21 35. Vehicle Code section 3065.2 defines what it means to be a reasonable warranty  
22 reimbursement rate by setting a formula. The formula does not include consideration of the rates of  
23 surrounding dealers and these rates do not control the Board's determination. The Legislature sought to  
24 replace the determination of reimbursement rates based on a reasonableness standard with the  
25 methodology contained in Section 3065.2.

26 36. Putnam's Request is not materially inaccurate or fraudulent. Putnam seeks to apply  
27 Ford's factory guide when pricing customer pay repairs with an hourly rate of \$440 per hour. Ford failed  
28 to provide evidence the sold hours in the customer pay repairs subject to Putnam's Request are

substantially inconsistent with Ford's factory guide. Ford failed to offer an analysis comparing Putnam's sold hours with Ford's factory guide. Examples discussed during the hearing show Putnam's sold hours are equal to or approximately equal to Ford's factory guide. The requested labor rate of \$436.76 is consistent with Putnam's pricing to retail customers at \$440 per hour based on Ford's factory guide.

37. Ford's argument the Board should conduct an independent review is inconsistent with Ford's burdens of proof and the requirements of Sections 3065.2 and 3065.4.

38. Ford was not denied due process because it always had the option to provide a supplemental notification to the extent it discovered additional reasons for its Denial Letter. Ford failed to supplement the Denial Letter prior to the hearing. Allowing Ford to add to, expand, supplement, or otherwise modify elements of its Denial Letter in the middle of the merits hearing and the Board making a decision based on those expansions to the Denial Letter would violate Putnam's due process rights.

39. Ford provided Putnam a proposed adjusted retail labor rate of \$220 per hour in the Denial Letter. Ford cannot seek a rate below its own proposed adjusted retail labor rate in this Protest proceeding, especially when the \$220 per hour rate was based on what Ford determined to be supported by valid documentation and consistent with surrounding Ford dealer rates.

### **FINDINGS OF FACT<sup>3</sup>**

#### **I. WITNESS BACKGROUND FINDINGS**

40. John Michael Becic Background: He has worked for approximately 18 years with Ford Motor Company. He is currently a field operations analyst since 2017. He received a psychology and anthropology major from University of Michigan in Ann Arbor in 2003 and received a MBA from Wayne State University in 2005. He was previously in Commodity Business Planning, Ford Credit, Product Development Engineering Finance, Customer Service Division in the Parts Distribution Center managing the budget, and Cost analysis at a Michigan assembly plant. (RT Vol. I, 33:2-37:18 [Becic].)

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<sup>3</sup> References to testimony, exhibits or other parts of the record supporting these findings are intended to be examples of evidence relied upon to reach that finding, and not to be exhaustive. Findings of Fact are organized under topical headings for readability only, and not to indicate an exclusive relationship to the issue denoted by the topic heading. The Board may apply a particular finding to any of the requirements of Section 3065.2 or burdens of proof described in Section 3065.4. Citations to the record are for the convenience of the Board. The absence of a citation generally signifies that the underlying facts are foundational or uncontested, or that the finding is an ultimate fact based upon other facts in the record and reasonable inferences flowing from those facts.

1 41. Mr. Becic became involved in warranty rate management in approximately 2021. (RT  
2 Vol. I, 37:19-23 [Becic].)

3 42. Meghan Murphy-Austin Background: She has worked for Ford for approximately 16  
4 years. She is currently a manager in U.S. Field Operations and has been in that role since the Spring of  
5 2023. Ms. Murphy-Austin's first role at Ford was the Zone Manager in the New York Region in parts  
6 and service. She was a Zone manager for approximately five years covering different territories in the  
7 New York market. Thereafter, she held specialist roles on the sales side. She then became a market  
8 representation manager and also other management positions in digital marketing, sales operations, and  
9 the retail incentives group. After those management positions, she became the San Francisco regional  
10 manager. Prior to her current position, she also worked in customer experience. She received an  
11 undergraduate bachelor's degree from Villa Nova University and an MBA from Columbia University.  
12 (RT Vol. I, 172:5-175:1 [Murphy-Austin].)

13 43. Ms. Murphy-Austin's role as the San Francisco regional manager did not involve the  
14 review, analysis, or approval of warranty claims or warranty rates. (RT Vol. I, 177:2-8 [Murphy-  
15 Austin].) Ms. Murphy-Austin did not review or analyze repair orders for any reason. (RT Vol. I, 177:9-  
16 11 [Murphy-Austin].) She also did not review, analyze, or approve customer repair rates. (RT Vol. I,  
17 177:12-14 [Murphy-Austin].)

18 44. Allen Dale Kanouse Background: He currently works for Ford as a repair process  
19 specialist. He began his current position in October of 2022. His first job in the automotive industry  
20 was working for a family-owned Ford dealership in Southern Indiana called Larry Scheltmer Ford in  
21 approximately 1978 until 1981. At the same time, he attended Northwood Institute in Midland, Michigan  
22 where he earned two associate's degrees: one in automotive marketing for car and light truck dealership  
23 management and the other for automotive marketing heavy-duty truck concentration. He also received  
24 a bachelor's in business administration. After college he worked for Kent Industries selling automotive  
25 hardware, fasteners, and chemicals to dealerships and independent body shops and repairs shops for a  
26 year. He then worked for Audubon Ford in sales for about two-and-a-half years. His next position was  
27 at Robinson Brothers Lincoln Mercury as an assistant service manager. He became the service manager  
28 three months later. Thereafter he went to Sam Galloway Ford in Fort Myers, Florida as the service

1 manager for a year and a half. He then worked at Town and Country Ford in Charlotte, North Carolina  
2 for four years. He took a couple years off doing odd jobs after working at Town and Country Ford. (RT  
3 Vol. II, 244:1-256:7 [Kanouse].)

4 45. Mr. Kanouse returned to service management at Henderson Saya as the service manager  
5 for Chrysler, Plymouth, Jeep, Eagle, and Volvo franchises under one roof for seven-and-a-half to eight  
6 years. He eventually became the parts and service director at the store. He then worked for All Star  
7 Automotive Group in Baton Rouge running the Dodge store and later the Ford store as the service  
8 manager from 1998 to mid-2003. He then worked for MSX International contracted to the warranty  
9 department for Ford. He would function similar to a parts and service director to implement change and  
10 install processes to control a dealer's warranty expense. He worked for MSX for approximately five  
11 years and then contracted directly through Ford's warranty department until 2010. Mr. Kanouse became  
12 a Ford employee in 2010. He continued performing his consulting role and became a Ford warranty  
13 auditor. He worked as a Ford auditor from 2010 until September 2022. He testified he reviews repair  
14 orders on a daily basis at the individual repair level. (RT Vol. II, 256:9-260:20 and 271:16-274:15  
15 [Kanouse].)

16 46. Mr. Kanouse never worked in a role at Ford that evaluated warranty labor rate requests.  
17 He also never reviewed Putnam's labor rate request in this case. (RT Vol. II, 288:23-289:5 [Kanouse].)  
18 He repeatedly confirmed he was not familiar with Vehicle Code section 3065.2 or subsections thereof.  
19 (RT Vol. II, 365:17-23, 366:15-21, 395:5-11, and 457:22-458:2 [Kanouse].) Mr. Kanouse only became  
20 involved in Putnam's submission because Bill Walsh reached out to him, and it was unusual he became  
21 involved in the Putnam submission. (RT Vol. II, 396:10-20 [Kanouse].)

22 47. Mr. Kanouse has never been to Putnam Automotive, he never looked into the dealership's  
23 DMS system, and he never spoke to any of Putnam's technicians, service writers, service managers, or  
24 any representative of Putnam. (RT Vol. II, 368:25-369:17 [Kanouse].) The only thing Mr. Kanouse  
25 reviewed in support of his opinions were Putnam's Supplemental ROs. (RT Vol. II, 369:18-24  
26 [Kanouse]; *see also* Exh. 23 – 001-002 [A81-A82] (showing the set of ROs Mr. Kanouse and Mr. Walsh  
27 discussed were the supplemental ROs; ROs after RO 10286, the last RO in the original submission  
28 ROs).)

1           48.     The ROs in Mr. Walsh’s spreadsheet range from 10287 through 10450. (Exh. 23 – 001-  
2     002 [A81-A82].) The ROs correspond to the supplemental ROs. (See Exh. J-7 – 527-889 [B1831-  
3     B2193] (ranging from RO 10287 through RO 10455).)

4           49.     Mahe “Mike” Sweis Background: He works as a repair improvement specialist for  
5     Ford’s proactive team. He has been in his current position since March 1, 2023. Mr. Sweis has worked  
6     in the automotive industry since approximately 1993. He began working as a porter and technician in  
7     his brother-in-law’s repair facility for four years. He changed location to a closer facility for six years  
8     in the same role. In 2003, he opened his own independent repair shop handling general auto repair and  
9     smog inspections. He ceased operating the business after ten years. Mr. Sweis then began teaching at  
10    colleges in Los Angeles and Orange County (Saddleback Community College for a semester and UEI  
11    College in Gardena). (RT Vol. III, 509:7-513:8 [Sweis].)

12          50.     Mr. Sweis considered himself a diagnostic master when teaching. He indicated he could  
13    diagnosis any car in 5 to 10 minutes. When Mr. Sweis was teaching, he also became employed as a  
14    technical repair specialist for Toyota. He worked with Toyota for six years and relocated to Plano,  
15    Texas. He then returned to San Francisco to work as a field service engineer for FCA, now known as  
16    Stellantis. (RT Vol. III, 513:9-515:22 [Sweis].) He worked as a field service engineer for two years.  
17    Thereafter, he began working for Ford in 2021. He continued to work as a field service engineer when  
18    he was hired by Ford. In his position as a field service engineer, Mr. Sweis would be responsible for  
19    discussing Ford’s process and assisting dealers with difficult repairs. He could not work on vehicles but  
20    advised technicians how to fix or diagnosis the vehicle and how to follow Ford’s process. (RT Vol. III,  
21    516:4-520:17 [Sweis].)

22          51.     Mr. Sweis received his ASE Master’s and was a master certified automotive technician.  
23    He also received his smog license issued by the State of California for diagnostics, repair, and testing.  
24    (RT Vol. III, 515:23-516:3 [Sweis].) He has since let his ASE certifications for Toyota and Dodge lapse  
25    and is 86 percent complete toward becoming a Ford master. (RT Vol. III, 628:16-629:6 [Sweis].)

26          52.     Mr. Sweis called on 13 dealerships including Putnam Ford of San Mateo in his role as a  
27    field service engineer for Ford. Mr. Sweis never worked in any area of Ford that evaluated warranty  
28    labor rate requests and only discussed portions of Putnam’s labor rate request with counsel. (RT Vol.

1 III, 521:11-522:3 [Sweis].)

2 53. Mr. Sweis first visited Putnam in mid-September 2021 (approximately September 15,  
3 2021). (RT Vol. III, 522:24-523:2 [Sweis].)

4 54. David Alan Martinez Background: Mr. Martinez was the Service Manager at Putnam  
5 Ford from September 1, 2021, through February 10, 2023. (Exh. AA – 001, ¶ 2 [B1227].) Mr. Martinez  
6 managed the service department which included supervising the service advisors, service technicians,  
7 and porters. (Exh. AA – 001, ¶ 4 [B1227].) Mr. Martinez ceased working for Putnam Ford on February  
8 10, 2023. (RT Vol. III, 652:25-653:4 [Martinez].) Mr. Martinez filed a lawsuit against the Putnam  
9 dealership approximately a week or two after he was terminated; the lawsuit is ongoing. Mr. Martinez  
10 described his lawsuit is not based on any problem with Kent Putnam (dealer principal) or Al Vasquez  
11 (general manager) but is directed toward the conduct of Troy Davis. Mr. Martinez stated Mr. Putnam  
12 and Mr. Vasquez always were respectful to him and treated him well. (RT Vol. III, 665:25-666:20  
13 [Martinez].)

14 55. Mr. Martinez has worked for approximately nine different dealerships and each one (or  
15 at least most of them) used the AllData third-party guide to price customer-pay repairs. He also indicated  
16 he has seen the use of the Mitchell time guide at dealerships. (RT Vol. III, 674:1-16.)

17 56. LaShawne Swann Background: Ms. Swann has worked for Ford for 28 years. She is  
18 currently the San Francisco Regional Manager. During college, she was part of the Ford Marketing  
19 Sales and Service desk for two summers picking parts in the Los Angeles Parts Depot. She received an  
20 undergraduate degree from San Diego State University in Political Science and an MBA from the  
21 University of Maryland in 2008. Her other positions with Ford included staffing Ford's 800 line for  
22 customer questions, a merchandising job assisting the office in the Los Angeles Region, a Zone Manager  
23 position in the Los Angeles Region, franchising and marking in San Francisco, working in the Atlanta  
24 office for 18 years (in the operations, sales, marketing, and contest incentives departments, and she has  
25 also did a rotation as management in Ford's franchising department referred to as network development).  
26 (RT Vol. IV, 791:7-795:19 [Swann].)

27 57. Suzanne Engel Heinemann Background: Ms. Heinemann was the expert witness Ford  
28 called during the hearing. She is a forensic account and economic consultant with her own company



1 called Analytics West. In 1994, she received a bachelor of business with a concentration in finance from  
2 William & Mary in Williamsburg Virginia. She is a certified public accountant in California and  
3 accredited in business valuation through the American Institute of Certified Public Accountants  
4 (“AICPA”). She is a member of the Cal CPA and the AICPA. Her work experience included working  
5 for Peterson Consulting, HealthNet, Pricewaterhouse Coopers, Analysis Group, and Nathan Associates.  
6 She started Analytics West in February 2019 (RT Vol. V, 875:10-877:16, 881:5-25, and 882:22-897:6  
7 [Heinemann].)

8 58. In preparing her analysis, Ms. Heinemann relied on Ford representatives, John Becic,  
9 Tanya Gill, and Mike Sweis for her opinion that actual hours and sold hours should be the same or  
10 approximately the same. (Exh. MM – 004-005 [B1256-B1257] and RT Vol. V, 903:12-20, 908:14-18,  
11 941:4-10, and 988:11-17 [Heinemann].)

12 59. Prior to this protest, Ms. Heinemann had not really looked at repair orders. (RT Vol. V,  
13 904:4-10 [Heinemann].) Prior to this protest, Ms. Heinemann had never calculated a retail labor rate.  
14 (RT Vol. V, 982:4-9 [Heinemann].) Prior to this protest, Ms. Heinemann had never offered an opinion  
15 based upon her review of repair orders. (RT Vol. V, 982:20-24 [Heinemann].) Similarly, prior to this  
16 protest, Ms. Heinemann did not know whether a Ford Time Guide existed. (RT Vol. V, 982:25-983:23  
17 [Heinemann].) Ms. Heinemann was unaware a California dealer is required to provide the customer an  
18 upfront price before any work is completed. (RT Vol. V, 991:22-992:22 [Heinemann].)

19 60. Ms. Heinemann did not attempt to do any comparison of Putnam’s sold hours to the Ford  
20 Time Guide or any commonly used third-party time guide. (RT Vol. V, 996:24-997:4 [Heinemann].)  
21 Instead, Ms. Heinemann compared the Putnam sold hours to the actual technician hours. This analysis  
22 is of little value to the Board’s determination of the issues in this Protest because it is not possible to  
23 generate customer charges based upon actual hours—it is legally impossible in California. Similarly,  
24 her analysis depended on conclusions of law that are rejected for reasons discussed throughout this  
25 decision. For example, her report considered the location where repairs were performed as relevant to  
26 the Board’s determination. (Exh. MM – 010-013 [B1262-B1265].) The Board rejects that legal  
27 conclusion below.

28 ///

61. Kent Thomas Putnam Background: Mr. Putnam received his bachelor's degree in business administration from the University of San Francisco. He grew up on the San Francisco Peninsula, in San Mateo County. He started in the automotive industry as a service writer at a family dealership, sold cars for a period of time, acted as a sales manager for approximately seven years, served as a general manager for approximately ten years, and has been a dealer principal ever since. He has an ownership interest in 11 franchised dealerships. He is the dealer principal for Putnam Ford. (RT Vol. V, 1020:24-1022:13 [K. Putnam].)

62. Edward "Ted" Stockton Background: Mr. Stockton was the expert witness Putnam called during the hearing. He is the Vice President and Director of Economic Services at the Fontana Group. He received his undergraduate degree in economics from the Western Michigan University and a Master's Degree from the Department of Agriculture and Resource Economics at the University of Arizona. Mr. Stockton's Master's Degree has a concentration in applied econometrics. Mr. Stockton began working for Old INA Corp for three years performing analysis and management of a department involving quality assurance. Mr. Stockton began working at the Fontana Group in 1998. Mr. Stockton began as an analyst, became a senior analyst, became a senior financial analyst (a case manager), and became Vice President and Director of Economic Services. He has been the Vice President and Director of Economic Services for 12 and a half years. Mr. Stockton's recent work has involved cost-of-repair work, including the cost of warranty and customer-pay work. Mr. Stockton's experience includes both automotive and non-automotive engagements. (RT Vol. VI, 1159:6-1172:15 [Stockton]; *see also* Exh. 40 – 013-022 [A807-A828] (Mr. Stockton's CV).)

63. Jeffrey J. Korenak Background: Mr. Korenak received an associate degree in applied sciences. He has worked at a Ford dealership in Green Bay, Wisconsin, various sales positions, and sales and leasing for Dorsch Ford in De Pere, Wisconsin where he was also promoted to finance manager. In approximately 2000 to 2010, he was the general sales manager and was promoted to general manager after five or six years at Bergstrom Automotive Saturn of Green Bay. Mr. Korenak then began working for Zurich Insurance working with dealer clients, writing insurance policies, and training F & I teams. He then returned to working as an internet sales manager for a Lexus dealer in Madison, Wisconsin, also worked for Zimbrick, a dealer group in Madison, Wisconsin, and as a sales manager at Auto Nation

1 Toyota of South Austin. He then worked in the service department for Audi of South Austin. Thereafter,  
2 and following the onset of COVID-19, he began working for FrogData, in July 2020. Mr. Korenak is  
3 currently the Director of Implementation for FrogData. (RT Vol. VII, 1350:22-1355:3 [Korenak].)

4 64. Andrey Kamenetsky Background: In 1990, Mr. Kamenetsky received a Bachelor's  
5 Degree in International Relations, German West European Studies and Economics, from the School of  
6 International Service at American University in Washington D.C. After graduating, he worked as a  
7 research assistant to an associate of the Brookings Institution in economic and public policy think tank  
8 in Washington D.C. and also as a research assistant at the Brookings Institute for the Konrad Adenauer  
9 Foundation in Washington D.C. He then began work in California as a sales associate, worked his way  
10 up as a sales manager, general sales manager, and eventually general manager and partner at the Toyota  
11 dealership owned by the Putnam organization. He worked in his role as general manager and partner  
12 from approximately 2003 to 2020. He then became the Group Operations Manager for the stores across  
13 the Putnam organization and taking on the role of CFO in June or July of 2022. (RT Vol. VII, 1436:11-  
14 1438:12 [Kamenetsky].)

## 15 II. PUTNAM FORD BACKGROUND

16 65. Putnam was awarded a Ford franchise on or about January 27, 2021. (RT Vol. V,  
17 1023:11-1024:13 [K. Putnam]; Exh. J-1 – 005 [B5].)

18 66. The dealership opened at 790 North San Mateo Drive. (RT Vol. V, 1024:14-16 [K.  
19 Putnam].) The dealership is currently located at 885 North San Mateo Drive, San Mateo, California.  
20 (RT Vol. V, 1024:17-20 [K. Putnam].) The dealership relocated after the month-to-month lease for 790  
21 North San Mateo Drive ended. (RT Vol. V, 1024:21-1025:2 [K. Putnam].)

22 67. The dealership has five lifts at 885 North San Mateo Drive, less than the 17 Mr. Putnam  
23 is required to have pursuant to the terms of the Ford franchise agreement. (RT Vol. V, 1025:19-25 [K.  
24 Putnam].) Ford approved the opening of Putnam Ford despite the service capacity deficiency because it  
25 had to open within a year of the prior dealership shutting down to avoid reestablishment protests from  
26 the surrounding dealerships. (RT Vol. V, 1026:5-12 [K. Putnam]; *see also* Cal. Veh. Code, § 3062, subd.  
27 (d) (creating the exception of reopening a dealership within a year to avoid protest rights).)

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## 1 III. PUTNAM’S REQUEST, FORD’S REVIEW, AND THE DENIAL LETTER

2 68. In reviewing a labor rate submission, Ford consults the applicable state statute for the  
3 rules concerning the submission. (RT Vol. I, 40:12-17 [Becic].) Here, the applicable statute is Section  
4 3065.2.

5 69. Ford dealers are instructed to submit labor rate increase requests through Ford’s warranty  
6 rate website which provides a portal for a dealer to electronically submit a request to Ford. (RT Vol. I,  
7 42:2-7 [Becic].) New requests are opened as drafts; dealers upload documents and supporting material  
8 relevant to the request and submit a final request by clicking a “submit” button. (RT Vol. I, 42:8-19  
9 [Becic].)

10 70. Putnam submitted its labor rate request through Ford’s website. (RT Vol. I, 43:24-44:5  
11 [Becic].)

12 71. Putnam formally submitted its labor rate request on August 24, 2021. (RT Vol. I, 44:21-  
13 22 [Becic].)

14 72. At the time of Putnam’s labor rate submission, its labor rate was \$177 per hour. (RT Vol.  
15 I, 45:1-3 [Becic]; *see also* RT Vol. I, 68:14-19 [Becic].) The \$177 per hour rate was put into place in  
16 early 2021. (RT Vol. I, 138:22-138:6 [Becic].) The \$177 per hour was the warranty labor rate Ford had  
17 been paying the previous Ford dealer who went out of business. (RT Vol. V, 1053:19-24 [K. Putnam].)

18 73. Putnam submitted a letter accompanying its labor rate request dated July 28, 2021. (Exh.  
19 J-2 (B44).) The letter requested an increase to Putnam’s current warranty labor reimbursement rate equal  
20 to \$436.76 per hour. (*Id.*) Pursuant to California Vehicle Code section 3065.2, the request relied on a  
21 repair order analysis using repair orders number 10286 through 10036 from 6/7/2021 through 3/10/2021.  
22 (*Id.*) The letter stated if Ford required any additional information or had any questions, it could contact  
23 Kent Putnam or Jeff Korenak. (*Id.*)

24 74. In addition to the letter, Putnam submitted a spreadsheet containing Putnam’s calculation  
25 of the requested \$436.76 per hour labor rate and all the repair orders that support the request. (RT Vol.  
26 I, 45:4-11 [Becic].) Putnam submitted the ROs as stated in the July 28, 2021, letter. (RT Vol. I, 45:12-  
27 18 [Becic]; *see also* Exh. J-2 (B44).)

28 ///

1           75.     On September 20, 2021, Ford provided Putnam a letter dated September 17, 2021. (RT  
2 Vol. I, 47:3-9 [Becic].) In the letter, Ford requested Putnam submit accounting copies of all repair orders  
3 closed within the period of 30 days immediately following the set of repair orders submitted by Putnam  
4 pursuant to California Vehicle Code section 3065.2, subdivision (d)(4). (Exh. J-5 (B49).) The letter  
5 provided that Putnam’s requested retail labor rate was substantially higher than its current warranty rate.  
6 (*Id.*) The letter further stated the requested repair orders “must show dealer labor cost and the  
7 corresponding amount of time *charged* to the retail customer, including any discounts applied.” (*Id.*  
8 (emphasis added).)

9           76.     Putnam submitted the requested supplemental repair orders on September 27, 2021. (RT  
10 Vol. I, 47:12-16 [Becic].)

11           77.     Exhibit J-7 includes both sets of repair orders Putnam submitted. (RT Vol. I, 47:24-48:1  
12 [Becic].)

13           78.     Exhibit J-3 is the spreadsheet Putnam submitted with its request. (RT Vol. I, 49:2-5  
14 [Becic].) The “Count” column corresponds to individual repair orders; the count can repeat because  
15 each line will represent one line item in an individual repair order. (RT Vol. I, 49:23-50:8 [Becic].)  
16 Column O with the header “Line” refers to the line of the particular RO. (RT Vol. I, 50:9-23 [Becic].)  
17 The spreadsheet contains 25 repair order with 41 individual repair lines. (RT Vol. I, 50:24-51:7 [Becic].)

18           79.     John Becic did not have primary responsibility for evaluating Putnam’s labor rate  
19 submission. (RT Vol. I, 70:12-15 [Becic]; *see also* RT Vol I, 123:2-9 [Becic].) Mr. Becic did not do  
20 any analysis when the Putnam submission was first provided to Ford in 2021. (RT Vol. I, 112:2-5  
21 [Becic].) Rich Reibel who retired at the end of 2021 was primarily responsible for evaluating Putnam’s  
22 submission. (*Id.* at 70:16-19; *see also* RT Vol. I, 112:6-9 [Becic].)

23           80.     Mr. Becic did not have any discussion with Mr. Reibel concerning whether his analysis  
24 should be done using actual hours. (RT Vol. I, 113:15-18 [Becic].)

25           81.     On August 27, 2021, Rich Reibel directed Matthew Watson to review Putnam’s  
26 submission “as normal.” (Exh. 6 [A29].) He further indicated Ford “will probably need to give them a  
27 market appropriate rate, but we will need to know what the actual effective rate is regardless.” (*Id.*)

28 ///

1           82.     A “market-appropriate rate” as the phrase is used by Ford refers to a rate that is “fair and  
2 reasonable for [an] area” and can involve examining the average rates for surrounding dealers. (RT Vol.  
3 I, 124:12-21 [Becic].) Before responding to Putnam’s submission, Mr. Reibel examined the average  
4 rates of surrounding dealers. (RT Vol. I, 124:22-125:9 [Becic].)

5           83.     The phrase “actual effective rate” is the rate supported by the submission in the context  
6 of Vehicle Code section 3065.2. (RT Vol. I, 125:21-126:6 [Becic].)

7           84.     Mr. Reibel referenced “the region” meeting with Putnam to find out what they are doing.  
8 (Exh. 6 [A29].) Meghan Murphy-Austin met with Putnam following the submission. (RT Vol. I, 122:5-  
9 22 [Becic].)

10          85.     Ford did not consider what Putnam’s technicians were being paid in responding to its  
11 requested labor rate. (RT Vol. I, 129:2-6 [Becic].)

12          86.     On September 1, 2021, Rich Reibel directed Matthew Watson to review Putnam’s request  
13 “so we know what was skipped or included and get a final rate.” (Exh. 8 – 001 [A34].)

14          87.     On September 3, 2021, John Ulrich, Mr. Becic and Mr. Reibel’s direct manager at the  
15 time (RT Vol. I, 153:24-154:9 [Becic]), directed John Becic and Kendra Wetterling to stay close to  
16 Meghan Murphy-Austin and to “keep all updated.” (Exh. 12 – 001 [A46].) The communication  
17 indicated the desire to “keep everybody involved informed as to where we stand with the status of  
18 [Putnam’s] request.” (RT Vol. I, 154:19-155:21 [Becic].)

19          88.     Ms. Murphy-Austin did not review any of Putnam’s labor rate submission materials. (RT  
20 Vol. I, 188:14-16 [Murphy-Austin].) She further had no responsibility for approving or denying the  
21 requested rate. (RT Vol. I, 188:17-189:4 [Murphy-Austin].)

22          89.     Ms. Murphy-Austin visited the Putnam dealership after September 2, 2021, following an  
23 email providing information concerning the average labor rates of the closest dealers, who submitted the  
24 request, and if an outside company completed the analysis. (RT Vol. I, 218:22-219:8 [Murphy-Austin];  
25 Exh P-11 [A42].)

26          90.     On October 22, 2021, Bill Walsh sent an email and repair orders to Allen Kanouse asking  
27 how Putnam was “trying to get a \$400 labor rate?” (Exh. 20 – 001 [A60]; RT Vol. II, 398:5-399:3  
28 [Kanouse].) Mr. Walsh indicated he would schedule a time to discuss on Monday, October 25, 2021,

1 however, it happened after Monday, October 25, 2021, because Mr. Kanouse was traveling that day.  
2 (Exh. 20 – 001 [A60]; RT Vol. II, 399:4-11 [Kanouse].)

3 91. Mr. Kanouse had been working for Ford as an auditor since at least August 24, 2021,  
4 prior to Mr. Walsh’s email; Mr. Walsh supervised Mr. Kanouse and Mr. Walsh had Mr. Kanouse’s  
5 contact information the entire time from August 24, 2021, through October 22, 2021. (RT Vol. II, 400:3-  
6 14 [Kanouse].) Mr. Walsh could have contacted Mr. Kanouse “anytime between August 24th, 2021,  
7 and October 22nd, 2021, if he had questions about basically anything[.]” (RT Vol. II, 400:15-18  
8 [Kanouse].)

9 92. On or about Wednesday, October 27, 2021, Mr. Walsh and Mr. Kanouse discussed Mr.  
10 Kanouse’s concerns related to the Putnam ROs focusing on the ISP entries as well as a spreadsheet  
11 prepared by Mr. Walsh. [RT Vol. II, 401:7-404:19 [Kanouse]; Exh. 22 – 001 [A70].) Upon reviewing  
12 Mr. Walsh’s spreadsheet, Mr. Kanouse indicated Mr. Walsh’s spread sheet “makes sense” and that he  
13 agreed with Mr. Walsh’s “assessment based on the limited information that we have been given.” (Exh.  
14 22 – 001 [A70].)

15 93. Exhibit 23 pages 1 and 2 are the spreadsheet Mr. Kanouse went over with Mr. Walsh.  
16 (RT Vol. II, 404:11-19 [Kanouse]; *see also* Exh. 22 – 001 [A70-A80] and 23 – 001-002 [A81-82]  
17 (showing the described spreadsheet follows Ford’s Bates labeling of the email chain between Mr.  
18 Kanouse and Mr. Walsh (Exh. 22: Ford\_00416-00426; Exh. 23 – 001-002: Ford\_00427-00428))).)

19 94. The columns of the spreadsheet in Exhibit 23 correspond to the Putnam ROs, the RO line  
20 numbers, the actual hours in Putnam’s ROs, the accrual for Putnam’s labor cost, the sold hours in  
21 Putnam’s ROs, the amount the customer paid for each repair in Putnam’s ROs, and the effective labor  
22 rate based on dividing the labor paid by customer column by the technician paid hours (actual hours)  
23 column. (RT Vol. II, 405:4-409:3 [Kanouse]; *see also* Exh. 23 – 001-002 [A81-A82].)

24 95. The ROs in Mr. Walsh’s spreadsheet range from 10287 through 10450. (Exh. 23 – 001-  
25 002 [A81-A82].) The ROs correspond to the supplemental ROs. (*See* Exh. J-7 – 527-889 [B1831-  
26 B2193] (ranging from RO 10287 through RO 10455).) Mr. Kanouse did not review ROs with green  
27 highlighting (i.e., the ROs accompanying Putnam’s original submission) prior to speaking with Mr.  
28 Walsh. (RT Vol. II, 444:4-9; *see, e.g.*, Exh. J-7 – 021 [B1325] (showing the green highlighting in the



original submission ROs for RO 10277).) Mr. Walsh calculated an overall effective labor rate based on his spreadsheet of ROs of \$173.06 per hour (\$23,873.58 divided by 137.95 actual technician hours). (Exh. 23 – 002 [A82]; *see also* RT Vol. II, 409:18-410:7 [Kanouse] (agreeing Mr. Walsh’s spreadsheet was a calculation of an effective labor rate).) When using Putnam sold hours instead of actual technician hours, Mr. Walsh’s spreadsheet calculates a labor rate of \$369.85 per hour (\$23,873.58 divided by 64.55 sold hours). (*Id.*)

96. When Mr. Walsh encountered repairs without actual hours, he removed those repairs from his calculation. (Exh. 23 – 002 [A82] (showing 10319D and 10448B are not included in Mr. Walsh’s calculation).)

97. Ford denied Putnam’s Request by letter dated October 26, 2021. (RT Vol. I, 71:1-6 [Becic]; *see also* RT Vol. I, 136:1-8 [Becic] (indicating Mr. Reibel drafted the letter).) Exhibit J-6 is a copy of Ford’s denial of Putnam’s requested labor rate (“Denial Letter”). (*Id.*) The Denial Letter denied Putnam’s requested labor rate increase “because it is materially inaccurate or fraudulent.” (Exh. J-6 [B50].) The letter acknowledged Ford was able to verify some of the repairs included in Putnam’s analysis. (*Id.*) Ford disagreed with whether the “labor hours (customer estimate hours)” were appropriate for the associated repair or consistent with technician clocked hours. (*Id.*)

98. The Denial Letter included discussion of the sold and actual hours for ROs 10239 and 10305; discussion of the rate charged by Putnam for repairs excluded by statute for calculating Putnam’s labor rate (ROs 10283 and 10287); criticism of Putnam’s pricing to a customer on RO 10048; and further discussion of the differences between Putnam’s sold and actual hours on ROs 10251, 10206, 10248, 10216, 10204, 10319, and 10362.<sup>4</sup> (Exh. J-6 [B50-B51].) Ford further disputed the requested labor rate was consistent with the rates being charged by other dealers in Putnam’s market. (Exh. J-6 [B51] (stating Putnam’s requested rate is around double the rate being charged by other dealers of any other brand in Putnam’s market).)

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<sup>4</sup> A latter paragraph of the Denial Letter also references an issue with the ROs submitted being listed as duplicates. (Exh. J-6 [B51].) Ford did not raise any issue that the ROs discussed during the hearing were the final accounting ROs for vehicle.

1           99.     In the Denial Letter, Ford proposed an adjusted retail labor rate of \$220.00 per hour based  
2 on “the most common customer pay rate your documentation shows in repairs where we see what appears  
3 to be valid documentation.” (Exh. J-6 [B51]; *see also* RT Vol. I, 135:14-25 [Becic] (describing Mr.  
4 Reibel granting Putnam a \$220 rate in the Denial Letter).) Ford claimed to have determined Putnam’s  
5 actual rate to be \$220 per hour. (RT Vol. I, 140:13-15 [Becic]; RT Vol. I, 141:22-142:10 [Becic] (“I  
6 think based on what we have seen it is reasonable to assume that that’s what Putnam was charging their  
7 customers, 220 an hour or thereabouts.”))

8           100.   Ford did not include any calculations in its Denial Letter except concerning ROs 10239,  
9 10305, 10283, 10287, 10048, and 10251. (Exh. J-6 [B50-B51].) Ford did not support its proposed  
10 adjusted retail labor rate with a spreadsheet. (RT Vol. I, 143:1-5 [Becic]; *see also* Exh. J-6 [B50-B51].)  
11 Mr. Reibel used some draft spreadsheets but did not use them for a final determination. (RT Vol. I,  
12 143:6-15 [Becic].) Mr. Becic claimed Ford did not perform an actual calculation to get the \$220  
13 proposed adjusted retail labor rate. (RT Vol. I, 162:24-163:5 [Becic].) In Mr. Korenak’s experience, he  
14 typically receives a calculation spreadsheet accompanying a response from a manufacturer. (RT Vol.  
15 VII, 1383:8-16 [Korenak].) Mr. Kamenetsky further agreed Ford did not provide a calculation to support  
16 the rate of \$220 per hour, and Ford never explained how it arrived at the \$220 rate or what ROs it used  
17 to arrive at the \$220 rate. (RT Vol. VII, 1475:6-1476:1 [Kamenetsky].)

