

VIA EMAIL

New Motor Vehicle Board

Received
1-10-25

FILED

New Motor Vehicle Board

Date: 1-10-25

By: am

1 Steven M. Kelso (Colorado Bar No. 29099)
2 April C. Connally (Colorado Bar No. 53464)
3 H. Camille Papini-Chapla (California Bar No. 282893)
4 Greenberg Traurig, LLP
5 1144 15th Street, Suite 3300
6 Denver, CO 80202
7 Telephone: 303.572.6500
8 Facsimile: 303.572.6540
9 Email: kelsos@gtlaw.com
10 april.connally@gtlaw.com
11 papinichapla@gtlaw.com

12 Attorneys for Respondent
13 FORD MOTOR COMPANY

14 STATE OF CALIFORNIA
15
16 NEW MOTOR VEHICLE BOARD

17 In the Matter of the Protest of
18 KPAUTO, LLC, dba PUTNAM FORD OF SAN
19 MATEO,
20
21 Protestant,
22 v.
23 FORD MOTOR COMPANY,
24 Respondent.

Protest No. PR-2826-23

FORD MOTOR COMPANY'S POST-
HEARING OPENING BRIEF

TABLE OF CONTENTS

1		
2	Introduction.....	1
3	Facts in Evidence	3
4	I. Background of the Parties.....	3
5	II. The Ford SSA and Warranty Manual	4
6	III. Putnam Ford’s Labor Rate Protest for \$436.76 per hour.....	6
7	IV. The Warranty Study and Audit.....	7
8	A. Ford’s Audit Process.....	7
9	B. The Auditor: John Owens	8
10	C. The Allegation that Putnam Ford Submitted False Claims for Warranty	
11	Repairs Performed at an Unauthorized Location.....	9
12	D. The Putnam Ford Warranty Study	10
13	E. Mr. Owens Conducts a Warranty Audit	13
14	F. The Results of the Audit	15
15	G. Mr. Owens’ Decision Was Based Solely on Putnam Ford’s False	
16	Practices	19
17	H. Putnam Ford’s Insistence It Was Selected for an Audit in a Retaliatory	
18	Manner Is Based on Nothing More Than Speculation.....	21
19	Procedural History	23
20	Relevant Law	23
21	Argument	24
22	I. Ford Complied with Section 3065(e).....	24
23	A. Ford Properly Charged Back False Warranty Claims for Repairs	
24	Performed at an Unauthorized Location	25
25	i. The Disallowed Claims Were False Because They Erroneously	
26	and Misleadingly Certified that the Repairs Were Performed at	
27	an Authorized Location.....	26
28		

1	ii.	Putnam Ford’s Invented Justification of Limited Service	
2		Capacity Is Irrelevant.....	30
3	iii.	Putnam Ford’s Invented Justification is Not Supported by the	
4		Evidence.....	30
5	iv.	The Justification Has Limited Value Even if Correct.....	33
6	B.	Ford Satisfied all Procedural and Administrative Requirements of	
7		Section 3065(e)(3)	34
8	C.	The Audit was Not Retaliatory	35
9	i.	Mr. Owens Selected Putnam Ford for an Audit Because of	
10		Evidence of False Claims Discovered During the Warranty	
11		Study	36
12	ii.	There is No Evidence that the Audit Was Retaliatory	37
13	D.	Impermissible Invasion of the Attorney Client Privilege	38
14	i.	California Law Unequivocally Rejects Drawing Inferences	
15		from Privilege Objections.....	38
16	ii.	Putnam Ford Has Actively Stated It Wants the Board to Draw	
17		an Inference from the Invocation of Privilege	40
18	iii.	Putnam’s Belated Invocation of the Crime Fraud Exception	
19		Has No Application.....	41
20	II.	The Board Cannot and Should Not Consider Putnam Ford’s Belated Section	
21		3065.2 Claim for Bad Faith	42
22	A.	The Board Has Narrow Jurisdiction That Does Not Encompass a	
23		Section 3065.2 Claim Presented In a Section 3065 Protest.....	43
24	B.	A Section 3065.2 Claim is Precluded	45
25	C.	Putnam Ford May Not Raise a New Claim During a Hearing	46
26	D.	Evidence to Be Excluded	48
27	III.	The Record Shows Ford Acted in Good Faith Responding to Putnam Ford’s	
28		Ever-Changing Relocation Requests	48

1	A.	The Authorized Location Was Approved as a Temporary Location.....	49
2	B.	Putnam Ford Blew the May 2022 Deadline and Never Submitted a	
3		Written Relocation Request	50
4	C.	Putnam Ford Violates the SSA and Warranty Manual and Tries to	
5		Cover Its Tracks	51
6	D.	Putnam Ford’s Multiple Relocation Requests	52
7	i.	Written Request 1: Satellite Service at the Barn.....	52
8	ii.	Written Request 2: Relocation and Satellite Service at	
9		Bayswater.....	53
10	iii.	“Request” 3: Mr. Putnam Attempts to Get a Ford Entry-Level	
11		Employee to Add the Nissan Facility as Part of the SSA	
12		Renewal Paperwork	54
13	iv.	Written Request 4: Complete Relocation to 925 Bayswater	54
14	v.	Written Request 5: Relocation to Nissan Facility.....	55
15	E.	The Facts Reveal Ford’s Good Faith and Putnam Ford’s True Nature	56
16		Conclusion	56

TABLE OF AUTHORITIES

Page(s)

State Cases

Bradshaw v. Park

(1994) 29 Cal.App.4th 1267 [34 Cal.Rptr.2d 872]43

Carroll v. Commission on Teacher Credentialing

(2020) 56 Cal.App.5th 365[270 Cal.Rptr.3d 448]39, 40

County of Kern v. Alta Sierra Holistic Exchange Service

(2020) 46 Cal.App.5th 82 [259 Cal.Rptr.3d 563]28

Cummings v. Stanley

(2009) 177 Cal.App.4th 493, [99 Cal.Rptr.3d 284]26, 35

Farnum v. Iris Biotechnologies, Inc.

(2022) 86 Cal.App.5th. 602 [302 Cal.Rptr.3d 584]27

Garcia v. Roberts

(2009) 173 Cal.App.4th 900 [93 Cal.Rptr.3d 286]46, 47

Hardin Oldsmobile v. New Motor Vehicle Bd.

(1997) 52 Cal.App.4th 585 [60 Cal.Rptr.2d 583], *as modified on denial of reh'g*

(Feb. 28, 1997)43, 44

Howitson v. Evans Hotels, LLC

(2022) 81 Cal.App.5th 475 [297 Cal.Rptr.3d 181]45, 46

LaCour v. Marshalls of California, LLC

(2023) 94 Cal.App.5th 1172 [313 Cal.Rptr.3d 77]45

McHugh v. Santa Monica Rent Control Bd.

(1989) 49 Cal.3d 348 [261 Cal.Rptr. 318]43

People v. Hughes

(Cal. Ct. App. May 16, 2013) No. F061613, 2013 WL 210341426

1	<i>State Farm Fire & Cas. Co. v. Superior Ct.</i>	
2	(1997) 54 Cal.App.4th 625 [62 Cal.Rptr.2d 834], <i>as modified</i> (May 1, 1997)	41
3	<i>Voices of the Wetlands v. State Water Resources Control Bd.</i>	
4	(2011) 52 Cal.4th 499, [128 Cal.Rptr.3d 658, 257 P.3d 81].....	26, 35
5		
6	State Statutes	
7	Cal. Evid. Code, § 913	38, 39
8	Cal. Evid. Code, § 913(a).....	39
9	Cal. Gov. Code, § 11513.....	38
10	Cal. Gov. Code, § 11513(c)	39
11	Cal. Gov. Code, § 11513(e)	39
12	Cal. Gov. Code, § 17726.....	44
13	Cal. Veh. Code, §§ 3000 <i>et seq.</i>	44
14	Cal. Veh. Code, § 3050(c)	30, 42, 44, 45
15	Cal. Veh. Code, § 3065	1, 2, 23, 25, 26, 30, 32, 37, 42, 45, 56
16	Cal. Veh. Code, § 3065(e)	24, 30, 45
17	Cal. Veh. Code, § 3065(e)(1).....	2, 23, 24, 35
18	Cal. Veh. Code, § 3065(e)(2).....	1, 24, 26, 27, 28, 30
19	Cal. Veh. Code, § 3065(e)(3).....	24, 34, 35
20	Cal. Veh. Code, § 3065(e)(5).....	23, 24
21	Cal. Veh. Code, § 3065(e)(6).....	24, 30
22	Cal. Veh. Code, § 3065.2	2, 42, 44, 45, 46
23	Cal. Veh. Code, § 3065.2(i)(2)(D).....	23, 42, 44, 45, 46, 48
24	Cal. Veh. Code, 3065.2(i)(2)(G).....	23, 42
25	Cal. Veh. Code, § 3065.4	23, 44
26	Cal. Veh. Code, § 3065.4(a)	44, 46
27	Constitutional Provisions	
28	Cal. Const., art. VI, § 1	43

1	Other Authorities	
2	29B pt. 3A West's Ann. Evid. Code (2009 ed.)	40
3	Assem. Com. on Judiciary, com. on Evid. Code, § 913	40
4	False, Black's Law Dictionary (12th ed 2024)	26
5	Retaliation, Black's Law Dictionary (12th ed. 2024)	35

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

INTRODUCTION

The key fact upon which this protest turns is stipulated: KP Auto, LLC dba Putnam Ford of San Mateo (“Putnam Ford”) performed every warranty repair at issue at an unauthorized location. It is also undisputed that every time Putnam Ford submitted a warranty claim, it certified that it complied with Ford’s Warranty and Policy Manual (“Warranty Manual”). The Warranty Manual unequivocally requires that all warranty work be performed at an authorized location and, as such, every single disallowed claim contained a false certification and was false under California law. Ford warranty auditor, Jon Owens learned of this practice, investigated, conducted a warranty audit, and properly charged back \$502,821.56 for false warranty claims.

Having been caught using a Nissan dealership to perform Ford warranty work and submitting reimbursements for hundreds of false warranty claims, Putnam Ford filed this protest. Putnam Ford vaguely insists that the claims are not false, but the central core of its argument is that Ford selected Putnam Ford for an audit in a punitive, retaliatory, and unfairly discriminatory manner in response to Putnam Ford’s 2021 labor rate request and subsequent protest (“Labor Rate Protest”) in violation of California Vehicle Code Section 3065 (“Section 3065”). Putnam Ford’s Section 3065 protest has no merit.

Ford complied with Section 3065(e)(2), because it may disallow previously approved claims if they are false or fraudulent and subject to certain procedural requirements. Here, every disallowed claim was false because performing a repair at an unauthorized location violates the Warranty Manual and the Sales and Service Agreement (“SSA”). Putnam Ford not only falsely certified that it complied with the Warranty Manual every time it submitted a warranty claim, but it falsely included the address at which it was authorized to do business on every claim, falsely representing it had complied with the SSA. Ford also fulfilled the procedural requirements of Section 3065. Because Putnam Ford’s actions are, under any definition, “false,” Putnam Ford functionally urges the Board to ignore the plain language of Section 3065 and create a justification exception to the doctrine of falsity. Specifically, Putnam Ford seeks to excuse its use of the Nissan of Burlingame facility, including an attached location called the “Barn,” on the grounds that it needed additional service capacity. This argument is legally irrelevant. Further, the facts do not support its application, as Putnam Ford had other options,

1 consistent with the Warranty Manual and SSA, to increase service capacity. Instead, it chose to violate
2 the SSA and Warranty Manual.

3 Ford also complied with Section 3065(e)(1) because it had a reasonable, non-retaliatory basis
4 for selecting Putnam Ford for an audit. Ford obtained evidence Putnam Ford was performing warranty
5 repairs at an unauthorized location. Jon Owens thoroughly investigated this allegation remotely (which
6 is not an audit). After substantiating the allegation, he traveled to the dealership and conducted a
7 warranty study (which is not an audit). Based on the evidence and his finding, he appropriately decided
8 to then initiate and conduct a warranty audit. Putnam Ford's speculation that Ford used the audit to
9 retaliate for the Labor Rate Protest is wholly unsubstantiated by the facts. Putnam Ford was selected
10 for an audit because of its own inappropriate use of an unauthorized location for warranty repairs. In
11 the absence of evidence to support their theory, Putnam Ford urges the Board to violate California law
12 and draw a negative inference that the audit was retaliatory because Ford has properly invoked attorney
13 client privilege regarding certain issues. This tactic defies credulity and should be squarely rejected.

14 Notwithstanding its lack of fact-based support for its Section 3065 protest, Putnam Ford
15 belatedly alleges bad faith under California Vehicle Code Section 3065.2 ("Section 3065.2"). The
16 Board may not hear and decide Putnam Ford's Section 3065.2 claim that Ford acted in bad faith by
17 not approving its relocation requests. First, the Board lacks jurisdiction to hear and decide a Section
18 3065.2 claim in a Section 3065 protest. Second, the claim is precluded because it could have been
19 raised in the Labor Rate Protest. Third, Putnam Ford did not timely present this allegation to the Board,
20 raising it for the first time in its Prehearing Brief. But even if the Board hears and decides the Section
21 3065.2 claim, the record resoundingly shows that Ford, at all times, acted in good faith responding to
22 Putnam Ford's constantly changing relocation requests. Putnam Ford's bad faith theory is nothing
23 more than a distraction from issues properly before the Board.

24 Ford respectfully requests that the Board overrule Putnam Ford's protest and find that Ford
25 met its obligations under Section 3065. It further requests that the Board decline to consider arguments
26 raised under Section 3065.2, or, alternatively, overrule the protest to the extent it alleges Ford violated
27 Section 3065.2. Although the Board need not reach this issue of good faith, it if does, it should hold
28 that Ford acted in good faith.

1 **FACTS IN EVIDENCE**

2 **I. BACKGROUND OF THE PARTIES**

3 On January 27, 2021, Ford and Putnam Ford entered into the SSA, pursuant to which Putnam
4 Ford operates as a Ford new motor vehicle dealer. (Ex. J-01.) At all times relevant to this protest,
5 Putnam Ford's authorized location was at 885 N. San Mateo Drive, San Mateo, California
6 ("Authorized Location"). (Ex. J-02.) Kent Putnam and Al Vasquez are owners of Putnam Ford, and
7 Mr. Vasquez works as the General Manager of Putnam Ford. (Ex. R-331-006; Ex. R-332-006.) Andrey
8 Kamenetsky is the group operations manager and CFO of Putnam Automotive Group. (Kamenetsky:
9 8/12/24, 229:12-14.)

10 At all relevant times, Nissan of Burlingame operated at 101 California Drive, Burlingame,
11 California ("Nissan Facility"). (Ex. R-326-006, Nissan PMK Dep. 23:4-7.) Included with this property
12 are some service stalls, somewhat separated from the rest of the Nissan Facility, colloquially referred
13 to as the "Barn." (*Id.*) Putnam Ford, through Mr. Putnam and Mr. Vasquez, intentionally decided to
14 use the Nissan Facility, including the Barn for Putnam Ford service work as early as June 2021.
15 (Vasquez: 8/8/24, 81:5-10.) This included using the Nissan Facility for warranty repair work from at
16 least 2021 through 2023. (*See* Ex. R-336-010; Ex. J-02.)

17 Mr. Putnam admitted that the Barn is not an authorized location of Ford; it is a Nissan facility.
18 (Ex. R-327-012 (testimony of K. Putnam, Labor Rate Protest (9/25/23) 1073:4-16).) He also
19 acknowledged that Nissan required that its authorized locations be used exclusively for Nissan
20 operations. (*Id.* 1073:25-1074:3.)¹ It is "absolutely" unusual for a dealer to service vehicles at an
21 unapproved location. (Swann: 9/21/23, 808:2-7.)