18           101.   Consistent with the Denial Letter, Mr. Becic testified that upon reviewing Putnam’s  
19 Request, “it is actually the technician hours or the actual hours that are generating the labor charges.”  
20 (RT Vol. I, 71:21-24 [Becic].)

21           102.   Ford’s representatives testified actual and sold hours are normally close together (within  
22 0.1 or 0.2 hours) and in most cases identical. (RT Vol. I, 71:25-72:10 [Becic].) Mr. Becic testified “the  
23 sold hours that are used on the repair order generally seem to come out to that magical number of 440  
24 an hour.” (RT Vol. I, 72:11-72:23 [Becic].)

25           103.   In Mr. Kanouse’s experience, dealerships attempt to be at least 100 percent or more  
26 efficient (up to 120 percent) with their technicians by beating sold time in terms of their actual repair  
27 times. (RT Vol. II, 319:9-320:13 [Kanouse].)

28     ///

1           104. While Mr. Kanouse was not involved in preparing a response to Putnam’s request, Mr.  
2 Kanouse’s team leader, Bill Walsh, shared a group of repair orders with him asking how Putnam was  
3 getting to a 400-plus-dollar rate. (RT Vol. II, 289:6-20 [Kanouse].)

4           105. Mr. Kanouse’s report-out meeting with Mr. Walsh occurred after the Denial Letter was  
5 sent out. By the time Ford provided Mr. Kanouse the repair orders for review, it was too late to include  
6 any of his review in the Denial Letter. (RT Vol. II, 289:21-290:5 [Kanouse].) Mr. Walsh’s late meeting  
7 with Mr. Kanouse is not justification to not provide Mr. Walsh’s spreadsheet as a calculation in support  
8 of Ford’s Denial Letter nor is it justification to “add to, expand, supplement, or otherwise modify any  
9 element of” the Denial Letter. Ford had over 60 days to review and respond to Putnam’s submission  
10 and Mr. Walsh’s contact email did not change over that period of time. (RT Vol. II, 497:13-23  
11 [Kanouse].) Moreover, Ford had thirty days after September 27, 2021, (RT Vol. I, 47:12-16 [Becic]  
12 (describing September 27, 2021, as the date Ford received the supplemental ROs)) to issue the Denial  
13 Letter. The letter could have been issued after the meeting between Mr. Kanouse and Mr. Walsh—Ford  
14 chose not to do so.

15 IV. PUTNAM’S USE OF FORD’S FACTORY GUIDE HOURS

16           106. Putnam explained to Ford it was endeavoring to use Ford’s factory guide to price the sold  
17 hours in its customer pay repairs. (RT Vol. I, 109:18-110:2 [Becic] (testifying he heard that  
18 explanation).) Reference to Ford’s factory guide is the same as referring to the Ford service labor time  
19 standards or the “SLTS.” (RT Vol II, 376:13-17 [Kanouse].)

20           107. Mr. Becic testified that “in most of the cases we looked at” Putnam was not adhering  
21 exactly to Ford’s factory guide hours. (RT Vol. I, 110:4-8 [Becic].) However, Mr. Becic only made the  
22 comparison at the direction of counsel and did not provide the substance of any comparison. (*Id.* at  
23 110:9-111:20.) When asked how many comparisons of Putnam’s sold hours to Ford’s guide he did, he  
24 answered, “A handful.” (*Id.*)

25           108. When Ford pays for a warranty repair claim, Ford bases the hours for payment off the  
26 Ford time guide. (RT Vol. I, 113:19-23 [Becic]; *see also* RT Vol. I, 115:1-6 [Becic].) Ford develops  
27 the times in Ford’s time guide with technicians contracted to do time studies for certain repairs. (RT  
28 Vol. I, 114:2-21 [Becic].)

1           109. Ford does not have a policy concerning what time guide hours a Ford dealer should use  
2 in pricing customer-pay jobs. (RT Vol. I, 116:9-12 [Becic].) A Ford dealer, including Putnam, may use  
3 the Ford time guide to price customer-paid repairs. (RT Vol. I, 116:13-25 [Becic].)

4           110. In comparison to third-party time guides, including Mitchell ProDemands, AllData, and  
5 Chilton, the third-party guides apply a multiple to Ford's factory time. (RT Vol. I, 117:1-10 [Becic].)

6           111. Examples discussed during the merits hearing show Ford typically reimburses Putnam  
7 for warranty repairs based on its factory guide hours without regard to the hours a technician may actually  
8 work on the repair.

9           112. Line B on RO 10362 shows a warranty reimbursement of \$70.80 (\$177/hour for 0.4  
10 hours) despite the airbag inspection and replacement requiring 4.01 actual hours. (Exh. J-7 – 673  
11 [B1977].) The 0.4 hours used to reimburse Putnam for this warranty repair is based on Ford's time  
12 guide. (RT Vol. I, 145:8-15 [Becic].)

13           113. Line A on RO 10248 shows a warranty reimbursement of \$460.20 (\$177/hour for 1.1 and  
14 1.5 hours – a total of 2.6 hours). (Exh. J-7 – 074 [B1378].) The 2.6 hours is less than the actual hours  
15 the technician employed to make the required repair. (RT Vol. I, 149:24-150:7 [Becic] (comparing the  
16 total of 2.6 sold hours and 4.43 actual hours).)

17           114. Line E on RO 10259 shows a warranty reimbursement of \$53.10 (\$177/hour for 0.3  
18 hours). (Exh. J-7 – 049 [B1353].) The 0.3 hours is less than the 0.68 actual hours recorded on the repair.  
19 (*Id.*)

20           115. “Ford, in most cases, compensates dealers based on the time allowances in the Ford time  
21 guide.” (RT Vol. I, 147:5-9 [Becic].)

22           116. Mr. Becic admitted that if Putnam were using Ford's factory guide hours as its sold hours,  
23 Ford would accept the use of those hours and not need to calculate using actual hours. (RT Vol. I, 160:5-  
24 11 [Becic].)

25           117. Ms. Murphy-Austin's description of her discussion with Kent Putnam and Al Vasquez is  
26 consistent with Putnam applying Ford's factory guide hours instead of a multiplied third-party guide to  
27 price customer pay repairs. She testified Mr. Putnam and Mr. Vasquez told her “the price point that the  
28 customer would be paying would be comparable to the neighboring dealers despite the fact that they had

1 a higher labor rate.”<sup>5</sup> (RT Vol. I, 190:2-16 and 191:22-192:11 [Murphy-Austin]; *see also* RT Vol. I,  
2 198:18-23 and 200:5-14 [Murphy-Austin].) While neighboring dealers continued to use multiplied time  
3 guides, Putnam Ford was using the lower Ford factory guide hours.<sup>6</sup> Applying fewer hours to a higher  
4 hourly labor rate results in a similar price to customers compared to applying greater hours and a lower  
5 hourly rate.

6 118. Ms. Murphy-Austin could not confirm what other Ford dealers use to price customer pay  
7 repairs. (RT Vol. I, 199:24-200:4 [Murphy-Austin].)

8 119. Warranty time allowances are based on time studies conducted by Ford using contracted  
9 non-Ford-trained technicians in a controlled environment. The technicians are supplied “the parts and  
10 everything.” Ford times the technicians to determine how long is required to follow Ford’s repair  
11 procedures. (RT Vol. II, 262:10-263:1 [Kanouse].)

12 120. Mr. Martinez admitted he was instructed to price customer service repairs, other than  
13 routine maintenance, using the Ford factory warranty times and applying a labor rate at \$440 per hour.  
14 (RT Vol. III, 672:13-20 [Martinez].) Putnam’s instruction for pricing repairs was to use Ford’s factory  
15 guide and use the rate of \$440 per hour. (RT Vol. III, 686:6-9 [Martinez].)

16 <sup>5</sup> Ms. Murphy-Austin further testified Putnam’s “sold labor hours don’t reflect reality.” (RT Vol. I,  
17 192:10-11 [Murphy-Austin].) However, guide hours are always a set amount of time for a given  
18 repair. The vehicle service industry in California cannot price repairs based on actual hours because an  
19 estimate is required before a repair is performed. (Cal. Bus. & Prof. Code, § 9884.9.) Similarly, Mr.  
20 Kanouse admitted there are instances where Ford will pay more for a warranty repair based on Ford’s  
21 time allowance if a technician is able to “beat” (work faster than) the time allowance; such a warranty  
22 payment is not based on actual time. (RT Vol. II, 269:5-270:7; *see also* RT Vol. II, 387:24-389:2  
23 [Kanouse] (indicating that a flat rate technician might achieve 110% efficiency by completing a repair  
with guide hours of 1.1 hours in an hour).) As a result, sold hours may not always “reflect reality” in  
the sense that unforeseen events or slowness in the technician performing the repair may not match the  
sold hours. However, the reality is that the sold hours generate the charges to the customers; the actual  
hours cannot be used as a means of pricing customer pay repairs.

24 <sup>6</sup> Ms. Murphy-Austin testified she understood Putnam Ford was using time guide hours that were less  
25 than Ford’s factory time allowances. (RT Vol. I, 202:4-10 [Murphy-Austin].) However, she provided  
26 no examples where Putnam Ford’s sold hours were less than Ford’s time allowances and her testimony  
27 was inconsistent with her description of what she described Mr. Putnam and Mr. Vasquez as saying;  
28 she did not say Mr. Putnam and Mr. Vasquez said they were using a guide less than Ford’s factory  
guide. (*See* RT Vol. I, 190:2-16 and 191:22-192:11 [Murphy-Austin]; *see also* RT Vol. I, 198:18-23  
and 200:5-14 [Murphy-Austin].) She further confirmed Mr. Putnam and Mr. Vasquez did not tell her  
exactly what time guide they were using to match with the higher labor rate. (RT Vol. I, 202:13-  
203:21 [Murphy-Austin].) She did not “know what source they used for their labor times.” (RT Vol.  
I, 202:13-203:21 [Murphy-Austin].)

1           121. Mr. Martinez described Ford's factory guide as "soft" meaning the dealership was not  
2 always able to find an applicable Ford factory guide time and Ford factory guide times "are not realistic  
3 with retail." (RT Vol. III, 672:21-673:10 [Martinez].) Mr. Martinez gave the example that a  
4 transmission through Ford can maybe be 8.3 hours which the AllData time guide for the repair could be  
5 13 hours. (RT Vol. III, 673:11-23 [Martinez].)

6           122. Mr. Martinez admitted he was quoting prices to customers based on a \$440 per hour labor  
7 rate. (See RT Vol. III, 674:17-675:9 [Martinez].) He indicated he would tell customers the hourly rate  
8 at Putnam Ford when asked. (RT Vol. III, 675:15-18 and 676:8-13 [Martinez].)

9           123. Mr. Putnam and Mr. Kamenetsky instructed Putnam Ford to price customer pay repairs  
10 using Ford's factory guide time and multiply it by an hourly rate of \$440. (RT Vol. V, 1042:18-1043:13  
11 [K. Putnam]; *see also* RT Vol. VII, 1467:20-1468:1 [Kamenetsky].)

12           124. Putnam sought to use one uniform guide in pricing repairs at Putnam Automotive Group  
13 using the factory guide. (RT Vol. V, 1044:2-11 [K. Putnam]; *see also* RT Vol. VII, 1469:19-1470:5  
14 [Kamenetsky].) Putnam's \$440 per hour customer pay rate is not unique to Mr. Putnam's Ford  
15 franchises; he applies the same methodology to each of his franchises. (RT Vol. V, 1044:12-19 [K.  
16 Putnam].)

17           125. Putnam could not achieve uniform pricing without applying the factory guide because the  
18 factory will only use their guide when paying for warranty repairs. (RT Vol. V, 1045:24-1047:4 [K.  
19 Putnam]; *see also* RT Vol. VII, 1470:6-1471:2 [Kamenetsky] (describing third-party guides artificially  
20 increasing the number of hours by applying a multiple to the factory guide and the desire to not  
21 incentivize technicians to prefer customer-pay jobs over warranty jobs based on the number of guide  
22 hours that would apply).)

23           126. Ms. Heinemann testified about half of the sold hours have a \$440 per hour rate; 24 out of  
24 the 41 entries in Exhibit J-3 show the ROs in Putnam's submission have a \$440 per hour rate. (RT Vol.  
25 VI, 1225:19-25 [Stockton].) The variation in the labor rate in column K of Exhibit J-3 was not unusual  
26 to Mr. Stockton and it was not a sound position to assume there would be no variation in column K. (RT  
27 Vol. VI, 1227:6-25 [Stockton].) "The variation in rates at the line level have very little impact on the  
28 average rate, specifically \$3.24 if the baseline rate is 440." (RT Vol. VI, 1228:1-20 [Stockton].)

1 127. Ford's Guide is lower than third-party time guides. (RT Vol. VII, 1390:11-1392:2  
2 [Korenak].) Andrey Kamenetsky testified Ford's Guide hours are lower than third-party guides because  
3 third-party guides apply a multiple to the factory time (RT Vol. VII, 1461:11-23 [Kamenetsky]  
4 (explaining the goal of Putnam's use of Ford Guide).)

5 128. Putnam Ford has never used a multiplied time guide and Mr. Putnam instructed his  
6 employees to use the Ford factory guide. (RT Vol. VII, 1465:1-9 and 1466:15-1467:7 [Kamenetsky].)

7 V. THE BURLINGAME MARKET AREA

8 129. The Burlingame market area is one of the most expensive areas in the state of California  
9 and the nation. (RT Vol. I, 131:19-23 [Becic].)

10 130. The ZIP code in which Putnam Ford operates contains the most expensive housing in the  
11 nation. (RT Vol. V, 1054:3-11 [K. Putnam].)

12 131. Ms. Murphy-Austin had previously discussed with Putnam concerns about how much it  
13 was paying its technicians as a result of complaints from other Ford dealers. (RT Vol. I, 216:17-217:21  
14 [Murphy-Austin].) Ms. Murphy-Austin called as a result of complaints from other Ford dealers in the  
15 Bay Area because Mr. Putnam was hiring technicians from other Ford stores. Ms. Murphy-Austin  
16 further criticized Putnam for driving up wages up for technicians. (RT Vol. V, 1052:16-1053:12 [K.  
17 Putnam].)

18 132. Ford does not make available to Ford dealers the warranty reimbursement rates for other  
19 Ford dealers. (RT Vol. I, 219:20-23 [Murphy-Austin].) As a result, Putnam could not have known how  
20 its requested rate compared to other neighboring Ford dealers prior to the submission.

21 VI. FORD'S PURPORTED RELIANCE ON ACTUAL HOURS TO DETERMINE PUTNAM'S  
22 RETAIL LABOR RATE

23 133. To Mr. Becic's knowledge, no other California dealer's labor rate submission has been  
24 reviewed by Ford using actual hours. (RT Vol. I, 153:14-17 [Becic]; RT Vol. I, 161:23-162:6 [Becic].)

25 134. Similarly, in Mr. Becic's experience no California Ford dealer has submitted a labor rate  
26 request calculated and submitted using actual hours instead of sold hours. (RT Vol. I, 162:9-13 [Becic].)

27 135. Mr. Kanouse admitted other dealers operate separately or differently in terms of  
28 accounting for expenses. (RT Vol. II, 274:16-275:19 [Kanouse].) In Mr. Kanouse's experience, ROs



1 between dealers did not always have the same information and dealers overrode the standard procedures  
2 in their own DMS systems. (RT Vol. II, 393:14-394:20 [Kanouse].)

3 136. Mr. Kanouse admitted Ford does not have a requirement for how a dealership must do its  
4 accounting for hourly technician's expenses on customer-pay repairs. (RT Vol. II, 391:20-392:1  
5 [Kanouse].) He further agreed there were at least minor accounting differences between how certain  
6 dealers might handle their internal accounting. (RT Vol. II, 392:2-12 [Kanouse].) He has seen varying  
7 levels of dealer operations that result in higher or lower policy account and unapplied time compared to  
8 other dealerships. (RT Vol. II, 429:2-15 [Kanouse].)

9 137. Mr. Kanouse testified he priced customer pay jobs using a guide at Robinson Brothers  
10 Lincoln Mercury, specifically the Chilton's guide. (RT Vol. II, 358:8-23 [Kanouse].) The Chilton's  
11 guide hours were higher compared to the Ford factory guide. (RT Vol. II, 359:3-16 [Kanouse].) The  
12 Mitchell's guide is also generally higher in the number of hours than the Ford factory guide. (RT Vol.  
13 II, 359:17-19 [Kanouse].) The Motors guide is also generally higher than the factory guide. (RT Vol.  
14 II, 360:1-3 [Kanouse].) Mr. Kanouse also used a guide for pricing customer-pay repairs at Sam  
15 Galloway Ford, Town and Country Ford, as much as he could when self-employed (or a reasonable  
16 charge), Henderson Saya, and All Star Automotive. (RT Vol. II, 360:4-23 [Kanouse].) Mr. Kanouse  
17 admitted it was common practice in the automotive industry to price customer-pay work using a guide.  
18 (RT Vol. II, 360:24-361:1 [Kanouse].)

19 138. At Robinson Brothers Lincoln Mercury, Mr. Kanouse provided customers with upfront  
20 pricing. (RT Vol. II, 361:2-5 [Kanouse].) He also provided customers with upfront pricing at Galloway  
21 Ford, at Town and Country Ford, when he was self-employed, at Henderson Saya, and at All Star  
22 Automotive. (RT Vol. II, 361:6-23 [Kanouse].) Mr. Kanouse admitted it is a general industry custom  
23 that for customer-pay repairs, customers receive upfront pricing before the repair is done. (RT Vol. II,  
24 361:24-362:2 [Kanouse].) Mr. Stockton confirmed Mr. Kanouse admission; the industry custom is to  
25 provide up front pricing. (RT Vol. VI, 1204:19-1205:15 [Stockton].)

26 139. At Robinson Brothers Lincoln Mercury, at Sam Galloway Ford, at Town and Country  
27 Ford, while self-employed, at Henderson Saya, and at All Star Automotive Group, Mr. Kanouse would  
28 quote customers the price of a repair based on the total price and not based on the component parts of

1 the repair including labor, parts, and other potential costs. (RT Vol. II, 362:3-21 [Kanouse].)

2 140. Ford does not control the ability of dealers to discount repair work to a customer on a  
3 customer pay repair. (RT Vol. II, 363:20-23 [Kanouse].) A dealer may discount a customer-pay repair  
4 in the dealer's sole discretion. (RT Vol. II, 363:24-364:1 [Kanouse].)

5 141. A dealer has the discretion to change the guide they use for customer pay repairs in their  
6 discretion; Ford does not place any restrictions on what customer-pay repair guide a dealer uses. (RT  
7 Vol. II, 367:18-368:5 [Kanouse].)

8 142. Ford can pay dealers actual time for a warranty repair in instances where there are new  
9 models and time studies have not yet been conducted, in instances where a bolt or stud breaks during the  
10 repair, or in instances where a vehicle comes in for a warranty repair with auxiliary equipment. (RT  
11 Vol. II, 263:19-265:3 [Kanouse].)

12 143. Ford requires dealers to use Ford's service labor time standards for warranty repairs up  
13 to where there is no existing operation. If a labor operation has no published time guide, a dealer could  
14 claim the difference from where there is no operation up to what they have time recorded. (RT Vol. II,  
15 265:11-266:8 [Kanouse].)

16 144. To claim actual time for a warranty repair with an established Ford time allowance, a  
17 dealer must request the payment, support the request with comments explaining why the additional time  
18 was necessary, and time record the additional time. (RT Vol. II, 268:6-20 [Kanouse].)

19 145. In addition, Ford paying for a warranty repair based on actual time instead of based on a  
20 time guide requires the following: (1) "Actual time may not be claimed for time spent checking OASIS,  
21 contacting the Technical Assistance Center (TAC), or other Company hotlines or Company sponsored  
22 hotlines." (2) "The Actual time claimed for a repair must not be included in another labor operation (i.e.  
23 overlapping operation)." and (3) "An actual time labor operation is used only if: [A] There is no  
24 published labor operation in the in the Ford Service Labor Time Standards. [and B] Actual time is  
25 required to complete a **highly unusual** repair (e.g. repairing broken bolts, nuts, or fasteners that require  
26 the use of a torch, drilling, or tapping)." (Exh. A – 144 [B1084] (emphasis in original); *see also* RT Vol.  
27 II, 373:12-377:9 [Kanouse] (testifying concerning these requirements in section 4.2.03 of Ford's  
28 Warranty and Policy Manual).) Ford only pays for "highly unusual" repairs pursuant to the express

1 terms of its Warranty and Policy Manual. (*Id.*)

2 146. Ford places other requirements on payment of actual time in its Warranty and Policy  
3 Manual including there being an unusual circumstance or abnormal diagnosis times, a maximum of 1.5  
4 hours for a no problem found diagnostic time, and other requirements in sections 4.2.03 through 4.2.07.  
5 (RT Vol. II, 377:10-378:15 [Kanouse]; Exh. A – 144-146 [B1084-B1086].)

6 147. “Labor reimbursement is normally based on standards hours shown in the Ford Service  
7 Labor Time Standards Manual multiplied by the dealer’s approved warranty labor rate in effect on the  
8 date of repair.” (Exh. A – 151 [B1091]; *see also* RT Vol. II, 378:21-25 [Kanouse] (agreeing the normal  
9 labor reimbursement is based on Ford’s service labor time standards manual).)

10 148. Moreover, Ford has discretion whether to accept a dealer’s claim to pay actual time on a  
11 warranty repair. (RT Vol. II, 381:16-22 [Kanouse].)

12 149. Ford will not pay actual time for a warranty repair if a technician just cannot meet the  
13 Ford warranty time guide for a repair. (RT Vol. II, 384:12-20 [Kanouse].)

14 150. There are generally two ways of paying technicians in the motor vehicle repair industry.  
15 They are flat rate and hourly. (RT Vol. II, 384:21-387:22 [Kanouse].) Putnam pays its technicians  
16 hourly. An hourly technician is paid based on his clock hours. (RT Vol. II, 387:9-20 [Kanouse].) An  
17 hourly technician’s time on a given repair is not used to pay the technician but to set up an accrual to  
18 offset his payroll (an accounting function). (*Id.*) “Other than that, it doesn’t mean anything.” (*Id.*; *see*  
19 *also* RT Vol. II, 390:8-391:22 [Kanouse] (describing in more detail the accrual accounting function for  
20 an hourly technician).)

21 151. Mr. Kanouse agreed he has experienced technicians being paid based on clock time in the  
22 motor vehicle repair industry; he admitted he paid his trainee technicians based on clock time. (RT Vol.  
23 II, 389:3-16 [Kanouse].) Other service department staff such as a warranty administrator, a cashier, a  
24 porter, someone who cleans the shop, or a file clerk may also be paid based on their clock time instead  
25 of a flat-rate time. (RT Vol. II, 426:4-11 [Kanouse].) Additionally, a shop foreman is generally not paid  
26 based on flat rate. (RT Vol. II, 427:1-4 [Kanouse].)

27 152. In his role as a service manager, Mr. Kanouse has seen errors in a technician’s actual  
28 hours due to not clocking out for lunch, not clocking out for a break, and not clocking out for the day.

1 (RT Vol II, 437:8-20 [Kanouse].) A technician can also clock time on the wrong line by forgetting to  
2 clock over to a different line on a repair order. (RT Vol. II, 437:21-438:14 [Kanouse].)

3 153. In Mr. Kanouse's experience, certain technicians might work faster or slower than other  
4 technicians. (RT Vol. II, 440:23-441:5 [Kanouse].) If a dealership uses a time guide, how fast or slow  
5 a technician works does not impact how much the customer pays. (RT Vol. II, 441:6-12 [Kanouse].)

6 154. After performing a diagnostic for customer pay repairs, a customer might choose not to  
7 proceed with the final repair if the repair price is too high for the customer. (RT Vol. II, 453:19-24  
8 [Kanouse].)

9 155. In describing his role as a field service engineer, Mr. Sweis provided an example where  
10 a technician could not diagnosis a repair because a chafed wire was touching a metal bracket behind the  
11 steering column cover and causing a fuse to short out when the vehicle was put in gear. While the  
12 technician could not figure it out, Mr. Sweis indicated he "was able to figure it out in a few minutes."  
13 (RT Vol. III, 519:6-19 [Sweis].) This underscores that prices in the motor vehicle repair industry are  
14 not based on actual hours because a customer pays the same price for a repair regardless of the experience  
15 of the technician, as illustrated by Mr. Sweis's example.

16 156. When Mr. Sweis operated his independent shop, he provided customers up-front pricing  
17 and would not adjust the cost of the job based on the actual hours it required to repair the vehicle. (RT  
18 Vol. III, 630:16-25 [Sweis].) Mr. Sweis agreed it is industry practice to provide up-front pricing and  
19 any changes to the repair cost must be made in advance of the repair being completed. (RT Vol. III,  
20 631:1-632:2 [Sweis].)

21 157. Mr. Martinez agreed he would naturally expect sold hours on Putnam's repair orders to  
22 be less than the actual technician hours. (RT Vol. III, 696:8-14 [Martinez].) A warranty repair or  
23 customer-pay repair done using a warranty time allowance will result in the actual hours being higher  
24 than the guide hours. Mr. Martinez also attributed the difference to the approach or skill level of the  
25 technician. (RT Vol. III, 707:2-23 [Martinez].)

26 158. Pricing a repair based on actual hours at Putnam Ford would fail to account for areas of  
27 lost productivity, including technicians having to go look for his car, technicians carrying parts to the  
28 Barn, and technicians moving between the facilities. (RT Vol. III, 713:13-21 [Martinez].)

1 159. None of Kent Putnam's franchises charge customers for customer pay repairs based on  
2 actual hours. They have never done so. Mr. Putnam was not aware of any franchise owned by someone  
3 else that prices customer pay repairs based on actual hours. (RT Vol. V, 1041:20-1042:8 [K. Putnam].)

4 160. Putnam Ford prices repairs to customers before the repairs take place using a time guide.  
5 (RT Vol. V, 1042:10-17 [K. Putnam].)

6 161. In Mr. Stockton's experience and review of common repairs with a comparison of  
7 warranty billed hours versus technician hours, billed hours are not the same as technician hours. (RT  
8 Vol. VI, 1200:17-1201:20 [Stockton].) Among the dozens if not hundreds of dealers Mr. Stockton has  
9 consulted, none of them starts with the assumption that billed hours and technician hours would be the  
10 same.<sup>7</sup> (RT Vol. VI, 1201:22-1202:15 [Stockton]; *see also* Exh. 40 – 005 [A799] (“In consulting for  
11 many dozens of dealerships, I have never encountered a dealership whose management expected billed  
12 hours and technician hours to be the same.”)) Both in the warranty and customer pay contexts, billed  
13 hours and technician hours are not the same. (RT Vol. VI, 1202:16-1203:17 [Stockton].)

14 162. Applying Ford's argument that Putnam's labor rate should be determined based on actual  
15 hours is inconsistent with Ford reimbursing Putnam based on its factory guide hours. Mr. Stockton  
16 provided an example of a repair quoted to take two hours based on a factory guide at a rate of \$150 (for  
17 a total of \$300) but requires the technician three hours to complete the repair. Two potential rates flow  
18 from the example: \$150 per hour based on billed hours (sold hours) and \$100 per hour based on  
19 technician hours (actual hours). If the \$100 were accepted as Putnam's reimbursement rate for warranty  
20 repairs based on technician hours, reimbursement for a similar warranty repair would only be \$200 based  
21 on the factory guide compared to a \$300 labor cost for a similar customer pay repair. (RT Vol. VI,  
22 1247:2-1249:22; *see also* Exh. 40 – 009-011, ¶¶ 30-35 [A805].)

23 163. Applying this methodology to warranty ROs from Putnam, Mr. Stockton calculated the  
24 rate per technician hour or actual hour compared to the rates per sold hour for a list of Putnam warranty  
25 repairs. Applying technician hours results in an hourly rate of \$82.01 compared to \$177 for sold hours.  
26

27 <sup>7</sup> Mr. Stockton noted the only exception was in the context of truck dealerships near an interchange  
28 concerning broken-down commercial vehicles who might bill based on actual time. The exception is  
not relevant here. (RT Vol. VI, 1203:18-1204:18 [Stockton].)

(RT Vol. VI, 1250:17-1252:10; Exh. 40 – 044-045 [A838-A839].)

164. In the warranty repairs in Tab 3 of Mr. Stockton’s report, the average ratio of a technician’s actual hours to the sold hours (the hours based on Ford’s factory time guide) is 2.1583 to 1 or more than 2.1 times the number of actual technician hours per sold hour.<sup>8</sup> (RT Vol. VI, 1252:11-1253:5; Exh. 40 – 046 [A840].) Assuming the ratio in the range of ROs Mr. Stockton considered is approximately consistent over time, applying actual hours to calculate Putnam’s labor rate will result in Putnam receiving approximately half the reimbursement for warranty repairs compared to the same customer pay repair. (*See id.*) Working backward from the “best box” rate provided by Ms. Heinemann of \$246.52 per hour (*see* RT Vol. V, 973:22-974:21 [Heinemann]), in order to receive the same reimbursement from Ford as an equivalent customer pay repair, Putnam labor rate would need to be \$532.06 per hour (\$246.52 multiplied by the ratio 2.1583) (RT Vol. VI, 1256:21-1257:20 [Stockton]).

165. The motor vehicle repair industry uses billing hours to determine customer-pay charges over actual technician hours. (RT Vol. VI, 1339:13-18 [Stockton].)

166. Mr. Korenak has never relied on actual hours when calculating a labor rate submission and factories have not requested actual hours be used in his calculations. (RT Vol. VII, 1387:14-1388:18 [Korenak].) “Because it is a retail labor rate. So retail means to the customer. So sold hours is to the customer. Charges are to the customer.” (RT Vol. VII, 1389:9-14 [Korenak].)

#### VII. PUTNAM’S AUTHORIZED FACILITY AND USE OF OTHER FACILITIES

167. Putnam was authorized to operate at 885 North San Mateo Drive. (RT Vol. I, 184:5-7 [Murphy-Austin].) Whether Putnam could conduct any customer-pay work at any location other than 885 North San Mateo Drive would be determined by the dealer sales and service agreement. (RT Vol.

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<sup>8</sup> Counsel for Ford cross-examined Mr. Stockton concerning his Tab 3 calculating the 2.1583 including that the repair orders were not in the same range as Putnam’s submission (RO 10029-10271 in Tab 3 compared to RO 10036 to 10286) (RT Vol. VI, 1273:13-1274:16) and outliers (or what counsel referred to as “aberrant data”) in the data set (RT Vol. VI, 1284:10-1294:6 (discussing ROs 10038, 10044, and 10208). However, the range of ROs concerned the ratio of Putnam’s actual hours to sold hours in warranty repairs—the range of repairs is used for purposes of comparison and was not required to cover the same ROs in Putnam’s submission. Moreover, even removing ROs 10038, 10044, and 10208 from Mr. Stockton’s calculation as outlier would result in a ratio of approximately 1.7 to 1 (actual hours to sold hours) (RT Vol. VI, 1335:16-1336:8 [Stockton]; *see also* Exh. 40 – 044-045 [A838-A839].)

1 I, 184:20-185:9 [Murphy-Austin].)

2 168. Ford's San Francisco regional manager at the time of Putnam's submission understood  
3 Putnam's 885 North San Mateo Drive facility to have inadequate service capacity. (RT Vol. I, 204:17-  
4 24 [Murphy-Austin].)

5 169. Ford's Warranty and Policy Manual provides, "Warranty repairs must be performed at an  
6 authorized Ford or Lincoln dealership." (RT Vol. II, 287:19-25; Exh. A – 006 [B946].)

7 170. However, the provisions of Ford's Warranty and Policy Manual apply only to (1)  
8 warranty repairs, (2) Ford/Lincoln Protect repairs, (3) In-transit loss and damage claims, (4) Policy  
9 repairs, (5) Customer Satisfaction repairs, (6) After-Warranty Assistance repairs, and (7) recall repairs.  
10 (Exh. A – 004 [B944].) Mr. Kanouse admitted without reservation that warranty repairs, in-transit loss  
11 and damages claims, policy repairs, customer satisfaction repairs, and recall repairs are not customer pay  
12 repairs. (RT Vol. II, 379:15-380:1 [Kanouse].) Ford/Lincoln Protect repairs are extended service plan  
13 repairs excluded from consideration in this Protest by Vehicle Code section 3065.2, subdivision (c)(11).  
14 (Cal. Veh. Code, § 3065.2, subd. (c)(11) (excluding repairs for service contract providers).) After-  
15 Warranty Assistance repairs include repairs for which Ford will pay as a warranty claim or portions  
16 thereof (RT Vol. II, 380:11-23 [Kanouse]) and are therefore excluded from consideration in this Protest  
17 by Vehicle Code section 3065.2, subdivision (c)(10). (Cal. Veh. Code, § 3065.2, subd. (c)(10)  
18 (excluding manufacturer approved goodwill or policy repairs).) As a result, none of the categories of  
19 repairs described as covered by Ford's Warranty and Policy Manual are at issue in this Protest and the  
20 provision of the manual do not apply to customer pay repairs.

21 171. During a visit in September 2021, the field engineer training Mr. Sweis (Vincent Demico)  
22 also took him to the Barn and did not seem surprised Ford repairs were occurring at the Barn; Mr. Demico  
23 had visited the Barn before to provide technical field assistance. (RT Vol. III, 523:3-524:17 [Sweis].)  
24 Mr. admitted Putnam did not conceal use of the Barn; Putnam's service manager drove Mr. Sweis and  
25 Mr. Demico to the barn during their visit. (RT Vol. III, 607:4-8 [Sweis].)

26 172. Mr. Sweis observed Putnam's technicians "doing a good job" at the Barn and the  
27 authorized location. The technicians were mostly adequately trained for their capabilities. (RT Vol. III,  
28 614:5-12 [Sweis].)



1 173. Mr. Martinez agreed Putnam could not have performed its service obligations without the  
2 use of the Barn. (RT Vol. III, 738:15-739:3 [Martinez].)

3 174. Paragraph 5(c) of the sales and service agreement between the parties states Putnam  
4 shall not move or substantially modify or change the usage of any of the DEALERSHIP  
5 LOCATION or FACILITIES for COMPANY PRODUCTS, nor shall the Dealer or  
6 any person named in subparagraphs F(i) and F(ii) hereof directly or indirectly establish  
7 or operate in whole or in part any other locations or facilities for the sale or service of  
COMPANY PRODUCTS or the sale of used vehicles without the prior written  
consent of the Company.

8 (Exh. J-1 – 021 [B21] (emphasis added).)

9 175. COMPANY PRODUCTS is defined to mean:

10 (1) new passenger cars

11 (2) new trucks and chassis, excluding all trucks and chassis of series 850 or higher designations,  
12 and

13 (3) parts and accessories therefor

14 (Exh. J-1 – 014 [B14] (emphasis added).) The definition limits COMPANY PRODUCTS to new cars  
15 or trucks. (*Id.*)

16 176. None of the vehicles receiving qualified customer pay repairs in this proceeding can be  
17 considered new cars or trucks. For example, RO 10277, the first RO listed in Exhibit J-3, concerns a  
18 2005 Ford F-150 with approximately 153,000 miles. (Exh. J-7 – 021 [B1325].) The vehicle is not a  
19 COMPANY PRODUCT as defined in the sales and service agreement. Similarly, RO 10259, the second  
20 RO listed in Exhibit J-3, concerns a 2012 Ford Focus with approximately 98,000 miles. (Exh. J-7 – 048  
21 [B1352].) The pattern continues.<sup>9</sup> None of the vehicles at issue are “new passenger cars” or “new trucks  
22 and chassis” and cannot be considered COMPANY PRODUCTS.