22
23 ¹ Mr. Putnam apparently did not want Nissan to know that Putnam Ford was using the Barn for Ford
24 service. When Mr. Vasquez knew that Nissan executives were coming to the Nissan Facility for an
25 inspection, Mr. Vasquez told the Ford service manager, David Martinez, to close the Barn doors,
26 remove all the Ford vehicles out of the Barn, and assure that all Ford technicians were out of sight;
27 Mr. Martinez thought this was "totally abnormal." (Martinez: 9/20/23, 763:6-764:15, 767:20-768:14;
28 Protest No. PR-2759-21 Ex. X-001 (text message sent to Mr. Martinez to remove the Ford employees
from the Barn due to an upcoming Nissan visit).) Testimony from September 2023 is from the Labor
Rate Protest Hearing. During the instant Hearing, ALJ Nelsen granted Ford's oral motion for the Board
to take official notice of testimony and evidence from the Labor Rate Protest Hearing. (Hr'g Tr.:
8/13/24, 195:17-196:5.) All cited testimony will be attached as Attachment 3.

II. THE FORD SSA AND WARRANTY MANUAL

The SSA governs where a Ford new motor vehicle dealer may operate. Pursuant Paragraph 5 of the SSA, “[t]he Dealer shall establish and maintain at the DEALERSHIP LOCATION approved by the Company DEALERSHIP FACILITIES of satisfactory appearance and condition and adequate to meet the Dealer’s responsibilities under this agreement.” (Ex. J-01-020, ¶ 5(a) (“Locations and Facilities”) (capitalization in original).)² “DEALERSHIP FACILITIES” is defined as “the land areas, buildings and improvements established at the DEALERSHIP LOCATION in accordance with the provisions of paragraph 5 of this agreement.” (Ex. J-01-014, ¶ 1(l) (capitalization in original).) A dealer

[S]hall not move or substantially modify or change the usage of any of the DEALERSHIP LOCATION or FACILITIES for COMPANY PRODUCTS, nor shall the Dealer . . . **directly or indirectly establish 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.

(Ex. J-01-020, ¶ 5(c) (emphasis added) (capitalization in original).) “COMPANY PRODUCTS” means

(1) new passenger cars, (2) new trucks and chassis, . . . (3) parts and accessories therefor, as from time to time are offered for sale by the Company to all authorized Ford dealers as such for resale, plus such other products as may be offered for sale by the Company to the Dealer from time to time.

(Ex. J-01-013, ¶ 1(a).) Melissa Hughes, a Ford Sales and Performance Manager, testified that any vehicle that is purchased as a new vehicle, regardless of when it was purchased or the condition of the vehicle at the time of service is considered a new vehicle and, therefore, a company product. (Hughes: 8/15/24, 129:1-3 164:25-165:17.)

In addition to an obligation to adhere to the terms of the SSA, the Dealer is required to perform warranty service on Company Products in accordance with the Warranty Manual. (Ex. J-01-019, ¶ 4(b)(1).) The SSA obligated Putnam Ford to comply with the Warranty Manual. (Ex. J-01-017, 019,

² Some words and phrases are defined terms in the SSA, and the definitions are located in Section 1 of the SSA. (See Ex. J-01-013 to 015.)

1 020, ¶¶ 2(i), 3(f) ¶ 4(b)(4).)³ Specifically, in the SSA, Ford and Putnam Ford agreed that Putnam Ford
2 “shall submit claims to [Ford] for reimbursement for the parts and labor used in performing warranty
3 . . . in accordance with the provisions of the Warranty Manual” (Ex. J-01-020, ¶ 4(b)(4).) The
4 Warranty Manual requires, among other things, that “**Warranty repairs must be performed at an**
5 **authorized Ford or Lincoln dealership.**” (Ex. J-03-006, § 1.1.03 (emphasis added).)

6 Ford has the right to audit warranty claims. (See Ex. J-03-0185, § 7.3.00.) According to the
7 Warranty Manual:

8 **7.3.03 FALSE PRACTICES**

9 The submission of false claims to the Company violates [the dealer’s] Sales and
10 Service Agreement(s) and is a sufficiently substantial breach of faith between the
11 Company and the dealer to warrant termination. . . .

12 The Company may elect to conduct an audit for any Dealer. This action may be
13 taken when allegations of improper warranty practices have been made.

14 The following list contains examples of False Claim Categories, but is not all
15 inclusive:

16 ☐ The knowing submission of claims with omissions of material facts or substantial
17 violations of program requirements.

18

19 ☐ Work not performed as claimed. . . .

20 (Ex. J-03-186.)

21 The Manual also bestows authority on the Dealer Principal/Owner Operator to submit warranty
22 claims and provides the following information regarding the certification of every warranty claim:

23 **Important:** . . . [T]he authorization to submit [a warranty claim] is based on
24 knowledge and compliance with the following statement:

25 **“I certify that the information on this claim is accurate and, unless shown, the**
26 **services were performed at no charge to the owner. To my knowledge, this**
27 **repair contains no parts repaired or replaced that are connected in any way**
28 **with any accident, negligence or abuse and is compliant with Ford Warranty**
& Policy.”

³ Mr. Vazquez admitted Putnam Ford is required to abide by Ford’s Warranty Manual. (Vasquez: 8/12/24, 54:8-11.)

1 In practice, submission of a repair to Ford Motor Company for payment
2 consideration signifies confirmation by the Dealer Principal or delegate that the
repair conforms to the statement above.

3 (Ex. J-03-006 to 007, § 1.1.04 (emphasis in original).)

4 **III. PUTNAM FORD’S LABOR RATE PROTEST FOR \$436.76 PER HOUR**

5 On August 24, 2021, Putnam Ford submitted to Ford a request to increase its warranty labor
6 rate. (Ex. R-336-014 (Labor Rate Protest Decision).) Putnam Ford represented to Ford that its retail
7 labor rate was \$436.76. (*Id.*) Ford denied the request, finding the represented rate was materially
8 inaccurate or fraudulent. (Ex. R-336-017 to 021.) Putnam Ford filed the Labor Rate Protest over this
9 denial in December 2021. (Ex. R-336-007, 021.)

10 In an order dated June 28, 2024, the Board overruled the Labor Rate Protest. (Ex. R-336-002,
11 055.) The Board found Putnam Ford’s submission and determination of its retail labor rate of \$436.76
12 per hour was materially inaccurate. (Ex. R-336-048.) In reaching its conclusions, the Board expressly
13 determined that the testimony of Ford witnesses John Becic, Allen Kanouse, and Mike Sweis was
14 credible. (*Id.*) It made no such finding regarding the credibility of the Putnam Ford witnesses,
15 including Mr. Putnam and Mr. Kamanetsky. (*See generally id.*) The Board held that there were
16 numerous inconsistencies, discrepancies, and irregularities in Putnam Ford’s warranty labor rate
17 submission to Ford, which included “the impossible hourly rates that could not plausibly be entered
18 into the repair order system; the large discrepancies between actual hours and sold hours; customer
19 labor charges associated with zero sold or actual hours; and the presence of flat rate charges.” (Ex. R-
20 336-048.) While the Board declined to reach the issue of fraud as unnecessary to its decision, it
21 expressly found that fraud was “one possible inference that could be drawn from the evidence.” (Ex.
22 R-336-052.)

23 Additionally, the Board affirmed the Administrative Law Judge’s order granting Ford’s motion
24 of sanctions against Putnam Ford for failure to produce documents relating to the location of repairs
25 during discovery. (Ex. R-336-010.) As a sanction, the Board entered a finding of fact that some of the
26 repairs in the submission for the warranty labor rate increase were performed at a location other than
27 Putnam Ford’s Authorized Location. (*Id.*)

1 **IV. THE WARRANTY STUDY AND AUDIT**

2 Putnam Ford submits warranty claims to Ford so it can be paid for the warranty repairs that it
3 performs on new Ford vehicles under warranty. (Vasquez: 8/12/24, 54:4-7.) Mr. Vazquez agreed
4 Putnam Ford is required to abide by Ford's Warranty Manual. (*Id.* 54:8-11.) Pursuant to the Warranty
5 Manual, Ford may conduct a warranty audit based on an allegation of false practices. (Ex. J-03-186,
6 § 7.3.03 ("The Company may elect to conduct an audit for any Dealer. This action may be taken when
7 allegations of improper warranty practices have been made.").)

8 **A. Ford's Audit Process**

9 Ford has three different types of warranty audits: Phase 3 audits, a required follow-up audit,
10 and an allegation or warranty study audit. (Owens: 8/6/24, 75:10-20.) A Phase 3 audit occurs as part
11 of a three-phase process relating to warranty scores and involves consulting with the dealership. (*Id.*
12 76:22-77:10.) Follow-up audits are mandatory audits that occur between seven and 18 months after
13 Ford conducts an audit and identifies a false finding. (*Id.* 76:11-21.) Allegation audits, which is the
14 type of audit at issue here, begin with a report, or allegation, to Ford of improper warranty practices
15 at a dealership. (*Id.* 81:19-23.) Allegations can come from customers, dealership employees, or Ford
16 corporate employees. (*Id.* 82:23-83:4.) Allegation audits make up approximately half of the work of
17 the Global Warranty Team. (*Id.* 86:18-87:2.) Ford gives allegation audits top priority because it takes
18 allegations of false claims very seriously. (*Id.* 83:7-14.)

19 When the Global Warranty Team receives an allegation, it enters the allegation into a tracker
20 and assigns an auditor to perform an initial investigation. (*Id.* 81:23-82:1, 84:1-2.)

21 The assigned auditor then investigates the allegation remotely by reviewing the information
22 provided and any other potential false claims at the dealership. (*Id.* 84:5-11.) An allegation
23 investigation is **not** an audit because it is a preliminary investigation only and Ford cannot charge back
24 a claim at this phase. (*Id.* 85:2-12.) If the auditor is unable to substantiate the allegation or unable to
25 identify any potential false claims, the auditor closes the allegation and takes no further action. (*Id.*
26 84:23-25.)

27 If the auditor substantiates the allegation, the auditor will proceed to a warranty study. (*Id.*
28 85:13-15.) The auditor may perform the study remotely or at the dealership and review select repair

1 orders (“ROs”) and other relevant documents to evaluate the allegation. (*Id.* 85:17-86:7.) A warranty
2 study is **not** an audit; at this stage, Ford will not perform charge-backs even if it identifies false claims.
3 (*Id.* 86:8-14.) If the auditor does not identify any false claims, the warranty study is closed out as a
4 consulting action, and no audit is conducted. (*Id.* 86:15-17.)

5 If the auditor finds evidence of false claims during the warranty study, the auditor may decide
6 to conduct a warranty audit. (*Id.* 86:13-15.) The warranty audit begins with a request of all the ROs to
7 review. (*Id.* 133:19-20.) The auditor will then review each individual RO to ensure that the repair was
8 performed properly, the technician followed the service publications, and the technician performed
9 the repair in accordance with the Warranty Manual requirements. (*Id.* 133:20-134:1.) If analysis of an
10 RO demonstrates sufficient failings, the auditor writes the warranty claim up as a disallowance and
11 schedules it for a charge-back. The auditor prepares a disallowance summary and conducts a claims
12 review meeting with the dealer at which the auditor reviews every disallowance and explains the basis
13 for the charge-back. (*Id.* 216:5-11.)

14 Ford’s warranty auditors belong to the Global Warranty Operations group.⁴ (*Id.* 73:8-14.)
15 Global Warranty Operations is not connected with the Ford team that handles labor rate requests. (*Id.*
16 73:15-21.) Mr. Owens is not aware of any employees in the warranty labor rate group asking Global
17 Warranty Operations to audit a dealer because they were displeased with the dealer. (*Id.* 74:6-75:9.)

18 **B. The Auditor: John Owens**

19 During the relevant period, Sharita Crawford was the manager of the Global Warranty
20 Operations group, and she was responsible for assigning allegations for investigations to Ford auditors.
21 (*Id.* 84:2-6.) She assigned the Putnam Ford allegation to Mr. Owens. (*Id.* 87:20-24.) Mr. Owens
22 selected Putnam Ford for an audit, performed the audit, and testified at the Hearing over the course of
23 two days. He is currently employed at Ford as a warranty auditor (*id.* 65:8-9) and has worked for Ford
24 since January 2001 (*id.* 65:6-7). Mr. Owens graduated from the FORD ASSET Program, became
25 certified in bumper-to-bumper automotive repair, and proceeded to work as a technician for an
26

27
28 ⁴ At the Hearing, Mr. Owens used the phrases “Global Warranty Team” and “Global Warranty Operations Group” interchangeably.

1 authorized Ford dealer. (*Id.* 65:23-67:2.) After working as a technician, he joined Ford as a Service
2 Engineer working on Ford’s technical service hotline. (*Id.* 68:9-69:10.) He worked as a service
3 engineer for 6.5 years and then became a field service engineer for 8.5 years, during which time he
4 provided in-person, technical support to dealerships having trouble repairing a Ford vehicle. (*Id.*
5 69:14-70:13.) For the last six to seven years, he has worked as a Ford warranty auditor. (*Id.* 72:8-9.)
6 As a warranty auditor, he reviews a dealership’s ROs and supporting documents to determine whether
7 the technician properly performed the repair pursuant to all rules and requirements of the Warranty
8 Manual, service publications, shop manuals, and technical services bulletins. (*Id.* 72:10-23.) In his
9 current role, he has performed approximately 50 warranty audits; of those, approximately 20 to 25
10 were allegation audits. (*Id.* 73:4-5, 86:23-87:2.)

11 As ALJ Nelsen noted during the hearing, “From what I've heard of Mr. Owens’s testimony, it
12 sounds like he's well qualified and well -- very knowledgeable about extensive operations of -- at least
13 of the Ford Company.” (Hr’g Tr.: 8/6/24, 125:13-16.)

14 **C. The Allegation that Putnam Ford Submitted False Claims for Warranty Repairs**
15 **Performed at an Unauthorized Location**

16 The San Francisco region, and specifically regional manager Ms. LaShawn Swann, was the
17 source of the allegation, and the pictures associated with the allegation. (Owens: 8/6/24, 92:3-4;
18 Owens: 8/7/24, 163:4-8.)⁵ Prior to receiving the allegation, Mr. Owens had never heard of Putnam
19 Ford and was unaware of the pending Labor Rate Protest. (Owens: 8/6/24, 88:2-12.)

20 According to Mr. Owens, the allegation was that Putnam Ford was performing repairs at an
21 unauthorized location. (Owens: 8/6/24, 88:14-15.) He believed this qualified as a false warranty claim
22 because performing repairs “in an unauthorized location is not allowed by [the Warranty Manual] or
23

24 ⁵ Ms. Swann learned that Putnam Ford was performing repairs at an unauthorized facility when Mr.
25 Putnam mentioned this to her in October 2022. (Swann: 8/16/24, 209:14-210:14) In January 2023, Ms.
26 Swann and Ms. Hughes toured the Nissan Facility in connection with a relocation request. (Hughes:
27 8/15/24, 135:1-18.) Prior to the visit, Ms. Swann and Ms. Hughes discussed that Putnam Ford might
28 be performing unauthorized service work at the Nissan Facility. (*Id.* 136:22-137:3.) Both Ms. Swann
and Ms. Hughes found this concerning. (*Id.* 137:4-7.) They collectively decided that if they saw Ford
vehicles during the visit, Ms. Hughes would try to get pictures of them. (*Id.* 138:10-16.)

1 the Sales and Service Agreement. So, by submitting those claims to Ford Motor Company, the dealer
2 is agreeing or confirming that those repairs complied with all Warranty and Policy Manual
3 requirements.” (*Id.* 129:5-11.)

4 The allegation was accompanied by pictures showing Ford vehicles being repaired at the
5 Nissan Facility. (*Id.* 88:17-18, 89:15-18, 90:3-91:21; Ex. R-322.)⁶ Mr. Owens used the license plate
6 numbers of the vehicles in the pictures to locate VINs, which he in turn used to search for warranty
7 claims. (Owens: 8/6/24, 94:14-23.) Based on Mr. Owens’s testimony and his contemporaneous notes,
8 it was apparent that three of the four vehicles in the photos had warranty claims submitted around the
9 time Ms. Hughes took the pictures. (*Id.* 95:1-17, 96:4-7; Ex. R-308.) The pictures also showed the
10 work identified in the warranty claims was in process. (Owens: 8/6/24, 96:8-11.) For example, Exhibit
11 R-322-003 shows a vehicle with a powertrain assembly below the vehicle, and that car has a warranty
12 claim for an engine replacement. (*Id.* 96:16-19.) There is also a vehicle with the driveline removed,
13 which is necessary for a warranty repair on the transmission. (*Id.* 96:20-25.)

14 Based on the information collected, Mr. Owens determined there was reason to believe that
15 Putnam Ford submitted false warranty claims. (*Id.* 97:12-16.) Additionally, he searched through the
16 rest of the dealership’s warranty claims for the nine-month scope permitted by California law, and
17 found a milage misstatement, which also would have served as an independent basis for a warranty
18 study. (*Id.* 97:18-22.) Mr. Owens shared his findings with his supervisor, Ms. Crawford, and
19 recommended a warranty study. (*Id.* 98:9-16.) Ms. Crawford immediately assigned Mr. Owens to do
20 the warranty study. (*Id.* 98:19-23.) Had Mr. Owens believed that the allegation had no merit, he could
21 have closed out the allegation with no action taken. (*Id.* 97:23-98:1.)

22 **D. The Putnam Ford Warranty Study**

23 Mr. Owens generated a letter dated March 28, 2023, notifying Putnam Ford that Ford would
24 conduct a warranty study with the dealership. (101:10-102:9; Ex. R-309.) The letter was signed by
25 Ms. Swann. (Owens: 8/6/24, 101:25-102:3.) Through the letter, Ford notified Putnam Ford that if the
26

27 ⁶ The photos at issue were taken by Ms. Hughes while she and Ms. Swann toured the Nissan Facility
28 on January 19, 2023. (Hughes: 8/15/24, 144:13-19; Ex. P-107.) Ms. Swann directed Ms. Hughes to
send the photos to the franchising team in Dearborn, Michigan. (Swann: 8/16/24, 145:8-25.)

1 warranty study uncovers false practices, Ford may elect to proceed with a warranty audit. (*Id.* 102:24-
2 103:5.) But “if improper warranty practices are not confirmed, the action will be closed as a study
3 outside of the warranty audit process.” (*Id.* 103:7-10; *accord* Ex. R-309.)

4 Because of the size of the dealership and the number of warranty claims, Mr. Owens opted to
5 perform the warranty study in-person. (Owens: 8/6/24, 103:11-18.) He planned to begin the warranty
6 study with an opening meeting to discuss agenda items with the dealer and answer any question the
7 dealer might have. (*Id.* 112:1-4.) He would also present the dealer with an initial list of ROs that he
8 would like to review. (*Id.* 112:4-6; *see also* Ex. R-311 (4/3/23 opening meeting agenda).)

9 On April 3, 2023, Mr. Owens met with Mr. Vasquez, Gavin Hughes (counsel for Putnam Ford
10 in this litigation⁷), Kent Putnam, and others in a conference room at Mr. Putnam’s Chevrolet
11 dealership. (Owens: 8/6/24, 113:5-6, 114:7-115:6.) Mr. Owens only got through the greetings and
12 introduction when Mr. Hughes introduced himself as an attorney and “essentially took over the
13 meeting.” (*Id.* 115:7-15.) At that time, Mr. Hughes asked Mr. Owens if he was aware of the labor rate
14 lawsuit; Mr. Owens stated he was aware that there was one, but that was all he knew. (*Id.* 115:15-17.)
15 Mr. Hughes gave Mr. Owens a copy of the protest in the labor rate lawsuit, announced that the
16 warranty actions were retaliatory, threatened to sue Ford for the warranty study or any warranty audit,
17 and threatened that Mr. Owens should be expected to be deposed and called as a witness. (*Id.* 115:18-
18 25.) According to Mr. Owens, Mr. Hughes had an aggressive tone, and “essentially ambushed me,
19 made me very uncomfortable, and prevented me from going through my normal opening meeting.”
20 (*Id.* 116:1-4.)

21 Mr. Owens eventually completed the opening meeting agenda. (*Id.* 116:5-7.) When asked
22 whether he did anything different in the warranty study as a result of Mr. Hughes badgering, Mr.
23 Owens testified:

24 A I did not.

25 Q Why?

27 ⁷ Putnam Ford’s own witness, Mr. Vasquez, testified that he could not remember another audit in
28 which he was involved where the dealer’s attorney spoke with the auditor. (Vasquez: 8/12/24, 24:3-
7.)

1 A Because I treat all dealers the same. Big, small, important, not important - - in
2 my book, all the dealers should be treated the same, and that's how I approach
things.

3 (*Id.* 116:10-15.)

4 Putnam Ford had Mr. Owens work from an office located in Mr. Putnam's General Motors
5 dealership. (*Id.* 116:17-24.) He set to work. Once he had access to the ROs, Mr. Owens confirmed that
6 the buildings in the pictures attached to the allegation were part of an unauthorized location. (*Id.*
7 117:11-25.) Mr. Owens spoke to several Putnam Ford technicians and confirmed that the picture of
8 the vehicles he received depicted the Barn. (*Id.* 117:20-25.) He also observed three other Putnam Ford
9 technicians working at the Nissan Facility. (*Id.* 118:19-22.) The Putnam Ford shop foreman was also
10 working out of the Nissan Facility and Mr. Owens discovered Putnam Ford technicians in the Barn
11 and the rest of the Nissan Facility actively working on Ford vehicles. (*Id.* 119:14-21.) Mr. Owens
12 analyzed ROs from June 2022 to February 2023, and he interviewed the Putnam Ford technicians to
13 determine how long they had been working at the Nissan Facility. (*Id.* 119:25-120:6.) According to
14 Mr. Owens, it would be highly unusual for a technician to work in different buildings throughout the
15 day because their toolboxes are so large and "technicians don't typically wheel their toolboxes . . .
16 across the parking lot or down the street." (*Id.* 120:20-121:8.)

17 In addition to information from the Ford technicians, Mr. Owens found other evidence of Ford
18 warranty work being performed at unauthorized locations. He observed several pallets of Ford parts
19 with RO numbers written on them, which is consistent with the requirement that dealerships retain
20 parts that are replaced as part of a warranty repair. (*Id.* 122:22-123:15.) Putnam Ford technicians
21 informed Mr. Owens that the parts department only came to collect the Ford parts every two or three
22 months. (*Id.* 124:1-4.) According to Mr. Owens, "those were just a pile on piles of parts that they had
23 done, indicating to me that they had been doing a lot of warranty repairs in that shop. That's where
24 those technicians keep their parts while they wait for the parts department to come pick it up." (*Id.*
25 124:5-9.) Mr. Owens also observed repairs of Ford vehicles under warranty by Putnam Ford
26 technicians in the Barn and the main Nissan Facility. (*Id.* 126:7-21.)

27 Mr. Owens ultimately requested the ROs for the six Putnam Ford technicians who confirmed
28 they had been working at the Barn or Nissan Facility during this period. (*Id.* 120:7-19.) After Mr.

1 Owens completed the study, he determined that there was an extensive amount and quantity of false
2 claims. (*Id.* 127:11-14.) He found that “repairs that are being performed in an unauthorized facility[,
3 which] is not allowed by [the Warranty Manual] or the Sales and Service Agreement. So by submitting
4 those claims to Ford Motor Company, the dealer is agreeing or confirming that those repairs complied
5 with all Warranty and Policy Manual requirements.” (*Id.* 129:5-11.) The factual basis for this finding
6 was that six Putnam Ford technicians informed him that they were working in an unauthorized facility.
7 (*Id.* 129:14-16.)⁸

8 Based on his findings, Mr. Owens recommended to Ms. Crawford that he upgrade the warranty
9 study to a warranty audit. (*Id.* 127:2-17.) The decision to select Putnam Ford for an audit was made
10 by Mr. Owens in a conversation with Mr. Crawford that was “fairly straightforward” and, based on
11 the presence of false claims, Ms. Crawford “immediately agreed” to the recommendation. (*Id.* 127:18-
12 128:4.) No one else was involved in the decision to audit Putnam Ford. (*Id.* 128:13-15.) Mr. Owens
13 did not select Putnam Ford for a warranty audit to punish Putnam Ford or retaliate, nor does he believe
14 that the decision was unfair; he would have made the same decision for any dealer under the same
15 circumstances. (*Id.* 129:24-130:15.) The decision to conduct the audit was in no way related to the
16 Labor Rate Protest, in response to the protest, or to create leverage; nor did Mr. Owens consider the
17 Labor Rate Protest in his decision to conduct the audit. (*Id.* 130:16-131:16.) In fact, under the Ford
18 process, Mr. Owens could **not** upgrade a study based on a labor rate request. (*Id.* 131:23-132:6.) The
19 decision to audit Putnam Ford was solely in response to the false claims Mr. Owens personally
20 identified in the warranty study. (*Id.* 131:17-22.)

21 **E. Mr. Owens Conducts a Warranty Audit**

22 On May 8, 2023, Putnam Ford was notified the warranty study was being upgraded to a
23 warranty audit. (Ex. R-313; Owens: 8/6/24, 132:17-21, 133:1-2.) The scope of the audit was June 2022
24 through February 2023 (Owens: 8/6/24, 133:10-15), and Mr. Owens only reviewed the ROs performed
25
26

27 _____
28 ⁸ A separate basis for the audit was also that he confirmed a milage misstatement through personally
reviewing diagnostic tool equipment. (Owens: 8/6/24, 129:16-18.)

1 by the six technicians that he confirmed worked at the unauthorized facility⁹ (*id.* 136:2-21). Mr. Owens
2 spent over four weeks reviewing ROs. (*Id.* 213:24-214:1.) Although lengthy, he confirmed that he did
3 not spend more time reviewing the ROs than he would typically spend on any other audit. (*Id.* 134:23-
4 135:19.)

5 Mr. Owens testified as to why performing a warranty repair at an unauthorized location
6 rendered a warranty claim false and could result in a disallowance.

7 **First**, it violates the Warranty Manual:

8 A [Exhibit] J-3, under “False Practices,” you can get down to right above where the
9 bullet points are, it reads, “The following list contains examples of false claim
10 categories that is not all-inclusive.” The bullet points that I selected and associated
11 with this one is the first one, “The knowing submission of claims with omissions
12 of material facts or substantial violations of the program requirements.” . . . And
then I also included “Work not performed as claimed,” since it was done at the
Nissan facility, including the barn.

13 Q Well, how is it work not done as claimed?

14 A So by submitting the claim, the dealer is confirming that they followed all
15 Warranty and Policy Manual requirements. There is another section in the Warranty
and Policy Manual, if you'd like to look at that while we're here.

16

17 On page 6, under Warranty and Policy, Section 1.1.03, for dealer principal warranty
18 responsibilities, second paragraph, second sentence reads, “Warranty repairs must
19 be performed at an authorized Ford or Lincoln dealership.” Also at the bottom in
20 bold, in quotes, it says, “I certify that the information on this claim is accurate and,
21 unless shown, the services were performed at no charge to the owner. To my
22 knowledge, this repair contains no parts repaired or replaced that are connected in
23 any way with any accident, negligence, or abuse and is compliant with Ford
Warranty and Policy.” Continuing on to page 7 of J-03, it says, “In practice,
submission of a repair to Ford Motor Company for payment consideration signifies
confirmation by Dealer Principal or delegate that the repair conforms to the
statement above.”

24
25 ⁹ Mr. Owens testified he used a document provided by Putnam Ford containing a list of technician ID
26 numbers and their corresponding technician names in order to identify which repairs were performed
27 by the six identified technicians. (Owens: 8/6/24, 139:7-140:5; Ex. R-321.) He also testified Putnam
28 Ford employees identified where each technician worked, writing down “Barn” and “Nissan” for
technicians working at those respective locations. (*See* Owens: 8/6/24, 139:18-142:8; Ex. R-321.) Mr.
Owens did not charge back repairs performed by any technicians that he could not confirm was
working at an unauthorized location. (Owens: 8/6/24, 142:24-143:3.)

1 Q Meaning, this is compliant with Ford Warranty and Policy?

2 A Correct.

3 (*Id.* 160:3-162:4; *accord* Ex. J-03-006 to 007 (certification statement that warranty claim complies
4 with Warranty Manual).)

5 **Second**, performing warranty repairs at an unauthorized facility violated Paragraph 5(c) of the
6 SSA (Owens: 8/6/24, 162:17-163:2), which states, in relevant part:

7 **5. (c) *Changes and Additions.*** The Dealer shall not move or substantially modify
8 or change the usage of any of the DEALERSHIP LOCATION or FACILITIES for
9 COMPANY PRODUCTS, nor shall the Dealer . . . directly or indirectly establish
10 or operate in whole or in part any other locations or facilities for the sale or service
11 of COMPANY PRODUCTS or the sale of used vehicles without the prior written
consent of the Company. Any such change shall be evidenced by a new Dealership
Facilities Supplement executed by the Dealer and the Company[.]

12 (Ex. J-01-020 (emphasis and capitalization in original).)

13 Mr. Owens was aware of at least one other Ford dealer who had warranty claims disallowed
14 because that dealer was performing repairs at an unauthorized facility. (Owens: 8/6/24, 237:13-25,
15 239:9-12 (testifying he looked at disallowance summary reports for another dealer that had claims
16 disallowed for performance at an unauthorized facility in order to seek an example of how the other
17 auditor “went about it.”).)

18 **F. The Results of the Audit**

19 Ultimately, Mr. Owens examined 562 warranty claims and disallowed 552, for a total
20 disallowance amount of \$502,821.56. (*See generally* Ex. J-04 (Disallowance Summary); Ex. J-05
21 (ROs); *see also* Owens: 8/6/24, 144:1-13 (explaining contents of Exhibit J-04), 145:12-146:12
22 (explaining Exhibit J-5 is the supporting documentation for Exhibit J-04), 147:24-25 (disallowance
23 total).)

24 During the Hearing, Mr. Owens discussed six line-item repairs in five different ROs and the
25 corresponding disallowance summaries as examples as to how to review the evidence:

- 26 • **RO 14564, Line A** (Ex. J-04-580; Ex. J-05-Vol. 10-014692 to 14700.) Mr. Owens
27 disallowed this repair primarily for a mileage misstatement, which means that the dealer
28 claimed there was a lower mileage on the car than the actual mileage so that it would
qualify as under warranty. (Owens: 8/6/24, 150:21-23, 152:1-2, 152:15-153:20.) The
RO indicates that Putnam Ford was waiting on the customer’s authorization for the

1 repair, which indicates that the dealership knew the vehicle was out of warranty. (*Id.*
2 153:21-154:11; Ex. J-05-Vol. 10-014693 (“Waiting on Authorization customer for
3 repair”).)¹⁰ The secondary reason for the disallowances was the repair being performed
4 at an unauthorized location. (Owens: 8/6/24, 152:2-4, 154:12-25, *see also* 155:1-157:25
5 (explaining how he can match a specific technician to a specific repair using the
6 information in the RO and Exhibit R-321).) Finally, the RO was disallowed because it
7 includes a cooling system pressure test that was not necessary for the repair. (*Id.*
8 164:14-18.) The RO states that a visual inspection identified the water pump leak, so
9 no additional test was necessary. (*Id.* 165:2-17, 166:8-15 (explaining these types of
10 tests are “padding” the ticket and claiming extra things that do not need to be done);
11 Ex. J-05-Vol 10-014693 (“Performed a visual inspection . . .and found water pump
12 leak.”).) The disallowance summary also cites to the sections of the Warranty Manual
13 supporting Mr. Owens’s determination of a false practice. (*See* Owens: 8/6/24, 159:6-
14 24, 163:3-164:7, 164:14-25; *compare* Ex. J-04-580 to 581, *with* Ex. J-05-014692 to
15 14700.)