23 177. This is consistent with Ms. Swann’s testimony during her deposition prior to the hearing  
24 when she was sure it was against the dealer agreement to do service work at the Barn in terms of warranty  
25 work. However, she was not sure if customer-pay work would be prohibited. (RT Vol. IV, 831:12-  
26 832:9 [Swann].) She confirmed that when she told Mr. Putnam it was against the dealer agreement it  
27

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28 <sup>9</sup> To take just one more example, RO 10239 concerns a 2004 Ford Focus with over a quarter million  
miles. (Exh. J-7 – 095 [B1399].)

1 was specific to warranty work being done at an unauthorized location. (RT Vol. IV, 835:7-15 [Swann].)

2 178. The Barn is not branded with any Ford trademarks and customers do not visit the Barn  
3 location. (RT Vol. V, 1027:6-11 [K. Putnam].)

4 179. The Barn was previously used for General Motors repairs prior to Putnam renovating the  
5 General Motors facility. (RT Vol. V, 1030:10-23 [K. Putnam].)

6 VIII. REPAIR ORDERS IN PUTNAM'S SUBMISSION

7 180. The repair orders contained in Exhibit J-7 list the repair order number in the top center.  
8 (RT Vol. I, 52:17-22 [Becic].) The repair orders have personal customer information redacted in Exhibit  
9 J-7 for purposes of the merits hearing, however, Ford received the customer information as part of the  
10 repair orders Putnam submitted. (RT Vol. I, 52:23-53:2 [Becic].) The repair orders list vehicle and  
11 repair information in the first three rows. (RT Vol. I, 53:5-10 [Becic].) The following row of the repair  
12 orders starting with "Line" shows the column headers that describe the information displayed in the  
13 repair order below. (RT Vol. I, 53:11-19 [Becic].) "Line" refers to the individual repair line. (RT Vol.  
14 I, 53:20-22 [Becic].) The column headers relate to the information directly under the column header.  
15 (RT Vol. I, 54:18-24 [Becic].) "Tech" is the individual code assigned to a technician. (RT Vol. I, 55:6-  
16 11 [Becic].) "Type" is the type of repair; C for customer-paid and W for warranty-paid. (RT Vol. I,  
17 55:12-15 [Becic].) "A/HRS" stands for actual hours and designates the actual hours the technician  
18 worked on the repair. (RT Vol. I, 55:16-20 [Becic].) "S/HRS" stands for sold hours and designates  
19 hours that are billed to the customer. (RT Vol. I, 56:1-5 [Becic].) "List," "Net," and "Total" refer to  
20 charges for parts and labor; for example, the customer was charged \$68.16 for labor on line A in RO  
21 10286. (RT Vol. I, 56:9-25 [Becic].) The ROs contain total labor charges in the bottom right corner of  
22 the last page. (RT Vol. I, 57:7-13 [Becic].)

23 181. The number listed to the right of the sold hours on a repair line in CDK are the cost of  
24 labor (the amount of expense for the dealership associated with the technician's repair). It is expressed  
25 without a decimal point but is a value of dollars and cents. (RT Vol. II, 294:14-295:5 and 295:18-20  
26 [Kanouse].)

27 182. Multiple individuals at a dealership may be involved in the creation of a repair order over  
28 time. The individuals involved depend on the dealership structure. The individuals involved can include

1 a business development center, a service advisor, control dispatching, the service technician, a warranty  
2 administrator, a cashier, and the dealer's office. (RT Vol. II, 278:1-280:17 [Kanouse].)

3 183. In the warranty audit context, Mr. Kanouse testified he sees "all kinds of variations" in  
4 the information contained in repair orders and they are not always accurate. (RT Vol. II, 280:18-281:17  
5 [Kanouse].)

6 184. The repair orders in Putnam's submission were based on 90-days of consecutive repair  
7 orders measured by the RO opened date. (*See* Exh. J-2 – 001 [B44] (describing the RO Range to begin  
8 with RO 10286 dated 6/7/2021 and ending with RO 10036 dated 3/10/2021); *see also* J-6 – 001 [B1305]  
9 (RO 10286 with the RO Opened date of June 7, 2021) and J-6 – 524 [B1828] (RO 10036 with the RO  
10 Opened date of March 10, 2021).)

11 185. The submission of ROs in a 90-day consecutive time period based on their opened date  
12 is consistent with Section 3065.2. If the ROs were submitted based on closed date for a 90-consecutive-  
13 day period, it would be inconsistent with the objective of the franchisor receiving a consecutive set of  
14 repair orders and would scramble the order of the repair orders. Interpreting "completed" in Section  
15 3065.2, subdivision (a)(1)(B) to mean a consideration of only closed repair orders (and not an indication  
16 of some order other than a consecutive set based on when repairs are opened) is consistent with  
17 subdivision (a)(1)(A) requiring the submission of a consecutive set of repair orders while also  
18 referencing those repair orders as "completed." (Cal. Veh. Code, § 3065.2, subd. (a)(1).)

19 186. As Mr. Stockton described, ROs could be grouped based on when initiated (open date),  
20 when completed (closed date), and consecutively. All three are very unlikely to occur in the same  
21 sequence because there are delays on parts and some repairs take longer. Mr. Stockton favored grouping  
22 them based on open date because "the same conditions, the same pricing, the same behaviors would have  
23 applied. It leaves less room for a change into the future." (RT Vol. VI, 1195:2-1196:6 [Stockton].) A  
24 dealer may have ROs open for potentially large periods of time before they become closed. (RT Vol.  
25 VI, 1196:7-15 [Stockton].)

26 187. Mr. Korenak testified in the approximate 1,100 submissions he prepared, he has never  
27 seen one where each individual labor rate was the same. (RT Vol. VII, 1375:2-1376:15 [Korenak]  
28 (testifying to the normal variation) and 1356:14-24 (testifying to the number of labor rate submissions

1 he has worked on).)

2 188. When submitting labor or parts increase requests, FrogData consistently relies on 90-day  
3 periods for the submission based on open date because FrogData must submit every RO in sequence.  
4 (RT Vol. VII, 1360:16-23 [Korenak].)

5 **RO 10277**

6 189. RO 10277 is the first count supporting Putnam's labor rate submission. (Exh. J03 [B45]  
7 (first column).) Putnam's submission spreadsheet identified Line A as a qualified repair and used Line  
8 A in the calculation of Putnam's requested warranty labor rate. (Exh. J-3 [B45].)

9 190. RO 10277 is contained in Exhibit J-7 at page 21. (Exh. J-7 – 021 [B1325].)

10 191. RO 10277, line A documents a request to install a replacement brake lamp housing. (Exh.  
11 J-3 [B45]; Exh. J-7 – 021 [B1325]; *see also* RT Vol. I, 62:13-19 [Becic] (describing the repair as a  
12 qualified repair pursuant to Vehicle Code section 3065.2).) The customer paid \$132.00 for labor on the  
13 repair line for 0.2 sold hours reflecting a \$660.00 labor rate on the individual repair line as reflected  
14 below the Labor Rate column in Exhibit J-3. (*Id.*)

15 **RO 10259**

16 192. RO 10259 is the second count supporting Putnam's labor rate submission. (Exh. J-3  
17 [B45] (first column).) Putnam's submission spreadsheet identified Line A as a qualified repair and used  
18 Line A in the calculation of Putnam's requested warranty labor rate. (Exh. J-3 [B45].)

19 193. RO 10259 is contained in Exhibit J-7 at pages 48-53. (Exh. J-7 – 048-053 [B1352-  
20 B1357].)

21 194. RO 10259, line A documents a diagnosis related to a customer concern about drops in  
22 RPMs and somewhat of a stall when driving in stop and go traffic; the repair line also describes the  
23 technician performing a PCM reprogramming to the latest calibration and can be considered a repair as  
24 well as a diagnosis. (Exh. J-3 [B45]; Exh. J-7 – 048 [B1352]; *see also* RT Vol. II, 292:17-293:18  
25 [Kanouse].) The statement of the customer's description of the problem with the vehicle is a normal and  
26 regular statement that might be included in a repair order. (RT Vol. II, 292:9-16 [Kanouse].) The  
27 customer paid \$440.00 for labor on the repair line for 1.0 sold hours reflecting a \$440.00 labor rate on  
28 the individual repair line as reflected below the Labor Rate column in Exhibit J-3. (*Id.*)

1 195. The actual hours from lines D and G total 4.92 hours, less than the 6.0 sold hours listed  
2 for line G. (Exh. J-7 – 049-050 [B1353-B1354]; RT Vol. II, 436:20-437:3 [Kanouse].)

3 **RO 10251**

4 196. RO 10251 is the third count supporting Putnam’s labor rate submission. (Exh. J-3 [B45]  
5 (first column).) Putnam’s submission spreadsheet identified Lines C and F as qualified repairs and used  
6 Lines C and F in the calculation of Putnam’s requested warranty labor rate. (Exh. J-3 [B45].)

7 197. RO 10251 is contained in Exhibit J-7 at pages 67-68. (Exh. J-7 – 067-068 [B1371-  
8 B1372].)

9 198. RO 10251, Line C documents a diagnosis related to a customer concern about the battery  
10 light coming on and off, usually after short drives. (Exh. J-3 [B45]; Exh. J-7 – 067 [B1371].) The  
11 customer paid \$110.00 for labor on the repair line for 0.5 sold hours reflecting a \$220.00 labor rate on  
12 the individual repair line as reflected below the Labor Rate column in Exhibit J-3. (*Id.*) Mr. Kanouse  
13 disputed 0.02 actual hours was a reasonable amount of time to complete the repair. (RT Vol. II, 307:14-  
14 308:9 [Kanouse].) However, he estimated it might take three minutes to open the hood of a car and  
15 check whether or not the belts have tension—three minutes is approximately 0.05 of an hour. (RT Vol.  
16 II, 439:22-440:12 [Kanouse].)

17 199. RO 10251, Line F documents a cooling system repair involving the replacement of a  
18 thermostat, thermostat housing, and both coolant temperature sensors. (Exh. J-3 [B45]; Exh. J-7 – 068  
19 [B1372].) The customer paid \$641.06 for labor on the repair line for 1.0 sold hours reflecting a \$641.06  
20 labor rate on the individual repair line as reflected below the Labor Rate column in Exhibit J-3. (*Id.*)

21 200. On line B of RO 10251, Mr. Kanouse testified the factory guide for a cooling system  
22 pressure test might be somewhere between 0.3 hours and 0.5 hours based on the vehicle and engine  
23 combination. (RT Vol. II, 445:1-25 and 447:3-9 [Kanouse].)

24 **RO 10248**

25 201. RO 10248 is the fourth count supporting Putnam’s labor rate submission. (Exh. J-3 [B45]  
26 (first column).) Putnam’s submission spreadsheet identified Line D as a qualified repair and used Line  
27 D in the calculation of Putnam’s requested warranty labor rate. (Exh. J-3 [B45]; *see also* RT Vol. I,  
28 98:2-3 [Becic] (identifying line D as a qualified repair).)

202. RO 10248 is contained in Exhibit J-7 at pages 74-77. (Exh. J-7 – 074-077 [B1378-B1381].)

203. RO 10248, Line D documents a diagnosis related to a customer concern about delayed shifting and a judder from the transmission. (Exh. J-3 [B45]; Exh. J-7 – 076-077 [B1380-B1381].) The customer paid \$220.00 for labor on the repair line for 0.5 sold hours reflecting a \$440.00 labor rate on the individual repair line as reflected below the Labor Rate column in Exhibit J-3. (*Id.*)

204. The total actual time between the two labor entries on Line A of RO 10248 is 4.43 hours compared to a total of 2.6 for reimbursement pursuant to Ford's factory guide—approximately 70% more actual hours than Ford's factory guide. (RT Vol. II, 461:24-463:10 [Kanouse]; *see also* Exh. J-7 – 076 [B1380].)

205. Line B of the RO shows CDK automatically populates apportioned totals from the total price to the customer based on the actual hours entered on a job with multiple technicians. The \$117.68 is the rounded calculation of \$964.98 multiplied by 0.3/2.46 (the portion of technician 2030's actual hours out of the total 2.46 actual hours across all the technicians); \$192.21 is the rounded calculation of \$964.98 multiplied by 0.49/2.46; and \$655.09 is the rounded calculation of \$964.98 multiplied by 1.67/2.46. (Exh. J-7 – 074 [B1378]; *see also* RT Vol. II, 468:16-470:19 [Kanouse] (agreeing with the math for the first calculation, however, maintaining it would need to be a manual entry).) The math shows Mr. Kanouse's conclusion the entries were manually overridden is not credible. Putnam has no reason to apportion the total cost of a repair based on the actual hours of its technicians. The more credible explanation is that CDK separates the total price of the repair based on the technician's actual hours to offset each technician's accrued labor cost.

#### **RO 10244**

206. RO 10244 is the fifth count supporting Putnam's labor rate submission. (Exh. J-3 [B45] (first column).) Putnam's submission spreadsheet identified Line A as a qualified repair and used Line A in the calculation of Putnam's requested warranty labor rate. (Exh. J-3 [B45].)

207. RO 10244 is contained in Exhibit J-7 at page 81. (Exh. J-7 – 081 [B1385].)

208. RO 10244, Line A documents a diagnosis related to a customer concern about a check engine light. (Exh. J-3 [B45]; Exh. J-7 – 081 [B1385].) The customer paid \$220.00 for labor on the

1 repair line for 1.00 sold hours reflecting a \$220.00 labor rate on the individual repair line as reflected  
2 below the Labor Rate column in Exhibit J-3. (*Id.*)

3 **RO 10239**

4 209. RO 10239 is the sixth count supporting Putnam's labor rate submission. (Exh. J-3 [B45]  
5 (first column).) Putnam's submission spreadsheet identified Lines A and D as qualified repairs and used  
6 Lines A and D in the calculation of Putnam's requested warranty labor rate. (Exh. J-3 [B45].)

7 210. RO 10239 is contained in Exhibit J-7 at pages 95-96. (Exh. J-7 – 095-096 [B1399-  
8 B1400].)

9 211. RO 10239, Line A documents a diagnosis related to a customer concern about an oil leak.  
10 (Exh. J-3 [B45]; Exh. J-7 – 095 [B1399].) The customer paid \$220.00 for labor on the repair line for 0.5  
11 sold hours reflecting a \$440.00 labor rate on the individual repair line as reflected below the Labor Rate  
12 column in Exhibit J-3. (*Id.*)

13 212. RO 10239, Line D documents a replacement of the crankshaft rear main seal. (Exh. J-3  
14 [B45]; Exh. J-7 – 095-096 [B1399-B1400].) The customer paid \$1,442.50 for labor on the repair line  
15 for 3.2 sold hours reflecting approximately a \$450.78 (450.78125) labor rate on the individual repair line  
16 as reflected below the Labor Rate column in Exhibit J-3. (*Id.*)

17 213. The Denial Letter suggested Ford's factory guide for the R&I of the transmission is 3.7  
18 hours and it was not clear what the 3.2 hours represented in Line D of the repair order. (Exh. J-6 – 001  
19 [B50].) However, 3.7 is the sum of the diagnostic time (0.5) from Line A of the RO and the repair from  
20 Line D (3.2) which matches what Ford claimed as Ford's factory guide for the qualified repair contained  
21 in RO 10239. (Exh. J-6 – 001 [B50]; Exh. J-7 – 095-096 [B1399-B1400]; *see also* RT Vol. VII, 1485:12-  
22 1486:22 and 1487:9-20 [Kamenetsky] (describing the sum of lines A and D to be the 3.7 hours specified  
23 in the Ford SLTS labor time guide).)

24 214. Mr. Kanouse testified the Ford warranty time allowance for line D of this repair would  
25 be "right around four hours with diagnostics included." (RT Vol. II, 321:10-13 [Kanouse].) Mr.  
26 Kanouse was impeached with the Ford time guide printout for the repair described in RO 10239, Line B  
27 with code 6701A which showed 3.3 hours as well as an additional 0.5 hours for diagnostic associated  
28 with 6007D (for a total of 3.8). (RT Vol. II, 450:22-452:7 [Kanouse].) The repair order reflects 0.5 sold



1 hours of diagnostic time on Line A and 3.2 sold hours for the repair—within 0.1 of the Ford time guide  
2 for the diagnostic and repair. (Exh. J-7 – 095 [B1399]; *see also* RT Vol. II, 453:25-454:15 [Kanouse]  
3 (further supporting the customer paid for both repair lines as described above).) Applying 3.3 instead of  
4 3.2 sold hours would result in an approximate \$437.12 labor rate instead of an approximate \$450.78  
5 labor rate on the individual repair line—even closer to \$440 than applying the 3.2 listed on the RO.

6 215. Additionally, dividing the total amount paid for labor in lines A and D (\$1,662.50) by the  
7 3.7 sold hours between lines A and D reflects a rate of \$449.324 per hour, with the 324 repeating, but  
8 dividing by the 3.8 sold hours reflects a rate of \$437.50 per hour (with no repeating decimal). (RT Vol.  
9 II, 455:3-456:1 [Kanouse].)

10 216. Exhibit K further shows the diagnostic and repair from lines A and D on RO 10239 should  
11 sum to 3.8 as the factory guide for the described repair and not the 3.7 described in Ford’s Denial Letter  
12 nor the 4 hours described in Mr. Kanouse’s testimony. (Exhibit K – 001 [B1162]; *see also* RT Vol. VIII,  
13 1627:25-1630:25 [Kamenetsky].)

14 217. Mr. Kanouse disputed 0.02 actual hours were enough hours to set tire pressure in Line C  
15 of the RO. (RT Vol. II, 321:20-322:9 [Kanouse].) The dispute was inconsistent with Ford’s argument  
16 Putnam’s repair orders contained too many actual hours compared to the sold hours. Moreover, setting  
17 the tire pressure for every service vehicle is required by law and is not billed to the customer. These  
18 time values are of no consequence. (*See* 17 C.C.R., § 95550, subd. (d).)

19 **RO 10216**

20 218. RO 10216 is the seventh count supporting Putnam’s labor rate submission. (Exh. J-3  
21 [B45] (first column).) Putnam’s submission spreadsheet identified Lines A, D, and E as qualified repairs  
22 and used Lines A, D, and E in the calculation of Putnam’s requested warranty labor rate. (Exh. J-3  
23 [B45].)

24 219. RO 10216 is contained in Exhibit J-7 at pages 146-147. (Exh. J-7 – 146-147 [B1450-  
25 B1451].)

26 220. RO 10216, Line A documents a diagnosis related to a customer concern about the  
27 vehicle’s back-up camera screen being dark and blurred. (Exh. J-3 [B45]; Exh. J-7 – 146 [B1450].) The  
28 customer paid \$220.00 for labor on the repair line for 0.5 sold hours reflecting a \$440.00 labor rate on

1 the individual repair line as reflected below the Labor Rate column in Exhibit J-3. (*Id.*)

2 221. RO 10216, Line D documents the replacement of the rear back-up camera assembly and  
3 housing. (Exh. J-3 [B45]; Exh. J-7 – 146-147 [B1450-B1451].) The customer paid \$220.00 for labor  
4 on the repair line for 0.5 sold hours reflecting a \$440.00 labor rate on the individual repair line as  
5 reflected below the Labor Rate column in Exhibit J-3. (*Id.*)

6 222. RO 10216, Line E documents the replacement of the mirror assembly. (Exh. J-3 [B45];  
7 Exh. J-7 – 147 [B1451].) The customer paid \$132.00 for labor on the repair line for 0.3 sold hours  
8 reflecting a \$440.00 labor rate on the individual repair line as reflected below the Labor Rate column in  
9 Exhibit J-3. (*Id.*)

10 **RO 10212**

11 223. RO 10212 is the eighth count supporting Putnam's labor rate submission. (Exh. J-3 [B45]  
12 (first column).) Putnam's submission spreadsheet identified Line A as a qualified repair and used Line  
13 A in the calculation of Putnam's requested warranty labor rate. (Exh. J-3 [B45].)

14 224. RO 10212 is contained in Exhibit J-7 at pages 153-154. (Exh. J-7 – 153-154 [B1457-  
15 B1458].)

16 225. RO 10212, Line A documents the replacement of the right side tail light assembly. (Exh.  
17 J-3 [B45]; Exh. J-7 – 153 [B1457].) The customer paid \$88.00 for labor on the repair line for 0.2 sold  
18 hours reflecting a \$440.00 labor rate on the individual repair line as reflected below the Labor Rate  
19 column in Exhibit J-3. (*Id.*)

20 **RO 10206**

21 226. RO 10206 is the ninth count supporting Putnam's labor rate submission. (Exh. J-3 [B45]  
22 (first column).) Putnam's submission spreadsheet identified Lines A and E as qualified repairs and used  
23 Lines A and E in the calculation of Putnam's requested warranty labor rate. (Exh. J-3 [B45].)

24 227. RO 10206 is contained in Exhibit J-7 at pages 163-166. (Exh. J-7 – 163-166 [B1467-  
25 B1470].)

26 228. RO 10206, Line A documents a diagnosis related to a customer concern about the engine  
27 overheating and the check engine light coming on. (Exh. J-3 [B45]; Exh. J-7 – 163 [B1467].) The  
28 information that the engine starts to overheat and the check engine light came on and runs rough is the

1 only information the dealership would receive prior to the diagnosis. (RT Vol. II, 473:12-19 and 475:1-  
2 5 [Kanouse].) The customer paid \$440.00 for labor on the repair line for 1.0 sold hour reflecting a  
3 \$440.00 labor rate on the individual repair line as reflected below the Labor Rate column in Exhibit J-3.  
4 (*Id.*)

5 229. RO 10206, Line E documents the replacement of the left side turbo. (Exh. J-3 [B45];  
6 Exh. J-7 – 164-165 [B1468-B1469].) The customer paid \$1,503.52 for labor on the repair line for 3.4  
7 sold hours reflecting approximately a \$442.21 (442 and 18/85;  $442.21176470588235294$ ) labor rate  
8 on the individual repair line as reflected below the Labor Rate column in Exhibit J-3. (*Id.*)

9 230. Mr. Kanouse could not testify if 3.4 hours was consistent or inconsistent with Ford's  
10 factory guide for the line E repair. (RT Vol. II, 476:10-12 [Kanouse].)

#### 11 **RO 10204**

12 231. RO 10204 is the tenth count supporting Putnam's labor rate submission. (Exh. J-3 [B45]  
13 (first column).) Putnam's submission spreadsheet identified Lines A and B as qualified repairs and used  
14 Lines A and B in the calculation of Putnam's requested warranty labor rate. (Exh. J-3 [B45].)

15 232. RO 10204 is contained in Exhibit J-7 at pages 171-173. (Exh. J-7 – 171-173 [B1475-  
16 B1477].)

17 233. RO 10204, Line A documents a diagnosis related to a customer concern about an  
18 explosion from the engine area and the engine no longer functioning as well as an oil leak. (Exh. J-3  
19 [B45]; Exh. J-7 – 171 [B1475].) The customer paid \$220.00 for labor on the repair line for 0.5 sold  
20 hours reflecting a \$440.00 labor rate on the individual repair line as reflected below the Labor Rate  
21 column in Exhibit J-3. (*Id.*)

22 234. RO 10204, Line B documents a diagnosis related to a customer concern about the  
23 electrical system including the starter motor and starter relay. (Exh. J-3 [B45]; Exh. J-7 – 171-172  
24 [B1475-B1476].) The customer paid \$220.00 for labor on the repair line for 0.5 sold hours reflecting a  
25 \$440.00 labor rate on the individual repair line as reflected below the Labor Rate column in Exhibit J-3.  
26 (*Id.*)

#### 27 **RO 10183**

28 235. RO 10183 is the eleventh count supporting Putnam's labor rate submission. (Exh. J-3

[B45] (first column).) Putnam's submission spreadsheet identified Line A as a qualified repair and used Line A in the calculation of Putnam's requested warranty labor rate. (Exh. J-3 [B45].)

236. RO 10183 is contained in Exhibit J-7 at pages 213-214. (Exh. J-7 – 213-214 [B1517-B1518].)

237. RO 10183, Line A documents the installation and replacement of a horn unit. (Exh. J-3 [B45]; Exh. J-7 – 213 [B1517].) The customer paid \$176.00 for labor on the repair line for 0.4 sold hours reflecting a \$440.00 labor rate on the individual repair line as reflected below the Labor Rate column in Exhibit J-3. (*Id.*)

**RO 10148**

238. RO 10148 is the twelfth count supporting Putnam's labor rate submission. (Exh. J-3 [B45] (first column).) Putnam's submission spreadsheet identified Line A as a qualified repair and used Line A in the calculation of Putnam's requested warranty labor rate. (Exh. J-3 [B45].)

239. RO 10148 is contained in Exhibit J-7 at pages 279-280. (Exh. J-7 – 279-280 [B1583-B1584].)

240. RO 10148, Line A documents a diagnosis related to a customer concern about the horn not working. (Exh. J-3 [B45]; Exh. J-7 – 279 [B1583].) The customer paid \$440.00 for labor on the repair line for 1.0 sold hour reflecting a \$440.00 labor rate on the individual repair line as reflected below the Labor Rate column in Exhibit J-3. (*Id.*)

**RO 10145**

241. RO 10145 is the thirteenth count supporting Putnam's labor rate submission. (Exh. J-3 [B45] (first column).) Putnam's submission spreadsheet identified Line D as a qualified repair and used Line D in the calculation of Putnam's requested warranty labor rate. (Exh. J-3 [B45].)

242. RO 10145 is contained in Exhibit J-7 at pages 283-285. (Exh. J-7 – 283-285 [B1587-B1589].)

243. RO 10145, Line D documents the replacement of the valve cover gasket and spark plug tube seals. (Exh. J-3 [B45]; Exh. J-7 – 285 [B1589].) The customer paid \$440.00 for labor on the repair line for 1.0 sold hour reflecting a \$440.00 labor rate on the individual repair line as reflected below the Labor Rate column in Exhibit J-3. (*Id.*)

**RO 10123**

244. RO 10123 is the fourteenth count supporting Putnam's labor rate submission. (Exh. J-3 [B45] (first column).) Putnam's submission spreadsheet identified Line A as a qualified repair and used Line A in the calculation of Putnam's requested warranty labor rate. (Exh. J-3 [B45].)

245. RO 10123 is contained in Exhibit J-7 at pages 334-336. (Exh. J-7 – 334-336 [B1638-B1640].)

246. RO 10123, Line A documents the replacement of the catalytic converter and associated gaskets. (Exh. J-3 [B45]; Exh. J-7 – 334 [B1638].) The customer paid \$561.62 for labor on the repair line for 1.3 sold hours reflecting approximately a \$432.02 (432 and 1/65; 432.0153846) labor rate on the individual repair line as reflected below the Labor Rate column in Exhibit J-3. (*Id.*)

**RO 10118**

247. RO 10118 is the fifteenth count supporting Putnam's labor rate submission. (Exh. J-3 [B45] (first column).) Putnam's submission spreadsheet identified Line A as a qualified repair and used Line A in the calculation of Putnam's requested warranty labor rate. (Exh. J-3 [B45].)

248. RO 10118 is contained in Exhibit J-7 at pages 343-344. (Exh. J-7 – 343-344 [B1647-B1648].)

249. RO 10118, Line A documents a diagnosis related to a customer concern about the radio not working and an update to the radio. (Exh. J-3 [B45]; Exh. J-7 – 343 [B1647].) The customer paid \$440.00 for labor on the repair line for 1.0 sold hour reflecting a \$440.00 labor rate on the individual repair line as reflected below the Labor Rate column in Exhibit J-3. (*Id.*)

**RO 10106**

250. RO 10106 is the sixteenth count supporting Putnam's labor rate submission. (Exh. J-3 [B45] (first column).) Putnam's submission spreadsheet identified Lines C, G, and H as qualified repairs and used Lines C, G, and H in the calculation of Putnam's requested warranty labor rate. (Exh. J-3 [B45].)

251. RO 10106 is contained in Exhibit J-7 at pages 368-372. (Exh. J-7 – 368-372 [B1672-B1676].)

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1           252. RO 10106, Line C documents a diagnosis related to a customer concern about filling up  
2 the vehicle with gas as well as notes related to the repair (*see also* Line G). (Exh. J-3 [B45]; Exh. J-7 –  
3 370 [B1674].) The customer paid \$440.00 for labor on the repair line for 1.0 sold hour reflecting a  
4 \$440.00 labor rate on the individual repair line as reflected below the Labor Rate column in Exhibit J-3.  
5 (*Id.*)

6           253. RO 10106, Line G documents the replacement of both the right and left side fuel  
7 pumps/fuel senders (as also described in Line C). (Exh. J-3 [B45]; Exh. J-7 – 371-372 [B1675-B1676].)  
8 The customer paid \$440.00 for labor on the repair line for 1.0 sold hours reflecting a \$440.00 labor rate  
9 on the individual repair line as reflected below the Labor Rate column in Exhibit J-3. (*Id.*)

10           254. RO 10106, Line H documents the replacement of the power steering high pressure hose.  
11 (Exh. J-3 [B45]; Exh. J-7 – 372 [B1676].) The customer paid \$440.00 for labor on the repair line for 1.0  
12 sold hours reflecting a \$440.00 labor rate on the individual repair line as reflected below the Labor Rate  
13 column in Exhibit J-3. (*Id.*)

14           **RO 10094**

15           255. RO 10094 is the seventeenth count supporting Putnam's labor rate submission. (Exh. J-  
16 3 [B45] (first column).) Putnam's submission spreadsheet identified Line A as a qualified repair and  
17 used Line A in the calculation of Putnam's requested warranty labor rate. (Exh. J-3 [B45].)

18           256. RO 10094 is contained in Exhibit J-7 at pages 396-397. (Exh. J-7 – 396-397 [B1700-  
19 B1701].)

20           257. RO 10094, Line A documents a diagnosis related to a customer concern about the tire  
21 pressure fault light (the customer ultimately declined the replacement of the four TPMS sensors as  
22 reflected in Line D). (Exh. J-3 [B45]; Exh. J-7 – 396 [B1700].) The customer paid \$440.00 for labor  
23 on the repair line for 1.0 sold hours reflecting a \$440.00 labor rate on the individual repair line as  
24 reflected below the Labor Rate column in Exhibit J-3. (*Id.*)

25           **RO 10091**

26           258. RO 10091 is the eighteenth count supporting Putnam's labor rate submission. (Exh. J-3  
27 [B45] (first column).) Putnam's submission spreadsheet identified Lines A, B, and E as qualified repairs  
28 and used Lines A, B, and E in the calculation of Putnam's requested warranty labor rate. (Exh. J-3

1 [B45].)

2 259. RO 10091 is contained in Exhibit J-7 at pages 401-402. (Exh. J-7 – 401-402 [B1705-  
3 B1706].)

4 260. RO 10091, Line A documents a diagnosis related to a customer concern about the advance  
5 tract system light and vehicle acceleration behavior. (Exh. J-3 [B45]; Exh. J-7 – 401 [B1705].) The  
6 customer paid \$440.00 for labor on the repair line for 1.0 sold hours reflecting a \$440.00 labor rate on  
7 the individual repair line as reflected below the Labor Rate column in Exhibit J-3. (*Id.*)

8 261. RO 10091, Line B documents a four wheel alignment. (Exh. J-3 [B45]; Exh. J-7 – 401  
9 [B1705].) The customer paid \$190.00 for labor on the repair line for 1.0 sold hours reflecting a \$190.00  
10 labor rate on the individual repair line as reflected below the Labor Rate column in Exhibit J-3. (*Id.*)

11 262. RO 10091, Line E documents replacement of the power steering gear assembly. (Exh. J-  
12 3 [B45]; Exh. J-7 – 402 [B1706].) The customer paid \$980.44 for labor on the repair line for 1.9 sold  
13 hours reflecting approximately a \$516.02 (516 and 2/95;  $516.0\overline{210526315789473684}$ ) labor rate on  
14 the individual repair line as reflected below the Labor Rate column in Exhibit J-3. (*Id.*)

15 **RO 10090**

16 263. RO 10090 is the nineteenth count supporting Putnam's labor rate submission. (Exh. J-3  
17 [B45] (first column).) Putnam's submission spreadsheet identified Lines A, I, and J as qualified repairs  
18 and used Lines A, I, and J in the calculation of Putnam's requested warranty labor rate. (Exh. J-3 [B45].)

19 264. RO 10090 is contained in Exhibit J-7 at pages 403-406. (Exh. J-7 – 403-406 [B1707-  
20 B1710].)

21 265. RO 10090, Line A documents a diagnosis related to a customer concern about the rear air  
22 suspension leaking. (Exh. J-3 [B45]; Exh. J-7 – 403 [B1707].) The customer paid \$440.00 for labor on  
23 the repair line for 1.0 sold hour reflecting a \$440.00 labor rate on the individual repair line as reflected  
24 below the Labor Rate column in Exhibit J-3. (*Id.*)

25 266. RO 10090, Line I documents the replacement of both rear air suspension bags. (Exh. J-  
26 3 [B45]; Exh. J-7 – 405 [B1709].) The customer paid \$532.00 for labor on the repair line for 1.2 sold  
27 hours reflecting approximately a \$443.33 (443 and 1/3;  $443.\overline{3}$ ) labor rate on the individual repair line as  
28 reflected below the Labor Rate column in Exhibit J-3. (*Id.*)



267. RO 10090, Line J documents replacement of both rear tailgate window hatch struts. (Exh. J-3 [B45]; Exh. J-7 – 405 [B1709].) The customer paid \$207.90 for labor on the repair line for 0.6 sold hours reflecting a \$346.50 labor rate on the individual repair line as reflected below the Labor Rate column in Exhibit J-3. (*Id.*)

**RO 10071**

268. RO 10071 is the twentieth count supporting Putnam’s labor rate submission. (Exh. J-3 [B45] (first column).) Putnam’s submission spreadsheet identified Lines A, B, and F as qualified repairs and used Lines A, B, and F in the calculation of Putnam’s requested warranty labor rate. (Exh. J-3 [B45].)

269. RO 10071 is contained in Exhibit J-7 at pages 444-447. (Exh. J-7 – 444-447 [B1748-B1751].)

270. RO 10071, Line A documents a diagnosis related to a customer concern about an “odd rattling type sound” from the engine area of the vehicle. (Exh. J-3 [B45]; Exh. J-7 – 444 [B1748].) The customer paid \$220.00 for labor on the repair line for 0.5 sold hours reflecting a \$440.00 labor rate on the individual repair line as reflected below the Labor Rate column in Exhibit J-3. (*Id.*)

271. RO 10071, Line B documents a diagnosis related to a customer concern about little to no heat coming from the vents and the radiator fan turning on more often. (Exh. J-3 [B45]; Exh. J-7 – 444 [B1748].) The customer paid \$220.00 for labor on the repair line for 0.5 sold hours reflecting a \$440.00 labor rate on the individual repair line as reflected below the Labor Rate column in Exhibit J-3. (*Id.*)

272. RO 10071, Line F documents the repair and replacement of a water pump and thermostat with gasket and coolant. (Exh. J-3 [B45]; Exh. J-7 – 445-446 [B1749-B1750].) The customer paid \$616.00 for labor on the repair line for 1.4 sold hours reflecting a \$440.00 labor rate on the individual repair line as reflected below the Labor Rate column in Exhibit J-3. (*Id.*)

**RO 10061**

273. RO 10061 is the twenty-first count supporting Putnam’s labor rate submission. (Exh. J-3 [B45] (first column).) Putnam’s submission spreadsheet identified Line B as a qualified repair and used Line B in the calculation of Putnam’s requested warranty labor rate. (Exh. J-3 [B45].)