- 16 • **RO 12559, Line A.** (Ex. J-04-008 to 009; Ex. J-05-Vol. 1-000174 to 000177.) Mr.
17 Owens disallowed this repair because it was performed at an unauthorized location.
18 (Owens: 8/6/24, 171:14, 171:20-174:17.) The secondary reason for disallowance was
19 improper service labor time studies, labor operations, or sublet. (*Id.* 171:15-16.) The
20 RO included an after-the-fact additional repair line, for which the technician did not
21 obtain authorization from the service management, which violates the Warranty
22 Manual. (*Id.* 176:5-15.) Mr. Owens also noted on the disallowance sheet that the dealer
23 did not claim something to which it would have been entitled in order to educate
24 Putnam Ford as to the proper way to complete the warranty request. (*Id.* 174:19-175:5;
25 Ex. J-04-009.)
- 26 • **RO 12559, Line D.** (Ex. J-04-009 to 012; Ex. J-05-Vol. 1-000199.) Mr. Owens
27 disallowed this repair for work not performed in the authorized location. (Owens:
28 8/6/24, 177:4, 177:11-16.) He also disallowed the repair as a warranty solicitation. (*Id.*
177:19-22.) Under the specific warranty program at issue, the dealership is only
permitted to perform the repair if the vehicle exhibits the concern (e.g., the cooling fan
always on or never coming on). (*Id.* 178:9-17.) This is an add-on repair, and there is no
explanation as to whether the cooling fan was not working, nor was there
documentation that there was a problem with the fan. (*Id.* 178:17-179:19; 180:21-25
(would have disallowed regardless of location of repair).)
- **RO 15372, Line A.** (Ex. J-04-514 to 515; Ex. J-05-Vol. 8-013065 to 013109.) Mr.
Owens disallowed this repair for performing the work at an unauthorized location
(Owens: 8/6/24, 184:8-13), and for a part being damaged or defective (*id.* 184:13-14).
The root cause of the repair was not a warrantable item because the customer added

¹⁰ Putnam Ford presented no evidence rebutting the accuracy of any of the facts underlying any of the disallowances.

1 something to the vehicle that blocked the subject sensors from working. (*Id.* 185:15-186:6.)¹¹

- 2
- 3 • **RO 14795, Line B.** (Ex J-04-426 to 429; Ex. J-05-Vol. 6-010767 to 010785.) Mr. Owens disallowed this repair because it was not performed at the authorized location. (Owens: 8/6/24, 189:19-190:1.) Additionally, Mr. Owens disallowed it as a repeat
- 4 repair, for a part being damaged or defective, missing files or record retention, and insufficient documentation of the repair. (*Id.* 190:1-4.) Putnam Ford had performed a
- 5 prior repair for the same issue on the same vehicle, and documentation showed an improper repair procedure (no documentation showing proper transmission cooler
- 6 flushing or replacement as required). (*Id.* 192:12-18.) The failure to flush the fluid after the previous repair can leave contaminants in the transmission which causes additional
- 7 damage. (*Id.* 193:17-194:17, 196:10-21.) The previous RO did document flushing of the transmission, so contamination worked back into the replacement transmission and
- 8 caused it to fail. (*Id.* 196:18-21; *see also id.* 196:22-198:12 (explaining basis under Warranty Manual for disallowing repeat repairs).) The repair was also disallowed
- 9 because Putnam Ford did not have proper documentation of a cost cap, which is a process by which the technician compares the cost to replace the transmission versus
- 10 repair the transmission and selects the most cost-effective option. (*Id.* 199:16-200:20.) Another reason for the disallowance was that Putnam Ford replaced the torque
- 11 converter without trying to clean or flush it as required by Ford. (*Id.* 201:3-17.) The final reason for the disallowance, was that during the prior repair, the technician failed
- 12 to replace the heat shields on the vehicle, and Ford is not responsible to pay for new shields. (*Id.* 202:17-203:19.)
- 13
- 14
- 15 • **RO 14349, Line D.** (Ex. J-04-327 to 328; Ex. J-05-Vol. 9-014564 to 014630.) Mr. Owens disallowed this repair because it was performed at an unauthorized location. (Owens: 8/6/24, 206:6-19.) He also disallowed the repair as an unauthorized add-on
- 16 repair. (*Id.* 206:13-14.) Putnam Ford added repair line D after it generated the RO and the service management had not authorized the repair on the hard copy, as required by
- 17 the Warranty Manual. (*Id.* 207:11-20, 208:1-6, 210:1-5 (testifying it needs to be authorized because service management inspected the vehicle and agreed that it is a
- 18 warrantable and necessary repair); 210:23-211:9 (identify applicable Warranty Manual provision, Section 1.2.04).)
- 19
- 20

21 Mr. Owens compiled his disallowances in a 583-page document which contained an

22 explanation for every charge-back on the disallowed claim. (Owens, 8/6/24: 144:1-13; *see generally*

23 Ex. J-04 (disallowance summary document).) Although he discussed six disallowances in detail during

24 the hearing, *supra*, he testified that the remaining disallowance write ups are all similar and contain

25 the specific ground(s) on which each claim was disapproved. (Owens: 8/6/24, 212:23-213:3, 213:21-

26

27

28 ¹¹ Putnam Ford could have chosen to use its goodwill fund through Ford to pay for this repair. (Owens: 8/6/24, 187:2-11.)

23.) As is typical for any audit, Mr. Owens shared his audit finding with Ms. Crawford, Ms. Swann (regional manager) and Rob Benke (regional parts and service operations manager). (Owens: 8/7/24, 125:21-25, 126:16-22, 127:5-7; Ex. J-04.)

Nearly all of the disallowed warranty claims—551 of 552—were found to be false claims pursuant to the Warranty Manual as performance at an unauthorized location. (*See* Ex. J-04.) Where the disallowance was based on performing the repair at an unauthorized location, the disallowance is coded as “work not performed as claimed.” (Owens: 8/7/24, 75:17-76:1.) Of those 551 denied warranty claims, 74 claims were also disallowed for reasons additional to the fact that the repairs were performed at an unauthorized location. *See* Attachment 1: Summary of Non-Location Based Disallowed Claims (citing to specific disallowances in Ex. J-04 in which claims were disallowed for reasons other than location and the corresponding value of the claim). The value of those disallowed repairs totaled \$244,116.47. *See id.* at 10.

After analyzing each RO and completing the write-ups for every disallowance, Mr. Owens scheduled a claims review meeting and a closing meeting with Putnam Ford. (Owens: 8/6/24, 214:7-17; Ex. R-318.) The meeting took place on May 24, 2023, and Mr. Owens, Ms. Crawford, and Ms. Swann attended on behalf of Ford; Mr. Putnam, Mr. Vasquez, Mr. Kamenetsky, Parts and Service Director Troy Davis, and Service Manager Marc Freschet attended on behalf of Putnam Ford. (Owens: 8/6/24, 220:11-12; Ex. R-316; Ex. R-318.) Mr. Owens was prepared to discuss every single disallowance at the meeting. (Owens: 8/6/24, 217:24-218:21.)

Mr. Owens did not go through all the disallowances with Putnam Ford because Putnam Ford did not wish to review any of the claims where the disallowance was based on location. (*Id.* 216:12-217:4; Ex. R-318.) Mr. Owens reviewed some of the claims with multiple disallowances, but Mr. Vasquez terminated the review and stated he would give the claims to their lawyer to review. (Owens: 8/6/24, 217:5-9; Ex. R-318.) Mr. Owens offered to set up a Webex meeting to answer any questions Putnam Ford might have about the claims, but Putnam Ford never took advantage of the offer. (Owens: 8/6/24, 217:10-23; Ex. R-318.) The closing meeting immediately followed the premature end of the claims review. (Owens: 8/6/24, 218:22-25.)

1 The day after the meeting, Mr. Owens sent Mr. Putnam, Mr. Vazquez, and Mr. Kamenetsky
2 the Closing Meeting Packet, the Disallowance Summary Report, and a 30-Day Action Plan. (Owens:
3 8/6/24, 220:13-221:14 (summarizing documents provided to Putnam Ford); Ex. R-316 (email).) He
4 sent an email with the closing letter and related documents to finalize the audit on June 12, 2023.
5 (Owens: 8/6/24, 221:15-222:22; Ex. R-317) The letter informed Putnam that the total charge-back was
6 \$502,821.56. (Owens: 8/6/24, 223:23-25.)

7 Mr. Owens notified Putnam Ford in writing of its right to appeal the audit to an independent
8 appeal board within Ford. (*Id.* 224:16-225:5, 226:22-25; Owens: 8/7/24, 165:23-166:5; Ex. R-315.)
9 Any time Ford audits a dealership, the dealership can appeal any of the auditor's findings to the policy
10 board. (Owens: 8/7/24, 166:10-12.) The policy board has the authority to reverse any or all of the
11 auditor's decisions. (*Id.* 166:12-14.) Mr. Vasquez initialed a copy of the letter to confirm receipt of
12 the right to appeal. (*See* Owens: 8/6/24, 226:7-20; Ex. R-315.) Putnam Ford did not avail itself to
13 Ford's appeal process. (Owens: 8/6/24, 227:1-3.)

14 **G. Mr. Owens' Decision Was Based Solely on Putnam Ford's False Practices**

15 Mr. Owens was unequivocal that his decision to conduct the audit was based exclusively on
16 evidence of false practices, not the Labor Rate Protest or any other extraneous reason. (*See, e.g.,*
17 Owens: 8/6/24, 127:18-128:4 (decision to perform an audit was made in a conversation with Ms.
18 Crawford that was "fairly straightforward" and, based on the presence of false claims, Ms. Crawford
19 "immediately agreed" to the recommendation), 129:24-130:15 (Mr. Owens did not select Putnam Ford
20 for a warranty audit to retaliate, nor does he believe that the decision was unfair), 130:16-131:16
21 (decision to conduct the audit was not related to the Labor Rate Protest, in response to the Labor Rate
22 Protest, or to create leverage; nor did Mr. Owens consider the Labor Rate Protest in his decision to
23 conduct the audit), 131:23-132:6 (under the Ford process, Mr. Owens could not upgrade a study based
24 on a labor rate request); 131:17-22 (decision to audit Putnam Ford was solely in response to the false
25 claims Mr. Owens personally identified in the warranty study).)

26 Mr. Owens briefly discussed the existence of the Labor Rate Protest with other Ford
27 employees. (Owens: 8/6/24, 229:20-231:13.) In each and every instance, the communication was
28

1 cursory, merely acknowledging that there was a dispute and did not affect his investigation or the
2 decision to audit Putnam Ford. These limited interactions involved:

- 3 • **Bill Walsh** (*Id.* 229:9-14 (did not discuss details of labor rate case with Mr. Walsh);
4 Owens: 8/7/24, 154:9-20 (discussion with Mr. Walsh about labor rate case was less
5 than 5 seconds long and did not go beyond that a labor rate existed), 154:21-24
(conversation with Mr. Walsh did not affect his allegation investigation).)
- 6 • **Allen Kanouse** (Owens: 8/6/24, 234:7-10 (did not know what Mr. Kanouse's
7 involvement was in the labor rate request); Owens 8/7/24, 152:10-18 (conversation
8 with Mr. Kanouse limited to Mr. Kanouse saying he could not talk about Putnam Ford),
153:24-154:1 (Mr. Kanouse did not have any involvement in the decision to conduct
9 audit of Putnam Ford).)
- 10 • **Mr. Shire** (Owens: 8/7/24, 155:14-156:7 (conversation was less than five seconds, did
11 not go beyond the fact that the labor rate case existed, and discussion did not affect the
12 allegation investigation or audit in any way).)
- 13 • **Ms. Crawford** (*Id.* 156:11-157:7 (conversation with Ms. Crawford regarding labor rate
14 was less than a minute, did not discuss details of the case, and did not affect the
15 allegation investigation or decision to initiate an audit).)
- 16 • **Ms. Airington** (*Id.* 157:8-158:4 (discussion was about five seconds long and they did
17 not discuss any details of the labor rate case except that it existed; no part of the
18 discussion affected his allegation investigation or decision to audit Putnam Ford).)

16 The first time Mr. Owens learned details about the Labor Rate Protest was when Mr. Hughes,
17 counsel for Putnam Ford, gave Mr. Owens a copy of the protest at the opening meeting (*id.* 158:13-
18 16)—after the decision to audit Putnam Ford had been made.

19 Putnam Ford attempted to attack Mr. Owens' credibility and challenge his testimony that the
20 audit was not in retaliation for the Labor Rate Protest. It pointed to Mr. Owens' deposition testimony
21 in which he testified that "[Mr. Walsh] asked what dealer it was, and when I told him, he asked if that
22 was related to a lawsuit, and I said, yes, it was." (Owens: 8/6/24, 247:5-13.) But Putnam Ford
23 conveniently elides the rest of the testimony from the same deposition:¹² "Q: And how was that related

24 _____
25 ¹² During the hearing, counsel for Putnam Ford started to read this explanatory portion of deposition
26 testimony and stopped himself when he realized that the clarification immediately following the
cherry-picked testimony undermined his entire theory:

27 "Question: And how was it related to the law-"

28 Mr. Hughes: Oh, wait. I'm sorry. I should stop reading at this point."

1 to the lawsuit? A: Just that there was a lawsuit related to the labor.” (Owens: 8/7/24, 149:13-18.)
2 Indeed, Mr. Owens clarified in his deposition “I may have chosen . . . [a] poor word related. When I
3 am --- when I was researching the allegation, the labor rate case came up. But, again, that is all my
4 extent to the knowledge is that there was a case.” (*Id.* 149:21-150:2, 182:3-11.)

5 **H. Putnam Ford’s Insistence It Was Selected for an Audit in a Retaliatory Manner**
6 **Is Based on Nothing More Than Speculation**

7 Because there is no evidence that the decision to conduct an audit was based on anything other
8 than false practices, Putnam Ford presented speculative testimony from Mr. Vasquez and Mr.
9 Kamenetsky that they believed the audit must have been retaliation for the Labor Rate Protest.

10 Mr. Vasquez testified that it was “100 percent obvious to me that [the audit] was retaliatory.”
11 (Vasquez: 8/8/24, 106:14-15.) He was later impeached with his sworn deposition testimony, wherein
12 he was asked whether he had an opinion as to whether the audit was retaliatory, and he testified at the
13 deposition, “I don’t like to form an opinion of things I’m not aware of, you know. **I don’t know.**”
14 (Vasquez, 8/12/24 16:17-17:7 (emphasis added).) In fact, as of the time of his deposition—a full year
15 after the close of the audit—he could not remember any conversation with Mr. Putnam or Mr.
16 Kamenetsky in which they discussed whether the audit was retaliatory. (*Id.* 98:3-12 (time of
17 deposition).)