274. RO 10061 is contained in Exhibit J-7 at pages 470-472. (Exh. J-7 – 470-472 [B1774-

1 B1776[.])

2 275. RO 10061, Line B documents the replacement of a power steering line. (Exh. J-3 [B45];  
3 Exh. J-7 – 471 [B1775].) The customer paid \$430.28 for labor on the repair line for 0.8 sold hours  
4 reflecting a \$537.85 labor rate on the individual repair line as reflected below the Labor Rate column in  
5 Exhibit J-3. (*Id.*)

6 **RO 10049**

7 276. RO 10049 is the twenty-second count supporting Putnam’s labor rate submission. (Exh.  
8 J-3 [B45] (first column).) Putnam’s submission spreadsheet identified Line A as a qualified repair and  
9 used Line A in the calculation of Putnam’s requested warranty labor rate. (Exh. J-3 [B45].)

10 277. RO 10049 is contained in Exhibit J-7 at pages 488-490. (Exh. J-7 – 488-490 [B1792-  
11 B1794].)

12 278. RO 10049, Line A documents a teardown inspection and replacement of a timing chain  
13 and associated components. (Exh. J-3 [B45]; Exh. J-7 – 488-489 [B1792-B1793].) The customer paid  
14 \$4654.89 for labor on the repair line for 10.6 sold hours reflecting approximately a \$439.14 (439 and  
15 149/1060; 439.140566037735849) labor rate on the individual repair line as reflected below the Labor  
16 Rate column in Exhibit J-3. (*Id.*)

17 279. Mr. Kanouse could not testify if 10.6 hours was consistent or inconsistent with Ford’s  
18 factory guide for the line A repair. (RT Vol. II, 476:16-477:6 [Kanouse].) Similarly, Mr. Sweis did not  
19 look up Ford’s factory guide time for the repair. (RT Vol. III, 622:11-13 [Sweis].) Mr. Sweis could  
20 not say if Ford’s factory guide time was or was not 10.9 hours for the type of repair described in line A.  
21 (RT Vol. III, 622:21-623:3 [Sweis].)

22 **RO 10048**

23 280. RO 10048 is the twenty-third count supporting Putnam’s labor rate submission. (Exh. J-  
24 3 [B45] (first column).) Putnam’s submission spreadsheet identified Line E as a qualified repair and  
25 used Line E in the calculation of Putnam’s requested warranty labor rate. (Exh. J-3 [B45].)

26 281. RO 10048 is contained in Exhibit J-7 at pages 491-492. (Exh. J-7 – 491-492 [B1795-  
27 B1796].)

28 ///

282. RO 10048, Line E documents replacement of the vehicle's starter motor. (Exh. J-3 [B45]; Exh. J-7 – 491-492 [B491-B492].) The customer paid \$302.85 for labor on the repair line (\$336.50 reduced by an allocated discount of \$33.65 (*see also* RT Vol. II, 492:25-493:6 (\$88 is the discount for the entire RO))) for 0.7 sold hours reflecting approximately a \$432.64 (432 and 9/14; 432.6428571) labor rate on the individual repair line as reflected below the Labor Rate column in Exhibit J-3. (*Id.*)

283. Ford argued Lines A and D should also be included in calculating Putnam's labor rate. (RT Vol. I, 75:14-21 [Becic]; *see also* RT Vol I, 76:19-24 [Becic].) However, battery replacements are expressly excluded from the calculation as routine maintenance pursuant to Vehicle Code section 3065.2, subdivision (c)(3).

#### **RO 10042**

284. RO 10042 is the twenty-fourth count supporting Putnam's labor rate submission. (Exh. J-3 [B45] (first column).) Putnam's submission spreadsheet identified Line I as a qualified repair and used Line I in the calculation of Putnam's requested warranty labor rate. (Exh. J-3 [B45].)

285. RO 10042 is contained in Exhibit J-7 at pages 504-508. (Exh. J-7 – 504-508 [B1808-B1812].)

286. RO 10042, Line I documents the replacement of the valve cover gasket. (Exh. J-3 [B45]; Exh. J-7 – 506 [B1810].) The customer paid \$303.48 for labor on the repair line (\$337.20 reduced by an allocated discount of \$33.72) for 0.8 sold hours reflecting a \$379.35 labor rate on the individual repair line as reflected below the Labor Rate column in Exhibit J-3. (*Id.*)

#### **RO 10036**

287. RO 10036 is the twenty-fifth count supporting Putnam's labor rate submission. (Exh. J-3 [B45] (first column).) Putnam's submission spreadsheet identified Lines B, E, and F as qualified repairs and used Lines B, E, and F in the calculation of Putnam's requested warranty labor rate. (Exh. J-3 [B45].)

288. RO 10036 is contained in Exhibit J-7 at pages 524-526. (Exh. J-7 – 524-526 [B1828-B1830].)

289. RO 10036, Line B documents a diagnosis related to a customer concern about the vehicle cranking but not starting. (Exh. J-3 [B45]; Exh. J-7 – 524 [B1828].) The customer paid \$440.00 for

labor on the repair line for 1.0 sold hour reflecting a \$440.00 labor rate on the individual repair line as reflected below the Labor Rate column in Exhibit J-3. (*Id.*)

290. RO 10036, Line E documents replacement of the fuel pump control module. (Exh. J-3 [B45]; Exh. J-7 – 525 [B1829].) The customer paid \$100.36 for labor on the repair line for 0.2 sold hours reflecting a \$501.80 labor rate on the individual repair line as reflected below the Labor Rate column in Exhibit J-3. (*Id.*)

291. RO 10036, Line F documents replacement of the mass airflow sensor. (Exh. J-3 [B45]; Exh. J-7 – 525-526 [B1829-B1830].) The customer paid \$75.65 for labor on the repair line for 0.1 sold hours reflecting a \$756.50 labor rate on the individual repair line as reflected below the Labor Rate column in Exhibit J-3. (*Id.*)

292. Mr. Kanouse admitted he was judging the reasonability of the rates for lines B, E, and F on RO 10036 based on what all new motor vehicle dealers might receive for warranty reimbursement especially in California. (RT Vol. II, 477:11-478:4 [Kanouse].)

#### **Summary of Submission ROs**

293. The spreadsheet Putnam submitted to Ford showed the foregoing ROs had a total number of sold hours of 46.8 with customers paying a total of \$20,440.55 for the repairs. Dividing the total charges for labor customers paid for the qualified repairs and dividing it by the total number of sold hours associated with those repairs supported a \$436.76 labor rate. (Exh. J-3 [B45].)

294. Of the 41 qualified lines of repairs in Putnam’s submission, 7 of the lines calculate to a repeating decimal when the individual line’s charges are divided by the sold hours. (*See* Exh. J-3 [B45].) The individual lines and their individual labor rates are not relevant to Vehicle Code section 3065.2’s determination of a labor rate because the statute requires the division of the “total charges for labor” by the “total number of hours that generated those charge.” (Cal. Veh. Code, § 3065.2, subd. (a)(2).)

295. The statute contemplates a range of individual repair line charges for different qualified repairs (including the circumstance where some of the qualified repair lines are subject to discounts). (*See* Cal. Veh. Code, § 3065.2, subd. (a)(2).) Nothing in section 3065.2 requires the rate a dealer charges for labor on each individual qualified repair be identical to each other qualified repair in the submission.

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296. In addition, review of the individual ROs show Ford's argument Putnam charges diagnostic at a flat rate (one hour at \$440 per hour) is not consistent with the charges. For example, RO 10216, Line A is a diagnostic related to a customer concern about the vehicle's back-up camera screen being dark and blurred. (Exh. J-3 [B45]; Exh. J-7 – 146 [B1450].) Putnam did not charge the customer \$440.00 based on 1.0 sold hours for the diagnostic. Putnam instead charged a total of \$220 with 0.5 sold hours.

297. Moreover, this diagnostic shows any flat rate charge for customer pay diagnostics is consistent with Section 3065.2. The customer concern in RO 10216 relates to a concern about the vehicle's back-up camera screen being dark and blurred. (Exh. J-3 [B45]; Exh. J-7 – 146 [B1450].) With only this description from the customer, Putnam must price the diagnostic before any work is performed and without any knowledge of the actual complexity of the issue to be discovered. This is generally true of the other diagnostics in the submission. Even if Ford could show Putnam charges a flat rate for diagnostics, flat rate charges for diagnostics are consistent with pricing in the vehicle repair industry using guides which in themselves create flat rate charges for the same type of repair independent of the actual hours the repair may require.

IX. ROS PUTNAM SUBMITTED PURSUANT TO FORD'S REQUEST FOR SUPPLEMENTAL ROS

298. During the hearing, Ford discussed the following ROs from Putnam's supplemental submission which it argued should also be considered qualified ROs:

**RO 10287**

299. Mr. Becic testified Line B of RO 10287 should be considered a qualified repair. (RT Vol. I, 76:25-77:9 [Becic].) Mr. Becic testified the difference between 0.77 actual hours and 0.2 sold hours on the repair was larger than he normally sees. (*Id.* at 77:10-19.)

300. Putnam did not rely on RO 10287 to support its requested labor rate. (*See* Exh. J-3 [B45]; *see also* RT Vol. I, 143:23-144:5 [Becic].) Ford did not rely on RO 10287 to calculate a proposed adjusted retail labor rate. (*See* Exh. J-6 [B50-B51].)

**RO 10305**

301. Mr. Becic testified Line D of RO 10305 should be considered a qualified repair. (RT

Vol. I, 78:18-25 [Becic] (testimony states “line B,” however, the subsequent testimony is consistent with Line D; the “B” in the transcript appears to be a transcription error); *see also* Exh. J-7 – 564 [B1868].) Mr. Becic noted the actual hours were 7.69 for the repair and 2.4 sold hours for the repair. (RT Vol. I, 79:1-4 [Becic].)

302. Mr. Becic further testified Line A is related line D and testified his perspective was the 5.05 actual hours should be included in the Line D repair. (RT Vol. I, 79:9-80:19 [Becic].) Mr. Becic calculated a labor rate using the 7.69 and 5.05 actual hours and the \$1,062.68 customer charges of \$83.41 “with some extra decimal places.” (RT Vol. I, 80:17-81:4 [Becic].)

303. Putnam did not rely on RO 10305 to support its requested labor rate. (*See* Exh. J-3 [B45]; RT Vol. I, 144:12-18 [Becic].) Ford did not rely on RO 10305 to calculate a proposed adjusted retail labor rate. (*See* Exh. J-6 [B50-B51].)

#### **RO 10362**

304. Mr. Becic testified the qualified lines on RO 10362 are lines A, F, G, H, and I.

305. Mr. Becic acknowledges having two technicians working on the same repair is “absolutely” okay. (RT Vol. I, 87:21-23 [Becic].)

306. Putnam did not rely on RO 10362 to support its requested labor rate. (*See* Exh. J-3 [B45].) Ford did not rely on RO 10362 to calculate a proposed adjusted retail labor rate. (*See* Exh. J-6 [B50-B51].)

307. On Line B of RO 10362, the RO reflects a payment of 0.4 sold hours for the warranty repair compared to 4.01 actual hours. (RT Vol. II, 482:25-485:7 [Kanouse]; Exh. J-7 – 673 [B1977].)

#### **RO 10415**

308. The RO states in Line A it is a “shop ticket only, due [sic] not use for service.” (Exh. J-7 – 799 [B2103].) The RO further states in Line B “shop ticket training only.” (*Id.*) The RO is the only RO of its type (internal shop ticket) in the entire 120-day period covered by Putnam’s original submission and the supplemental submission. (*See, generally*, Exh. J-7; *see also* RT Vol. II, 460:19-21 [Kanouse].) The RO contains a total of 21.41 hours of actual time for six different technicians (technician numbers 2018, 2035, 2036, 2037, 2040, and 2041). (Exh. J-7 – 799 [B2103].) The RO records an average of approximately 3.57 actual hours for each of the six technicians. (*Id.*; *see also* RT Vol. II, 458:23-459:9

1 [Kanouse] (reaching a similar conclusion).) The RO covers approximately a half day of service work  
2 for the six technicians and cannot explain purported discrepancies on other ROs.

3 309. While Mr. Kanouse disputed whether the training costs documented on the RO should  
4 have been expensed to account 77400 (training expense) instead of 77500 (internal shop policy), they  
5 are both expense accounts for a dealership. (RT Vol. II, 325:5-327:7 [Kanouse].)

6 310. Mr. Kanouse suggested Putnam might be paying its technicians less on qualified lines but  
7 then instead paying them through this RO to reduce a discrepancy between what the technicians are paid  
8 and the rate. (RT Vol. II, 327:25-328:14 [Kanouse].) Mr. Kanouse's suggestion is inconsistent with  
9 Ford's argument that Putnam's actual hours are too high compared to the sold hours.

10 311. Mr. Kanouse further agreed there is a variety in the amount of time a Ford training might  
11 take. (RT Vol. II, 459:10-460:2 [Kanouse].) Similar to the variety of actual times reflected in RO 10415.  
12 (Exh. J-7 – 799 [B2103].)

13 312. Mr. Kanouse also admitted internal service policy repairs are not part of the labor rate  
14 calculation relevant to this protest. (RT Vol. II, 482:15-18 [Kanouse].)

15 **Summary of Supplemental ROs**

16 313. Vehicle Code section 3065.2 makes the supplemental ROs relevant only if utilized to  
17 calculate a proposed adjusted retail labor rate. (Cal. Veh. Code, § 3065.2, subd. (d)(5).) Otherwise, the  
18 supplemental ROs cannot show the Request to be materially inaccurate because they are repairs that  
19 were not part of the submission.

20 **X. FINDINGS RELATED TO FORD'S REPEATING DECIMAL ARGUMENT**

21 314. Ford received all the ROs associated with each of the ROs listed in Putnam's spreadsheet  
22 supporting Putnam's labor rate submission. (Exh. J-3 [B45]; Exh. J-7 [B1305-B1830].) Ford could see  
23 the sold hours and charges to customers on each line of the spreadsheet. (Exh. J-3 [B45].) Further, Ford  
24 could edit the submitted spreadsheet to show more than two decimal places. (See RT Vol. I, 84:14-85:3  
25 [Becic].)

26 315. Ford further calculated labor rates for individual repairs in the Denial Letter that  
27 contained more than two decimals. (Exh. J-6 [B50-B51].) Ford calculated a rate for RO 10239 as  
28 follows: "At \$1,662.50 for 3.7 total hours, this customer repair would seem to show an effective labor



1 rate of \$449.32 per hour.” (*Id.*) However, the labor rate as stated by Ford is rounded; the actual  
2 calculation is 449 and 12/37 or 449. $\overline{324}$ . (*See id.*)

3 316. Similarly, concerning RO 10305, \$1,062.68 divided by 2.4 customer hours is 442 and  
4 47/60 or 442.78 $\overline{3}$ . Ford’s Denial Letter rounds this figure and states: “Based on this the effective rate  
5 on this repair would seem to be \$442.78.” (Exh. J-6 [B50].)

6 317. Ford failed to raise any concern some individual repair lines showed effective labor rates  
7 with repeating decimals as a reason for its denial in the Denial Letter. (Exh. J-6 [B51-B51].) Despite  
8 calculating repeating decimals itself, Ford did not raise this issue and instead rounded the figures. (*Id.*)

9 318. Ford is precluded by law from relying on repeating decimals as a basis to show Putnam’s  
10 labor rate is allegedly materially inaccurate or fraudulent. Ford was required to provide “a full  
11 explanation of any and all reasons for [its] allegation]” as well as “a copy of all calculations used by the  
12 franchisor in determining the franchisor’s position” in Ford’s Denial Letter. (Cal. Veh. Code, 3065.2,  
13 subd. (d)(1).) Ford is precluded from “expand[ing], supplement[ing], or otherwise modify[ing] any  
14 element of [the Denial Letter], including, but not limited to, its grounds for contesting the retail labor  
15 rate, retail parts rate, or both, without justification.” (*Id.*)

16 319. Here, Ford fails to have justification to expand, supplement, or otherwise modify its  
17 Denial Letter to include repeating decimals (or decimals of labor rates pasted two decimals) because it  
18 could have done so based on the numbers contained in Putnam’s spreadsheet or its own calculations of  
19 the example ROs Ford relied on at any time, including prior to issuing the Denial Letter. Ford is  
20 precluded from relying on a reason for its denial not included in the Denial Letter and raised for the first  
21 time during the merits hearing.<sup>10</sup>

22 320. In addition, repeating decimals in calculating a labor rate for an individual repair line can  
23 arise when a customer receives a discount for the repair. If a customer is charged \$300 for 3 sold hours  
24

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25 <sup>10</sup> Ford’s Opening Brief stated there were three primary reasons Putnam’s requested rate is not  
26 reasonable and is materially inaccurate or fraudulent. The first concerned whether Putnam’s rate is  
27 reasonable in light of it being a 246% higher rate than Putnam’s \$177 rate and approximately twice as  
28 high as surrounding Ford dealers. The second concerned whether sold or actual hours should be used  
to calculate Putnam’s requested labor rate. The third concerned whether repairs were performed at an  
unauthorized location. (Ford’s Prehearing Brief at 1:1-3:6.) Nowhere in Ford’s Opening Brief did  
Ford raise repeating decimals. (*See, generally*, Ford’s Prehearing Brief.)

(and 3 actual hours), and receives a \$20 discount, the total charges to the customer are \$280 and the hours that generated those charges are 3 hours (whether using sold or actual hours in this example). Calculating a labor rate using Vehicle Code section 3065.2, for such a repair results in a \$93.33, with the 3 repeating, labor rate.<sup>11</sup> (*See* RT Vol. II, 364:2-366:21 [Kanouse]; *see also* Cal. Veh. Code, § 3065.2, subd. (a)(2) (providing the total charges for labor must be divided by the total number of hours that generated those charges).)

321. There are two repairs in the submission that included discounts: RO 10048 and 10042. (Exh. J-3 [B45].) In addition, a dealer may discount a customer-pay repair in the dealer's sole discretion. (RT Vol. II, 363:24-364:1 [Kanouse].) The dealer may not record a discount but instead negotiate a lower price when discussing the repair with the customer. Both ways of accounting for the discount can result in labor rates as calculated on individual repair lines that have a repeating decimal. However, the repeating decimal does not show the charge to the customer or the total number of hours that generated those charges is somehow materially inaccurate or otherwise invalid.

322. In the spreadsheet Mr. Walsh prepared dividing labor paid by the customer by the A/HRS in Putnam's repair order, he rounded calculations to the nearest cent. (RT Vol. II, 408:15-409:3 [Kanouse] (showing rounding 87.50 divided by 3.74 to \$23.40 – the division actually calculates to 23.3957219...); *see also* Exh. 23 – 001 [A81].) At the time, Mr. Walsh was the North America Warranty Manager who supervised the auditors for Ford, including Mr. Kanouse. (RT Vol. II, 409:4-10 [Kanouse].)

323. As discussed as an example during the hearing, a job priced with a factory guide range of 1.5 to 1.7 to be the middle of that range (1.6 hours) would generate a labor estimate of \$704 using a \$440 rate. (RT Vol. VI, 1216:8-24 [Stockton].) However, if after the job was performed, it is discovered the repair should have been 1.7 sold hours (the high end of the range), dividing \$704 by 1.7 hours results in

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<sup>11</sup> Mr. Kanouse attempted to dispute 93.33, with the 3 repeating, would be the labor rate for this hypothetical repair. (RT Vol. II, 365:1-16.) He suggested the full amount should be billed with the discount accounted for in an advertising and promotions expense or something similar. (*Id.*) However, when calculating a labor rate pursuant to Section 3065.2, *total charges* are the relevant number (across all ROs in the submission); how a dealership accounts for the discount is not relevant to Section 3065.2. (Cal. Veh. Code, § 3065.2, subd. (a)(2).) As a result, \$280 would contribute to the overall labor rate when calculated using Vehicle Code section 3065.2 in this example and not \$300.

1 an approximate \$414.11 rate with a repeating decimal with a period of 16; a repeating decimal also  
2 results if the sold hours should be 1.5 (the low end of the range). (RT Vol. VI, 1216:25-1220:7  
3 [Stockton].)

4 324. As Mr. Stockton described, “this is division and sometimes that is going to be a whole  
5 number, sometimes it is going to be a well-behaved number with one or two decimals, and sometimes it  
6 is going to be a repeating decimal. But obviously it follows, if you change the denominator, or in the  
7 example, if the billed hours, once they are known, are different from the anticipated billed hours when  
8 the job is quoted, then it is going to change the result, and sometimes that gives you a decimal, sometimes  
9 it doesn’t.” (RT Vol. VI, 1219:18-1220:7 [Stockton].)

10 XI. FINDINGS RELATED TO THE DECLARATION OF DAVID MARTINEZ

11 325. Mr. Martinez reviewed his declaration, Exhibit AA, for the first time on September 3,  
12 2023. (RT Vol. III, 652:7-19 [Martinez].)

13 326. The labor rate submission occurred before Mr. Martinez’s employment began. (RT Vol.  
14 III, 671:15-17 [Martinez].)

15 327. In his declaration, Mr. Martinez alleged Putnam was manipulating sold hours to show an  
16 ELR of \$440. (Exh. AA – 002, ¶ 10 [B1228].) However, when asked to explain his basis for this  
17 statement Mr. Martinez offered an entirely contrary explanation. Mr. Martinez did not even allege  
18 Putnam was manipulating sold hours to affect the hourly rate. Instead, he explained service advisors  
19 consistently applied the \$440 hourly rate but would sometimes use guide hours higher than Ford’s Guide  
20 to increase the total cost to customers in order to pad their commissions. (RT Vol. III, 683:23-684:13  
21 and 686:1-9 [Martinez].) Mr. Martinez’s testimony plainly shows he had no knowledge of anyone at  
22 Putnam manipulating the sold hours in an attempt to demonstrate a \$440 hourly rate. It also shows he  
23 did not understand the declaration drafted by Ford’s counsel in support of its narrative in this litigation.

24 328. Mr. Martinez confirmed he had no knowledge of Putnam manipulating sold hours to  
25 demonstrate a \$440 hourly rate. At Paragraph 12 of his declaration, Mr. Martinez alleged Putnam was  
26 manipulating sold hours down to show a higher ELR, but at the hearing he testified service advisors were  
27 adjusting the hours up to increase commissions. (RT Vol. III, 696:25-698:10 [Martinez].)

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1           329. In response to Paragraph 9 of his declaration, Mr. Martinez testified Putnam's service  
2 advisors would sometimes use the AllData time guide to price repairs using the \$440 per hour rate in  
3 instances where the AllData time guide was greater than the Ford factory guide. The service advisors  
4 would use the guide with a greater number of hours because they were paid on commission. (RT Vol.  
5 III, 680:11-681:2 [Martinez].)

6           330. While the service advisors were instructed to price repairs using Ford's factory guide and  
7 apply a \$440 per hour rate, the service advisors would use a guide with a greater number of hours to  
8 benefit themselves personally. (RT Vol. III, 683:23-684:13 [Martinez].) If a service advisor applied a  
9 higher number of sold hours, the price to the customer would increase resulting in a higher commission.  
10 (RT Vol. III, 685:8-686:5 [Martinez].)

11           331. In describing the meaning of Paragraph 10 of his declaration, Mr. Martinez testified it  
12 meant the service advisors would use one of three different labor types at a \$440 per hour rate—not that  
13 the hours were being manipulated to get to a labor rate of \$440. (Compare RT Vol. III, 689:10-692:3  
14 [Martinez] with Exh. AA – 002, ¶ 10 [B1228].) As described during his testimony, “[T]he declaration  
15 says one thing, but his testimony to [Administrative Law Judge Van Rooyen] says a different thing  
16 today.” (RT Vol. III, 692:20-21.)

17           332. Mr. Martinez then described actual time might be moved from one line to another on an  
18 RO, however, Putnam does not charge customer-pay repairs based on actual time. (RT Vol. III, 693:9-  
19 694:5 [Martinez].) Paragraph 10 of Mr. Martinez's declaration does not state anything concerning actual  
20 hours—Mr. Martinez's was nonresponsive when faced with the contradiction in his testimony at hearing  
21 and in Paragraph 10 of his declaration.

22           333. Mr. Martinez further agreed after review of Paragraph 12 of his declaration that the  
23 service advisors were increasing the hours as opposed to decreasing the hours. This would result in the  
24 total cost being higher and result in the service advisor receiving more commission. (RT Vol. III, 697:18-  
25 698:10 [Martinez].)

26           334. In explaining Paragraph 15 of his declaration, Mr. Martinez provided at least three  
27 different versions of events in answer. He indicated the technicians threatened Mr. Vasquez and Mr.  
28 Martinez with quitting if the dealership went to a flat rate payment system; then he indicated they were

1 previously paid based on their skill but said “that is not true either”; and then he indicated the technicians  
2 were paid a lot of money per hour and did not have a lot of certifications to do repairs because Putnam  
3 needed more technicians. (RT Vol. III, 713:10-714:18 [Martinez].)

4 335. Mr. Martinez admitted he made a mistake in Paragraph 16 of his declaration. Putnam  
5 technicians were always paid based on hours of attendance and not based on hours spent on individual  
6 repairs. (RT Vol. III, 716:21-718:8 [Martinez].)

7 336. Mr. Martinez agreed the information he provided in Paragraph 17 of his declaration had  
8 no impact on the effective labor rate the dealership was charging. (RT Vol. III, 722:22-724:10  
9 [Martinez].) Mr. Martinez similarly agreed Paragraph 19 included information that did not have an  
10 impact on the effective labor rate the dealership was charging. (RT Vol. III, 724:21-24 [Martinez].)

11 337. Mr. Martinez agreed again when discussing Paragraph 22 of his declaration he was  
12 referring to service advisors manipulating sold hours to get larger commissions (similar to the testimony  
13 described above). (RT Vol. III, 734:21-735:5 [Martinez].)

14 338. Mr. Martinez’s declaration also cannot be relied upon because he was fired from Putnam  
15 Ford as a result of falsifying documents on a warranty repair. Moreover, he is actively pursuing litigation  
16 against Putnam Ford. (RT Vol. V, 1054:12-22 [K. Putnam].)

17 339. The Board finds the Declaration of David Martinez (Exhibit AA) to not be credible. The  
18 Board will not rely on the Declaration of David Martinez in reaching determinations in this Protest.

19 **ANALYSIS**

20 I. FORD’S FAILURE TO COMPLY WITH SECTION 3065.2

21 340. Ford’s Denial Letter relied on a battery replacement for RO 10048 specifically excluded  
22 as routine maintenance by Section 3065.2, subdivision (c)(3). Ford’s Denial Letter failed to comply with  
23 Section 3065.2 by not omitting routine maintenance from its determination.

24 341. Ford’s Denial Letter failed to raise all reasons for Ford’s denial. Ford specifically omitted  
25 any reference to reasons for the denial offered at hearing showing some of the repairs would result in a  
26 repeating decimal when dividing the total labor charge by the sold hours, instances in the ROs showing  
27 actual or sold hours listed as zero, diagnostic repairs being charged at a flat rate, and technician hours  
28 being improperly characterized as “internal shop policy” repairs. These alleged additional reasons for

1 Ford's denial were based on information contained in the repair orders Ford received from Putnam as  
2 part of the submission. Ford lacked justification for adding to, expanding, supplementing, or otherwise  
3 modifying any element of Denial Letter because each of the foregoing alleged reasons are based on  
4 documents Ford had in its possession for over sixty (60) days prior to issuing the Denial Letter.  
5 Moreover, Ford only raised these alleged reasons for denial for the first time at the merits hearing. To  
6 the extent Ford discovered these alleged reasons for denial, it was required to supplement its Denial  
7 Letter well in advance of the merits hearing to provide a full explanation of any and all reasons for Ford's  
8 allegations.

9 342. Ford's Denial Letter further failed to provide a full explanation of any and all reasons for  
10 Ford's allegation because Ford chose to include only examples of its more extensive review of the repair  
11 orders. Mr. Reibel used some draft spreadsheets but did not use them for a final determination. (RT  
12 Vol. I, 143:6-15 [Becic].) Ford was required to provide a "*full* explanation" and not fragments of its  
13 reasons for denying Putnam's Request. Ford discussed its position concerning ROs 10239, 10305,  
14 10283, 10048, and 10251 as examples and only listed additional ROs "10206, 10248, 10216, 10204,  
15 10319, 10362, *and others*." (Exh. J-6 – 001-002 [B50-B51].) Discussion of five ROs from the Request  
16 and listing six other ROs with an indication there were others upon which Ford relied, but did not  
17 provide, failed to provide Putnam a full explanation of any and all reasons for Ford's allegation.

18 343. Ford was also required to provide a copy of all calculations used by Ford in determining  
19 Ford's position. (Cal. Veh. Code, § 3065.2, subd. (d)(1).) Ford was required to provide each such  
20 calculation if used by Ford in determining its position and not limited to whether the calculation was  
21 ultimately relied on by Ford. Mr. Reibel used some draft spreadsheets but did not use them for a final  
22 determination. (RT Vol. I, 143:6-15 [Becic].) Mr. Reibel used these spreadsheets to determine Ford's  
23 position and Ford was required to provide them with its Denial Letter. Ford failed to do so.

24 344. In an email from Rick Reibel dated August 27, 2021, Mr. Rebel advises Matt Watson to  
25 review the Putnam submission "as normal." Mr. Reibel went on to explain Ford would "probably need  
26 to give them a market appropriate rate, but we will need to know what the actual effective rate is  
27 regardless." (Exh. 6 [A29].) This email confirms Ford had no intention of acting in compliance with  
28 Section 3065.2—Ford would do the calculation, but would offer a market appropriate rate. Despite this

1 clear instruction to determine the ELR, Ford failed produce any analysis performed by Mr. Watson or  
2 Mr. Reibel.

3 345. Similarly, Mr. Walsh prepared a spreadsheet calculating an effective labor rate based on  
4 Ford's submission at or before Ford issued the Denial Letter. (Exh. 23 – 001-002 [A81-A82].) Mr.  
5 Walsh calculated an overall effective labor rate based on his spreadsheet of ROs of \$173.06 per hour  
6 (\$23,873.58 divided by 137.95 hours). (Exh. 23 – 002 [A82]; *see also* RT Vol. II, 409:18-410:7  
7 [Kanouse] (agreeing Mr. Walsh's spreadsheet was a calculation of an effective labor rate).) Ford's  
8 Denial Letter was due the day after it was issued (October 27, 2021). Ford could have waited the day  
9 between October 26 and 27, 2021, to issue the Denial Letter to ensure Mr. Walsh's calculations were  
10 included as a copy. As a result, Ford lacked justification for not including Mr. Walsh's spreadsheet as a  
11 copy of calculations used by Ford in determining its position. Ford failed to include all calculations used  
12 by Ford in determining Ford's position.

13 346. Moreover, Ford's Denial Letter proposed an adjusted retail labor rate of \$220.00 per hour  
14 "which seems to be the most common customer pay rate your documentation shows in repairs where we  
15 see what appears to be valid documentation." (Exh. J-6 – 002 [B51].) Implied in Ford's Denial Letter  
16 is a subset of ROs it relied on to determine a most common customer pay rate. Ford failed to provide  
17 the set of ROs from which it determined a most common customer pay rate. Determining a mathematical  
18 mode or most common customer pay rate from a set of ROs is a "calculation" for purposes of Vehicle  
19 Code section 3065.2, subdivision (d)(1). Ford failed to provide a copy of its calculation or list any ROs  
20 which supported its position.

21 347. Ford's proposed adjusted retail labor rate in the Denial Letter also failed to comply with  
22 Section 3065.2 because it was not determined by using the same requirements applicable to Putnam for  
23 the submission. (Cal. Veh. Code, § 3065.2, subd. (d)(5)(A).) Instead, Ford unilaterally calculated a  
24 retail labor rate in a way other than as specified in subdivision (d) in direct violation of Section 3065.2,  
25 subdivision (h)(3). (Cal. Veh. Code, § 3065.2, subd. (h)(3).)

26 348. Ford also failed to comply with Section 3065.2, subdivision (i) when it attempted to  
27 influence Putnam's pricing to its retail customers as a result of Putnam's Request. Ms. Murphy-Austin,  
28 who did not review or analyze repair orders for any reason (RT Vol. I, 177:9-11 [Murphy-Austin]) nor



1 review, analyze, or approve customer repair rates (RT Vol. I, 177:12-14 [Murphy-Austin]), called and  
2 met with Kent Putnam to discuss Putnam's Request. In her words she told Mr. Putnam and Mr. Vasquez  
3 she was "concerned that the customer would be paying an uncompetitive price, obviously not good for  
4 the customer, compared to a neighboring Ford dealer." (RT Vol. I, 190:2-16 [Murphy-Austin].) Ms.  
5 Murphy-Austin's communications were attempts to influence a change to Putnam's pricing of labor in  
6 retail repairs in response to Putnam's Request, in violation of Section 3065.2, subdivision (i)(1).

7 349. As a result of Ford's failure to show it complied with Section 3065.2, Putnam's requested  
8 labor rate is deemed approved by operation of Vehicle Code sections 3065.4 and 3065.2, subdivision  
9 (e).

10 II. FORD'S FAILURE TO SHOW PUTNAM'S REQUEST IS MATERIALLY INACCURATE  
11 OR FRAUDULENT

12 350. Ford also failed to satisfy its burden of proof to show Putnam's Request is materially  
13 inaccurate or fraudulent.

14 351. Putnam seeks to apply Ford's factory guide when pricing customer pay repairs with an  
15 hourly rate of \$440 per hour. Ford failed to provide evidence the sold hours in the customer pay repairs  
16 subject to Putnam's Request are substantially inconsistent with Ford's factory guide. Ford failed to offer  
17 an analysis comparing Putnam's sold hours with Ford's factory guide. Examples discussed during the  
18 hearing show Putnam's sold hours are equal to or approximately equal to Ford's factory guide. The  
19 requested labor rate of \$436.76 is consistent with Putnam's pricing to retail customers at \$440 per hour  
20 based on Ford's factory guide.

21 352. Putnam is permitted by Section 3065.2 to select the guide it uses to price customer pay  
22 repairs. Putnam uses Ford's factory guide hours or hours similar thereto as sold hours to price repairs to  
23 customers in its repair orders. The sold hours generate the charges to the customer while the actual hours  
24 have no impact on the charges to the customer. As a matter of California law, the charges to the customer  
25 must be determined based on guide hours prior to the completion of the repair. (Cal. Bus. & Prof. Code,  
26 § 9884.9, subd. (a).) Ford's arguments based on actual hours are rejected as irrelevant in light of the  
27 plain language of Vehicle Code section 3065.2 which requires a division based on "the total number of  
28 hours that generated those charges." Actual hours do not generate charges in the motor vehicle repair

1 industry; sold hours generate those charges.

2 353. Ford's generalized claims concerning whether Putnam was exactly adhering to Ford's  
3 factory guide hours are rejected. (*See* RT Vol. I, 110:4-8 [Becic].) Ford failed to introduce evidence  
4 comparing Ford's factory guide hours with Putnam's sold hours and those examples discussed during  
5 the hearing show consistency between Ford's factory guide hours and Putnam's sold hours.  
6 Additionally, Ford withheld any such review of Ford's factory guide and Putnam's sold hours as  
7 privileged. (*See* RT Vol. I, 110:9-111:20 [Becic].) Ford cannot both rely on Mr. Becic's generalized  
8 claims and withhold the underlying analysis on the basis of the attorney-client privilege.

9 354. The location where the repairs documented by Putnam's ROs accompanying Putnam's  
10 Request is irrelevant to the Board's determination because Vehicle Code section 3065.2, subdivision (j)  
11 provides for the *type* of repairs subject to a Section 3065.2 submission and not whether those repairs  
12 would have been paid by the franchisor if they had been submitted as warranty repairs for  
13 reimbursement. Moreover, Ford's Dealer Agreement does not govern the location where customer-pay  
14 repairs may be performed for the vehicles at issue in this Protest.

15 355. Ford also fails to show Putnam's Request is materially inaccurate by relying on the  
16 reasonableness of the rate. Vehicle Code section 3065.2 defines how a reasonable warranty  
17 reimbursement rate shall be determined. The prescribed formula does not include consideration of the  
18 rates for surrounding dealers and these rates do not control the Board's determination. The Assembly  
19 Committee on Transportation comment on AB 179 recites AB 179 "...reverses the existing power  
20 dynamic between dealers and manufacturers by allowing dealers to set the labor and parts rate through  
21 an established formula outlined in this bill instead of having those rates dictated by the manufacturers  
22 and judged on a 'reasonableness' standard by NMVB." (2019 Cal. Assemb. Bill No. 179, Cal. 2019-  
23 2020 Reg. Sess., Assemb. Comm. on Trans. – April 18, 2019, at p. 7.) The express intent of the  
24 California legislature in enacting Vehicle Code section 3065.2 was to replace the statutory  
25 "reasonableness" standard with the formula established by Section 3065.2. Applying a reasonableness  
26 standard as advocated for by Ford would impermissibly override the express legislative intent underlying  
27 Section 3065.2.

28 ///

## DETERMINATION OF ISSUES

360. The difference between the rate Respondent reimbursed Protestant for its fulfillment of warranty obligations is different from the amount Protestant would have received if Respondent had compensated Protestant at the retail labor rate as determined in accordance with Section 3065.2 by the amount of \$216.76 per hour.


A1086

**PROPOSED DECISION**

Based on the evidence presented and the findings herein, IT IS HEREBY ORDERED THAT Protest No. PR-2759-21 is sustained. Respondent failed to establish its burdens of proof under Vehicle Code section 3065.4(a) that it complied with Section 3065.2 and that Protestant's requested retail labor rate is materially inaccurate or fraudulent. Protestant's requested retail labor rate of \$436.76 per hour is the retail labor rate determined in accordance with Section 3065.2.

Dated: April 4, 2024

LAW OFFICES OF  
GAVIN M. HUGHES

By   
Gavin M. Hughes  
Robert A. Mayville, Jr.  
Attorneys for Protestant

**DECLARATION OF SERVICE BY ELECTRONIC MAIL**

I, Robert A. Mayville Jr., declare that I am employed in the County of Sacramento, State of California, that I am over 18 years of age, and that I am not a party to the proceedings identified herein. My business address is 4360 Arden Way, Suite 1, Sacramento, California 95864.

I declare that on April 4, 2024, I caused to be served a true and complete copy of:

***PROTESTANT'S POST HEARING BRIEF***

*and*

***PROTESTANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW***

***KPAuto, LLC, dba Putnam Ford of San Mateo***

*v.*

***Ford Motor Company***

***Protest No. PR-2759-21; OAH NO. 2023050701***

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

Executed this 4 April 2024 Sacramento, California.

  
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10  
11 **STATE OF CALIFORNIA**  
12 **NEW MOTOR VEHICLE BOARD**

13 In the Matter of the Protest of  
14 KPAUTO, LLC, dba PUTNAM FORD OF SAN  
MATEO,  
15  
16 v. Protestant,  
17 FORD MOTOR COMPANY,  
Respondent.

**Protest No. PR-2759-21**

**RESPONDENT FORD MOTOR  
COMPANY'S REPLY IN SUPPORT OF  
POST-HEARING BRIEF**

19  
20 Respondent Ford Motor Company ("Ford") submits its Reply in Support of its Post-Hearing  
21 Brief.

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## INTRODUCTION

Protestant KPAUTO, LLC, d/b/a Putnam Ford of San Mateo's ("Putnam") Response to Ford Motor Company's ("Ford's") Post-Hearing Brief should be rejected for three key reasons.

**First**, Putnam's argument that Ford did not meet its burden to show the Submission is materially inaccurate and fraudulent is based on assertions of counsel, rhetorical questions presented in its Response, and incorrect interpretations of repair orders. With regard to whether the sold hours generated the charges, Putnam fails to point to any evidence that the sold hours were based on the Ford Time Guide and were actually used to calculate the final labor charge to the customer. Putnam ignores Ford's argument that the accounting anomalies render all the of Submission unreliable and, by extension, materially inaccurate and fraudulent. Finally, Putnam spends considerable time on the location issue claiming it is irrelevant because it bears on reimbursements, but this argument ignores that a repair is not covered by the "manufacturer's warranty" if the manufacturer does not reimburse a dealer for it.

**Second**, Putnam's argument that Ford did not comply with the notification provision in Section 3065.2(d)(1) is based on an incorrect interpretation of the law and ignores the details contained in the Denial Letter. Putnam ignores the text of the statute and Denial Letter, conflates a "reason" with "evidence" of that reason, and relies on conjecture that Ford surely used calculations and failed to produce them. Putnam also tries to prevent supplementation of the Denial Letter with the information from Expert Suzanne Heinemann, which ignores the facts and law regarding justification for any supplementation.

**Third**, Putnam seeks to impermissibly limit the Board's scope of review should it determine Ford has not met its burden. Putnam's response ignores the plain language of Sections 3065.2 and 3065.4, and instead relies on incorrectly claiming that plain language of Section 3065.4(b) is inconsistent with other provisions of the statute (it is not) and that legislative history shows that the Legislature intended to limit the Board's scope of review (it did not).

## LEGAL STANDARD

Putnam's Response misstates the applicable legal standard regarding the Board's scope of review. (Putnam Br. At 11). By framing the Board's jurisdiction as limited as to whether a

1 manufacturer has failed to comply with the rate setting provisions, Putnam glosses over Section  
2 3065.4's full mandate. Putnam writes: "Section 3065.4 provides the Board jurisdiction over a  
3 franchisee protest alleging the franchisor failed to comply with the rate setting provisions of Section  
4 3065.2." (Putnam Br. at 11.) It does not cite or quote the statute. Yet, Section 3065.4 states: "If a  
5 franchisee disputes the franchisor's proposed adjusted retail labor rate or retail parts rate, the  
6 franchisee may file a protest with the board for a declaration of the franchisee's retail labor rate or  
7 retail parts rate." Veh. Code § 3065.4(a). This mandate is not limited to whether Ford complied with  
8 Section 3065.2, but it also encompasses the authority to set a rate. *Id.* To that end, the Board may:

9 Determine the difference between the amount the franchisee has actually received  
10 from the franchisor for fulfilled warranty obligations and the amount that the  
11 franchisee would have received if the franchisor had compensated the franchisee at  
12 the retail labor rate and retail parts rate as determined in accordance with Section  
3065.2 for a period beginning 30 days after receipt of the franchisee's initial  
submission under subdivision (a) of Section 3065.2.

13 Veh. Code § 3065.4(b). The Board has the discretion to engage in an independent analysis and  
14 calculation and is not bound to accept the calculation of either the manufacturer or the dealer. *See*  
15 *generally id.*; (Ford Br. at 56-64.)

## 16 ARGUMENT

### 17 I. PUTNAM HAS NOT REBUTTED FORD'S OVERWHELMING EVIDENCE THAT 18 THE SUBMISSION IS MATERIALLY INACCURATE AND FRAUDULENT

19 Ford has demonstrated, through considerable evidence, that Putnam's Submission is materially  
20 inaccurate at best and fraudulent at worst. (Ford Br. 29-49.) Putnam's Response fails to refute Ford's  
21 evidence.<sup>1</sup>

---

22  
23  
24  
25  
26  
27 <sup>1</sup> Putnam does not address the legal standards for material inaccuracy or fraud under California  
28 law, and, as such, the legal framework for fraud and material inaccuracy detailed by Ford remains  
unrefuted. (*See id.* Ford Br. 29-30.)

**A. Putnam Has Not Rebutted that the Sold Hours Did Not Generate the Charges**

**1. Putnam's Response That It Relied on the Ford Time Guide to Calculate the Labor Charges is Unsupported**

Putnam announces that whether Ford's Time Guide hours ("Time Guide") may be used to calculate a warranty labor rate under Section 3065.2 is not moot because it *did* use the Time Guide as the basis for sold hours in the Submission. (Putnam Br. at 34 (acknowledging that the sold hours are not the same as the Time Guide hours)). But, outside of this assertion, Putnam does not present evidence rebutting testimony that, based on a review of a sample set of repair orders, the sold hours were not the same as Time Guide hours. (Ford Br. at 33 (identifying testimony).) There is no evidence showing that Putnam used the Time Guide. (Ford Br. at 33-34.) As such, whether the Time Guide hours are hours that "generate the charges" for the purpose of Section 3065.2 is moot. (Ford Br. at 33-34.)

First, Putnam points to testimony from David Martinez that service advisors were "instructed" to use the Time Guide as evidence that the sold hours were actually based on the Time Guide. (Putnam Br. at 34.) But the evidence shows that the practice was quite different, and service advisors used discretion in setting the final rate and did not simply multiply the Time Guide by \$440. (Martinez: 9/20/23, 697:1-9.) To the extent Putnam seeks to have this Board rely on argument of counsel on this point, "[a]rgument by counsel is not evidence," and a reviewing court will "not consider counsel's argument in determining whether there is substantial evidence" for an ultimate finding. *Villacorta v. Cemex Cement, Inc.* (2013) 221 Cal. App. 4th 1425, 1433.

Second, Putnam contends that the testimony of Ford witnesses, Allen Kanouse and John Becic is not credible because they only looked at a sample set of repairs within the Submission and determined that Putnam had not used the Time Guide (*Compare* Putnam Br. at 33, *with* Ford Br. at 33.) Putnam appears to take an all-or-nothing approach. *Id.* However, using basic Bayesian statistics, there is a joint probability of even distribution such that the remainder of the repair orders are also likely not based on the Time Guide. *People v. Reyes* (Cal. Ct. App., Oct. 13, 2011, No. B225436) 2011 WL 4840979, at \*7 (affirming denial of motion to exclude testimony that relied on a Bayesian statistical methodology).

1 Third, Putnam reasons that because Ford never produced the entire Time Guide at trial; this  
2 must be proof positive that Putnam used the Time Guide. (Putnam Br. at 33.) This is absurd – and is  
3 not as helpful as Putnam imagines.<sup>2</sup> Ford produced evidence that the Time Guide was not used through  
4 the testimony of witnesses who compared the Time Guide with specific entries and who have personal  
5 and extensive knowledge of the Time Guide. This evidence has gone un rebutted. Putnam produced no  
6 evidence, so it is seeking to make up for this deficiency by posing rhetorical questions as to why Ford  
7 did not present *more* evidence. Ford met its burden.

8 Should the Board decide to reach the merits of whether sold hours derived from a time guide,  
9 and not actual hours, may be used to calculate a warranty labor rate, it should determine that Section  
10 3065.2 does not permit a franchisee to use time guide hours. As explained in Ford’s Pre-Hearing Brief  
11 (*See* Pre-Hr’g Br. at 10-14) and incorporated by Ford’s Post-Hearing Brief (Ford Br. at 33), labor  
12 charges are “generated” by the performance of actual work, or the actual hours. This is the plain  
13 reading of the text, and it trumps secondary tools of statutory interpretation, such as industry standards.  
14 *People v. Cochran* (2002) 28 Cal. 4th 396, 400-01 (“If there is no ambiguity or uncertainty in the  
15 language, the Legislature is presumed to have meant what it said, and we need not resort to legislative  
16 history to determine the statute's true meaning.”); *Martinez v. Cot’n Wash, Inc.* (2022) 81 Cal. App.  
17 5th 1026, 1045, review denied (Nov. 9, 2022) (“When the statutory text is ambiguous, or it otherwise

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19 <sup>2</sup>The introduction of the Time Guide as evidence would not, standing alone, aid this Board. As  
20 pointed out through the testimony of Mr. Kanouse and raised during Ford’s objection to Putnam’s  
21 attempt to introduce a print-out from the Time Guide, the use of the Time Guide requires a certain  
22 automotive knowledge in understanding the repairs described in a repair order and selecting the  
23 appropriate actions in the Time Guide. (*Id.*; *see also* Kanouse: 9/19/27, 447:10-448:23 (explaining that  
24 time guide hours can vary on a repair depending on the engines, accessories, and VIN), 451:5-452:7  
25 (testimony requiring consideration of additional entries to obtain time guide hours).) Even if the Time  
26 Guide were admitted, it is useless without a witness to compare the description of the repairs in the  
27 ROs to the Time Guide, which Putnam never proffered. Further, this impacts Putnam’s argument that  
28 if Ford may argue that the presence of labor rates with fractions of cents and repeating decimals shows  
that the sold hours are a *post hoc* fiction, then Putnam should be permitted to rely on evidence of the  
Time Guide. (Putnam Br. at 45-46.). This is apples and oranges. Ford’s argument is based on  
admissible evidence that was listed as an exhibit, and which was introduced through witnesses with  
the capacity to perform the necessary arithmetic. Further it is evidence of a reason identified in the  
Denial Letter. The Board excluded the Time Guide because Putnam failed to identify it as an exhibit  
and sought to introduce the evidence through Mr. Kamenetsky, who lacked the requisite knowledge  
to apply the Time Guide to the Submission. (Kamenetsky: 9/27/23, 1487:24-1490:19.)

1 fails to resolve the question of its intended meaning, we proceed to the second step . . . [and] courts  
2 may turn to secondary rules of interpretation, such as maxims of construction[.]” (internal quotation  
3 marks and citations omitted)). Even if Section 3065.2 was ambiguous, opening the door to additional  
4 tools of interpretation, the legislature’s express decision to remove reference to time guides during the  
5 amendment process is evidence of its intent to exclude the use of time guide hours as hours that  
6 “generated the charges” to calculate a warranty labor rate. Plaintiff’s strained attempt to use  
7 California’s estimate requirement likewise fails; if the sold hours were to be identical to the estimate  
8 hours, the Legislature would have used “estimate hours” instead of hours generating the charges in  
9 Section 3065.2.<sup>3</sup>

10 2. Putnam Functionally Concedes that Flat Rate Charges Cannot Be Used to  
11 Calculate a Warranty Labor Rate under Section 3065.2

12 Ford devoted a subsection to explaining that the Submission was fraudulent and/or materially  
13 inaccurate because it includes repair orders in which Putnam used a flat rate to determine a labor  
14 charge. (Ford Br. at 34-35.) At least 25% of the Submission contains flat-rates associated with one  
15 sold hour for diagnostic repairs. Putnam offers no response to the legal argument, aside to later quibble  
16 with the 25% number as an “over generalization.” (Putnam App’x at 9.) Ford addresses Putnam’s  
17 errors and hyperbole in its own Appendix. *See infra* App’x at 21-22 (n. 25). Further, the failure to  
18 address or respond to an argument raised in a brief is generally considered a concession of that  
19 argument. *Beaudin v. Stewart Title Guaranty Co.* (Cal. Ct. App., Feb. 4, 2019, No. A152769) 2019  
20 WL 422208, at \*4 n. 2 (“The Beaudins concede the argument because they fail to respond to it in their  
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22 \_\_\_\_\_  
23 <sup>3</sup> Putnam’s reliance on the requirement of providing estimates as support for its interpretation  
24 of Section 3065.2 as requiring the use of a time guide to calculate a warranty labor rate is simply  
25 incorrect. (*See, e.g.*, Putnam Br. at 41.) Putnam misstates the statute because a mechanic is permitted  
26 to amend the estimate once it starts performing actual work, so long as it obtains consent from the  
27 owner. Bus. & Prof. Code § 9884.9 (a)(“No charge shall be made for work done . . . in excess of the  
28 estimated price . . . without the oral or written consent of the customer that shall be obtained at some  
time after it is determined that the estimated or posted price is insufficient and before the work not  
estimated or posted is done or the parts not estimated or posted are supplied.”). The notion that the  
actual hours worked do not impact a labor cost is pure fiction. Second, if the Legislature wanted to  
link the warranty labor rate to the hours that generated the *estimate* it certainly would have done so;  
Plaintiff is impermissibly reading words into a statute.



reply brief.”); *People v. Finley* (Cal. Ct. App., Mar. 18, 2004, No. A102625) 2004 WL 527952, at \*5 n. 5 (“After respondent’s brief had pointed out the evidence of waiver in the record, defendant made no reply to this argument in his reply brief, suggesting that the argument has been abandoned as unsupported.”).

Likewise, Putnam elides the fact that its “estimates” are also impermissible flat rates. (Ford Br. at 34-33.) In the absence of any response, the Board should determine that the Submission is fraudulent or materially inaccurate because it includes flat-rate charges.

3. Putnam’s Response Failed to Rebut the Evidence That It Manipulated Sold Hours to Reach a Rate Near \$440

Ford proved that the Submission is fraudulent and/or materially inaccurate because Putnam manipulated the sold hours in the repair orders to create the illusion of a rate near \$440/hour.<sup>4</sup> In support, Ford identified seven categories of evidence supporting this reason. Putnam’s responses to those seven categories are based on arguments (not facts), an incorrect application of the law, or an incorrect view of the repair orders.

*i. Category One: Putnam admits to “tinkering” with the repair orders.*

Putnam unsuccessfully attacks the substance and context of the testimony Ford proffered showing it “tinkered” with the repair orders. (Putnam Br. at 51-52.) First, Megan Murphy-Austin recounted that Kent Putnam admitted—before litigation—that the price the customer paid would remain comparable to neighboring dealers because the hours Putnam used to calculate the customer charge would be lower than what the job would take, which would offset the higher labor rate. (Murphy-Austin: 9/18/23, 191:22-192:16 (emphasis added).) Putnam ignores this testimony in the body of the brief, and incorrectly claims it is misrepresented in the Appendix. But the testimony is clear:

Q. What exactly did Putnam say about the rate?

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<sup>4</sup> Whether sold hours should be used at all under the plain language of the statute is an open question, as the actual hours are the hours that reflect the work done and generate the charges. However, as explained, *infra*, the testimony shows that it is the industry standard that the sold hours and the actual hours are the same or exceptionally close, thus demonstrating that sold hours are, in practice, closely tied to the actual hours worked. Here, there is no connection between actual hours and sold hours, demonstrating that the sold hours are pure fiction.

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A. Yes. In my conversations with Kent and Al, and I expressed some concern about the 436-dollar labor rate that was proposed. They explained that the end price to the customer would be comparable to the surrounding dealers because the labor times that would be matched up with that higher rate – the labor times would be lower which would then offset the higher labor rate and create a competitive price point in the market. So, in fact, the labor and the sold labor hours don’t reflect reality.

(Murphy- Austin: 9/18/23, 192:1-192:16.)

Second, Mr. Kamenetsky believed that service advisors were “tinkering” with repair orders. (Kamenetsky: 9/27/23, 1600:25-1601:3.) Putnam claims that Ford has misstated the testimony but this is not true. (Putnam Br. at 51; Ford App’x at 1.) Mr. Putnam testified that rather than have hours generate charges, Putnam set up their system by using algebra to “back into the [\$440/hour] rate.” (K. Putnam: 9/25/23, 1044:2-11 (emphasis added).) Putnam never “rais[ed] the price to the customer. The price to the customer is not going to change . . . so we backed into it. We did basic algebra and we backed into the [\$440] rate.” (*Id.*, (emphasis added).)

Third, David Martinez, Putnam’s former service manager, confirmed the flagrant manipulation of sold hours by Putnam’s service advisors. Service advisors could and did change the sold hours after the fact, without regard to the hours listed in the Time Guide. (Martinez: 9/20/23, 733:7-19, 735:6-9; Ex. AA, ¶ 21 [B1229].) Among the reasons they would change the sold hours was to get the rate of \$440. (Martinez: 9/20/23, 755:13-19.) Putnam claims that this citation is “simply wrong” and points to separate testimony regarding use of a \$440 labor rate. (Putnam Br. at 52.) Putnam advances the fallacy that it used a consistent pricing practice and therefore, both statements cannot be true.<sup>5</sup> But, Putnam’s own service manager testified that Putnam employees regularly manipulated sold hours.

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<sup>5</sup> Mr. Martinez’s testimony is evidence of the warning Ford’s counsel provided at the Hearing not to fall into the trap of believing there was a single, consistent method for pricing repairs. Rather, Putnam’s service advisors seemed to use all manner of methodologies with the apparent end goal of ensuring the sold hours gave the appearance of a \$440/hour rate. Putnam’s reliance on a sliver of Mr. Martinez’s testimony is an invitation to fall into this trap. The only thing that is certain is that Putnam did not consistently or reliably calculate the final labor charge by multiplying sold hours by \$440.

1 And no witness with personal knowledge of the creation of a single RO in the Submission refutes this  
2 testimony.

3 *ii. Category Two: Repeating decimals prove rates are fake.*

4 Ford detailed how the rates of numerous repairs ended in decimal places of fractions of a  
5 penny, including repeating decimals. (Ford Br. at 36-37.) For these repairs, this is mathematical proof  
6 a rate was not used in these repairs, and, necessarily, the final charge was not the product of a rate  
7 multiplied by the sold hours. If sold hours were actually multiplied by \$440, the vast majority of the  
8 repair orders would be divisible by \$440, without additional decimals. (Kamenetsky: 9/27/23,  
9 1557:11-24, 1598:2-25.) At the Hearing and in its opening brief, Ford addressed Putnam's bunk  
10 discount theory that the fractions of cents in the rate may be explained through a use of discounts..  
11 (Ford Br. at 37-38.) Predictably, Putnam raises this argument again, but the fact remains that there are  
12 only two discounts in the entire submission, and discounts are accounted for in a particular way in the  
13 accounting system, which does not impact the rate calculation. (Putnam Br. at 39-41, 52.)

14 Putnam also tries to raise the specter of "human error" but there was no testimony at the  
15 Hearing that any of these anomalies were the result of human error. (Putnam Br. at 52.) This is *post-*  
16 *hoc* argument of counsel trying to explain away infinite bad facts.<sup>6</sup>

17 *iii. Category Three: Huge discrepancies between sold hours and actual hours*  
18 *prove sold hours are artificial.*

19 With regard to the irregular and reoccurring discrepancies between actual hours and sold hours  
20 which evinces material inaccuracy and fraud, Putnam claims that "the record is replete with consensus  
21 testimony that Ford's Guide hours are lower than those used in commercial guides." (Putnam Br. at  
22 53; *see also id.* at 31.) But discrepancies in various industry time guides are not the issue here.  
23 Considerable testimony from individuals who frequently look at dealer repair orders, the actual hours,  
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26 <sup>6</sup> Putnam claims that because Ford has repeating decimals in some of its documentation, that  
27 this is evidence that repeating decimals is acceptable or standard. (Putnam Br. at 38.) Whether Ford's  
28 arithmetic of Putnam's rates produces repeating decimals is not salient to whether the abundance of  
rates with fractions of cents is irrefutable, mathematical proof that Putnam's final labor charge was  
not the product of multiplying a rate by a determined number of hours.

1 and the sold hours which are normally identical or very close (within .1 or .2 hours of each other).  
2 (Ford Br. at 22, 38-40.) This is true regardless of the basis for the sold hours.

3 Putnam separately argues that disparities between sold hours and actual hours are “normal and  
4 should be expected.” (Putnam Br. at 30.) Tellingly, Putnam cites no testimony for this proposition.  
5 (*See generally id.*) The best Putnam can muster is pointing to testimony that Mr. Sweis can diagnose  
6 problems more quickly because of his expertise. (*Id.*). Regardless of whether that is true, Mr. Sweis’  
7 personal expertise does not trump or rebut the evidence that in customer pay orders throughout the  
8 industry, sold hours and actual hours are generally the same or very close. (Ford Br. 38-40.) The large  
9 discrepancy in Putnam’s Submission is highly unusual.

10 *iv. Category Four: Repairs could not have been completed in sold time.*

11 For some repair orders, the sold hours are not even close to the time necessary to complete the  
12 described repair. (Ford Br. at 40.) Putnam responds that this evidence does not show fraud or material  
13 inaccuracy, but the substance of its argument is to again ask why Ford did not provide a copy of its  
14 Time Guide. (Putnam Br. at 53-54.) As explained at trial by credible witnesses with personal  
15 knowledge, the sold hours for certain repairs are significantly lower than the time it takes to actually  
16 perform the repair, such that the only explanation for the sold hours is to give the appearance of a rate  
17 of \$440. (Sweis: 9/20/23, 559:18-560:7.) There is no testimony to rebut this evidence; Putnam certainly  
18 did not present evidence that the Time Guide hours for the qualified repairs was 1) the same as the  
19 sold hours and 2) that the Time Guide hours are not a fair reflection of the actual time for these repairs.

20 *v. Category Five: Missing actual hours.*

21 Putnam concedes that there are ROs that do not contain actual hours but insists that “this is not  
22 relevant” to whether the Submission is materially inaccurate or fraudulent. (Putnam Br. at 54.) It pivots  
23 to allegations about “industry standards” for estimates and time guides, which, even if true, does not  
24 obviate the need to record actual hours. This detour also ignores the testimony in which Mr. Kanouse  
25 explained that Time Guide hours represent the time it takes a non-Ford-trained technician to perform  
26 the repair. (Kanouse: 9/19/23, 262:16- 263:5.) Putnam’s insistence that the two be separated—that  
27 actual time has no relationship to sold hours or even Time Guide hours—is a fiction presented for the  
28 purpose of this case. Actual hours and sold hours are very closely linked (as shown by the evidence in

1 Category 3). Thus, when actual hours are missing, in the context of this Submission, it reinforces that  
2 the sold hours are also fiction, and it prevents using actual hours to calculate a rate.

3 *vi. Category Six: Wildly different rates in the same repair order.*

4 Putnam does not dispute that there are wildly different rates in the same repair order. First,  
5 Putnam claims that this is the “industry norm.” (Putnam Br. at 31.) Of course, Putnam points to no  
6 facts to support the proposition that hourly rates more than \$400 apart is the “norm.” Instead, Putnam  
7 points generally to Mr. Korenak’s testimony that in reviewing a Submission, he has never had one  
8 where every repair order had the exact same rate. Seeing slight variation over a set of hundreds of  
9 repairs is not the same as huge variations within the same repair order. Here, there are many repair  
10 orders that had huge variations in rates, and those variations appear designed to create an overall rate  
11 of \$440. (Ford Br. at 41.)

12 Putnam separately argues that because Section 3065.2 uses an average, variation in rates is not  
13 pertinent. (Putnam Br. at 55.) Again, this misses the mark. Ford’s identification of significant  
14 disparities is evidence that the sold hours are artificial. Again, the question is whether there is evidence  
15 to show that the sold hours in this Submission actually generated the final labor charge, or whether the  
16 sold hours were an after-the-fact addition to manipulate the warranty labor rate. The huge difference  
17 in these rates is highly unusual in the industry (Ford Br. at 41-42), and it proves manipulation (*id.*).

18 *vii. Category Seven: Related repairs with zero hours to inflate the rate.*

19 Putnam’s response to category seven is incomplete and relies on argument of counsel. Ford  
20 identified examples in which Putnam did not list charges or sold hours associated with related repairs,  
21 which would be qualified repairs, and instead moved the charge for the labor to a single line, with  
22 fewer hours, thus inflating the average hourly rate. (Ford Br. 42-43.) Putnam tries to attack the four  
23 examples provided, but in every instance relies on argument as to whether the repair identified is  
24 related. (Putnam Br. 55-57.) For each of the repair orders identified, whether a specific automotive  
25 repair is “related” to another automotive repair for the purpose of rendering it qualified, is a fact that  
26 requires knowledge of vehicle repair to answer. Because Putnam has no facts to support their opinion  
27 (nor could it—there are no such facts in the record) it relies on argument of counsel and irrelevant  
28 legal discussions.

**B. Putnam Does Not Address the Pervasive Accounting Anomalies that Tainted the Submission**

Ford presented evidence of the numerous accounting irregularities and anomalies that tainted the entire Submission, calling into doubt its veracity. (Ford Br. at 44-47.) This issue is relevant because it addresses whether Ford, or the Board, can trust anything in the Submission.

Putnam does not adequately respond to this argument in that there is no argument that numerous accounting anomalies do not render the submission as a whole materially inaccurate. While Putnam certainly tries to cast Ford's discussion of these anomalies as misrepresentations, the attempt fails. For example, in response to Mr. Kanouse's testimony regarding the highly inaccurate and irregular documentation of technician hours, Putnam claims that the testimony cited in Ford's Brief is not supported by the citation (Putnam App'x at 84.) But the cited testimony certainly supports the example, and if there is any confusion, additional testimony from Mr. Kanouse makes the same point. (See Kanouse: 9/19/27, 299:3-306:16; 311:21-312:19; 321:20-322:18.)<sup>7</sup>

The contents of a repair order is an issue of fact that requires the testimony of someone familiar with the CDK accounting system. The exclusive evidence shows that Putnam was engaging in highly unusual accounting practices that, collectively, call into the accuracy and reliability of Putnam's business practices with regard to the proper recording of data in repair orders. Because the Submission is wholly unreliable, it is materially inaccurate and cannot be used to calculate a warranty labor rate.

**C. Putnam Attempts to Dismiss the Location Issue but Fails**

Putnam's well-documented, and sanctionable, evasion of facts relating to location were documented at the hearing, resulting in a finding that some number of the repair orders in the Submission were not performed at Putnam's authorized location. (Ford Br. at 13-19 (detailing the discovery violations leading to sanctions).) Despite its documented resistance to fight discovery on this matter and even change its authorized location during litigation, Putnam's Response labels the location issue a "distraction." (Putnam Br. at 46.)

<sup>7</sup> Even Putnam's expert prefers to rely on a data file because he finds it more accurate than the actual ROs. (Stockton: 9/26/23, 1296:12-21.)

1 Putnam now argues the Board does not have “jurisdiction” to determine whether Ford is  
2 required to reimburse Putnam for repairs completed at the Barn because reimbursement is a matter of  
3 enforcing the dealer contract and not related to Section 3065.2. (Putnam Br. at 46-47.) The crux of  
4 Putnam’s argument is to create an artificial distinction between repairs covered by a warranty (which  
5 would presumably be relevant to Section 3065.2) and those that Ford must reimburse (which Putnam  
6 seems to think are irrelevant and therefore outside of the Board’s jurisdiction). But the purpose of the  
7 warranty is reimbursement; the two are intrinsically linked. The defining feature of a warranty repair  
8 is work that a dealership performs at no cost to the customer *because Ford will reimburse the dealer*  
9 *for the work*. But for the ability to seek reimbursement, the dealer has no obligation to perform the  
10 work at no cost. Likewise, if the dealer performs the work—and even does it at no cost—if the dealer  
11 is not reimbursed then the work was not covered by the *manufacturer’s* warranty. *See* Veh Code §  
12 3065.2(j) (defining a “qualified repair order” as “a repair order . . . for work that was performed outside  
13 of the period of the manufacturer’s warranty and paid for by the customer, **but that would have been**  
14 **covered by a manufacturer’s warranty** if the work had been required and performed during the  
15 period of warranty.”).

16 Putnam also claims Ford was aware work was being done at the Barn, as if this impacts the  
17 statutory analysis. Ford has already addressed this issue in its Opening Brief. (Ford Br. at 16 n.9, 18-  
18 19.)

19 Finally, Ford’s claim that the Sales and Service Agreement does not govern where customer  
20 pay work is performed also misses the mark. (Putnam Br. at 48-51.) This issue is not whether Putnam  
21 may perform customer pay work at the Barn, but whether that same customer pay work is considered  
22 “qualified” for the purpose of Section 3065.2. Even if performing customer pay work at the Barn is  
23 not considered a breach of the Service and Sales Agreement, it would still not be qualified for the  
24 purpose of calculating a warranty labor rate.

## 25 II. FORD’S DENIAL LETTER COMPLIED WITH SECTION 3065.2(d)

26 Putnam pens a full-throated objection to the consideration of significant evidence on the basis  
27 that it was not fully explained in Ford’s October 26, 2021 Denial Letter. (Putnam Br. at 12-26.)  
28



1 However, these contentions fail because Ford’s Denial Letter was timely and because it complied with  
2 the relevant statute.

3 **A. The Denial Letter was Timely**

4 Putnam does not contest evidence proving the Denial Letter was timely.

5 **B. Putnam Ignores the Plain Language of the Statute and the Contents of the**  
6 **Denial Letter**

7 Ford’s Opening Brief details how it satisfied all of the requirements of Section 3065.2,  
8 including identifying all reasons for the basis of the decision (Ford Br. at 50-51), evidence  
9 substantiating its position (*id.* at 51), and evidence that Ford did not use calculations in reaching its  
10 determination, so it had no obligation to produce calculations (*id.* at 52-53). Putnam’s arguments suffer  
11 from roughly two problems: conflating fundamentally different concepts in order to create false  
12 deficiencies and ignore the statute. As detailed in Ford’s brief, the evidence establishes that Ford has  
13 satisfied the requirements of Section 3065.2(d)(1). (Ford Br. at 49-56.)

14 1. Ford Provided a “Full Explanation” of its Reasons for Its Determination and  
15 Evidence In Support

16 Putnam claims that Ford’s letter did not contain a “full explanation” of its “reasons,” but the  
17 substance of its argument: confuses the meaning of “reasons” with “evidence”; ignores the evidence  
18 on which Ford relies; and imposes requirements not contained in the Notification Provision. (Putnam  
19 Br. at 16-22.) At a high level, Putnam advocates for an interpretation of Section 3065.2(d) that requires  
20 any denial letter be as detailed and thorough as the post-hearing briefing in this case. Ford has  
21 previously addressed that such a requirement would render the hearing provisions in Section 3065.4  
22 and 3066 meaningless; a hearing would not be necessary if the manufacturer’s reasons and evidence  
23 is limited to that in the denial letter. (Ford Br. at 58-59.)

24 Turning to Putnam’s specific arguments, all of them fall flat.

25 First, Putnam claims that Ford failed to provide evidence to support its determination of a rate  
26 of \$220. (Putnam Br. at 12.) Not so. Ford very clearly stated that the rate of \$220 was based on what  
27 “seems to be the most common customer pay rate your documentation shows in repairs where we see  
28 what appears to be valid documentation.” (Joint Ex. 6 at 2 [B51].) Further, it stated “The examples

1 above are just examples; the evidence substantiating Ford Motor Company's position contesting your  
2 request is all the documentation you submitted as part of your request, including the additional repair  
3 orders." (*Id.*) Ford based its determination on the totality of the Submission. That is the evidence.