18 Mr. Vasquez based his new opinion on, in part, the presence of regional and national Ford
19 employees at the closing meeting. (Vasquez: 8/8/24, 106:9-12; *see also* Vasquez: 8/12/24, 20:12-16.)
20 Mr. Vasquez would have certainly been aware of this fact at the time of his deposition. (Ex. R-331
21 (deposition taken June 4, 2024).) Yet, this was also the **only** Ford audit he had only experienced in his
22 career. (Vasquez: 8/12/24, 20:8-11.) He readily admitted he had no understanding of how the Ford
23 audit process worked. (*Id.* 18:4-17.) And testimony from Ford personnel indicates that the presence of
24 a “national” representative—here, Ms. Crawford—was based on the high volume of false claims. (Ex.
25 P-157.030 to 031, Crawford Dep. 6/3/24, 46:22-47:7.)

26
27 _____
28 (Owens: 8/6/24, 247:12-15.) Defense counsel objected (*id.* 247:16-20), and ALJ Nelsen instructed Mr.
Kelso to complete the testimony during re-direct (*id.* 249:4-8), which Mr. Kelso did (Owens: 8/7/24,
149:21-150:2).

1 Mr. Vasquez also based his new opinion that the audit was retaliatory on the fact that Mr.
2 Owens questioned Putnam Ford employees. (Vasquez: 8/8/24, 106:12-15.) Again, not only was this
3 the only Ford audit in which he took part (Vasquez: 8/12/24 20:8-11), he has never been involved in
4 any audit from any OEM stemming from an allegation (*id.* 20:4-7). So, he is not familiar with the
5 process. Further, Mr. Owens explained that he spoke with Ford technicians to investigate the veracity
6 of the allegations, among other things. (Owens: 8/6/24, 117:20-25.)

7 Putnam Ford's counsel tried to rehabilitate Mr. Vasquez at the Hearing, asking him why he
8 changed his opinion between his deposition and the Hearing as to why the audit was retaliatory.
9 (Vasquez: 8/12/24, 88:25-89:9.) Mr. Vasquez claimed it was "[t]he lack of communication with Ford.
10 The promptness of them - - of Ford executives responding to our request. The struggles that we have
11 - - that we have had to try and take care of our coming customers. Many, many things." (*Id.* 89:5-9.)
12 However, Mr. Vasquez's deposition was taken June 4, 2024—two months before his hearing
13 testimony. (*Id.* 98:3-12.) There is no evidence of any lack of communication with Ford during this
14 period; there is no evidence of any "requests" during this period. Mr. Vasquez did not explain how
15 struggles taking care of its customers was an indication of retaliation. Mr. Vasquez did not offer any
16 evidence of the other "many, many things."

17 Ultimately, Mr. Vasquez admitted he had "zero idea what might have led to the warranty
18 study," he did not know why Ford initiated the warranty audit, and he had no idea whether the study
19 arose out of an allegation. (Vasquez: 8/12/24, 18:13-25, 19:21-24.) He also never reviewed the 583-
20 page disallowance summary. (*Id.* 78:21-79:2.) As a result, he was unable to point to any write-up or
21 RO and claim that the basis for the disallowance was insufficient. (*Id.* 79:3-10.)

22 Mr. Kamenetsky also offered similar speculation that the audit was retaliatory. (Kamenetsky:
23 8/13/24, 58:20-22, 62:15-23.) But Mr. Kamenetsky's sole basis for this conclusion was that the Labor
24 Rate Protest was ongoing when the audit occurred. (*Id.* 58:23-59:8.) Mr. Kamenetsky has even less
25 experience with audits than Mr. Vasquez; aside from this experience with Ford, Mr. Kamenetsky has
26 no other experience with service audits with any OEM. (*Id.* 77:24-78:3; *see also id.* 77:19-23 (testifying
27 he had never been to an audit closing meeting before). In fact, Mr. Kamenetsky is not involved in the
28 management of any dealership within Putnam Auto Group. (*Id.* 64:18-65:1.) As of June 2024, a full

1 year after the completion of the audit, Mr. Kamenetsky had never even reviewed the Warranty Manual.
2 (*Id.* 80:13-25.) Mr. Kamenetsky testified that Ms. Swann did not say anything to him that would cause
3 him to believe that the selection of Putnam Ford for an audit was retaliatory. (*Id.* 224:22-225:1.) He
4 also agreed at the Hearing that no one from Ford has ever personally told him that Ford was so mad
5 about the Labor Rate Protest that it was going to punish Putnam Ford. (*Id.* 82:8-13.) Likewise, no one
6 from Ford has ever said anything directly to him that would indicate that Ford intended to punish
7 Putnam Ford for its labor rate request. (*Id.* 82:14-20.)

8 Mr. Kamenetsky has never worked as a service advisor, run a service department, or worked
9 as a technician. (*Id.* 71:17-25.) As such, he offered no testimony at trial challenging the basis for
10 disallowance for any specific claim.

11 There is no evidence of retaliation.

12 **PROCEDURAL HISTORY**

13 Putnam Ford filed the instant protest on May 26, 2023 (“Protest”) pursuant to California
14 Vehicle Code 3065. The Protest alleges that the disallowed claims were neither false nor fraudulent.
15 (Protest ¶ 11.) Putnam Ford claims that Ford “selected Protestant and conducted the Audit in an
16 unreasonable, punitive, and unfairly discriminatory manner.” (*Id.* ¶ 12.) Putnam Ford prays for the
17 Board to determine that Ford failed to comply with the requirements of Section 3065 and issue a final
18 order under Section 3065(e)(5). (*Id.* at 3 (Prayer Nos. 1 & 2).)

19 Putnam Ford’s Protest did not allege a violation of Section 3065.2(i)(2)(G) or (i)(2)(D). *See*
20 *generally* Protest.) Nor did Putnam Ford file a protest pursuant to Section 3065.4 or state that the
21 Protest was to determine a labor rate. (*See id.*) Putnam Ford’s Protest does not mention or discuss any
22 allegations of bad faith. At no point has Putnam Ford amended its Protest or sought leave to amend its
23 Protest.

24 **RELEVANT LAW**

25 Section 3065 governs the terms and implementation of warranty agreements between dealers
26 (or franchisees) and manufacturers (or franchisors). Pursuant to Section 3065(e)(1), a franchisor may
27 conduct an audit of a franchisee’s warranty records “on a reasonable basis” after a claim is paid or
28

1 credit issues. The franchisor “may not select a franchisee for an audit, or perform an audit, in a
2 punitive, retaliatory, or unfairly discriminatory manner.” Veh. Code, § 3065(e)(1).

3 During the course of an audit, a franchisor may not disapprove or charge back previously
4 approved claims “unless the claim is false or fraudulent, repairs were not properly made, repairs were
5 inappropriate to correct a nonconformity with the written warranty due to an improper act or omission
6 of the franchisee, or for material noncompliance with reasonable and nondiscriminatory
7 documentation and administrative claims submission requirements.” Veh. Code, § 3065(e)(2). If the
8 franchisor disallows a previously approved claim, “the franchisor shall provide to the franchisee,
9 within 30 days, a written disapproval notice stating the specific grounds upon which the claim is
10 disapproved.” Veh. Code, § 3065(e)(3). The franchisor must provide a reasonable appeal process of
11 an audit. Veh. Code, § 3065(e)(3).

12 Within six months of receipt of the written disapproval notice or completion of the appeal
13 process, a franchisee may file a protest to determine whether the franchisor complied with Section
14 3065(e). Veh. Code, § 3065(e)(6). In such a protest, the franchisor has the burden of proof. Veh. Code,
15 § 3065(e)(6). If the board sustains the charge-back or dismisses the protest, “the franchisor shall have
16 90 days after issuance of the final order or dismissal to make the chargeback, unless otherwise
17 provided in a settlement agreement.” Veh. Code, § 3065(e)(5).

18 ARGUMENT

19 **I. FORD COMPLIED WITH SECTION 3065(E)**

20 Ford met its burden to prove that it satisfied the requirements of Section 3065(e) in connection
21 with the warranty audit of Putnam Ford and subsequent charge-backs for false warranty claims.

22 **First**, Ford may disallow a warranty claim where it is false under California law. Submitting
23 warranty claims that falsely certify that they comply with the Warranty Manual is false. The Warranty
24 Manual requires that all warranty work be performed at an authorized dealership. It has been stipulated
25 that every single disallowed claim was performed at an unauthorized location.¹³ As such, every
26

27 _____
28 ¹³ Throughout the Hearing, the witnesses and evidence used the terms “dealership,” “location,” and
“facility” interchangeably. While the facility is the physical building and the location is the geographic

1 disallowed claim is “false” within the meaning of the statute. Putnam Ford seeks to excuse its behavior
2 by claiming it lacked adequate service capacity at the Authorized Location. This argument ignores the
3 language of the statute, which contemplates no exceptions to a manufacturer’s ability to disallow a
4 false claim. Substantively, this excuse crumbles under scrutiny as the facts show it is merely a lawyerly
5 post-hoc excuse for a business that flouted Ford’s rules and requirements.

6 **Second**, Ford satisfied the procedures required by Section 3065. Specifically, it provided a
7 written summary of each disallowance, and it provided Putnam Ford with the opportunity to appeal
8 the decision.

9 **Third**, there is zero evidence Ford selected Putnam Ford for an audit or performed the audit in
10 a punitive, retaliatory, or unfairly discriminatory manner. Mr. Owens followed Ford procedures and
11 independently investigated an allegation that Putnam Ford was engaging in false practices. He then
12 engaged in a warranty study to determine whether there was evidence of false claims, which he
13 substantiated. Only then did Mr. Owens, in conversation with Ms. Crawford, select Putnam Ford for
14 an audit. Putnam Ford’s allegation of wrongdoing is based on nothing more than speculation from
15 non-credible witnesses with no personal knowledge of how Ford conducts warranty audits. Because
16 Putnam Ford lacks evidence to support the focal claim in its Protest, it urges the Board to
17 impermissibly infer retaliation based on Ford’s invocation of attorney client privilege. Such a request
18 is flatly inconsistent with California law. The invocation of privilege cannot, as a matter of law, be
19 used to support any inferences of any kind.

20 The overwhelming weight of the evidence is clear: Ford audited Putnam Ford because it
21 submitted and received payment for false claims for repairs performed at an unauthorized location.
22 This Protest is nothing more than chest-beating and should be overruled.

23 **A. Ford Properly Charged Back False Warranty Claims for Repairs Performed at**
24 **an Unauthorized Location**

25 In an audit, “[p]reviously approved claims shall not be disapproved or charged back to the
26
27 _____
28 place, the terms are also used interchangeably here as the distinction has no legal relevance to the
outcome of this Protest.

1 franchisee unless the **claim is false or fraudulent . . .**” Veh. Code, § 3065(e)(2) (emphasis added).
2 Here, Ford correctly determined that all of the disallowed claims were “false” within the meaning of
3 Section 3065 because the claims were performed at an unauthorized location. Indeed, Putnam Ford
4 and Ford stipulated “that all the warranty repairs disallowed as a False Practice pursuant to 7.3.03
5 were performed at a location other than the Authorized Location.” Ex. J-02-001. Additionally,
6 approximately half of the value of the charge-backs were also found to be false for other, non-location-
7 based reasons. Putnam Ford does not challenge the underlying factual basis for the charge-backs but
8 questions whether performing a warranty repair at an unauthorized location is a “false claim” in the
9 first instance. This is not a complicated question—it is a false claim because it is an express violation
10 of the Warranty Manual and SSA.

11 Throughout the Hearing, Putnam Ford also sought to introduce evidence that excused or
12 justified its use of unauthorized facilities to perform warranty repair work. Specifically, Putnam Ford
13 attempted to introduce extensive evidence that its false practices were justified or excused because it
14 did not have sufficient service capacity at the Authorized Location. Ford objected to the admission of
15 this evidence before the Hearing and during the Hearing. (Ford Mot. Lim.; 8/8/24 Hr’g Tr., 75:2-15,
16 76:8-21, 79:15-21, 80:7-13, 80:15-24.) Ford now re-raises its objection to the consideration of this
17 evidence.

18 i. The Disallowed Claims Were False Because They Erroneously and
19 Misleadingly Certified that the Repairs Were Performed at an Authorized
20 Location

21 No court has ever interpreted the meaning of “false” as it relates to Section 3065. However,
22 California law is no stranger to statutory interpretation. The Board’s “fundamental task is to ascertain
23 the aim and goal of the lawmakers so as to effectuate the purpose of the statute.” *Cummings v. Stanley*
24 (2009) 177 Cal.App.4th 493, 507–508, [99 Cal.Rptr.3d 284]. “When interpreting statutes, we begin
25 with the plain, commonsense meaning of the language used by the Legislature. If the language is
26 unambiguous, the plain meaning controls.” *Voices of the Wetlands v. State Water Resources Control*
27 *Bd.* (2011) 52 Cal.4th 499, 519, [128 Cal.Rptr.3d 658, 257 P.3d 81]. Black’s Law Dictionary defines
28 false as “untrue,” “deceitful; lying,” “not genuine; inauthentic,” and “wrong; erroneous.” False,
Black’s Law Dictionary (12th ed 2024); *accord People v. Hughes* (Cal. Ct. App. May 16, 2013) No.

1 F061613, 2013 WL 2103414, at *6 (using a dictionary definition to determine the meaning of “false”
2 in a statute regulating license plates).

3 A warranty claim in which the work was performed at an unauthorized location is a false claim
4 because it is untrue, deceitful, wrong, and erroneous. Every time a dealer submits a warranty claim to
5 Ford, it certifies “this repair . . . is compliant with Ford Warranty & Policy.” (Ex. J-03-006
6 (certification statement), and 007 (submission of a warranty claims confirms that repair conforms with
7 statement); *accord* Owens: 8/6/24, 161:21-162:4 (testimony that submission of warrant claim is a
8 certification that the claim is compliant with Warranty Manual).) Every single charged back claim was
9 false because the certification was false, untrue, incorrect, erroneous, and misleading. Putnam Ford
10 did not comply with the Warranty Manual in performing the repair. Putnam Ford did not perform the
11 repair at an authorized location, as explicitly required not only by the Warranty Manual, but also by
12 Paragraph 5(c) of the SSA. (Owens: 8/6/24, 159:12-162:4 (claim is false because does not comply
13 with Warranty Manual), 162:17-163:2 (claim is false because does not comply with SSA); Ex. J-01-
14 020, ¶ 4(b)(4) (“[t]he Dealer shall submit claims to the Company for reimbursement for the parts and
15 labor used in performing warranty . . . work . . . in accordance with the provisions of the Warranty
16 Manual”), ¶ 5(c) (“ . . . nor shall the Dealer . . . establish or operate in whole or in part any other
17 locations or facilities for the sale or service of COMPANY PRODUCTS . . . without the prior written
18 consent of the Company.) (capitalization in original)); Ex. J-03-006, § 1.1.03 (“Warranty repairs must
19 be performed at an authorized Ford or Lincoln dealership.”). Mr. Putnam and Mr. Vazquez—owners
20 of Putnam Ford—knew that they had to comply with the Warranty Manual. (Vasquez: 8/12/24, 54:8-
21 11); Ex. R-332-009 (Putnam Dep. 17:12-15).)

22 Notably, Section 3065(e)(2) does **not** contain any materiality or substantive requirement to
23 justify a charge-back. The Legislature did not modify “false” in a way that suggests that the falsity
24 must be of a certain type or magnitude. *Cf. Farnum v. Iris Biotechnologies, Inc.* (2022) 86 Cal.App.5th.
25 602, 611 [302 Cal.Rptr.3d 584] (noting definition of phrase “without justification” in statute at issue
26 was less weighty than the standard in prior caselaw for a “substantial justification”). Indeed, the totality
27
28

1 of the subsection¹⁴ indicates that the Legislature was capable of providing specificity where it so
2 desired. For example, the same subsection refers to “fraudulent,” which requires a degree of intent,
3 and it also references “**material** noncompliance with **reasonable** and **nondiscriminatory**
4 documentation and administrative claims submission requirements.” Veh. Code, § 3065(e)(2)
5 (emphasis added). The Legislature can incorporate adjectives when it desires as much. It left “false”
6 unmodified. Thus, the question here is only whether a claim is “false.”