4 Second, Putnam claims that the Denial Letter's cited evidence does not comply with Section  
5 3065.2(d). (Putnam Br. at 18-22.) Putnam's analysis goes to the merits of Ford's reasons, not whether  
6 Ford satisfied the requisite procedure. Moreover, to the extent Putnam contests the merits, it is wrong:

- 7 • RO 10239: Putnam argues that this repair order does comport with the Time Guide because  
8 when the sold time for the repair and diagnosis are combined, it is equal to the Time Guide  
9 value of 3.7. (*Id.* at 18.) But Putnam admits in the next paragraph that the hours in the repair  
10 order do not match the hours in the Time Guide (3.8 hours). (*Id.* at 19.) Thus, Putnam's  
11 best and only evidence is one repair order where the numbers are close, not the same.
- 12 • RO 10305: Putnam complains that Ford did not compare the sold hours to the Time Guide  
13 hours for this repair order. (*Id.* at 19.) But Ford cited this repair order, which contained 2.4  
14 sold hours but 12.74 actual hours, as "another example" of "considerable disconnect  
15 between the amount of work [the] repair required and what is being reported on the repair  
16 order copy." This was a clear example of the disconnect between actual and sold hours.
- 17 • RO 10283 and 10287: Putnam argues that the consideration of rates for non-qualified  
18 repairs violates the statute. (*Id.*) Essentially, Putnam believes Ford is barred from  
19 considering any facts outside of the qualified repairs in raising fraud or material inaccuracy.  
20 There is absolutely no statutory basis for this position. Nor could there be. It would be  
21 fundamentally unjust to limit a manufacturer to proving fraud through fraudulent  
22 information only.
- 23 • ROs 10206, 102428, 10216, 10204, 10319, and 10362. Putnam objects to the list of  
24 numerous ROs Ford offered as additional examples of its previously-identified reasons,  
25 claiming that the references fail to provide a "full explanation of Ford's reasons for its  
26 denial." (*Id.* at 20.) Here, Putnam confuses "evidence" with a "reason." The statute requires  
27 that the manufacturer provide a full explanation for any and all reasons and evidence  
28 substantiating its position. It does not require a full discussion of all evidence and an  
analysis as to how that evidence supports each reason. Nor does it require all evidence be  
provided.
- Consideration of ROs in different 90-day sets. Putnam objects to the fact that Ford provided  
examples of deficiencies from ROs that were more than 90-days apart. (*Id.* at 20-21.) Since  
Ford may only calculate a rate based on a 90-day period, Putnam reasons that Ford should  
not cite deficiencies from ROs that cannot be in the same 90-day period. Putnam misses  
the point. Ford detailed how the entire Submission is clearly deficient and proffering  
reasons as to why it could not calculate a rate because of these deficiencies. It is because  
there is no single 90-day period that does not suffer from inaccuracies or fraud that Ford  
could not calculate a rate.

1 Third, Putnam claims that the Board should not consider the issue of repeating decimals  
2 because Ford did not discuss repeating decimals in the Denial Letter. (*Id.* at 26.) Again, Putnam  
3 confuses “evidence” of a “reason” with the “reason” itself. Ford relies on the repeating decimals in the  
4 supposed labor rates as *evidence* of the fact that “[r]ather than reflect reality, the hours assigned to the  
5 repair appear designed to demonstrate a \$440 per hour labor rate.” Joint Ex. 6 at 1 [B50]; *accord* Joint  
6 Ex. 6 at 2 [B51] (“In sum, the requested rate seems not to be based on customer quoted hours, or  
7 technician recorded time, but rather on a desire to attempt to demonstrate an inordinately high labor  
8 rate of approximately \$440.00 per hour, which is generally around double the rate being charged in  
9 the market by other dealers of any other brand.”). The repeating decimals are not the *reason* for the  
10 determination; they are *evidence* that Putnam was backing into a rate of \$440. The fact that Ford did  
11 not list this evidence in its Denial Letter does not render the letter deficient because the statute does  
12 not require an exhaustive list of the manufacturer’s evidence.

13 Putnam briefly addresses the distinction between reasons and evidence by offering a  
14 conclusory statement that all evidence should also be identified. (Putnam Br. at 22.) Putnam makes no  
15 attempt to analyze the statute, or explain why, under any cannon of instruction, “evidence” should be  
16 interpreted as “all evidence.”

17 Finally, Putnam does not address the reasons listed in the Denial Letter and identified in  
18 Ford’s Brief. As such, it is unclear how or why Putnam believes that the language of the Denial  
19 Letter was not a “full explanation.”

20 2. Putnam’s Insistence that Ford Calculated a Rate is Unsupported by Evidence

21 Putnam also argues that “Ford did not make an actual calculation to get the \$220 proposed  
22 adjusted retail labor rate” (Putnam Br. at 16), and that the determination of a \$220 rate “is itself both  
23 a reason for Ford’s position requiring a full explanation and a calculation used by the franchisor in  
24 determining its position” (*id.* at 17). Putnam is wrong. Ford did **not provide calculations to Putnam**  
25 **because it did not use calculations to support its position.** (*See* Becic: 9/18/23, 162:24-163:5  
26 (testifying that Ford did not make a calculation); *see generally* Joint Ex. 6 [B50-51].)

27 The basis of Putnam’s position that Ford “used” calculations to support its position is two-fold:  
28 (1) Mr. Bill Walsh made a spreadsheet; and (2) the rate of \$220 must be the product of a calculation.

1 Turning to the first proposition, Putnam’s reliance on Mr. Walsh’s spreadsheet lacks merit. Putnam  
2 admits that Mr. Becic testified the spreadsheet was not used as part of Ford’s determination. (Putnam  
3 Br. at 22.) Also, the spreadsheet at issue post-dates the Denial Letter by a day. (Kanouse: 9/19/23  
4 487:9-17.) Further, Mr. Walsh did not review, analyze, or respond to warranty labor rate requests for  
5 Ford. (*Id.* 499:15-19.)

6 Putnam is likewise convinced Ford arrived at the \$220 rate through “calculations,” and  
7 speculates that the selection of \$220 must have been the result of “calculation” of a mode. The Denial  
8 Letter explained:

9 The inconsistencies and excessive customer charges in the ROs you provided,  
10 including the examples discussed above, **make it unreasonable, if not effectively**  
11 **impossible, for Ford Motor Company to use your ROs to calculate a labor rate.**  
12 As such, we have no choice but to propose an adjusted retail labor rate of \$220.00  
per hour **which seems to be the most common customer pay rate your**  
**documentation shows in repairs** where we see what appears to be valid  
documentation.

13 (Joint Ex. 6 at 2 [B51] (emphasis added).)<sup>8</sup> The proposed rate of \$220 was not the product of a  
14 calculation but based on observation (“which *seems* to be the most common customer pay rate your  
15 documentation *shows* . . .”). Putnam is adamant that “Ford could not just reach the conclusion that  
16 \$220 was the most common rate without a list from which to make its mode calculation.” (Putnam Br.  
17 at 18.) Yet, it did. The number is a reasonable approximation given the context of an unreliable,  
18 inconsistent, and fraudulent Submission. All of the testimony and documentary evidence at the hearing  
19 proves that Ford did not calculate a rate because it could not calculate a rate.

20 This is an undisputed issue; there are no facts showing that Ford used any calculations in  
21 determining a \$220 labor rate, or in concluding that the Submission was materially inaccurate or  
22 unreliable.

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24 <sup>8</sup> Mr. Becic also reaffirmed that it was effectively impossible to use Putnam’s ROs to calculate  
25 an alternative rate during the hearing. (Becic: 9/18/23, 97:15-21 (cannot use data from repair orders to  
26 calculate a rate), 112:10-17 (“I believe that he did not do an analysis because it is difficult to interpret  
27 the repair orders and to determine what an actual rate might be. Just based on the discrepancies that  
28 we have examined, it is difficult to figure out exactly what's going on.”), 126:14-12 (“I believe it was  
extremely difficult, if not impossible, to calculate a rate based on the discrepancies in the data that we  
saw.”), 166:4-16 (cannot calculate a rate based on actual hours where actual hours listed as zero, but  
charged \$641.06 for labor).)

3. Putnam's Accusations of "Intent" not to Comply

Putnam claims that emails within Ford regarding effective labor rate calculations are evidence that it knew it would have to calculate a rate under the statute but willfully ignored the statute. (Putnam Br. at 12-13.) Aside from being based on speculation and conjecture, the argument is a red herring. Ford's letter speaks for itself and it provides a full explanation for the reasons for its decision and provided evidence in support thereof.

4. Concern That Putnam Is Price-Gouging Customers is Not A Violation of Section 3065.2

Putnam has introduced a whole new theory in its response—that Ford's concern that Putnam was price-gouging customers violates Section 3065.2(i)(a)'s prohibition of influencing a dealer's rate because the manufacturer will have to reimburse the rate. (Ford Br. at 19-20, 25 (citing Denial Letter's comment that Putnam was appearing to "maximize the charge to a customer who is not knowledgeable of the automotive repair being performed" and testimony of Megan Murphy-Austen).) However, nothing in California law prohibits a manufacturer for expressing concern that a dealer is overcharging California consumers. The law only prohibits attempting to "influence a franchisee to implement or change the prices for which the franchisee sells parts or labor in retail repairs because the franchisee is seeking compensation or exercising any right pursuant to this section." Veh. Code § 3065.2. As demonstrated at the hearing through documentary evidence and testimony, Ford was concerned that Putnam was harming consumers by charging unreasonable and outrageous rates. This is not pressure, nor was it born merely from an obligation to reimburse Putnam.

Further, Putnam identifies no evidence that Mr. Putnam, Mr. Kamenetsky, or any other Putnam employee believed that Ford's comments regarding consumers were attempts to influence Putnam's rate because it sought reimbursement for that rate. Further, even if Ford's concerns regarding price-gouging were a violation of Section 3065.2(i)(a), it is unclear how, if at all, that impacts the Board's review of whether Putnam's requested rate is materially inaccurate or fraudulent.

**C. Any Supplementation to the Denial Was Justified**

Putnam seeks to exclude all of Ms. Heinemann's testimony as supplemental to the Denial Letter without any justification.<sup>9</sup> Since Ms. Heinemann, an expert forensic accountant, was able to calculate a myriad of potential rates, Putnam reasons that Ford could have and should have done the same. Ford identified and disposed of these arguments in its Opening Brief and directs the Board to those facts and analysis. (Ford Br. at 53-56.)

At no point during trial did Putnam present any evidence, testimonial or otherwise, that Ford reasonably should have been able to accomplish what Ms. Heinemann accomplished. Notably, not even Putnam's own expert, Mr. Stockton, testified that Ford personnel should have been capable of the complicated analysis that Ms. Heinemann performed.

The best that Putnam can muster is to argue that because Mr. Becic was capable of performing a labor rate calculation and because Mr. Walsh put together a spreadsheet, this is proof that Ford was capable of performing a calculation like Ms. Heinemann. (Putnam Br. at 14-15, 24.) But, as eight days of testimony demonstrated, this case is not about whether Ford was capable of adding up labor sales and dividing it by the number of reported sold hours. Putnam's attempt to try to cast this case as such reinforces the problems inherent in its position. Ford could not calculate a rate because the information it had was materially inaccurate and fraudulent. It did not have the forensic accounting expertise necessary to evaluate the Submission as did Ms. Heinemann. Putnam wants a determination that a dealer can falsely engineer a rate and a manufacturer simply has to accept it. This is not sanctioned by California law.

Further, Putnam's effort to exclude supplemental information because it did not receive a second Denial Letter is similarly unavailing. (Putnam Br. at 45.)<sup>10</sup> Unsurprisingly, this argument does

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<sup>9</sup> Putnam also attacks Ms. Heinemann's qualifications without outright challenging them or arguing she is not a qualified expert. (Putnam Br. at 23) Ford disagrees with Putnam's attacks, but because they are gratuitous, Ford will not engage in a point-by-point rebuttal.

<sup>10</sup> Putnam also tries to enhance the Notification Provisions by arguing that the concept of a heightened pleading standard for fraud claims should apply. (Putnam Br. at 42-43.) Section 3065.2(d)(1) governs the content of the denial letter, not California's pleading rules. Ford's Denial Letter was not a Complaint filed in court. But Ford would gladly adopt a pleading standard over the

1 not look to the relevant statute; Section 3065.2(d)(1) contains no requirement for an additional written  
2 notification or denial letter: “After submitting the notification, the franchisor shall not add to, expand,  
3 supplement, or otherwise modify any element of that notification, including, but not limited to, its  
4 grounds for contesting the retail labor rate, retail parts rate, or both, without justification.” Veh. Code  
5 § 3065.2(d)(1). The statute does not specify how or when any supplementation, addition, expansion,  
6 or modification may be made.

7       Because the operative California Statute contains no limitation of supplementation, aside that  
8 it be “justified,” Putnam exclusively relies on a different set of statutes governing the termination of  
9 dealer agreements. (Putnam Br. at 43-44.) Putnam argues that Section 3065.2’s “full explanation”  
10 language is somehow more detailed than the termination statute, such that modification is even more  
11 disfavored. It is nonsensical that this Board should prohibit supplementation based on the language of  
12 a nonapplicable statute (Veh. Code § 3060) when the governing statute (Veh. Code § 3065.2) clearly  
13 permits it. Further, termination of a dealer agreement is an entirely separate substantive and procedural  
14 matter that involves a manufacturer issuing defaults over months and years under an agreement and  
15 resulting in termination of the dealer’s right to be a dealer. It is not a situation where, as here, a  
16 manufacturer has thirty days to make a decision based on information provided by the dealer for a  
17 reimbursement rate.

18       To the extent Putnam claims it was unaware of Ford’s evidence and arguments, and therefore  
19 was not put on notice of the supplementation, Putnam does not mention that months prior to the  
20 Hearing, it fully deposed every Ford witness, including Ms. Heinemann, and it received a written  
21 expert report from Ms. Heinemann prior to her deposition. Although Putnam tries to distinguish the  
22

23 \_\_\_\_\_  
24 notification requirements, as it only requires facts “sufficient to enable the court to determine whether  
25 . . . there is any foundation, prima facie at least, for the charge of fraud.” *Committee on Children’s*  
26 *Television, Inc. v. General Foods Corp.*(1983) 35 Cal. 3d 197, 217 (internal quotations marks and  
27 citation omitted. Such a standard does not require a “full explanation of all reasons” for a claim of  
28 fraud, nor does a plaintiff have to identify evidence of fraud or produce of calculations supporting a  
claim of fraud where used. In fact, “[l]ess specificity is required when “it appears from the nature of  
the allegations that the [opposing party] must necessarily possess full information concerning the facts  
of the controversy.” *Id.* While such a standard would undoubtedly be more favorable for  
manufacturers, this is not supported by the law.



1 holding of *Subaru of Am., Inc. v. Putnam Auto., Inc.* (2021) 60 Cal. App. 5th 829, 833 as inapplicable,  
2 the underlying principle is well-taken. Just as in *Subaru*, Putnam has had knowledge of the facts and  
3 access to depose all witnesses in this matter, so any claim of surprise is ill-taken.

4 **III. PUTNAM ERRONEOUSLY TRIES TO LIMIT THE BOARD'S SCOPE OF REVIEW**  
5 **IN CONTRAVENTION OF SECTIONS 3065.2 AND 3065.4**

6 **A. Putnam Tries to Strip the Board of Its Authority to Consider Evidence and**  
7 **Determine a Warranty Labor Rate**

8 Section 3065.4(b) states:

9 Upon a decision by the board pursuant to subdivision (a), the board may determine  
10 the difference between the amount the franchisee has actually received from the  
11 franchisor for fulfilled warranty obligations and the amount that the franchisee  
12 would have received if the franchisor had compensated the franchisee at the retail  
labor rate and retail parts rate as determined in accordance with Section 3065.2 for  
a period beginning 30 days after receipt of the franchisee's initial submission under  
subdivision (a) of Section 3065.2.

13 Based on this language, the Board may calculate a labor rate using the methodology in Section 3065.2  
14 after making a decision—any decision—as to whether Ford has met its burden. Unsurprisingly,  
15 Putnam is quite adamant that if the Board finds that Ford has not met its burden in anyway, it must  
16 adopt its proposed labor rate. (Putnam Br. at 62-71.) Putnam bypasses the plain language of the Section  
17 3065.4(b) and does not address the meaning of the phrase “upon a decision.”

18 Instead, Putnam claims that enforcing the plain language of Section 3065.4(b) renders  
19 provisions of Section 3065.2 and 3065.4 meaningless. (Putnam Br. at 59-62.) But the provisions  
20 Putnam cites has no such impact:

- 21 1. Burden of Proof. Putnam claims that the Board's review authority is inconsistent with  
22 Ford's burden of proof. (Putnam Br. at 60.) Whether and to what degree Ford has satisfied  
23 its burden to show material inaccuracy and fraud implicates the Board's ability to exercise  
24 its discretion to calculate a rate. The exercise of discretion is still inexplicably linked to a  
25 “decision,” such that in an abuse-of-discretion review, the findings under Subpart (a),  
26 impact whether the Board has correctly exercised its discretion. For example, if a  
27 manufacturer has met its burden under Section 3065.4(b), fraudulent, it is likely not an  
28 abuse of discretion for the Board to decline to engage in an independent calculation. Or, if

1 a manufacturer has substantially, but not fully, met its burden under Section 3065.4(a), by  
2 showing fraud, it would not be an abuse of discretion to calculate a new rate. And if a  
3 manufacturer has wholly failed to meet its burden, this would implicate the Board's  
4 discretion to simply adopt the dealer's proposed rate.

5 2. Section 3065.4 Procedures for an Unpaid Balance. Putnam claims that Section 3065.4(b)'s  
6 procedures for a dealer to calculate an unpaid warranty compensation following a decision  
7 by the Board is rendered meaningless by the Board's review. (Ford Br. at 60-61.) It is  
8 unclear how the two would be in tension. If a rate is unreasonable or a submission  
9 materially inaccurate or fraudulent, then there will be no outstanding unpaid balance.  
10 Putnam seems to be assuming that because the Legislature provided a mechanism for  
11 collecting an unpaid balance that that means the Board must always find there is an unpaid  
12 balance, which is nonsensical.

13 3. Section 3065.2(d)(1) Supplementation with Justification. Putnam argues that Ford's  
14 proposed interpretation renders the ability to supplement a notice with justification  
15 meaningless. But the supplementation issue goes to whether the manufacturer met its  
16 burden. As previously explained, the burden of proof and the Board's discretion to conduct  
17 an independent review can easily be harmonized.

18 4. Section 3065.2(d) deadline to contest rate. Putnam points to the deadline to review a rate,  
19 but this is an extension of the burden issue previously addressed. (Putnam Br. at 61.)

20 5. Manufacturer Unilaterally Setting a Rate. Putnam also claims that allowing the Board to  
21 calculate a rate renders meaningless the prohibition against a manufacturer setting a rate.  
22 (Putnam Br. at 61). First, this is not unilateral rate-setting; the Board must still apply the  
23 statute. Also, the Board is not Ford. There is no basis to strip the Board of review authority  
24 on the basis that Ford does not have such authority.

25 Putnam makes a weak attempt to dismiss Ford's public policy argument, claiming that Ford  
26 "misrepresented" the law in its Appendix. (Putnam App'x at 13.) Really, Putnam only tries to  
27 distinguish two cases on the grounds that they involved different legal issues. Ford did not incorrectly  
28 cite or summarize the cases. These cases affirm California's public policy in conserving judicial

resources, promoting judicial economy, minimizing repetitive litigation, and protecting consumers from unnecessarily high prices. (*See infra*, Ford App’x at 33-35 (nos. 35 & 36).) Public Policy is the same, regardless of the specific issue before the court. Frankly, calling this a “misrepresentation,” is inflammatory and demonstrates a fundamental misunderstanding of legal analysis.

Turning to due process, Ford explained how limiting a manufacturer to proving fraud based solely on the information in the Submission, which is the source of the fraud, is incompatible with due process. (Ford Br. at 61-64.) To that end, Sections 3065.4 and 3066 clearly contemplate robust discovery and hearing requirements in order to satisfy a manufacturer’s due process rights. (*Id.* at 62-63.) Putnam’s response completely bypasses this analysis and claims that its due process rights are violated if the manufacturer does not identify all the bases of its fraud in the notification letter. (Putnam Br. at 41-42.) The California Court of Appeals has already rejected this exact same argument—and Putnam was a party. *Subaru of Am., Inc. v. Putnam Auto., Inc.* (2021) 60 Cal. App. 5th 829, 833. Putnam received discovery, an expert report, numerous depositions, a pre-hearing brief, and eight days to question witnesses and probe evidence.

**B. Putnam Urges the Board to Ignore the Plain Language of Section 3065.2, which Requires a Reasonable Rate**

Putnam does not argue in its Brief that its rate is reasonable. Nor can it; there is no evidence for such a proposition. Rather, Putnam urges the Board to read the reasonableness requirement right out of the statute. Putnam’s argument is fundamentally flawed because it starts with the legislative history, which is a cannon reserved where the statute is ambiguous and incorrectly interprets the existing language.

**1. Putnam Skips Over the Plain Language and Cherry Picks Legislative History**

Putnam’s Brief purports to start with the plain meaning of the statute but does not actually look to the text of the statute at all. (Putnam Br. at 58.) Rather, it pivots to legislative history.<sup>11</sup> However,

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<sup>11</sup> This section also claims that Ford’s interpretation renders other provisions of the statute meaningless, but the analysis is not specific to the reasonableness threshold, and it appears to address the issue of the ability of the Board to conduct an independent review under Section 3065.4(b). As such, those arguments are addressed *supra*.

1 these tools are secondary to the plain language and should not be the first line of resort. “If there is no  
2 ambiguity or uncertainty in the language, the Legislature is presumed to have meant what it said, and  
3 we need not resort to legislative history to determine the statute’s true meaning.” *People v. Cochran*  
4 (2002) 28 Cal. 4th 396, 400-01

5 Putnam’s reliance on legislative history is unhelpful. Putnam points to a comment to AB 179,  
6 which discusses using the rate-setting procedures in the statute “instead of having those rates dictated  
7 by the manufacturers and judges on a reasonableness standard by the NMVB.” (Putnam Br. at 63.)  
8 This comment was addressing the methodology in which manufactures set rates and the Board could  
9 only review the manufacturer’s *unilateral* decisions under a reasonableness framework only. Were it  
10 the intent of the legislature to review consideration of reasonableness as opposed to eliminate the  
11 manufacturer’s unilateral power, then the plain text would not include reasonableness. Likewise,  
12 Putnam does not address the Legislature’s findings and declarations at the outset of AB 179 when it  
13 stated: “California franchise laws require manufacturers to provide **reasonable reimbursement to**  
14 **dealers for warranty work**, but fail to establish a clear procedure to determine whether a  
15 reimbursement is reasonable. (Putnam Pre H’rg Br., Tab 1, Section 1(c) at 2 (emphasis added).) It  
16 went on to state that “It is the intent of this act to ensure that new motor vehicle dealers are treated  
17 fairly by their franchisors, that dealers are **reasonably compensated for performing warranty**  
18 **repairs** on behalf of their franchisors, . . . .” (*Id.*, Section 1(i) at 3 (emphasis added).) Clearly the  
19 comment quoted by Putnam is not a prohibition of reasonableness but rather a move away from a rate  
20 setting process directed by the manufacturer.

21 Putnam also tries to diminish the significance of Governor Brown’s veto of AB 2107. (Putnam  
22 Br. 64-66.) However, the text of the veto (Ford Pre-Hr’g Br, Tab 2 (veto letter)), speaks for itself and  
23 is reinforced by the plain language of Section 3065.2, which maintained a reasonableness requirement.

24 2. The Evidence (Unsurprisingly) Proves \$436.76/hour is not Reasonable

25 Evidence that \$436.76 per hour is unreasonable has gone un rebutted. Putnam did not present  
26 the testimony of a single individual who testified that \$436.76 per hour rate is reasonable or consistent  
27 with the market. In fact, Kamenetsky testified that Putnam’s rate for warranty-like, qualified, customer  
28

1 pay repairs was intentionally not priced to be competitive. (Kamenetsky: 9/27/23, 1541:12-14.)  
2 Likewise, Putnam does not argue that the rate is reasonable in its Brief.

3 **C. Putnam Demands that the Law Is Only Used to Benefit Dealers**

4 Putnam claims that there is no statutory authority for the Board to determine a rate lower than  
5 what Ford had agreed to pay. (Putnam Br. at 66.) To the contrary,  
6 [T]he board **may determine the difference** between the amount the franchisee has  
7 actually received from the franchisor for fulfilled warranty obligations and the amount that  
8 the franchisee would have received if the franchisor had compensated the franchisee at the  
9 retail labor rate and retail parts rate as determined in accordance with Section 3065.2 for a  
subdivision (a) of Section 3065.2.

10 Veh. Code § 3065.4

11 It is right there in the statute. The Board may determine the “difference.” Difference can be  
12 negative numbers. There is no language limiting the difference only to amounts *owed* by the  
13 manufacturer. And by anchoring the difference to the amount received from the manufacturer and the  
14 amount the dealer should receive pursuant to Section 3065.2, the Legislature contemplates that Board  
15 may arrive at a figure different than the figure initially provided by either the dealer or the  
16 manufacturer.

17 Even if the Board finds that the statute does not permit it to order Putnam to repay any sums,  
18 it may nonetheless make the determination that there is a difference such that Ford may seek  
19 reimbursement through other judicial means.

20 Realizing defeat, Putnam now embraces market rates and reasonableness in advocating for a  
21 rate greater than \$177. (Putnam Br. at 66-67.) Irony aside, the argument is flawed because Ford has  
22 not asked that the Board set the \$177 rate as a reasonable rate. Rather, Ford has explained that, given  
23 the pervasive fraud, material inaccuracies, and unreasonableness, the Board should treat the  
24 Submission as non-compliant and as if no request for an increase was ever made. In the absence of a  
25 valid request, it stands to reason that the initial rate of \$177 should be instituted until Putnam can make  
26 a statutorily correct request free of fraud and material inaccuracies.

27 Putnam instead first urges the court to select a rate of \$369.63 based on its reported sold hours.  
28 (Putnam Br. at 69.) But, for reasons articulated at length, the sold hours are patently unreliable and did

1 not generate the charges. The Board should only consider actual hours if it is to calculate a rate based  
2 on the submission.

3 Putnam also asks the Board to embrace Ms. Heinemann's testimony that she would select the  
4 rate of \$246.52 should it rely on actual hours (Putnam Br. at 70.) But, as stated in Ford's Brief, while  
5 this testimony surely demonstrates Ms. Heinemann's credibility, her on-the-spot answer was not tied  
6 to the requirements of the statute. The Board should select a rate pursuant to Section 3065.2, which  
7 allows the manufacturer to optimize a rate through selecting whatever 90-day period it chooses. (Ford  
8 Br. at 69-71.) Putnam accuses Ford of distancing itself from her testimony. No, Ford is merely  
9 consistent—it wants the Board to follow the statute.

### 10 CONCLUSION

11 The Submission simply cannot be trusted and Putnam's Response Brief has done nothing to  
12 remedy this defect. Arguments from counsel are no substitute for the facts presented at the Hearing.

13 Ford respectfully requests that the Board overrule Putnam's protest and determine that Ford  
14 met its burden in satisfying the notice provision and showing that the Submission was materially  
15 inaccurate and fraudulent. As such, it should find that the original labor rate of \$177 is still in effect  
16 and order Putnam to reimburse Ford all warranty labor hours paid in excess of \$177 per hour.

17 Alternatively, the Board should find that \$436.76 is unreasonable and, as such, the whole  
18 request is non-conforming to the Statute, and it should find that the original labor rate of \$177 is still  
19 in effect and order Putnam to reimburse Ford all warranty labor hours reimbursed in excess of \$177  
20 per hour.

21 Should the Board attempt a calculation, it should find that the appropriate hourly warranty  
22 labor rate is the rate of \$198.02 and order Putnam to reimburse Ford all warranty labor hours  
23 reimbursed in excess of \$198.02 per hour.

24 Finally, because Putnam's arguments lack any factual or legal support, the Board should reject  
25 wholesale Putnam's Proposed Findings of Fact and Conclusions of Law. Ford will not respond to  
26 Putnam's Proposed Findings because the arguments and facts contained herein, including in Ford's  
27 Appendix, demonstrate that they are incorrect. As such, Ford requests that the Board adopt its  
28 Proposed Findings of Facts and Conclusions of Law.

Dated: May 2, 2024

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**PROOF OF SERVICE**

CAPTION: KPAuto, LLC, dba Putnam Ford of San Mateo v. Ford Motor Company

BOARD: NEW MOTOR VEHICLE BOARD

PROTEST NOS.: **PR-2759-21**

I am employed in the City and County of Denver, State of Colorado. I am over the age of 18 years and not a party to this action. My business address is 1144 15th Street, Suite 3300, Denver, CO 80202.

On May 2, 2024, I served the foregoing **Respondent Ford Motor Company's Reply in Support of Post-hearing Brief** on each party in this action, as follows:

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Attorneys for Protestants

- ☐ (BY MAIL) I caused such envelope to be deposited in the United States mail at Denver, Colorado, with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing documents for mailing. It is deposited with the United States Postal Service each day and that practice was followed in the ordinary course of business for the service herein attested to.
- ☐ (BY FACSIMILE) The facsimile machine I used complied with California Rules of Court, Rule 2003, and no error was reported by the machine. Pursuant to California Rules of Court, Rule 2006(d), I caused the machine to print a transmission record of the transmission, a copy of which is attached to this Affidavit.
- ☐ (BY FEDERAL EXPRESS) I caused such envelope to be delivered by air courier, with the next day service.
- ☒ (BY EMAIL) at the email address listed above.

Executed on May 2, 2024, at Denver, Colorado.

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

/s/ Elayna M. Fiene  
Elayna M. Fiene

# APPENDIX

	<u>Ford's Statement and Citation</u>	<u>Putnam's Argument<sup>1</sup></u>	<u>Actual Citation/Statement</u>	<u>Putnam's Error</u>	<u>Additional Evidence In Support</u>
1.	<p>"Putnam had been 'tinkering' with the data in the repair orders...." (Ford Br. at 1:20-21.)</p> <p>Kamenetsky: 9/27/23, 1600:25-1601:3</p>	<p>The cited testimony concerns instances where a change is made to match a customer estimate – not as to all the repair orders.</p>	<p>Ford Br. at 1:20-22: "Putnam has been 'tinkering' with the data in the repair orders (A. Kamenetsky: 9/27/23, 1600:25-1601:3) in order to give the false appearance of a \$436.76 hourly rate."</p> <p>Kamenetsky: 9/27/23, 1600:25-1601:3:</p> <p>Q. So to match a customer estimate, they are just tinkering with the 1503.52 to try to get the rest of the repair order to work out? A. I believe so."</p>	<p>Ford's statement is true – and the testimony supports it. Putnam was "tinkering" with the data in the repair orders. Further, changing the data to match the estimate shows that the estimate is essentially an impermissible flatrate. (Ford Br. at 34-35.)</p> <p>Ford does not state "all" the repair orders – just that the underlaying documentation was riddled with "discrepancies and inaccuracies" (Ford Br. at 18-21.)</p>	<p>The testimony leading up to the cited portion provided additional context and support.</p> <p>Additional support: Kamenetsky: 9/27/23, 1599:14-1601:3:</p> <p>Talks about how the service adjuster can't adjust the parts – therefore adjusts the labor to <b>match the total estimate given to the customer</b> – "Q. So that \$1,503.52 may have just been changed by a service adviser later to try to balance out an estimate given earlier because they can't change the parts listed on the repair order? A. I don't know that anyone would be happier if they could change the parts. Q. So to match a customer estimate, they are just <b>tinkering with the 1503.52 to try to get the rest of the repair order to work out? A. I believe so."</b></p>

<sup>1</sup> Unless otherwise noted, testimony discussed in this column is the testimony as cited by Ford in the first column.

	<u>Ford's Statement and Citation</u>	<u>Putnam's Argument<sup>1</sup></u>	<u>Actual Citation/Statement</u>	<u>Putnam's Error</u>	<u>Additional Evidence In Support</u>
2.	<p>"More specifically, Putnam had been 'backing into' the so-called sold hour figure after finalizing the customer labor total." (Ford Br. at 1:22-23; <i>see also</i> Ford's Proposed Findings at 4: fn. 6.)</p> <p>K. Putnam: 9/25/23, 1044:2-11</p>	<p>Kent Putnam's testimony concerned the one pricing policy at Putnam Automotive Group overall. Mr. Putnam determined the labor rate by keeping the rate to the customer the same while removing any multipliers. He did not testify they "backed into" the rate at the individual repair level. In addition, Mr. Putnam testified the \$440 an hour rate was applied to all Putnam franchises and not just the Ford franchise. (RT Vol. V, 1044:12-19 [K. Putnam].)</p>	<p>The cited testimony is correct. Putnam was asked how he determined a \$440 rate, and Putnam admits that "The price to the customer is not going to change. What rate do we – so we backed into it. We did basic algebra and we backed into it." Applying basic mathematical principals, if Putnam is admitting that the total labor price to the customer remains the "same"—or consistent with the typical labor rate of approximately \$200 per hour, th[e]n to get the number of sold hours, Putnam would divide the final charge by \$440.</p>	<p>Putnam ignores the context of basic mathematical principals. Whether the rate is applied to all franchises in the Putnam group does not make this less true.</p>	<p><i>See also</i> K. Putnam: 9/25/23, 1128:10-25:</p> <p>Q. When a customer brings in a vehicle for repair, they are given an estimate? A. Yes. Q. They are given an estimate by the service advisor before there is any sort of diagnostics? A. Correct. Q. And that estimate is honored regardless of how many hours it takes to perform the repair? A. Correct. Q. The estimate includes labor costs? A. Yes. Q. It does not include an hourly rate? A. Correct. Q. The customer is never provided with an hourly rate? A. Correct.</p> <p><i>See also</i> Putnam: 9/25/23, 1130:7-1138:3 (example of the math on the repair orders and how \$440 is being used –</p>

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					and Putnam's "plan" to use the \$440 rate).
3.	<p>"The price was based on the service advisor's discretion." (Ford Br. at 5:13.)</p> <p>Kamenetsky: 9/27/23, 1540:11-22.</p>	<p>The citation further describes when a service advisor is unsure, they are directed to look up the repair and use Ford's labor guide as opposed to a third-party guide. The prices were not based solely on service advisor discretion.</p>	<p>Kamenetsky: 9/27/23, 1540:11-22:</p> <p>Q. On page 75, on line 16, you were asked, "And how does Putnam Ford decide what price to give the customer?" Did I read that question correctly?</p> <p>A. Yes.</p> <p>Q. And the answer you gave was, "I think it's based on the service advisor's discretion, but if they are unsure and they look up a repair that they don't know, they're asked to use Ford's labor guide as opposed to a third-party guide." Did I read that correctly?</p> <p>A. I agree with the complete statement. Yes.</p>	<p>The testimony speaks for itself. The comment about the use of the time guide is secondary to the primary statement, which is that the service advisor uses his or her discretion in pricing the total labor charge. The testimony also lacks certainty as to whether the service advisor actually uses Ford's labor guide, as it indicates only that the service advisors are <i>asked</i> to do so.</p>	<p><i>See also</i> Kamenetsky: 9/27/23, 1540:23-1541:1:</p> <p>Q. And the same repair does not necessarily cost the same amount for each customer because they have discretion in adjusting the price, true?</p> <p>A. I agree with that, yes.</p>
4.	<p>"Prior to Putnam's acquisition of the subject Ford dealership, in 2019 or 2020, Mr. Putnam put a plan into place to increase the warranty labor rate at all of his dealerships." (Ford</p>	<p>The cited testimony only concerns why Mr. Putnam changed from Armatus to FrogData (describing a difference in pricing from taking a percentage to flat fee). No "plan" is discussed</p>	<p>Kamenetsky: 9/27/23, 1473:6-23:</p> <p>Q. And how was FrogData brought into the -- in to do that?</p>	<p>Ford did not quote Mr. Putnam and instead summarized his testimony. The testimony is describing a plan. Quibbling with</p>	

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	Br. at 5:26-27; <i>see also</i> Ford's Proposed Findings ¶ 19; 6:2-3.)  Kamenetsky: 9/27/23, 1473:6-23.	in the cited testimony.	A. The first submissions for the entire Putnam dealership group, Mr. Putnam was approached in 2019 prior to the enactment of the statute by a firm called Armatus or Armatus (pronunciation), A-r-m-a-t-u-s. They prepared in 2019 and filed right around January of 2020 the first round of statutory labor rate increases. And Mr. Putnam didn't like the fact that Armatus or Armatus (pronunciation) participated in the increases for both parts and labor and took a percentage moving forward for a year or so. I think it was a year contract following the labor rate increase. He was later approached by, I believe, Chris Dulla, the vice president of FrogData, who told him that they offered a similar service to Armatus for a flat fee and did not participate in the uplift. And Mr. Putnam liked that and wanted to try FrogData.	linguistic choices is not a basis to claim a misrepresentation.	