7 This alone should end the inquiry before the Board—the certification of compliance with the
8 Warranty Manual on every disallowed claim is false. But the performance of work at an unauthorized
9 location is false in a second way. Pursuant to the Warranty Manual, a false claim includes, but is not
10 limited to, “[t]he knowing submission of claims with omissions of material facts or substantial
11 violations of program requirements” and “[w]ork not performed as claimed.” (Ex. J-03-186.) The
12 ordinary meaning of the adjective “material” is “[o]f such a nature that knowledge of the item would
13 affect a person’s decision-making; significant; essential.” *County of Kern v. Alta Sierra Holistic*
14 *Exchange Service*, (2020) 46 Cal.App.5th 82, 101 [259 Cal.Rptr.3d 563] (citing Black’s Law Dict.
15 (8th ed. 2004)). “If an objectively reasonable person would consider the new circumstances significant
16 or important in making a decision about the subject matter of the ordinance, the change in
17 circumstances is material.” *Id.* Putnam Ford’s routine use of the Nissan Facility—a Ford competitor—
18 is material— because it is a breach of the SSA and the Warranty Manual. Putnam Ford’s failure to
19 disclose this to Ford is a material omission. The totality of the record in this case makes obvious that
20 Ford certainly would not have paid the claim if it knew the repair was performed at an unauthorized

21
22 ¹⁴ Section 3065(e)(2) states as follows:

23
24 Previously approved claims shall not be disapproved or charged back to the
25 franchisee unless the claim is false or fraudulent, repairs were not properly made,
26 repairs were inappropriate to correct a nonconformity with the written warranty due
27 to an improper act or omission of the franchisee, or for material noncompliance
28 with reasonable and nondiscriminatory documentation and administrative claims
submission requirements. A franchisor shall not disapprove or chargeback a claim
based upon an extrapolation from a sample of claims, unless the sample of claims
is selected randomly and the extrapolation is performed in a reasonable and
statistically valid manner.

1 location. By submitting a claim with a material omission, despite certifying compliance with the
2 Warranty Manual, the claim is false under California law.

3 Putnam Ford sought to introduce evidence at the Hearing that Ford permits off-site repairs in
4 other situations, but this evidence does nothing to undermine the falsity in this situation. While not
5 clearly articulated, the suggestion seems to be that the claims are not “false” because certain repairs
6 can be performed at unauthorized locations. This argument is irrelevant because the off-site exceptions
7 do not apply to any of the disallowed claims at issue in this Protest. (Owens: 8/7/24, 87:21-88:2
8 (testifying Putnam Ford was required to perform all of the disallowed warranty repairs identified in
9 Exhibit J-4 at the Authorized Location).)

10 The two types of off-site repairs identified (sublets and mobile service work) apply in very
11 specific situations and the off-site nature of the repair is disclosed.¹⁵ First, none of the disallowed
12 repairs involved sublets. (*Id.* 91:7-8, 93:9-12 (no sublet invoices provided on any of the claims charged
13 back).) Sublet work typically involves work for which Ford dealers do not need to be equipped to
14 perform, such as paint or glass repairs. (*Id.* 151:15-152:1.) The Warranty Manual clearly identifies the
15 requirements for sublet work. (*Id.* 115:2-8.) These requirements include a sublet invoice, purchase
16 order, or payment to the other shop. (*Id.* 150:15-17). A dealer cannot sublet to themselves. (*Id.* 151:3-
17 4.) None of the disallowed claims would have been a proper sublet repair (*id.* 151:11-14). Second,
18 there is the option for mobile service, a program in which Putnam Ford never enrolled, and therefore
19 was ineligible to use. (*Id.* 89:6-9, 95:13-20.)

20 Putnam Ford tried to argue that Ford should have retroactively permitted Putnam Ford to
21 simply resubmit all of the claims as sublets or mobile service claims. (*Id.* 96:9-13). This is not a
22 permissible practice. (*Id.* 96:14-15, 151:5-10.) Once a claim is submitted, no alterations are accepted.
23 (*Id.* 97:9-10.) Putnam Ford had the right to appeal within Ford to raise this issue, but Putnam Ford did
24 not appeal any of the claims to Ford. (*Id.* 97:15-20.)

25
26
27
28 ¹⁵ Ford objected to Putnam Ford’s inquiry into these exceptions during trial because information about
these situations is not relevant to the claims at issue in this Protest. (Owens: 8/7/24, 84:5-15.)

1 None of the repairs at issue here were sublet or mobile service repairs. It remains undisputed
2 that Putnam Ford falsely certified that it complied with the Warranty Manual and made the material
3 omission that it breached the SSA and Warranty Manual because each and every claim was performed
4 at an unauthorized location. (Ex. J-02-001.) Under Section 3065(e)(2), Ford is permitted to disallow
5 and charge back the previously approved warranty claims because they were false and/or fraudulent.

6 ii. Putnam Ford's Invented Justification of Limited Service Capacity Is Irrelevant

7 Putnam Ford's justification argument forces the Board to read a new subsection into Section
8 3065 and expand the statute. This is not only inappropriate under basic principles of statutory
9 construction, but it also raises significant jurisdictional challenges. The Legislature has authorized the
10 Board to "[h]ear and decide, **within the limitations and in accordance with the procedure**
11 **provided**, a protest **presented** by a franchisee pursuant to Section 3060, 3062, 3064, 3065, 3065.1,
12 3065.3, 3065.4, 3070, 3072, 3074, 3075, or 3076." Veh. Code, § 3050(c). The Legislature was very
13 explicit—the Board may only hear and decide protests "within the limitations" of the specific statutes
14 enumerated. As is relevant here, the Board may hear a protest presented pursuant to Section 3065 for
15 a "determination of whether the franchisor complied with this subdivision [(e)]." Veh. Code, § 3065
16 (e)(6). Thus, the Board may hear and decide only whether Ford complied with Section 3065(e),
17 nothing more. And that determination is limited to whether the claim is "false," with no modification,
18 and no qualifications added by the Legislature. There is no provision that considers whether the falsity
19 is excused, accidental, or the product of necessity (real or invented).

20 iii. Putnam Ford's Invented Justification is Not Supported by the Evidence

21 Even if the Board concludes that Section 3065 prohibits a manufacturer from disallowing an
22 otherwise false claim where there is a justification or excuse for the falsity, it should still overrule
23 Putnam Ford's protest. Simply, Putnam Ford's violation of the Warranty Manual is not justified.¹⁶

24 **First**, Putnam had other, compliant options that it never considered. (Swann: 8/16/24, 216:18-
25 217:4.) Putnam Ford's service department could have implemented split shifts and/or nighttime shifts,
26

27 _____
28 ¹⁶ Because these facts are ultimately irrelevant, they were not included in the main fact section of this
brief. They are recounted here only.

1 which creates additional hours for technicians to complete repairs, or mobile service. (*Id*; *see also id.*
2 219:11-23, 220:3-12.) As Ms. Hughes explained. “[T]here are temporary measures, like multiple shifts
3 at the dealership, that they could utilize in order to increase their capacity. But what they should not
4 have done was to utilize an unauthorized facility and then lie about it.” (Hughes: 8/15/24, 239:20-25.)
5 There is no evidence Putnam Ford considered, let alone implemented, any of these options. Putnam
6 Ford knew that it had to comply with the Warranty Manual and the SSA; nonetheless, it violated the
7 Warranty Manual and breached the SSA without exploring alternatives. And it did this in secret.
8 Putnam Ford only asked for “permission” to use the Barn **after** it had been using it for well over a
9 year. (Vasquez: 8/12/24, 29:20-30:10 (testifying he was unaware of any formal requests by Putnam
10 Ford to Ford requesting authorization to use the Barn prior to October 2022).)

11 **Second**, this is a “problem” of which Putnam Ford was well-aware when it sought approval
12 for the Authorized Location. and for which it had ample opportunity to correct. Putnam Ford agreed
13 that the Authorized Location would be temporary, and it would secure a final, permanent location by
14 May 2, 2022. (Kamenetsky: 8/13/24, 108:5-10, 111:1-12; Ex. P-102.001.) But Putnam Ford did not
15 **request** approval for a relocation until the end of December 2022, let alone **secure** a location. (*See*
16 Vasquez: 8/13/24, 111:24-112:2, Ex. P-106 (December 2022 letter requesting to relocate to Nissan
17 Facility).) Putnam Ford was content to circumvent its contractual obligations and delayed requesting
18 relocation after its dishonesty regarding the use of the Nissan Facility came to light. (Vasquez: 8/12/24,
19 29:20-30:10 (testifying he was unaware of any formal requests by Putnam Ford to Ford requesting
20 authorization to use the Barn prior to October 2022).)¹⁷ “[I]f [Putnam Ford] had moved forward with
21 their plans to do a facility from day one, [Ms. Hughes] believe[d] that facility would already be up and
22 running.” (Hughes: 8/15/24, 239:14-17.)

23
24
25 ¹⁷ The disallowance period was June 2022 through February 2023. But Putnam Ford requested the use
26 of satellite service facilities at the end of October 2022. Thus, for the months of June, July, August,
27 September, and October, it was violating the Warranty Manual without ever having made any written
28 request to relocate in whole or in part to expand its service capacity. Therefore, even if somehow
Ford’s “bad faith” forced Putnam to use an unauthorized location, that “bad faith” only “caused” the
false claims from—at most—November through February. The excuse has very limited value.

1 **Third**, the actual reason for Putnam Ford’s delay in relocation was its ever-changing requests.
2 Although Putnam Ford claims that Ford was dilatory, the totality of the facts show that Putnam Ford
3 constantly changed its relocation requests, making it impossible for Ford to approve a location. As
4 discussed in detail, *infra*. Part III(B),¹⁸ throughout 2021 and 2022, Putnam Ford vacillated between
5 three possible locations for relocation. Ford evaluated every single one and actively worked to get
6 Putnam Ford to commit to a relocation in a written request. On October 25, 2022, after being caught
7 violating the SSA and Warranty Manual, *see infra* Part III(C), Putnam Ford made its first satellite
8 service request, seeking to use the Barn for overflow service. (Vasquez: 8/12/24, 30:6-10.) Ford began
9 processing the request. Then, in December 2022, Putnam Ford requested to relocate its entire operation
10 to the Nissan Facility. (Kamenetsky: 8/13/24, 111:24-112:2; Ex. P-106.) As part of this request,
11 Putnam Ford also requested that Ford authorize the use of 925 Bayswater—a totally different
12 facility—for additional service stalls. (Ex. P-106.) Ford began processing this new request. However,
13 the request was hollow, as Nissan had apparently not agreed to move Nissan of Burlingame into a new
14 facility, so the Nissan Facility was not available for Putnam Ford; Nissan subsequently rejected
15 Putnam Ford’s proposal. (Kamenetsky: 8/13/24, 113:20-24.)

16 In January 2023, Putnam Ford orally indicated that it changed its mind regarding the Nissan
17 Facility. (Swann: 8/16/24, 112:10-14 (testifying that around January 2023, Mr. Vazquez called Ms.
18 Swann and informed her that he wanted to “scrap [the Nisan Facility] plan and move forward with
19 . . . Bayswater [] as their request.”).) On April 19, 2023, Putnam Ford requested to relocate the entire
20 operation to 925 Bayswater. (Kamenetsky: 8/13/24, 113:13-19; Ex. P-119.) Ford processed and
21 ultimately approved this third request to relocate, subject to clearance of the market, but denied the
22 use of the Nissan Facility for temporary service work. (Kamenetsky: 8/13/24, 114:12-18; Ex. R-339.)
23 Mr. Putnam accepted and agreed to Ford’s modified acceptance on June 28, 2023. (Kamenetsky:
24 8/13/24, 128:18-25; Ex. R-339-003.) Ford proceeded to notice the market in support of Putnam Ford’s
25 request to relocate the day after Mr. Putnam signed the conditional approval for relocation.

26
27

¹⁸ Many of these facts are discussed in more detail below. All of these facts are ultimately irrelevant,
28 as Section 3065 does not contain any justification exception and the Board may not consider Putnam
Ford’s bad faith arguments for jurisdictional, preclusion, and procedural reasons.

1 (Kamenetsky: 8/13/24, 129:1-24, 131:12-17, 132:12-15; Ex. R-340, Ex. R-341, R-342.) Two
2 dealerships filed protests; one was resolved. (Kamenetsky: 8/13/24, 133:16-21.)

3 Putnam Ford changed its mind again. In late 2023, Ms. Hughes spoke with Mr. Vasquez and
4 he raised changing the relocation request back to the Nissan Facility. (Hughes: 8/15/24, 235:8-23.)
5 Putnam Ford sent its formal written relocation request in a letter dated December 6, 2023.
6 (Kamenetsky: 8/13/24, 136:15-22, 137:14-138:4; Ex. R-343.) On February 20, 2024, Ford provided
7 conditional approval of Putnam Ford's relocation request to the Nissan Facility. (Kamenetsky:
8 8/13/24, 138:14-17, 139:7-16, Ex. R-344; Hughes: 8/15/24, 232:23-25.) Yet again, Ford noticed the
9 market on behalf of Putnam Ford. (Kamenetsky: 8/13/24, 142:15-21.) Ford of Serramonte filed a
10 protest. (*Id.* 144:15-18; R-345.)

11 In sum, Putnam Ford's argument that it was forced into using an unauthorized facility while
12 Ford idly stood by is simply unsupported by the facts. Putnam Ford had other options but did not
13 consider any of them. There are no facts that it made any effort to use staggered shifts or mobile service
14 at any time. Its efforts to relocate were belated and inconsistent. This is not a situation in which
15 Putnam Ford made every attempt to comply with its contractual duties and transparently went to Ford
16 for assistance. This is a case in which Putnam Ford ignored the rules, got caught, waived away its own
17 failings, and invented a post hoc justification for its actions.

18 iv. The Justification Has Limited Value Even if Correct

19 Even if the Board accepts that Putnam Ford was justified in performing repairs at an
20 unauthorized location, there remains the fact that approximately half of the value of the charge-backs
21 were for multiple reasons, not just the unauthorized location. In fact, of the \$502,821.56 in
22 disallowances, \$244,116.47, from 72 claims, were also disallowed for reasons unrelated to location of
23 the repair. (*See* Attachment 1 (summary of Ex. J-04 charge-back involving multiple bases for the
24 falsity determination).) The Disallowance Summaries fully set forth the basis for every disallowance.
25 (*See* Owens, 8/6/24: 144:1-13; Ex. J-04.)

26 The evidence establishing that Ford disallowed these claims as false for reasons other than
27 location was un rebutted. Rather than address the substance of any of these disallowances, Putnam
28 Ford downplayed these disallowed claims. Mr. Kamenetsky described that at the closing meeting, Mr.

Owens had two stacks of claims and “[o]ne was very small. One was very large. We started with the small one. The small one was in direct violation. . . . So we went through the small stack first.” (Kamenetsky: 8/12/24, 140:12-19.) The implication of the testimony and repetition of the word “small” was clear—Mr. Kamenetsky wanted to give the impression that Mr. Owens only found a *de minimis* number of “direct violations.” This is simply incorrect—almost half of the value had non-location bases as support.