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5.	<p>"It [FrogData] does not question the data in the repair orders, such as the variation of labor rates, because it is 'completely irrelevant to [FrogData],' and '[t]he repair order is the source document so that's that.'" (Ford Br. at 6:13-15.)</p> <p>Korenak: 9/27/23, 1375:16-24, 1374:7-8.</p>	<p>The citation to page 1374 references the following: "A. It would be the same 90-day set, yes. Q. Okay." The citation is inapplicable to the statement in Ford's Brief. Neither page contains the quote concerning the repair order as the source document.</p>	<p>Korenak: 9/27/23, 1376:7-8:</p> <p>A. The repair order is the source document so that's that.</p>	<p>The typographical error would have been easy to identify.</p>	<p>There was a typo in the citation. 1374:7-8 was supposed to be 1376:7-8.</p>
6.	<p>"Mr. Reibel observed that the Submission contained numerous accounting red flags and highly unusual data." (Ford Br. at 8:4- 5; <i>see also</i> Ford's Proposed Findings ¶ 31; 7:20-21.)</p> <p><i>See, e.g.</i> Joint Ex. 6 [B50-51].</p>	<p>The Denial Letter focuses on the difference between the actual hours and sold hours in the ROs—the phrases "accounting red flags" or "highly unusual data" are not used nor are phrases similar thereto.</p>	<p>The Denial Letter articulates serious and problematic inconsistencies and discrepancies in the Submission, including: (1) the sold hours did not "reflect reality"; (2) "there is a considerable disconnect between the amount of work [a RO] required and what is being reported"; (3) "some repairs simply seem intended to maximize the charge to a customer who is not knowledgeable of the automotive repair being performed"; (4) sold hours were based on "a desire to</p>	<p>Ford did not quote the Denial Letter and instead summarized it. Quibbling with linguistic choices is not a basis to claim a misrepresentation.</p>	<p><i>See also</i> Becic: 9/18/23, 166:4-167:10:</p> <p>Q. If Ford wanted to use actual hours to do an analysis of Putnam Ford's warranty submission, what would they do then?</p> <p>A. We would not be able to use the actual hours since there are none here.</p> <p>Q. And we looked at other ROs. Are there other examples for qualified repair lines where the actual hours are listed as zero?</p> <p>A. Yes.</p>



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			attempt to demonstrate an inordinately high labor rate"; (5) :[T]hese disconnects aggravate a concern . . ."; and (6) addressing "inconsistencies and excessive customer charges." Joint Ex. 6 [B50-51]		<p>Q. Is it actually -- is that possible? Can you do a repair that generates \$641.06 in revenue and has text about what was done for zero hours?</p> <p>A. No. That doesn't seem reasonable.</p> <p>Q. Does line F reflect reality.</p> <p>A. No, it does not reflect reality.</p> <p>Q. Do you trust the data in line F of this RO?</p> <p>A. No, I don't.</p> <p>Q. If you saw another submission with the large variances between actual hours and sold hours, as you saw in the Putnam submission, what hours would you use to evaluate that submission?</p> <p>The Witness: We would be guided by what we determined would be used -- or what actually generated the labor charges. So if we reviewed the repair orders and we felt that reasonably it is safe to assume that it was the technician hours that</p>

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					generated the labor charges, we would tend to use that just because it reflects reality.
7.	<p>"They explained that the customer charge would remain comparable to that of surrounding dealers <u>because the sold hours Putnam used to calculate the customer charge would be lower than what the job would take, which would offset the higher labor rate.</u>" (Ford Br. at 9:1- 4 (emphasis in original); <i>see also</i> Ford's Proposed Findings ¶ 36; 8:18-20 and ¶ 166; 38:14-17.)</p> <p>Murphy-Austin: 9/18/23, 191:22-192:16 (emphasis added).</p>	<p>The actual testimony at page 192 lines 4-11 states Mr. Putnam and Mr. Vasquez "explained that the end price to the customer would be comparable to the surrounding dealers because the labor times that would be matched up with that higher rate -- the labor times would be lower which would then offset the higher labor rate and create a competitive price point in the market. So, in fact, the labor and the sold labor hours don't reflect reality." (RT Vol. I, 192:4-11 [Murphy-Austin].) When asked "how could the labor time be lower?" she answered, she was not sure and then described her impression of what could be happening. (RT Vol. I, 192:12-16 [Murphy-Austin].) Mr. Putnam and Mr. Vasquez did not explain</p>	<p>Murphy-Austin: 9/18/23, 192:1-192:16:</p> <p>Q. What exactly did Putnam say about the rate?</p> <p>A. Yes. In my conversations with Kent and Al, and I expressed some concern about the 436-dollar labor rate that was proposed. They explained that the end price to the customer would be comparable to the surrounding dealers because the labor times that would be matched up with that higher rate – the labor times would be lower which would then offset the higher labor rate and create a competitive price point in the market. So, in fact, the labor and the sold labor hours don't reflect reality."</p> <p><i>Id.</i> at 192:12-16:</p>	<p>Ford did not quote Ms. Murphy-Austin and instead summarized her testimony.</p> <p>Putnam's Argument proceeds to cite to RT Vol. I, 192:12-16 [Murphy-Austin] and states "They were instead explaining they were using Ford's lower time guide to offset a higher labor rate." Ms. Murphy-Austin's testimony does not mention "Ford's lower time guide."</p>	

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		the sold hours Putnam was using were "lower than what the job would take." They were instead explaining they were using Ford's lower time guide to offset a higher labor rate. Ford's statement and citation are misleading.	A. I am not sure. The dealer could be charging a lower labor time than what the job could take, and that could offset the higher labor rate.		
8.	"Mr. Putnam admitted the same at the hearing; he testified Putnam manipulated the sold hours on repair orders in order to 'back into the [\$440/hour] rate.'" (Ford Br. at 9:7- 9; <i>see also</i> Ford Proposed Findings ¶ 37; 8:22-23; Ford Br. at 35:21-36:3 ("This tinkering was baked into the Putnam process at a conceptual level—Mr. Putnam testified that rather than have hours generate charges, Putnam set up their system by using algebra to 'back into the [\$440/hour] rate.'"); 36:3-5 ("Putnam never 'rais[ed] the price to the customer. The price to the customer is not going to change . . . so we backed into it. We did basic algebra and we backed into the [\$440] rate.'" and 38:7-11 (similar statement and quotation); Ford's Proposed	Kent Putnam's testimony concerned the one pricing policy at Putnam Automotive Group and how he settled on an overall rate of approximately \$440 for each of his franchises – he did not testify they "backed into" the rate at the individual repair level.	K. Putnam: 9/25/23, 1044:2-11: Q. And I am asking next, how did you make this determination that the \$440-an-hour rate should be applied? A. Oh. So we took the job pricing and we said, "Let's use one uniform guide. We are going to have one policy in the Putnam Automotive Group. Let's use the factory time guide. We are not raising the price to the customer. The price to the customer is not going to change. What rate do we" - - so we backed into it. We did basic algebra and we backed into the rate.	Putnam ignores the context of basic mathematical principals. Whether the rate is applied to all franchises in the Putnam group does not make this less true.	<i>See also</i> Putnam: 9/25/23, 1128:10-25: Q. When a customer brings in a vehicle for repair, they are given an estimate? A. Yes. Q. They are given an estimate by the service advisor before there is any sort of diagnostics? A. Correct. Q. And that estimate is honored regardless of how many hours it takes to perform the repair? A. Correct. Q. The estimate includes labor costs? A. Yes. Q. It does not include an hourly rate? A. Correct.

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	Findings ¶ 167; 38:19-21; 167; 38:21-23; and ¶ 173; 40:1-5.)  Putnam: 9/25/23, 1044:2-11.				Q. The customer is never provided with an hourly rate? A. Correct.  <i>See also</i> Putnam: 9/25/23, 1130:7-1138:3 (example of the math on the repair orders and how \$440 is being used – and Putnam's "plan" to use the \$440 rate).
9.	"Mr. Becic testified Mr. Reibel found it 'effectively impossible' to calculate a rate because it is 'difficult to interpret the repair orders and to determine what an actual rate might be' from all the discrepancies in the repair orders Ford examined, making it 'difficult to figure out exactly what was going on.'" (Ford Br. at 10:8-12; <i>see also</i> Ford's Proposed Findings ¶ 41; 9:24-25.)  Becic: 9/18/23, 112:10-17.	Mr. Becic's answer starts: "I think -- and this is speculating, ...." (RT Vol. I, 112:12 [Becic].) Ford cannot rely on Mr. Becic's speculations.	Becic: 9/18/23, 112:10-17:  Q. Okay. Why didn't he do an analysis based on the actual or - - actual hours on the Putnam ROs? A. I think - - and this is speculating, but I believe that he did not do an analysis because it is difficult to interpret the repair orders and to determine what an actual rate might be. Just based on the discrepancies that we have examined, it is difficult to figure out exactly what's going on.  Joint Ex. 6 [B51] states "The inconsistencies and excessive customer charges in the ROs	The "effectively impossible" language is take straight from the Denial Letter written by Mr. Reibel. Whether Mr. Becic is speculating as to why Mr. Reibel found it "effectively impossible" is an issue of weight, and is not a misstatement because this is a truthful discussion of Mr. Becic's testimony. Further, Mr. Becic's testimony is further supported by the	Joint Ex. 6 [B51]

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			you provided, including the examples discussed above, make it unreasonable, if not effectively impossible . . . to calculate a labor rate.”	language of the Denial Letter.	
10.	<p>“His [John Becic] current responsibilities include managing the entire complex processing and analysis of all Ford dealer warranty labor and parts rate increase requests with his team of analysts and ultimately validating the requested rate, all within the tight state time deadlines to approve or deny a request.” (Ford Br. at 10:17-20; <i>see also</i> Ford's Proposed Findings ¶ 44; 10:6-9.)</p> <p>Becic: 9/18/23, 36:5-37:3. During his testimony Mr. Becic is asked to explain what “field operations” is and “what it means to be a field operations analyst.”</p>	The cited testimony discusses Mr. Becic's administrative roles to help, manage, and run and support Ford's salespeople in regional offices. He describes his function in managing the administrative budget for those field offices and other administrative tasks. Ford's dealer warranty labor and parts rate increase requests are not discussed in the cited testimony.		Ford did not quote Mr. Becic and instead summarized his testimony. The testimony speaks for itself.	<i>See also</i> Becic: 9/18/23, 33:7-8, 37:4-40:11 discussing his current position as a field operations analyst and job responsibilities.
11.	“Consequently, he [Mr. Becic] has extensive experience in reviewing repair orders and addressing	The cited testimony shows he manages two other analysis “at a higher level,” assists with any issues, helps		Ford did not quote Mr. Becic and instead summarized his testimony. The	<i>See also</i> Becic: 9/18/23, 33:7-8; 37:4-40:11 discussing his current position as a field

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	<p>complex issues that may arise in those submissions.” (Ford Br. at 10:21-22; <i>see also</i> Ford's Proposed Findings ¶ 44; 10:9-10.)</p> <p>Becic: 9/18/23, 37:19-39:10. During this part of Mr. Becic's testimony he is asked what it means to have the role of “warranty rates process management.” He describes the process of reviewing dealer requests for new warranty labor rates and new warranty parts markups and his role as manager of the process.</p>	<p>the analysts deal with any difficult cases, and overall manages the administrative process. He only took on the warranty rate management in the past two years. (RT Vol. I, 37:19-23 [Becic].) Ford overstates Mr. Becic experience, especially given the breadth of assignments where he has responsibility (warranty labor and parts rate increase requests were the third area of responsibility Mr. Becic described during his testimony).</p>		<p>testimony speaks for itself.</p>	<p>operations analyst and job responsibilities.</p>
12.	<p>“During the tour, Mr. Putnam made a comment that ‘Ford knew they were servicing vehicles at the Nissan facility,’ that ‘caught [Ms. Swann] off guard.’” (Ford Br. at 15:4-5 (emphasis added); <i>see also</i> Ford's Proposed Findings ¶ 89; 20:14-15.)</p> <p>Swann: 9/21/23, 805:21-807:3</p>	<p>The testimony shows the described discussion occurred at Kent's office and not during the tour. (RT Vol. IV, 806:16-17 [Swann].) Moreover, Ford citation shows the context of Mr. Putnam's statement concerning use of the Barn was related to the discussion because they were discussing the need to expand the size of the</p>	<p>Swann: 9/21/23, 806:20-807:3:</p> <p>A. Yes. We reviewed a rendering that had, I think, been designed for a dealership. We talked about their plan and at one point during that discussion Mr. Putnam indicated that - - he made a comment that they were - - that Ford knew they were servicing vehicles at the</p>	<p>Ford erred in stating that the comment was made during a tour, but regardless of the location, it was still an admission.</p> <p>The rest of Putnam's Argument is speculative as there is no mention in Ms. Swann's testimony</p>	

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		current facility; Mr. Putnam's reference to the use of the Barn was relevant to the size of Putnam's current facility (Putnam would need at least as much capacity as it was currently using at the main facility and the Barn).	Nissan facility. And that was when we were talking about the size of the current facility and needed to do something. But that, quite frankly, caught me off guard.	that the "refence to the use of the Barn was relevant to the size of Putnam's current facility."	
13.	Mr. Putnam responded that it was "Nissan customer-pay" or "retail work." (Ford Br. at 16: fn. 9; <i>see also</i> Ford's Proposed Findings ¶ 95 and 96; 21:17-27.)  Swann: 9/21/23, 810:9-12.	Ms. Swann testified, "And he [Mr. Putnam] said, 'Oh, no. That's Nissan customer-pay,' or, 'It is retail work' is what he said." The statement "is what he said" shows Ms. Swann was correcting her statement from Mr. Putnam saying Nissan customer-pay to retail work. The testimony shows only that Mr. Putnam told her it was retail work. The subsequent testimony reinforces this interpretation. (RT Vol. IV, 810:13-811:5 [Swann] (testifying at page 811, line 5, "Yes. He said it was retail work."))	Swann: 9/21/23, 810:13-811:9:  Q. And when he said it was retail work what did you understand him to mean? A. Essentially that those were vehicles that were, you know, taken to Nissan for retail work by Ford customers. Q. So you understood Mr. Putnam to be saying that Ford owners were bringing their cars to the Nissan dealership as opposed to the Ford dealership? A. Yes. A. Yes. That is what I assumed.	The testimony speaks for itself and is accurate.	



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			<p>Q. When you understood that – when he said they were retail – you said “retail” right?</p> <p>A. Yes. He said it was retail work.</p> <p>Q. You understood when he was saying they were retail work that they were actually being serviced by Nissan techs, not Ford techs?</p> <p>A. That was my understanding, yes.</p>		
14.	<p>“A Ford employee informed Ms. Swann that Mr. Putnam had submitted a request to change the address on the contract to include the Nissan building as an authorized location.” (Ford Br. at 18:10-11; <i>see also</i> Ford's Proposed Findings ¶ 98; 23:4-6.)</p> <p>Swann: 9/21/23, 812:2-7.</p>	<p>The cited testimony concerns whether it was okay that Putnam was servicing Ford vehicles at the Nissan Facility or the Barn. The citation is unrelated to Ford's statement in the brief.</p>		<p>Typographical error, but correct citation immediately adjacent to proffered text and would have been easy to identify.</p>	<p>There was an error in the citation. Should be Swann: 9/21/23, 812:9-813:12.</p> <p>Q. Has Putnam Ford signed an extension of the sales and service agreement?</p> <p>A. They have, yes.</p> <p>Q. When did that happen?</p> <p>A. I believe it was in April. I don't know the exact date.</p> <p>Q. Did you have any communications with Mr. Putnam about that?</p> <p>A. I did. I was on a national call. I was going to say in a work-in-progress call. And we were going over open</p>

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					<p>contracts and things that needed updates and during - -</p> <p>Q. When you say, "we" - -</p> <p>A. I am sorry. So I was communicating with our network development team in Michigan, the franchising team, and it was communicated that there was an open, like, a document that hadn't been returned from Putnam Ford. And so during the call I immediately texted Kent because the person - - like, there was a specialist who was working on the paperwork and she indicated that Kent submitted a request to change the address on the agreement. And I, you know, just inquired - - I'm like, "What is the address that he requests to change it to?" And it was to the Nissan building. And so I immediately texted him and said, like, "Hey, we can't change anything. You know, like, we can only execute an agreement or extend - - do the extension on the</p>

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					approved location of business." And so he immediately responded and submitted the document that day.
15.	<p>"Ms. Swann believed Mr. Putnam was trying to get in a change of address without Ford noticing." (Ford Br. at 18:11-13; <i>see also</i> Ford's Proposed Findings ¶ 98; 23:5-7.)</p> <p>Swann: 9/21/23, 813:20-23.</p>	<p>The cited testimony begins, "Well, ultimately I don't know what was going on." The testimony thereafter cannot be relied upon.</p>	<p>Swann: 9/21/23, 813:20-23:</p> <p>A. Well, ultimately, I don't know what was going on. My impression was that, quite frankly, he was trying to get in a change in the address and we wouldn't notice it, but that was settled.</p>	<p>Ford did not quote Ms. Swann and instead summarized her testimony. The testimony speaks for itself.</p>	
16.	<p>"Mr. Putnam's credibility was demonstrated to be nonexistent during the hearing. He was <b>impeached with inconsistent statements 15 times.</b>" Ford then goes on to cite 15 areas of testimony. (Ford Br. at 18:20-19:8 (emphasis in original); <i>see also</i> Ford's Proposed Findings ¶ 100; 23:12-23.) Putnam discusses each of the citations with clear inaccuracies when compared to the record in the third column in this row.</p>	<p>K. Putnam: 9/25/23, 1068:3-1069:6 – is not an impeachment – Mr. Putnam said he could use the word rules to describe a policy or procedure which was consistent with the deposition testimony.</p> <p>1079:14-1080:3 – the answer is not inconsistent with the deposition transcript (Mr. Putnam couldn't build a 100-story building on his property presumably by local regulations).</p>	<p>Putnam: 9/25/23, 1068:3-1069:6 – describe policies and procedures as rules.</p> <p><i>Id.</i> 1069:10-24 – no rules for how technicians track their time.</p> <p><i>Id.</i> 1070:6-1072:4 – have to perform repairs at authorized location to be qualified.</p> <p><i>Id.</i> 1075:15-1076:22 – Nissan pays for expenses related to the Barn.</p>	<p>Putnam only argues that 10 of the 15 statements are not an impeachment. On its face, this is not a persuasive argument. Further, Putnam incorrectly applies refreshing recollection rule of evidence where Putnam claimed no information but had provided a definitive answer just months' prior. On cross examination of a</p>	<p>Putnam: 9/25/23, 1079:14-1080:3 – Putnam isn't "comparing" the depo testimony "I can do what I want" to "I couldn't build a 100-story building on it"</p> <p><i>Id.</i> 1088:22-1091:8 – He doesn't concede until 1091:9-16.</p> <p>The testimony leading up to the cited portion provided additional context and support. Additional support: Putnam, 9/25/23, 1092:8-1094:22; 1096:7-1097:23;</p>

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		<p>1088:22-1091:8 – mostly reading of the deposition transcript without impeachment; Mr. Putnam agreed to conceding The Barn was in use by Putnam in mid-June 2021 (RT Vol. V, 1088:22-1089:2 [K. Putnam]).</p> <p>1093:7-1094:22 – is a refreshing of recollection and not impeachment.</p> <p>1096:23-1097:13 – is a refreshing of recollection and not impeachment.</p> <p>1120:7-17 – not a proper impeachment – his answer at hearing was “I don’t think so” relative to “no” in the deposition transcript – they are consistent answers.</p> <p>1121:1-9 – is a refreshing of recollection and not impeachment.</p>	<p><i>Id.</i> 1079:14-1080:3 – no oral agreement between Nissan and Putnam for the Barn.</p> <p><i>Id.</i> 1088:22-1091:8 – when barn was in use.</p> <p><i>Id.</i> 1093:7-1094:22 – who he spoke with about use of the barn.</p> <p><i>Id.</i> 1095:16-1096:18 – allegedly looked at documents regarding timing of use of the barn.</p> <p><i>Id.</i> 1096:23-1097:13 – what he was told about repairs at the Barn.</p> <p><i>Id.</i> 1104:10-23 – timing of use of the Barn.</p> <p><i>Id.</i> 1120:7-17 – whether other dealerships serviced vehicles at the Barn.</p> <p><i>Id.</i> 1121:1-9 – when Chevrolet dealership stopped servicing vehicles at the Barn.</p>	<p>hostile witness, this is impeachment.</p>	<p>1120:7-1121:17; 1124:3-1125:4; and 1127:9-1130:6.</p>

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		<p>1124:3-18 – is a refreshing of recollection and not impeachment.</p> <p>1127:9-1128:1 – the answers are consistent. At hearing Mr. Putnam said there was no particular procedure for technician tracking followed by “I am not sure.” In the deposition, he answered “I don’t know” but also clarified there is not one overarching Putnam dealership process.</p> <p>1129:11-1130:1 – Mr. Putnam’s answer is consistent with the deposition testimony; he testified they do track effective labor rate both at his deposition and at the hearing.</p>	<p><i>Id.</i> 1124:3-18 – service advisor did not have discretion over hourly labor rate.</p> <p>1127:9-1128:1 – no dealership process for technicians tracking work on a repair.</p> <p>1129:11-1130:1 – track effective labor rate of service advisor.</p>		
17.	“Mr. Putnam feigned confusion over the word ‘accurate.’” (Ford Br. at 19:9; <i>see also</i> Ford’s Proposed Findings ¶ 101; 23:24.)	The confusion in the testimony (late that day) was whether the question was asking whether accurate meant as applied to the hourly rate as calculated or the repair order for line E.	<p>Putnam: 9/25/23, 1146:1-10:</p> <p>A. Accurate? What does accurate mean?</p> <p>Q. Yes, sir. This is what I am asking.</p> <p>A. Accurate?</p>	Ford did not quote Mr. Putnam and instead summarized his testimony. The testimony speaks for itself.	<p><i>See also</i> Putnam: 9/25/23, 1145:19-1146:3:</p> <p>Q. Do you really believe a service advisor took the number 1.9 and multiplied it by 516.021052 blah, blah,</p>

	<b><u>Ford's Statement and Citation</u></b>	<b><u>Putnam's Argument<sup>1</sup></u></b>	<b><u>Actual Citation/Statement</u></b>	<b><u>Putnam's Error</u></b>	<b><u>Additional Evidence In Support</u></b>
	Putnam: 9/25/23, 1146:1-10.	The confusion is clarified in the following testimony. (RT Vol. V, 1146:21-1147:4 [K. Putnam].) The original question to which Mr. Putnam asked for clarification was in full: "Is it accurate?" without the clarifications in the questions on pages 1146 and 1147.	Mr. Hughes: Object. The witness is - - object to being vague and ambiguous. The witness has already expressed he doesn't know what he means by "accurate." Judge Van Rooyen: I don't know how you cure that. If the witness doesn't know what accurate is, then I think - - I don't know what to do about that.		blah to get a charge of \$980.44? A. I don't believe that, no. Q. Is this a mistake? A. I don't know. Q. Is it accurate? A. Accurate? What does accurate mean? Q. Yes, sir. That is what I am asking. A. Accurate?
18.	"He intentionally, and repeatedly misheard the word 'defies.'" (Ford Br. at 19:9-10; <i>see also</i> Ford's Proposed Findings ¶ 101; 23:24-25.)  Putnam: 9/25/23, 1144:15-24.	The hearing was being held by Zoom. Mr. Putnam did not intentionally mishear the word. "Defies" and "defines" sound similar, especially over a remote connection.	Putnam: 9/25/23, 1144:15-24: Q. It defies explanation? A. Pardon me? Q. It defies explanation? A. A what? Q. It defies explanation? A. Defines explanation. Q. Defies? Judge Van Rooyen: Defies. D-e-f-i-e-s, defies. The Witness: I cannot define that.	Ford did not quote Mr. Putnam and instead summarized his testimony. The testimony speaks for itself.	
19.	"Similarly, Mr. Kamenetsky was impeached with Inconsistent statements eight times." (Ford Br. at 19:13-20 (emphasis in original); <i>see also</i> Ford's	9/27/23, 1500:15-1501:22 – there was no initial answer to the question inconsistent with the deposition testimony. Moreover, the question at hearing was "at	Kamenetsky: 9/27/23, 1500:15-1501:22 – not involved in management of the dealership.	Ford did not quote Mr. Kamenetsky and instead summarized his testimony. The testimony speaks for itself.	<i>See also</i> Kamenetsky: 9/27/23, 1502:19-21:  Q. I thought you testified on direct exam that you were the general manager at Putnam

<u>Ford's Statement and Citation</u>	<u>Putnam's Argument<sup>1</sup></u>	<u>Actual Citation/Statement</u>	<u>Putnam's Error</u>	<u>Additional Evidence In Support</u>
Proposed Findings ¶ 103; 24:1-7.) Ford then goes on to cite 8 areas of testimony. Putnam discusses each of the citations with clear inaccuracies in the third column in this row.	<p>all" (1500:16) compared to a qualified answer in response to "management of most (1501:5-6 and 1501:16-20).</p> <p>1511:3-512:11 – Mr. Kamenetsky's answers are not inconsistent (he has never seen the whole process but has seen parts of it).</p> <p>1513:4-9 – not an inconsistent statement (he knows some names but not all). Moreover, not an impeachment; no deposition testimony is relied on.</p> <p>1522:8-1524:25 – the answers are not inconsistent given the deposition answer was in terms of "generally familiar with the concept" compared to "a manufacture has to approve."</p> <p>1526:24-1527:20 – there is no impeachment on these</p>	<p><i>Id.</i> 1511:3-1512:11 – service advisors enter the sold hours on a repair order.</p> <p><i>Id.</i> 1513:4-9 – don't know names of all service advisors.</p> <p><i>Id.</i> 1522:8-1524:25 – manufacturer has to approve facility location.</p> <p><i>Id.</i> 1526:24-1527:20 – discussion with Mr. Putnam about location of service work.</p> <p><i>Id.</i> 1538:16-1539:6 – basis for sold hours.</p> <p><i>Id.</i> 1539:24-1540:22 – service advisor prices the job based on his discretion.</p> <p><i>Id.</i> 1542:24-1543:17 – Putnam might use Ford's time guide, so long as not using a multiplied time guide.</p>		<p>Toyota. A. If I did, I misspoke my role.</p> <p><i>Id.</i> 1512:12-22:</p> <p>Q. And on line 7, the question was, "The service advisor? Is that - - is it always the service advisor?" Correct?</p> <p>A. Yes.</p> <p>Q. And the answer you gave was, "I believe so, but I've never watched them actually do it, so - -" And then you stopped talking, and that's the end of that line. Correct?</p> <p>A. Yes.</p> <p>Q. I read that correctly, sir?</p> <p>A. Yes, sir.</p> <p><i>Id.</i> 1513:4-9:</p> <p>Q. You don't know the names of the service advisors, true?</p> <p>A. I know some of the names.</p> <p>Q. At the time of your deposition, you didn't know their names, true?</p>



	<u>Ford's Statement and Citation</u>	<u>Putnam's Argument<sup>1</sup></u>	<u>Actual Citation/Statement</u>	<u>Putnam's Error</u>	<u>Additional Evidence In Support</u>
		<p>pages. No prior statement by Mr. Kamenetsky is reference at all on the cited pages.</p> <p>1539:24-1540:22 – the question was inconsistent with the answer provided at the deposition. This was not a proper impeachment. There is a “but if...” in the deposition that is absent in the question during the hearing.</p> <p>1542:24-1543:17 – the questions are inconsistent – one asks if Putnam Ford did not instruct service advisors to use the Ford warranty time allowances while the other is Putnam Ford might use Ford's own factory time guide with the answer being yes; the only instruction is to not use multiplied time guides.</p>			<p>A. True.</p> <p><i>Id.</i> 1529:13-20:</p> <p>Q. I asked if you testified under oath to it, which is - - this is confusing, so let's just look. On page 52, line 21 you were asked, “Have you discussed with Mr. Putnam that The Barn is not an approved location?” And you said, “No.” Right?</p> <p>A. Yes.</p>
20.	“And Mr. Kamenetsky betrayed his deceit by fearing he would be	Not a fair retelling of the testimony. The question raised prior direct	Kamenetsky: 9/27/23, 1505:7-15:	Ford did not quote Mr. Kamenetsky and instead summarized his testimony.	<i>See also</i> Kamenetsky: 9/27/23, 1505:16-1506:9.

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	<p>impeached before he answered a question.” (Ford Br. at 19:19-20; <i>see also</i> Ford's Proposed Findings ¶ 103; 24:7-9.)</p> <p>Kamenetsky: 9/27/23, 1505:7-15.</p>	<p>testimony. Mr. Kamenetsky was seeking clarification.</p>	<p>Q. In direct, you said you are familiar with the service operations of all Putnam dealerships. But you are not familiar with the process of creating a repair order, true?</p> <p>A. Are you asking me about a previous testimony?</p> <p>Q. Sir, that is the great thing about this. I get to just ask questions, and you don't know whether I am going to throw your transcript up or not. You just have to give a truthful answer.</p>		
21.	<p>“Ms. Heinemann discerned that sold hours are often inserted into the repair orders after the labor charge had been determined and the repair order is closed.” (Ford Br. at 21:14-15; <i>see also</i> Ford's Proposed Findings ¶ 114; 26:5-7.)</p> <p>Heinemann: 9/25/23, 933:19-22.</p>	<p>The cited testimony does not support the sold hours are “often” inserted after the charge is determined and the repair closed; cited testimony states instead:</p> <p>“There is the information that sale hours are put in after the fact, when the RO is closed. And sale hours can be zero, which indicates that they are totally independent of the total charges on a repair order.”</p>	<p>Heinemann: 9/25/23, 933:19-22:</p> <p>A. There is the information that sale hours are put in after the fact, when the RO is closed. And sale hours can be zero, which indicates that they are totally independent of the total charges on a repair order.</p>	<p>Ford did not quote Ms. Heinemann and instead summarized her testimony. The testimony is describing how Ms. Heinemann came to the conclusion that sold hours were not a meaningful measure of the labor hours that generated the charges. Quibbling with linguistic choices is</p>	

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		The cited testimony does not express any opinion about the frequency of the described occurrences only that they "can be" zero.		not a basis to claim a "misrepresentation."	
22.	<p>"It [Putnam] is charging a lower rate and then artificially manipulating sold hours to give the appearance of \$440 per hour." (Ford Br. at 26:21-22; <i>see also</i> Ford's Proposed Findings ¶ 137; 31:15-17.)</p> <p>Heinemann: 9/25/23, 957:24-958:11, 960:4-18; 1002:10-1003:24.</p>	The cited testimony does not support the statement offered by Ford. The testimony instead focuses on issues of material accuracy in view of comparable dealership rates and the balance of Ms. Heinemann's analysis.		Ford did not quote Ms. Heinemann but summarized several pages of testimony regarding the subject matter. This is an accurate summary. The testimony speaks for itself.	
23.	<p>"This testimony went un rebutted. Edward Stockton, Putnam's rebuttal expert, did not provide any opinions on the appropriate labor rate, the accuracy of Putnam's Submission, or conformance with 3065.2." (Ford Br. at 27:1-3; <i>see also</i> Ford's Proposed Findings ¶ 139; 31:23-25.)</p>	All of Mr. Stockton's testimony was rebuttal testimony. He was not retained nor required to reach affirmative opinions on the topics Ford suggests in its briefing.		This is Putnam's argument, but it is certainly not a misstatement of fact by Ford. Notably, Putnam still does not cite a single line of testimony in which Mr. Stockton states what he believes the appropriate labor rate is, that he believes the sold	

	<b><u>Ford's Statement and Citation</u></b>	<b><u>Putnam's Argument<sup>1</sup></u></b>	<b><u>Actual Citation/Statement</u></b>	<b><u>Putnam's Error</u></b>	<b><u>Additional Evidence In Support</u></b>
	<i>See generally</i> , E. Stockton: 9/26/23, 1159:5-1340:24.			hours to be accurate, or whether he believes the Submission complied with the law.	
24.	<p>"Specifically, Mr. Becic testified that, based on a review of a sample set of the repair lines, the sold hours did not match the time guide hours." (Ford Br. at 33:6-7; <i>see also</i> Ford's Proposed Findings 36: fn. 25.)</p> <p><i>See</i> Becic: 9/18/23, 109:18-110:8.</p>	<p>As Mr. Becic testified, he only looked at time guide hours at the direction of counsel and not at the time of the Putnam submission. Mr. Becic's review of the time guide hours was part of privileged communications that should not be considered because Putnam could not effectively examine Mr. Becic due to the asserted attorney-client privilege. (RT Vol. I, 110:9-112:5 [Becic].)</p> <p>Moreover, the testimony was "in most of the cases we looked at, you are not adhering exactly to the Ford time guide's hours." (RT Vol. I, 110:4-8 [Becic].) To the extent Putnam's sold hours did not exactly match Ford's factory guide, the sold hours were</p>	<p>Becic: 9/18/23, 109:18-110:8:</p> <p>Q. Okay. It was never explained to you that the Putnam dealership was endeavoring to use the factory guide, Ford's factory guide, for the sold hours? Mr. Kelso: Objection. Hearsay because it is ambiguous.</p> <p>Judge Van Rooyen: It is overruled. If you understand the question, you can answer it. Go ahead.</p> <p>The Witness: I do believe I did hear that explanation, yes.</p> <p>By Mr. Hughes:</p> <p>Q. Okay. And what is your response to that explanation? What do you think about it? A. I would say in most of the cases we looked at, you are not adhering exactly to the Ford time guide's hours.</p>	<p>Ford did not quote Mr. Becic and instead summarized his testimony. The testimony speaks for itself.</p>	

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		approximately equal to Ford's factory guide.			
25.	<p>"Half of the lines that had a rate of \$440 were associated with diagnostic work which is a flat-rate charge, regardless of the time it took to perform the diagnosis." (Ford Br. at 34:13-17; <i>see also</i> Ford's Proposed Findings ¶ 18; 5:22-24 and ¶ 64; 15:3-5 and ¶ 65; 15:15-17.)</p> <p>Kamenetsky: 9/27/23, 1468:24-1469:3 (diagnostics done on a flat-rate basis); Korenak: 9/24/23 [sic], 1429:5-13 (same); Heinemann: 9/25/23, 943:16-18 (relying on deposition testimony of Putnam service advisor).</p>	<p>The testimony from Mr. Kamenetsky states normally diagnostic is billed at 1 hour at \$440, however if it is simpler or more complicated, there is discretion to price more or less time.</p> <p>The testimony from Mr. Korenak is specific to the RO being discussed in the testimony (RO 10048).</p> <p>Ford's statement is further inconsistent with other record evidence. For example, Exhibit J- 3 shows diagnostics associated with 10251C, 10248D, 10244A, 10239A, and 10216A shows pricing for diagnostics other than one hour for \$440. (Exh. J-3 [B45].) These examples are consistent with Mr. Kamenetsky's testimony and inconsistent with the overgeneralization offered by Ford.</p>	<p>Korenak: 9/27/23: 1429:5-13:</p> <p>Q. And this is a diagnostic? A. Yeah, that would be diagnostic. Q. Diagnostics can be difficult and take a lot of time sometimes? A. They can. Q. This case they charge 440? A. Apparently. Q. Flat fee? A. Looks like it.</p> <p>Heinemann: 9/25/23, 943:16-18:</p> <p>A. But about 50 percent of those 440 rates that are implied by sale hours relate to diagnostic work where it is a flat rate charge.</p>	<p>Ford did not quote Mr. Kamenetsky and instead summarized his testimony. The testimony speaks for itself.</p>	

	<b><u>Ford's Statement and Citation</u></b>	<b><u>Putnam's Argument<sup>1</sup></u></b>	<b><u>Actual Citation/Statement</u></b>	<b><u>Putnam's Error</u></b>	<b><u>Additional Evidence In Support</u></b>
26.	<p>"For example, taken as a whole, there are 90.3 sales hours in the Submission, for a net labor charge of \$34,963. This is an average labor charge of \$387.19 when using sold hours. But, if we exclude diagnostic repairs, which are estimated to be about 25% of the repair lines, or 18 lines, that reduces the total hours by 18 hours and the total charges by \$7,920. The effect is to lower the labor rate to \$374.04. The difference may be even greater depending on the 90-day period selected. This \$13/hour difference is material given the volume of warranty repair work for which Ford pays Putnam in a year." (Ford Br. at 35: fn. 21.)</p>	<p>In addition to not being supported by citation, the statements are inaccurate because they include sold hours outside Putnam's original submission. It is unclear what time range of ROs Ford is relying on for its calculation. The calculations appear to also be based on extrapolation and not the actual ROs.</p> <p>Applying Ford's calculation to the actual submission ROs from Exhibit J-3 shows a different result:</p> <p>There are eight repairs with one sold hour for \$440 relied on by Ford from Putnam's submission. (See Ford Brief at 34:17-22 (referencing RO 10259A, 10206A, 10148A, RO 10118A, 10106C, 10094A, 10091A, 10036B).) Reducing the totals in the spreadsheet (sixth and tenth column) by 8 hours and \$3,520 (8 time</p>		<p>The citation was listed in the sentence before footnote 21, Heinemann: 9/25/23, 943:8-944:19.</p>	

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		\$440) reduces 46.8 hours to 38.8 and \$20,440.55 to \$16,920.55. Dividing \$16,920.55 by 38.8 hours would instead result in a \$436.10 (436.9664948...) labor rate—approximately 66 cents less than Putnam's requested rate. As a result, the difference is not material and is almost twenty times less than the difference as calculated by Ford (\$13/hour divided by \$0.66/hour for purposes of comparison).			
27.	"According to Mr. Kanouse, this rate cannot be entered into the CDK system and the sale total would have had to be manually entered into the system (as opposed to the final charge being automatically populated by CDK by multiplying hours by a set rate." (Ford Br. at 37:7-9; <i>see also</i> Ford's Proposed Findings ¶ 48; 11:8-11.)	The citation does not support Mr. Kanouse's described testimony. The cited testimony states in full: "Q. I want to draw your attention to repair order 10049. And I think that begins on Exhibit J7-488, which is B1792. A. Okay. Q. Line A is one of the repairs that Putnam Ford claims is a qualified repair for their warranty labor rate submission. I want to ask you about line A then." The			There was an error in the citation. 345:17-23 was supposed to be 349:4-351:11.