Mr. Kamenetsky’s testimony has little substantive value to the merits and does not rebut the direct evidence from the exhibits and Mr. Owen’s testimony that the claims are false. It is however useful in evaluating the credibility of Mr. Kamenetsky and understanding the perspective of Putnam Ford as a whole. Without specifics or even an analysis of the facts, Mr. Kamenetsky casually attempted to minimize the false acts of Putnam Ford. By describing the claims pile as “small,” he suggests that Putnam Ford rarely violated the Warranty Manual and that, but for the location issue, there is nothing to audit. The facts are different. Putnam Ford, its principles, and its employees regularly cut corners, broke rules, and then massaged the facts to them.

Therefore, even if the Board concludes that affixing a false certification to every claim that it submitted to Ford was not a false practice, or that some how the practice is justified, and therefore not subject to a charge-back, Ford may nonetheless charge back \$244,116.47 for the unchallenged false claims.

B. Ford Satisfied all Procedural and Administrative Requirements of Section 3065(e)(3)

If the franchisor disallows a previously approved claim, the franchisor shall provide to the franchisee, within 30 days after the audit, “a written disapproval notice stating the specific grounds upon which the claim is disapproved.” Veh. Code, § 3065(e)(3). The franchisor must provide a reasonable appeal process. Veh. Code, § 3065(e)(3).¹⁹ Ford provided to Putnam Ford the

¹⁹ The full text reads as follows:

If the franchisor disapproves of a previously approved claim following an audit, the franchisor shall provide to the franchisee, within 30 days after the audit, a written disapproval notice stating the specific grounds upon which the claim is

comprehensive Disallowance Summary (Ex. J-04) on May 25, 2023, and again on June 12, 2023, well within thirty days of the claims review and closing meeting on May 24, 2023. (*See* Owens: 8/6/24, 221:10-14 (affirming he sent Ex. J-04 to Putnam Ford on 5/25/23); R-315 (letter from L. Swann to Putnam Ford summarizing closing meetings and that written documentation of the rationale for each charge-back was provided at the May 24, 2023 meeting); Ex. R-316 (5/25/24 email from J. Owens to Putnam Ford attaching Disallowance Summary); Ex. R-317 (email from J. Owens to K. Putnam & A. Vazquez (6/12/23), with attachment “Disallowance Summary Report”).) The Disallowance Summary identified the basis for each disallowance, with specific citations to the SSA and Warranty Manual supporting the false claims. (Ex. J-04.) And Putnam Ford was notified of, and acknowledged, its right to appeal. (Owens: 8/6/24, 224:16-225:5, 226:22-25; Owens: 8/7/24, 165:23-166:5; Ex. R-315.)

C. The Audit was Not Retaliatory

A franchisor may conduct an audit of a franchisee’s warranty records “on a reasonable basis” after a claim is paid or credit issues. The franchisor “may not select a franchisee for an audit, or perform an audit, in a punitive, retaliatory, or unfairly discriminatory manner.” Veh. Code, § 3065(e)(1). California courts have not expounded on what constitutes retaliation under this statute, so, again, the Board must limit itself to the plain language of the statute. *Cummings*, 177 Cal.App.4th at 507–508; *Voices of Wetlands*, 52 Cal.4th at 519. Retaliation is defined as “[t]he act of doing someone harm in return for actual or perceived injuries or wrongs; an instance of reprisal, requital, or revenge.” RETALIATION, Black's Law Dictionary (12th ed. 2024).

Putnam Ford posits Ford selected Putnam Ford for an audit in retaliation for the Labor Rate Protest. But there is no evidence that Mr. Owens, or anyone at Ford, selected Putnam Ford for an audit

disapproved. The franchisor shall provide a reasonable appeal process allowing the franchisee a reasonable period of not less than 30 days after receipt of the written disapproval notice to respond to any disapproval with additional supporting documentation or information rebutting the disapproval and to cure noncompliance, with the period to be commensurate with the volume of claims under consideration. If the franchisee rebuts any disapproval and cures any material noncompliance relating to a claim before the applicable deadline, the franchisor shall not chargeback the franchisee for that claim.

Veh. Code, § 3065(e)(3).

1 “in return” or “as revenge” for some sort of injury from the labor rate request or protest. Rather, the
2 totality of the evidence clearly shows that Mr. Owens followed all standard Ford procedures and
3 selected Putnam Ford for an audit based on evidence that Putnam Ford was performing warranty
4 repairs at an unauthorized location and that there was evidence of a milage misstatement. The Labor
5 Rate Protest did not impact his decision in any way. Putnam Ford insists, without evidence, that this
6 must be retaliation. Because Putnam Ford cannot substantiate its theory, it resorts to imploring the
7 Board to draw an inference of retaliation based on Ford’s invocation of attorney client privilege. This
8 is flatly prohibited by California law and cannot be countenanced.

9
10 i. Mr. Owens Selected Putnam Ford for an Audit Because of Evidence of False
Claims Discovered During the Warranty Study

11 Mr. Owens, during a conversation with his supervisor, Ms. Crawford, decided to select Putnam
12 Ford for an audit. (Owens: 8/6/24, 127:2-17.) Following Ford’s procedures, Mr. Owens selected
13 Putnam Ford for an audit only after first investigating the allegation, and then completing a warranty
14 study. (*Id.* 98:9-16, 127:11-14.) His decision was based on the following evidence:

- 15 • Personally confirming buildings in pictures from the allegation were not part of the
16 authorized facility. (*Id.* 117:11-15.)
- 17 • Conversations with Putnam Ford technicians confirming that some of the pictures of
18 the vehicles he received from the allegation depicted the Nissan Facility, including the
19 Barn. (*Id.* 117:20-25.)
- 20 • Conversations with six Putnam Ford technicians in which they disclosed they worked
21 in an unauthorized facility. (*Id.* 129:14-16.)²⁰
- 22 • Personally observing the Putnam Ford shop foreman working out of the Nissan Facility
23 and Putnam Ford technicians in the Barn and the Nissan Facility actively working on
24 Ford vehicles. (*Id.* 119:14-21.)
- 25 • Personally observing several pallets of Ford parts with RO numbers written on them at
26 an unauthorized facility, consistent with the requirement that dealerships retain parts
27 that are replaced pursuant to a warranty repair. (*Id.* 122:22-123:15; 124:1-9.)

28 ²⁰ A separate basis for the audit was also that he confirmed a milage misstatement through personally
reviewing diagnostic tool equipment. (Owens: 8/6/24, 129:16-17.) Mr. Owens did not consider any
other facts in determining there were false claims. (*Id.* 129:20-21.)

- Personally observing repairs of Ford vehicles under warranty by Putnam Ford technicians in the Barn and the Nissan Facility. (*Id.* 126:1-21.)

Based on the evidence, Mr. Owens determined there was an extensive amount and quantity of false claims. (*Id.* 127:11-14.) He found that “repairs that are being performed in an unauthorized facility[, which] is not allowed by warranty and policy or the Sales and Service Agreement. So, by submitting those claims to Ford Motor Company, the dealer is agreeing or confirming that those repairs complied with all Warranty and Policy Manual requirements.” (*Id.* 129:5-11.)

Only then was Putnam Ford selected for an audit. (*Id.* 127:2-17 (testifying he recommended upgrading the warranty study to an audit based on his findings).) Given the wealth of evidence of wrongdoing, the decision was “fairly straightforward.” (*Id.* 127:18-128:4.)

ii. There is No Evidence that the Audit Was Retaliatory

Putnam Ford presented no evidence to substantiate the allegation of retaliation. The testimony of Putnam Ford employees was speculative and the subject of impeachment. Despite claiming certainty this was retaliation, they had no actual knowledge of how Ford conducts audits, nor could they point to a single concrete fact showing that Mr. Owens’s testimony was false. (*See, e.g.*, Vasquez: 8/12/24, 18:4-17 (admitting no understanding of how Ford audit process works), 20:8-11 (testifying this was the only Ford audit he had experienced in his career), 19:21-20: 7 (he has never been involved in any audit from any OEM stemming from an allegation); Kamenetsky: 8/13/24, 77:24-78:3 (this was the only audit Mr. Kamenetsky had ever been involved in), 82:8-13 (no one from Ford has ever personally told Mr. Kamenetsky that Ford was so mad about the Labor Rate Protest that it was going to punish Putnam Ford), 82:14-20 (no one from Ford has ever said anything directly to him that would indicate that Ford intended to punish Putnam Ford for its labor rate request), 224:22-225:1 (testifying Ms. Swann did not say anything to him that would cause him to believe that the selection of Putnam Ford for audit was retaliatory).)

Putman Ford made a great to-do over the source of the initial allegation. This is largely a side show because it conflates the allegation with the audit. The allegation and the investigation of the allegation is not an audit. (Owens: 8/6/24, 85:2-12, 86:8-15.) Section 3065 does not apply to either. By receiving the allegation and investigation, Putnam Ford was not (and could not have been)

1 “selected” for an audit. Moreover, there is no evidence that Ms. Swann, the source of the allegation,
2 sent the allegation to retaliate for the Labor Rate Protest. She was not involved in reviewing or denying
3 the labor rate request. (Swann: 8/16/24, 205:20-24.)

4 Practically, Putnam Ford’s position is fundamentally flawed. It has functionally taken the
5 position that if Ford learns of a breach of the SSA and/or violation of its Warranty Manual while there
6 happens to be a labor rate protest pending, its hands are completely tied. This is absurd. Ford has the
7 right to enforce its contracts, even when it has an unrelated dispute with a dealer.

8 **D. Impermissible Invasion of the Attorney Client Privilege**

9 Putnam Ford does not have facts to support its protest, so it impermissibly relies on Ford’s
10 invocation of attorney-client privilege to create the false specter of wrongdoing led by Ford’s counsel.
11 See Attachment 2: Chart of Attorney-Client Privilege Objections. This tactic is not only manipulative,
12 but it violates basic tenants of California law.

13 The Board may not draw any inferences from Ford’s invocation of attorney-client privilege.
14 Questions designed to invade the attorney-client privilege and requests for inferences to be drawn from
15 the invocation of that privilege (1) violate the rules of privilege, as codified by Section 913 of
16 California’s Evidence Code; (2) are not designed to obtain relevant evidence; and (3) even if designed
17 to obtain relevant evidence, the objection and accompanying silence is not the sort of evidence on
18 which responsible persons are accustomed to rely in the conduct of serious affairs.

19 Accordingly, Ford requests that the Board refrain from giving any consideration to the fact that
20 Ford has invoked privilege and reject Putnam’s unfounded attempts to create negative inferences.

21 i. California Law Unequivocally Rejects Drawing Inferences from Privilege
22 Objections

23 This proceeding’s evidentiary rules are governed by Section 11513 of the California
24 Government Code, which states, in relevant part:

25 (c) The hearing need not be conducted according to technical rules relating to
26 evidence and witnesses, except as hereinafter provided. Any relevant evidence shall
27 be admitted if it is the sort of evidence on which responsible persons are
28 accustomed to rely in the conduct of serious affairs, regardless of the existence of
any common law or statutory rule which might make improper the admission of the
evidence over objection in civil actions.

1 ...

2 (e) The rules of privilege shall be effective to the extent that they are otherwise
3 required by statute to be recognized at the hearing.

4 Gov. Code, § 11513(c) & (e).

5 Here, California Evidence Code Section 913 must be recognized and applied at the hearing
6 because it prevents the introduction of evidence upon which “a responsible person would not rely in
7 the conduct of serious affairs.” *Id.* Under Section 913,

8 If in the instant proceeding or on a prior occasion a privilege is or was exercised
9 not to testify with respect to any matter, or to refuse to disclose or to prevent another
10 from disclosing any matter, **neither the presiding officer nor counsel may**
11 **comment thereon, no presumption shall arise because of the exercise of the**
12 **privilege, and the trier of fact may not draw any inference therefrom as to the**
13 **credibility of the witness or as to any matter at issue in the proceeding.**

14 Evid. Code, § 913(a) (emphasis added).

15 The Assembly Committee on the Judiciary explained that “[i]f comment could be made on the
16 exercise of a privilege and adverse inferences drawn therefrom, a litigant would be under great
17 pressure to forgo his claim of privilege and the protection sought to be afforded by the privilege would
18 be largely negated. **Moreover, the inferences which might be drawn would, in many instances, be**
19 **quite unwarranted.**” Evid. Code, § 913, cmt (emphasis added).

20 Section 913 codifies California’s long-standing protection and enforcement of the attorney-
21 client privilege. *Carroll v. Commission on Teacher Credentialing* (2020) 56 Cal.App.5th 365, 380
22 [270 Cal.Rptr.3d 448, 458–459], explained the purpose of this privilege safe-guard:

23 The attorney-client privilege, one of the oldest recognized, allows a client to refuse
24 to disclose, and to prevent others from disclosing, confidential communications
25 with an attorney. The fundamental purpose behind the privilege is to safeguard the
26 confidential relationship between clients and their attorneys so as to promote full
27 and open discussion of the facts and tactics surrounding individual legal matters.
28 The privilege is absolute[.] It prevents disclosure of the communication regardless
29 of its relevance, necessity or other circumstances peculiar to the case.

30 (internal quotation marks and citations omitted). Likewise, an examination tactic that repeatedly elicits
31 a privilege objection “put[s] defendants in an untenable position.” *Id.* at 382. The party invoking
32 privilege is stuck in a catch-22; it:

1 could avoid the negative inference raised by counsel's questions only by disclosing
2 their specific reasons for seeking legal advice, effectively waiving the attorney-
3 client privilege by disclosing the contents of their communication with counsel. It
4 was this choice that section 913 was enacted to prevent. According to legislative
5 comment on the statute, "If comment could be made on the exercise of a privilege
6 and adverse inferences drawn therefrom, a litigant would be under great pressure
7 to forgo his claim of privilege and the protection sought to be afforded by the
8 privilege would be largely negated. **Moreover, the inferences which might be
9 drawn would, in many instances, be quite unwarranted.**"

10 *Id.* (emphasis added) (quoting (Assem. Com. on Judiciary, com. on Evid. Code, § 913, reprinted at
11 29B pt. 3A West's Ann. Evid. Code (2009 ed.) foll. § 913, p. 245)).

12 The prohibition of drawing an inference from an attorney-client privilege objection, as codified
13 by the California Evidence Code, is an extension of the rules of privilege. Were the invocation of
14 privilege permitted to be weaponized, it would undermine the privilege itself by forcing Ford into an
15 "untenable position" of having to "effectively waive[] attorney-client privilege." *Id.*

16 Moreover, questions which knowingly seek an attorney-client privilege objection and
17 documents designed to introduce the invocation of privilege are necessarily not designed to obtain
18 relevant evidence. The invocation of privilege does not make any fact any more or less likely. Indeed,
19 an objection from counsel is **not** testimony from a witness; as such, the objection is, as a matter of
20 law, not evidence. Even if the question itself could be said to seek relevant evidence, the objection and
21 the inference that Putnam seeks is inherently unreliable because the alternative is to waive privilege.
22 And "the inferences which might be drawn would, in many instances, be quite unwarranted." *Id.*

23 ii. Putnam Ford Has Actively Stated It Wants the Board to Draw an Inference from
24 the Invocation of Privilege

25 Putnam Ford continues to advance the speculative argument that Ford's outside counsel
26 initiated the audit, instructed Ford to deny Putnam Ford's requests for authorization to use the Barn to
27 perform repairs, and "directed Ford's bad faith conduct for the primary purposes of gaining an
28 advantage in the ongoing Labor Rate Litigation and for the purported basis to conduct the retaliatory
audit." (Putnam Pre-Hr'g Br. at 4-5.) Unsurprisingly, there is no evidence to support these claims. In
the absence of evidence, Putnam Ford begs the Board to draw negative inferences in Putnam Ford's
favor every time Ford invokes the attorney-client privilege. Specifically, Putnam Ford intentionally

1 elicited the invocation of privilege when questioning Ford witnesses regarding when and how Ford
2 learned of Putnam Ford performing service work at an unauthorized location. *See* Attachment 2.