	<u>Ford's Statement and Citation</u>	<u>Putnam's Argument<sup>1</sup></u>	<u>Actual Citation/Statement</u>	<u>Putnam's Error</u>	<u>Additional Evidence In Support</u>
	Kanouse: 9/19/23, 345:17-23.	only word Mr. Kanouse states in the citation is "Okay" and only in response to the beginning of an RO in Exhibit J-7.			
28.	<p>"Putnam's CDK computer system is pre-programmed to calculates [sic] the customer charge from the sold hours for a given repair coded in its system and the default hourly rate the dealer sets." (Ford Br. at 37: fn. 26; <i>see also</i> Ford's Proposed Findings ¶11: fn. 11.)</p> <p>Kanouse: 9/19/23, 343:25-344:16, 465:14-17, 470:1-16.</p>	<p>The cited testimony from 343:25-344:16 does not discuss any pre-programmed calculation in CDK. The cited testimony from 465:14-17 describes that CDK can populate by parameters that are set up or defined (Mr. Kanouse does not describe pre-programmed calculations). The cited testimony from 470:1-16 disagrees with whether \$117.68 could be automatically displayed using actual hours. None of the cited testimony supports the conclusion Putnam's CDK computer system is pre-programmed to run the described calculation—none of Mr. Kanouse testimony could confirm if the parameters he described were in fact set up or defined.</p>	<p>Kanouse: 9/19/23, 343:25-344:16:</p> <p>Q. Does this show it is a repeating decimal of 442.2 followed by 16 digits that then continually repeat thereafter?</p> <p>A. Yes.</p> <p>Q. Mr. Kanouse, in your experience, does a labor rate of that make any sense?</p> <p>A. No.</p> <p>Q. Have you ever seen a labor rate like that before?</p> <p>A. No.</p> <p>Q. Can you put a labor rate that is a repeating decimal that starts a period of 16 repeating numbers at the hundredths into the CDK system?</p> <p>A. No.</p> <p>Q. Is there any way that the 3.4 sold hours is generating a</p>	<p>Ford did not quote Mr. Kanouse and instead summarized his testimony. The testimony speaks for itself.</p>	

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			<p>charge of 1503.52 to the customer? A. No, there is not.</p> <p><i>Id.</i> 465:14-17: Q. Are there - - how does CD - - does CDK populate parts of the RO by calculation? A. Unless it is overridden, yes, it would populate by the parameters that are set up or defined.</p> <p><i>Id.</i> 470:10-16: Q. Okay. But you said that the sold hours might have an automatic calculation and display it there. A. Sold hours do have an automatic calculation to display there. Q. You don't think actual hours could just do the same thing? A. No</p>		
29.	"These 'giant,' 'extreme' discrepancies between its sold hours and its ultimate technician hours indicated to Ford's witnesses what Mr. Putnam admitted; once	The "tinkering" in the quote concerns the price for labor and is unrelated to the statement by Ford concerning sold hours ("...once the repair was completed the technician	<p>Kamenetsky: 9/27/23, 1600:25-1601:3:</p> <p>Q. So to match a customer estimate, they are just tinkering with the 1503.52 to</p>	The tinkering issue has been previously addressed <i>infra</i> No. 1.	<p><i>See also</i> Kamenetsky: 9/27/23, 1598:5-1601:3 discussing manually overriding the dollar amount of labor</p> <p>Putnam: 9/25/23,</p>

	<b><u>Ford's Statement and Citation</u></b>	<b><u>Putnam's Argument<sup>1</sup></u></b>	<b><u>Actual Citation/Statement</u></b>	<b><u>Putnam's Error</u></b>	<b><u>Additional Evidence In Support</u></b>
	the repair was completed the technician manually change to sold hours to be much lower in order to give the appearance of a higher hourly rate.” (Ford Br. at 39:22-25; <i>see also</i> Ford's Proposed Findings ¶ 54; 13:6-8.)  Kamenetsky: 9/27/23, 1600:25-1601:3.	manually change to sold hours to be much lower in order to give the appearance of a higher hourly rate”). Ford's statement following the semicolon is unsupported by the citation.	try to get the rest of the repair order to work out? A. I believe so.		1136:6-1138:3 discussing how the math was done on repair orders
30.	“This comports with Mr. Putnam's admission to Ms. Murphy-Austin—the total charge to the customer, when considering actual hours, is competitive with the market.” (Ford Br. at 40:1-3.)  Murphy-Austin: 9/18/23, 191:22-192:16.	Ms. Murphy-Austin does not describe Mr. Putnam admitting any type of consideration of actual hours. As described by the testimony, Mr. Putnam said Putnam would be using a lower number of guide hours relative to those used elsewhere. No evidence shows the other dealers in the market price customer pay jobs using actual hours.	Murphy-Austin: 9/18/23, 191:22-192:16:  Q. So Ms. Murphy-Austin, we left off briefly talking about the conversation that you had with Putnam Ford about the rate. So I just want to break that down a little bit. What exactly did Putnam say about the rate? A. Yes. In my conversations with Kent and Al, and I - - expressed some concern about the 436-dollar labor rate that was proposed. They explained that the end price to the customer would be comparable to the	Ford did not quote Ms. Murphy-Austin and instead summarized her testimony. The testimony speaks for itself.	

	<u>Ford's Statement and Citation</u>	<u>Putnam's Argument<sup>1</sup></u>	<u>Actual Citation/Statement</u>	<u>Putnam's Error</u>	<u>Additional Evidence In Support</u>
			<p>surrounding dealers because the labor times that would be matched up with that higher rate - - the labor times would be lower which would then offset the higher labor rate and create a competitive price point in the market. So, in fact, the labor and the sold labor hours don't reflect reality.</p> <p>Q. Okay. And so - - so how could the labor time be lower?</p> <p>A. I am not sure. The dealer could be charging a lower labor time than what the job could take, and that could offset the higher labor rate.</p>		
31.	<p>"Even Mr. Stockton, Putnam's own expert, indicated that the repair orders were not reliable." (Ford Br. at 44:28- 45:3; <i>see also</i> Ford's Proposed Findings ¶ 197; 45:2-5.)</p> <p>Stockton: 9/26/23, 1296:12-21 (admitting to relying on the downstream data file over the accounting copies</p>	<p>Mr. Stockton does not testify the repair orders were not reliable. He testified the data file would have the "Most up-to-date information. There could be comebacks or additional encounters that I would expect to be captured in the downstream file. I wouldn't expect there to be major differences, but</p>	<p>Stockton: 9/26/23, 1296:12-21:</p> <p>Q. And you like a downstream - - a downstream data file better than the accounting copies that you had?</p> <p>A. Yes.</p> <p>Q. Because maybe things changed between these accounting copies and what</p>	<p>Ford did not quote Mr. Stockton and instead summarized his testimony. The testimony speaks for itself.</p>	<p><i>See also</i> Stockton: 9/26/23, 1294:15-19:</p> <p>Q. You were making sure the repair orders matched the data files?</p> <p>A. We Checked them. I think there may have been some small differences and we deferred to the file as a general matter, yes.</p>

	<b><u>Ford's Statement and Citation</u></b>	<b><u>Putnam's Argument<sup>1</sup></u></b>	<b><u>Actual Citation/Statement</u></b>	<b><u>Putnam's Error</u></b>	<b><u>Additional Evidence In Support</u></b>
	of the repair orders because it was more "up-to-date" than the actual repair orders).	that is a -- if there were differences, that is where I would expect them to be." (RT Vol. VI, 1296:21-1297:1.) Moreover, Mr. Stockton confirmed he and his staff checked the repair orders compared to the data file. (RT Vol. VI, 1294:7-19.) Duplicates were removed and only one minor correction as noted on Mr. Stockton's Tab 3, page 2 needed to be made. (RT Vol. VI, 1278:5-9; see also Exh. 40 – 045 [A839] (noting 1.27 was corrected to 1.25 for RO 10125 operation code 19S54B using Dealer Repair Order Invoices).)	would be in a downstream data file? A. Yes. Q. And the accounting copy may not actually have the most accurate information, right? A. Most up-to-date information.		
32.	"While reviewing repair orders with qualified repairs on various lines, Mr. Kanouse also noted the additional anomaly that actual technician hours were being designated as internal shop policy repairs, as opposed to customer-pay or warranty repairs, and	The citations describe the policy account (shop policy or account 77500) and payment of training to the 77500 account for shop policy. The "additional anomaly" as described by Ford is not supported by the cited testimony.	Kanouse: 9/19/23, 428:2-12:  A. Policy account for purposes of dealer accounting, a lot of times what that is used for, especially service department when you are talking about shop policy of 77500, that is used for times when maybe	Ford did not quote Mr. Kanouse and instead summarized his testimony. The testimony speaks for itself.	<i>See also</i> Kanouse: 9/19/23, 299:3-306:16 discussing the rate the technician was paid per hour and the math on a repair order.  <i>Id.</i> 311:21-312:19 discussing zero actual hour entry on a repair order

	<u>Ford's Statement and Citation</u>	<u>Putnam's Argument<sup>1</sup></u>	<u>Actual Citation/Statement</u>	<u>Putnam's Error</u>	<u>Additional Evidence In Support</u>
	<p>accounted for in accounts other than the expected cost of labor accounts at the bottom of the repairs orders. This apparently was a way to expense technician costs of labor other than a customer pay repair.” (Ford Br. at 46:7-12.)</p> <p>Kanouse: 9/19/23, 428:2-12, 457:16-17.</p>		<p>you make a bad repair and you have a come-back and you have to basically take care of the parts. A lot of times I expect a technician to take care of the labor on that if he did a bad repair or a misdiagnosis. If we damaged or broke something while in the shop, that's the kind of expense things that would go into a policy account.</p> <p><i>Id.</i> 457:16-17:</p> <p>A. Well, the accounting here says that it was paid to 77500, which is a shop policy expense.</p>		<p><i>Id.</i> 321:20-322:18 discussing the accuracy of the data presented on repair order 10239.</p>
33.	<p>“Although Putnam identified only 72 qualified repairs among the repair orders (there are 74 by Ford's count), these were buried among 1,673 individual repairs that had to be manually reviewed because of the extensive fraud and misrepresentations.” (Ford Br. at 55:11-14; <i>see also</i></p>	<p>The ROs supporting Putnam's requested rate were identified in the excel spreadsheet submitted therewith. (Exh. J-3 [B45].) Moreover, each of the qualified repair lines in the ROs were highlighted in green to make them stand out. (See, e.g., Exh. J-7 – 021 [B1325] (concerning RO 10277, line A).) The</p>	<p>Heinemann: 9/25/23, 914:14-16:</p> <p>Q. So how many repair lines were in total on these repair orders?</p> <p>A. 1,673.</p>	<p>Ford did not quote Mr. Heinemann and instead summarized his testimony. The testimony speaks for itself.</p>	

	<u>Ford's Statement and Citation</u>	<u>Putnam's Argument<sup>1</sup></u>	<u>Actual Citation/Statement</u>	<u>Putnam's Error</u>	<u>Additional Evidence In Support</u>
	<p>Ford's Proposed Findings ¶ 238; 54:3-4.)</p> <p>Heinemann: 9/25/23, 914:14-16.</p>	<p>qualified repairs relied on by Putnam were not "buried"—they were clearly identified.</p> <p>Ford's citation does not support its statement. The citation only identifies the number of repair lines in total. There is no reference to "extensive fraud."</p>			
34.	<p>"Neither Mr. Korenak nor Mr. Stockton analyzed the repair orders in any meaningful way. Mr. Korenak testified that he uses a software system that runs reports and pulls data into spreadsheets and allows for a "quick[]" analysis of qualified repairs. (Korenak: 9/27/23, 1359: 9-25.) After populating a spreadsheet, they "let the math do what it does." (<i>Id.</i> 1359:23-25; <i>see also id.</i> 1370:14- 1371:8.) Mr. Stockton relied on a data file prepared by Putnam that did not contain all of the same information as the</p>	<p>Ford's first reference ignores Mr. Korenak's testimony, "And then we look at the repair order to make sure that the spreadsheet and the repair order line up." (RT Vol. VII, 1359:20-22 [Korenak].) Similarly, Mr. Korenak testified, "Once we get to a point where we are looking at the specific qualified repair orders, it is a combination of eyeballs on the actual repair order and make sure everything lines up in the spreadsheet so that the two documents stay the same. The source document is always the repair orders."</p>	<p>Korenak: 9/27/23, 1359: 9-25:</p> <p>The Witness: Okay. The whole process simply goes, we will access the DMS, the dealer management system. . . . We build a spreadsheet from - - we turn - - we pull reports that we can build a spreadsheet that allows us to quickly analyze the entire data set and reduce the lines down in an efficient manner so that only the qualified remain. And then we look at the repair order to make sure that the spreadsheet and the repair order line up. And then we simply take the - - we</p>	<p>Ford did not quote Mr. Korenak or Mr. Stockton and instead summarized their testimony. Mr. Korenak did not analyze the Repair Orders; he just pulled the data and compared qualified repair orders to the RO, but did not look at the substance of the repair order or question it.</p> <p>Mr. Stockton admitted he could not read a repair order, and he relied</p>	



	<u>Ford's Statement and Citation</u>	<u>Putnam's Argument<sup>1</sup></u>	<u>Actual Citation/Statement</u>	<u>Putnam's Error</u>	<u>Additional Evidence In Support</u>
	<p>repair orders themselves. (Stockton: 9/26/23, 1297:5-1298:16.) He testified that he preferred the data file over the repair orders. (<i>Id.</i>, 1297:2-4.)” (Ford Br. at 55: fn. 36; <i>see also</i> Ford’s Proposed Findings 54: fn. 50.)</p>	<p>(RT Vol. VII, 1371:2-7 [Korenak].) Mr. Korenak and Frogdata utilized the ROs in a meaningful way.</p> <p>Moreover, while Mr. Stockton worked with the data file, he notes he and his staff “<b><u>did check them to the repair orders.</u></b> There were items that Mr. Kelso asked me about that I didn’t look for that, in my experience, I would expect to find in a certain place. And I was not seeing them.” (RT Vol. VI, 1297:18-21 [Stockton]; <i>see also</i> RT Vol. VI, 1298:10-14 (describing the sources he looked at were “[m]ainly the file. And the repair was a double-check to the file.”)) Mr. Stockton and his staff also utilized the ROs in a meaningful way.</p>	<p>simply take the hours and the dollars amount from the repair order, put it in the spreadsheet and let the math do what it does.</p> <p><i>Id.</i> 1370:14- 1371:8:</p> <p>Q. No, can you explain to us what the process was for creating this analysis? A. Yes. To create this, there is a series of reports that we would pull from the dealer management system. . . . Once we get to a point where we are looking at the specific qualified repair orders, it is a combination of eyeballs on the actual repair order and make sure everything lines up in the spreadsheet so that the two documents stay the same. The source document is always the repair orders. <b>That’s the truth of the matter, whatever is on the repair order.</b></p> <p>Stockton: 9/26/23, 1297:5-1298:16:</p>	<p>on a data file instead of the actual repair orders because he found it more reliable.</p>	

	<u>Ford's Statement and Citation</u>	<u>Putnam's Argument<sup>1</sup></u>	<u>Actual Citation/Statement</u>	<u>Putnam's Error</u>	<u>Additional Evidence In Support</u>
			<p>Judge Van Rooyen: I have a question as well. Sorry to interrupt, Mr. Kelso. So - - because I noticed when Mr. Kelso was asking you about some of the repair orders, including one instance where he is asking you for the sold and actual hours, it took you a rather long time to respond, and then also you weren't able to find the technician number and you weren't able to find the costs, et cetera. So I guess my question for you is, did you actually review the repair orders, or did you just go by this file largely in coming up with your report?</p> <p>The Witness: Primarily the work was to the file. We did check them to the repair orders. There were items that Mr. Kelso asked me about that I didn't look for that, in my experience, I would expect to find in a certain place. And I was not seeing them. It doesn't mean that it is not there, but just - -</p>		

	<u>Ford's Statement and Citation</u>	<u>Putnam's Argument<sup>1</sup></u>	<u>Actual Citation/Statement</u>	<u>Putnam's Error</u>	<u>Additional Evidence In Support</u>
			<p>Judge Van Rooyen: And to be fair, I have to be educated. I have spent now six days with these repair orders, and thanks to the efforts of both counsel, I can now read them. I was sitting there as they were asking you questions like, for those of you who are Harry Potter fans, I was like Hermoine sitting in the classroom wanting to say, "I know where it is, I know where it is." But - - so I, you know, spent six days. But that is why I was just curious, because it seems like you haven't - - to be fair, I don't want to put words in your mouth, but it seems like you haven't spent a lot of time with these repair orders. So I just wanted to understand what sources you were looking at. It sounds like mainly the file.</p> <p>The Witness: Mainly the file. And the repair was a double-check to the file. <b>But</b></p>		

	<u>Ford's Statement and Citation</u>	<u>Putnam's Argument<sup>1</sup></u>	<u>Actual Citation/Statement</u>	<u>Putnam's Error</u>	<u>Additional Evidence In Support</u>
			hierarchically, I would prefer the file to the repair order, given my understanding of how these records are maintained.		
35.	<p>"Additionally, California has an interest in 'conserving judicial resources and promoting judicial economy by minimizing repetitive litigation, preventing inconsistent judgments which undermine the integrity of the judicial system, and avoiding the harassment of parties through repeated litigation.'" (Ford Br. at 60:14-19.) <i>Meridian Fin. Servs., Inc. v. Phan</i> (2021) 67 Cal. App. 5th 657, 686–687, <i>review denied</i> (Nov. 10, 2021); <i>accord Ghaderi v. United Airlines, Inc.</i> (N.D. Cal. 2001) 136 F.Supp.2d 1041, 1043 ("Public policy favors avoiding waste of both litigants' and judicial resources").</p>	<p>Ford fails to identify <i>Meridian Fin. Servs., Inc. v. Phan</i> (2021) 67 Cal. App. 5th 657, 686–687, <i>review denied</i> (Nov. 10, 2021) is an issue preclusion case. Repeated litigation over the same issues is not an issue in this Protest. The statement of California's policy in the case is wholly inapplicable here.</p> <p>Similarly, <i>Ghaderi v. United Airlines, Inc.</i> (N.D. Cal. 2001) 136 F.Supp.2d 1041, 1043 is in the context of diversity of citizenship for purposes of federal diversity jurisdiction and is wholly inapplicable here.</p>		<p>Ford did not incorrectly cite or summarize the cases. Both cases affirm California's public policy in conserving judicial resources, promoting judicial economy, and minimizing repetitive litigation. Public Policy is the same, regardless of the specific issue before the court. Calling this a misrepresentation is inflammatory and incorrect.</p>	

	<u>Ford's Statement and Citation</u>	<u>Putnam's Argument<sup>1</sup></u>	<u>Actual Citation/Statement</u>	<u>Putnam's Error</u>	<u>Additional Evidence In Support</u>
36.	<p>Further, Ford's interpretation is consistent with California's policy interest in protecting consumers from unnecessarily high prices. (Ford Br. at 65:16-20; <i>see also</i> Ford's Proposed Findings ¶ 247; 6:11-15</p> <p><i>See, e.g., Josten v. Rite Aid Corp.</i> (S.D. Cal. Nov. 20, 2018) 2018 WL 6062415, at *5 (charging consumer higher prices violates public policy); <i>Smith v. State Farm Mut. Auto. Ins. Co.</i> (2001) 93 Cal. App. 4th 700, 719 ("Examples of unfair business practices include: charging a higher than normal rate for [a service].")</p>	<p>The <i>Josten</i> case concerns allegations where the defendant was alleged to have charged insurance customers a different and higher rate than cash-customers. The case was at the pleading stage and concerned different prices for insurance customers. The case does not support Ford's statement of policy.</p> <p>In addition, Ford removes the relevant context in its citation to <i>Smith</i> by using "[a service]" edit. The actual case describes something much for specific as the issue: "Examples of unfair business practices include: charging a higher than normal rate for copies of deposition transcripts (by a group of certified shorthand reporters), where the party receiving the original is being given an undisclosed discount as the result of an exclusive volume-discount contract with two insurance</p>		<p>Ford did not incorrectly cite or summarize the cases. Both cases affirm California's public policy in protecting consumers. Public Policy is the same, regardless of the specific issue before the court. Calling this a misrepresentation is inflammatory and incorrect.</p>	

	<u>Ford's Statement and Citation</u>	<u>Putnam's Argument<sup>1</sup></u>	<u>Actual Citation/Statement</u>	<u>Putnam's Error</u>	<u>Additional Evidence In Support</u>
		companies [citation] ..." ( <i>Smith v. State Farm Mut. Auto. Ins. Co.</i> (2001) 93 Cal. App. 4th 700, 719.)			
37.	<p>Reasonableness is a question of fact. (Ford Br. at 66:7-10; <i>see also</i> Ford's Proposed Findings ¶ 249; 56:23-26.)</p> <p><i>E.g., Great W. Distillery Prods. v. John A. Wathen Distillery Co.</i> (1937) 10 Cal. 2d 442, 446 ("What is a reasonable price is a question of fact dependent on the circumstances of each particular case."); <i>accord House v. Lala</i> (1960) 180 Cal. App. 2d 412, 418.</p>	<p>In <i>Great W. Distillery Prods.</i> The court is quoting directly from Civil Code section 1729 (4) inapplicable here: "This rule was adopted in the Uniform Sales Act and has been incorporated into our law by section 1729 (4) of the Civil Code, which provides as follows: 'Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. <u>What is a reasonable price is a question of fact dependent on the circumstances of each particular case.</u>'" (<i>Great W. Distillery Prods. v. John A. Wathen Distillery Co.</i> (1937) 10 Cal. 2d 442, 446 (emphasis added).)</p> <p>In <i>House v. Lala</i>, the court is similarly concerned with</p>		<p>Putnam's legal analysis is erroneous. Reasonableness is a fact question in all areas of the law. Plaintiff does not offer a single case showing that reasonableness is not a fact question under the Statute at issue. Calling this a misrepresentation is erroneous and inflammatory.</p>	

	<u>Ford's Statement and Citation</u>	<u>Putnam's Argument<sup>1</sup></u>	<u>Actual Citation/Statement</u>	<u>Putnam's Error</u>	<u>Additional Evidence In Support</u>
		Civil Code section 3391 subdivision (1) not applicable here: " <i>Cushing v. Levi</i> , 117 Cal.App. 94, at page 101 [3 P.2d 958] says: 'Adequate consideration,' as used in section 3391, subdivision 1, of the Civil Code, does not necessarily mean the highest price obtainable, but a price that is fair and reasonable under all the circumstances; it is always peculiarly a question of fact for the trial court to determine, in the light of all the facts and circumstances of each particular case.' " ( <i>House v. Lala</i> (1960) 180 Cal. App. 2d 412, 418.)			
38.	<p>"In fact, Kamenetsky testified that Putnam's rate for warranty-like, qualified, customer pay repairs was intentionally not priced to be competitive." (Ford Br. at 68:17-18.)</p> <p>Kamenetsky: 9/27/23, 1541:12-14.</p>	<p>No such intent is supported by the testimony. The cited testimony is as follows: "Q. Does that mean that you are not trying to price the qualified repairs competitively? A. Yes, I agree with that." Putnam is not considering other dealership's customer pay</p>	<p>Kamenetsky: 9/27/23, 1541:12-14:</p> <p>Q. Does that mean that you are not trying to price the qualified repairs competitively? A. Yes, I agree with that.</p>	<p>Ford did not quote Mr. Kamenetsky and instead summarized his testimony. The testimony speaks for itself.</p>	<p><i>See also</i> Kamenetsky: 9/27/23, 1541:15-1542:5:</p> <p>Q. And it is fair to say that warranty-like work, which is what you are trying to [price] with the qualified repairs, are not competitive, true? A. I understand the question. I think the context that I answered previously on the</p>



	<b><u>Ford's Statement and Citation</u></b>	<b><u>Putnam's Argument<sup>1</sup></u></b>	<b><u>Actual Citation/Statement</u></b>	<b><u>Putnam's Error</u></b>	<b><u>Additional Evidence In Support</u></b>
		rates with respect to warranty-like repairs; there is no intent to not price competitively. In fact, Ford's Proposed Findings paragraph 250 states the testimony accurately unlike Ford's Brief: "In fact, Mr. Kamenetsky testified that their labor rate was not priced to be 'competitive.'" (Ford's Proposed Findings ¶ 250; 57:8-9.)			maintenance competitive, I think I explained pretty well with competitive coupons that are given out or specials that are posted from third-party institutions. I don't think that we have tried to institute any kind of competitive repair versus any other Ford dealership. So I would separate those into two categories.

**VIA EMAIL**

New Motor Vehicle Board

Received  
December 30, 2021

**FILED**

New Motor Vehicle Board

Date: 12-30-21

By: GP

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ATTORNEYS FOR PROTESTANT

**STATE OF CALIFORNIA**

**NEW MOTOR VEHICLE BOARD**

In the Matter of the Protest of:

KPAUTO, LLC, dba PUTNAM FORD OF SAN  
MATEO,

Protestant,

v.

FORD MOTOR COMPANY,

Respondent.

**PROTEST NO: PR-2759-21**

**PROTEST**  
**[Vehicle Code Section 3065.4]**

Protestant, KPAuto, LLC, dba Putnam Ford of San Mateo, a California corporation, qualified to do business in California, through its attorneys, files this protest under the provisions of California Vehicle Code Section 3065.4 and alleges as follows:

1. Protestant is a new motor vehicle dealer selling Ford vehicles and parts, is duly licensed as a vehicle dealer by the State of California, and is located at 885 North San Mateo Drive, San Mateo, CA 94401; Protestant's telephone number is (650) 931-3124.

2. Respondent, Ford Motor Company, distributes Ford products and is the franchisor of Protestant.

1           3.       Protestant is represented in this matter by Law Offices of Gavin M. Hughes, whose  
2 address and telephone number are 3436 American River Drive, Suite 10, Sacramento, California 95864;  
3 (916) 900-8022.

4           4.       The terms of Protestant's Ford franchise obligate Protestant to provide warranty service  
5 on eligible Ford vehicles, for which Protestant is reimbursed in an amount determined by Respondent.

6           5.       Protestant's current warranty labor reimbursement rate is significantly below Protestant's  
7 effective labor rate charged to retail customers.

8           6.       Protestant submitted to Respondent a request for adjusted labor retail rate in compliance  
9 with the requirements of Vehicle Code section 3065.2 ("Request") on or about August 24, 2021.

10          7.       By letter dated October 26, 2021, Respondent advised Protestant it was denying the  
11 Request ("Denial") because the requested retail labor rate is "generally around double the rate being  
12 charged in the market by other dealers of any other brand." The Denial denied Putnam's requested labor  
13 rate because it is allegedly inaccurate or fraudulent. The Denial failed to request additional repair orders  
14 closed 30 days immediately preceding or 30 days immediately following the repair orders submitted  
15 with the Request.

16          8.       Respondent proposed an adjusted retail labor rate of \$220.00 per hour "which seems to  
17 be the most common customer pay rate your documentation shows in repairs where we see what appears  
18 to be valid documentation." Respondent's letter failed to provide sufficient indication for how this  
19 alternative rate is calculated, as required by Section 3065.2(d).

20          9.       Respondent failed to contest Protestant's Request within 30 days after receiving the  
21 Request. Vehicle Code section 3065.2 provides a "franchisor may contest to the franchisee the material  
22 accuracy of the retail labor rate or retail parts rate that was calculated by the franchisee under this section  
23 within 30 days after receiving notice from the franchisee." (Cal. Veh. Code § 3065.2, subd. (d)(1).) As  
24 a result of Respondent's failure to timely contest Protestant's Request, Protestant's requested retail labor  
25 rate should have taken effect on the 30th day after Respondent's receipt of the Request. (Cal. Veh. Code  
26 § 3065.2, subd. (e).)

27          10.       Protestant responded to the Denial letter by letter dated November 19, 2021, explaining  
28 Protestant's use of Respondent's time guide when performing customer paid repairs. Protestant's letter

1 also addressed the examples discussed in Respondent's October 26, 2021, letter.

2 11. Protestant uses a customer pay repair guide that is the same or similar to the guide used  
3 by Respondent in determining the amount of dealer reimbursement for each warranty repair. Respondent  
4 does not determine warranty reimbursement based on actual technician hours expended on each warranty  
5 repair. Respondent is unable to present evidence showing Putnam's Request to be materially inaccurate  
6 nor fraudulent.

7 12. The language from Section 3065.2 (h) is unambiguous regarding the franchisor's  
8 obligation to calculate rates as set forth therein: "When a franchisee submits for the establishment or  
9 modification of a retail labor rate, retail parts rate, or both, pursuant to this section, a franchisee's retail  
10 labor rate or retail parts rate *shall be calculated only using the method prescribed in this section*. When  
11 a franchisee submits for the establishment or modification of a retail labor rate, retail parts rate, or both,  
12 pursuant to this section, a *franchisor shall not use, or require a franchisee to use, any other method*,  
13 including, but not limited to, any of the following[.]" (Cal. Veh. Code § 3065.2, subd. (h) (emphasis  
14 added.))

15 13. In its November 19, 2021, letter, Protestant explained its customer pay repair guide is  
16 reasonable and also consistent with Ford's guide for warranty repair. Protestant's letter also pointed to  
17 Respondent's deviations from Vehicle Code section 3065.2 as set forth in the Denial letter.

18 14. Respondent did not reply to Protestant's November 19 letter.

19 15. Respondent's conduct demonstrates willful disregard for the specific requirements of  
20 Section 3065.2.

21 Protestant and its attorneys desire to appear before the Board and/or its designated hearing officer  
22 for the purpose of presenting oral and documentary evidence concerning the matters herein alleged.  
23 Protestant estimates the hearing in this matter will take five (5) days to complete.

24 WHEREFORE, Protestant prays as follows:

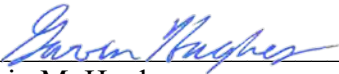
25 1. That the Board sustain this protest and order Respondent to immediately begin providing  
26 Protestant the warranty labor reimbursement rate requested.

27 2. That the Board order Respondent compensate Protestant for the difference between the  
28 requested labor reimbursement rate and the current rate, effective as of September 23, 2021.

3. That a pre-hearing conference be set and the parties notified thereof.
4. That Protestant be awarded such other and further relief as the Board deems just and proper.

Dated: December 30, 2021

LAW OFFICES OF  
GAVIN M. HUGHES

By   
Gavin M. Hughes  
Robert A. Mayville, Jr.  
Attorneys for Protestant

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I declare that on December 30, 2021, I caused to be served a true and complete copy of:

***KPAuto, LLC, dba Putnam Ford of San Mateo***

**Ford Motor Company**

CT Corporation System  
330 N Brand Blvd., Suite 700  
Glendale, CA 91203  
Ford Motor Company's California Agent for Service of Process

Executed this 30 December 2021 Sacramento, California.

Robert Mayville, Jr.  
Robert A. Mayville, Jr.