3 Additionally, Putnam Ford introduced exhibits containing information redacted for privilege
4 with the purpose of speculating and drawing negative inferences at the redacted information. (*See* Ex.
5 P-111.003; *see also* Owens: 8/7/24, 20:17-27:11 (objection and argument to exclude the admission of
6 the last page of the exhibit with privilege redactions).)

7 iii. Putnam’s Belated Invocation of the Crime Fraud Exception Has No Application

8 During the Hearing, Putnam Ford argued, for the first time, that it is appropriate to invade the
9 attorney-client privilege and asked the Board to draw inferences from its invocation because of the
10 crime-fraud doctrine. (Kamenetsky: 8/13/24, 222:9-13 (defense counsel arguing, “I don’t think
11 privilege attached to future unlawful acts and that is, sort of, what we are – we are arguing in this case
12 that the—there was an intention to retaliate for the labor rate submission.”).) This argument is flimsy
13 at best. The doctrine has no application here.

14 “Evidence Code section 956 is the so-called crime/fraud exception: ‘There is no privilege
15 under this article if the services of the lawyer were sought or obtained to enable or aid anyone to
16 commit or plan to commit a crime or a fraud.’” *State Farm Fire & Cas. Co. v. Superior Ct.* (1997) 54
17 Cal.App.4th 625, 643 [62 Cal.Rptr.2d 834, 847], as modified (May 1, 1997). “To invoke the Evidence
18 Code section 956 exception to the attorney-client privilege, the proponent must make a prima facie
19 showing that the services of the lawyer ‘were sought or obtained’ to enable or to aid anyone to commit
20 or plan to commit a crime or fraud. [Citation.]” *Id.* “[E]xtreme caution must be exercised when an
21 accusation is made which will invade the attorney-client relationship in connection with ongoing
22 litigation.” *Id.* at 644–45.

23 The crime-fraud exception does not apply. Putnam Ford is not seeking to bust privilege and
24 get to the substance of the communications. Even if it were applicable, Putnam Ford should have
25 raised this during discovery, when Ford timely raised the privilege objection. *See, e.g.,* Ex. P-111.003
26 (AC privilege redaction). If Putnam Ford truly believed privilege was being used to cloak a crime,
27 then it should have presented this to the Board well in advance of the Hearing, so that the Board could
28 decide whether to instruct witnesses to answer questions about privileged communications. In fact

1 Putnam Ford could not raise the crime-fraud exception during discovery because 1) there is no
2 allegation let alone evidence that Ford **committed a crime** or engaged in **fraud**; and 2) there is no
3 evidence that Ford sought the legal advice of counsel to do so. Indeed, the testimony exclusively
4 establishes that the Ford employee responsible for the audit did not rely on any legal advice in deciding
5 to conduct the audit nor in coming to his conclusions during the audit. The same employee has also
6 flatly rejected the notion that counsel was the source of the initial allegation. (Owens: 8/7/24, 52:2-
7 11.)

8 **II. THE BOARD CANNOT AND SHOULD NOT CONSIDER PUTNAM FORD'S**
9 **BELATED SECTION 3065.2 CLAIM FOR BAD FAITH**

10 The Board may not and should not hear and decide Putnam Ford's newly introduced theory
11 that "Ford acted in other than good faith when it refused to approve Putnam [Ford]'s repeated requests
12 for additional noncustomer facing service capacity" and that Ford withheld its approval of its
13 relocation requests in bad faith to "create leverage over Putnam Ford" in the Labor Rate Protest and
14 in the audit in violation of 3065.2(i)(2)(D) (Putnam Pre-Hr'g Br. at 5, 6, 10.)²¹ This new legal theory
15 was never pled in Putnam Ford's Protest. As a threshold issue, the Board does not have jurisdiction to
16 hear this claim. The Legislature was unequivocal that the Board may only "hear and decide, **within**
17 **the limitations and in accordance with the procedure provided**, a protest **presented** by a franchisee
18 pursuant to Section 3060, 3062, 3064, 3065, 3065.1, 3065.3, 3065.4, 3070, 3072, 3074, 3075, or
19 3076." Veh. Code, § 3050(c). A claim for a violation of Section 3065.2 may only be brought as part
20 of a Section 3065.4 protest seeking the determination of a labor rate. This Protest was presented
21
22

23 _____
24 ²¹ Putnam Ford also alleges Ford violated Section 3065.2(i)(2)(G) by "conducting or threatening to
25 conduct nonroutine nonrandom warranty, nonwarranty repair, or other service-related audits in
26 response to a franchisee seeking compensation or exercising any right pursuant to [Section 3065.2]"
27 (Putnam Pre-Hr'g Br. at 6.) Functionally, this is the same as Putnam Ford's allegation that Ford
28 selected it for an audit for a retaliatory purpose under Section 3065. Although the Board may not
consider a violation of Section 3065.2, it has considered the same underlying factual theory as part of
the Section 3065 claim. As explained, *supra*, Ford met its burden to show that Ford did not retaliate
against Putnam Ford for the Labor Rate Protest or the underlying request when it selected Putnam
Ford for an audit.

1 pursuant to Section 3065 only, and Section 3065 does not provide for the consideration of Ford’s good
2 faith related to relocation requests or labor rate requests.

3 Further, a Section 3065.2 claim that Ford acted in bad faith is precluded under the doctrine of
4 claim preclusion. Putnam Ford could have brought this claim in the Labor Rate Protest, but it failed to
5 do so. Because the Board has entered a final judgment on the merits in the Labor Rate Protest, and
6 because the parties are the same, the claim is precluded as a matter of law.

7 Finally, even if the Board has jurisdiction, the claim is untimely and its belated inclusion,
8 without discovery on the issue, is prejudicial to Ford. This claim was not in the Protest, was never the
9 subject of discovery, and only was subtly introduced days before the Hearing as part of Putnam Ford’s
10 Pre-Hearing Brief. It would be fundamentally unjust to force Ford to bear the burden of proof to defend
11 itself on an allegation of bad faith—a fact-based claim—in the context of relocation requests unrelated
12 to the audit, without having been able to fully develop its defense.

13 Putnam may not ambush Ford at trial by raising an entirely new, fact-intensive theory in this
14 audit case. As such, the Board should hold that the Section 3065.2 issue is not before it, and it may
15 stop its inquiry here, overruling Putnam’s Section 3065 protest. Should it reach this conclusion, the
16 Board does not need to consider Part III of this Post-Hearing Brief.

17 **A. The Board Has Narrow Jurisdiction That Does Not Encompass a Section 3065.2**
18 **Claim Presented In a Section 3065 Protest**

19 In California, “[t]he judicial power of the state is vested in the [courts].” Cal. Const., art. VI,
20 § 1.

21 An administrative agency may constitutionally hold hearings, determine facts,
22 apply the law to those facts, and order relief—including certain types of monetary
23 relief—so long as (i) **such activities are authorized by statute or legislation** and
24 are reasonably necessary to effectuate the administrative agency’s primary,
legitimate regulatory purposes, and (ii) the ‘essential’ judicial power (i.e., the power
to make enforceable, binding judgments) remains ultimately in the courts, through
review of agency determinations.

25 *McHugh v. Santa Monica Rent Control Bd.* (1989) 49 Cal.3d 348, 372 [261 Cal.Rptr. 318] (emphasis
26 added) (italics omitted). But “any administrative execution of judicial functions must be pursuant to
27 legislative authorization, legislative authorization is inadequate constitutionally if it does not meet the
28

1 reasonably necessary/legitimate regulatory purpose test or if it seizes the essential judicial power from
2 the courts.” *Hardin Oldsmobile v. New Motor Vehicle Bd.* (1997) 52 Cal.App.4th 585, 589 [60
3 Cal.Rptr.2d 583, 585], *as modified on denial of reh'g* (Feb. 28, 1997) (citing *Bradshaw v. Park* (1994)
4 29 Cal.App.4th 1267, 1275 [34 Cal.Rptr.2d 872]).

5 The Board is a creature of statute, and, as such, its authority to adjudicate cases flows from and
6 is limited by its enabling act. *Id.*; *see also* Veh. Code, §§ 3000 *et seq.* The California Legislature has
7 **only** authorized the Board to “[h]ear and decide, **within the limitations and in accordance with the**
8 **procedure provided**, a protest **presented** by a franchisee pursuant to Section 3060, 3062, 3064, 3065,
9 3065.1, 3065.3, 3065.4, 3070, 3072, 3074, 3075, or 3076.” Veh. Code, § 3050(c) (emphasis added).
10 The language of Section 3050(c) is explicitly and intentionally narrow. The Board may only hear and
11 decide claims within the “limitations” of the specifically enumerated statutes, and only when the
12 protest is “presented” pursuant to that statute. *Id.*

13 To “present” a claim of a violation of Section 3065.2, a franchisee must file a Section 3065.4
14 protest for a declaration of the franchisee’s retail labor rate. Veh. Code, § 3065.4(a) (“If a franchisor
15 fails to comply with Section 3065.2, or if a franchisee disputes the franchisor’s proposed adjusted retail
16 labor rate or retail parts rate, **the franchisee may file a protest with the board for a declaration of**
17 **the franchisee’s retail labor rate or retail parts rate.**”) Putnam Ford did not present the Protest
18 pursuant to Section 3065.4, and Putnam Ford is not seeking a declaration of its retail labor rate or retail
19 parts rate. (*See generally* Protest.) Thus, on the most basic level, the Board may not hear and decide
20 Putnam’s Section 3065.2 claim because it has not “presented” the claim.

21 In fact, no provision of the Vehicle Code provides the Board with authority to hear a standalone
22 claim that a manufacturer violated Section 3065.2(i)(2)(D) (or any other provision of Section 3065.2)
23 by acting in bad faith. The Legislature has only authorized the Board to hear and decide whether a
24 manufacturer has violated Section 3065.2 when the violation is pled as part of a labor rate protest.
25 Veh. Code, § 3065.4(a). As such, any action in which a dealer seeks to allege a violation of Section
26 3065.2 would have to be brought in a court of general jurisdiction pursuant to either Section 17726 of
27 the Government Code or some other available common law, such a declaratory judgment action or a
28 breach of contract action. *See, e.g., Hardin*, 52 Cal.App.4th at 589 (holding the Board may not hear a

1 protest where the Legislature has not provided the Board with a specific right to decide that particular
2 claim).²² Even if Putnam Ford had timely sought leave to amend its Protest to include its current
3 Section 3065.2(i)(2)(D) claim, the amendment would be futile because it must be included as part of
4 a labor rate determination.

5 Rather, Putnam Ford filed the Protest pursuant to Section 3065 alleging a violation of Section
6 3065(e). (*See generally* Protest.) The Board has jurisdiction to hear and decide the Protest pursuant to
7 the limitations of, and in accordance with, Section 3065. Section 3065 does not provide the Board with
8 any authority to hear and decide a protest challenging whether a manufacturer has complied with
9 Section 3065.2, or whether it acted in bad faith in denying a relocation or request for satellite services.
10 *See generally* Veh. Code, § 3065. As such, Putnam Ford may not seek to shoehorn its latest theory of
11 bad faith into the existing Protest.

12 Jurisdiction is not a technicality—it is a constitutional limitation. The Board must strictly
13 construe the Vehicle Code. Under the plain language of Section 3050(c), the Board may not hear and
14 decide Putnam Ford’s allegations that Ford violated Sections 3065.2(i)(2)(D).

15 **B. A Section 3065.2 Claim is Precluded**

16 “Claim preclusion applies to matters which were raised or could have been raised, on matters
17 litigated or litigatable in the prior action.” *Howitson v. Evans Hotels, LLC* (2022) 81 Cal.App.5th 475,
18 486 [297 Cal.Rptr.3d 181, 190] (internal quotation marks omitted); *accord LaCour v. Marshalls of*
19 *California, LLC* (2023) 94 Cal.App.5th 1172, 1189–90 [313 Cal.Rptr.3d 77, 89] (“claim preclusion
20 applies not just to what was litigated, but more broadly to what could have been litigated”). If the
21 matter to be litigated is “within the scope of the [prior] action, related to the subject-matter and relevant
22 to the issues, so that it could have been raised, the judgment is conclusive on it despite the fact that it
23 was not in fact expressly pleaded or otherwise urged.” *Howitson*, 81 Cal.App.5th at 486. There are
24 three elements to claim preclusion:

25
26
27 ²² The Vehicle Code does not describe the remedy a franchisee would receive if a manufacturer could
28 not meet its burden on a Section 3065.2 claim not tied to a labor rate dispute. As such, the Board has
no authority to provide a prevailing franchisee with any remedy.

1 First, the second lawsuit must involve the same “cause of action” as the first
2 lawsuit. Second, there must have been a final judgment on the merits in the prior
3 litigation. Third, the parties in the second lawsuit must be the same (or in privity
4 with) the parties to the first lawsuit.

5 *Id.*

6 Here, Putnam Ford argues that “Section 3065.2 (i)(2)(D) prohibits a franchisor from ‘[f]ailing
7 to act other than in good faith.’ (Cal. Veh. Code, § 3065.2, subd. (i)(2)(D).) Ford acted in other than
8 good faith when it refused to approve Putnam’s repeated requests for additional noncustomer facing
9 service capacity.” (Putnam Pre-Hr’g Br. at 6.) As previously discussed, a Section 3065.2 claim must
10 be brought as a Section 3065.4 protest. *See* Veh. Code, § 3065.4(a). And the Board has already heard
11 and issued a decision on the merits in the Section 3065.4 protest between Putnam Ford and Ford—the
12 Labor Rate Protest. (*See* Ex. R-336.) Although Putnam Ford did not raise bad faith in the Section
13 3065.4 protest, it could have included the claim as it was well aware of the alleged bad faith of Ford
14 (not approving the relocation requests and the audit) in advance of the September 2023 Labor Rate
15 Protest Hearing.

16 Putnam Ford will likely argue it was barred from discussing these issues in the Labor Rate
17 Protest. Not so. Putnam Ford was barred from alleging the audit was retaliatory in the Labor Rate
18 Protest. It never sought to argue Ford acted in bad faith under Section 3065.2 or tried to use the
19 relocation to “create leverage over Putnam Ford” in the Labor Rate Protest. It should not be able to
20 take a second bite at the Section 3065.2 apple now that it has received an unfavorable decision from
21 the Board in the Labor Rate Protest. (*See* Ex. R-336-001 and 055 (overruling Putnam’s Section 3065.4
22 protest).)

23 **C. Putnam Ford May Not Raise a New Claim During a Hearing**

24 Even if jurisdiction did not bar the Board from hearing Putnam Ford’s bad faith claim,
25 procedure and equity do. The Board would have to *sua sponte*²³ amend the pleadings to conform with
26 the proof presented by Putnam Ford. But an amendment is not permitted because it introduces “new

27 ²³ Although Ford objected to the consideration of the Section 3065.2 claim on the first day of the
28 Hearing, Putnam Ford did not move to amend the Protest. Thus, consideration of this issue would be
sua sponte. Had Putnam Ford moved for leave to amend, Ford would have objected, or, alternatively,
been able to consider whether to ask for the Board to continue the Hearing and reopen discovery so
that it could have an opportunity to develop its defenses.

1 and substantially different issues . . . in the case or the rights of the adverse party prejudiced.” *Garcia*
2 *v. Roberts* (2009) 173 Cal.App.4th 900, 909 [93 Cal.Rptr.3d 286, 293]. “[A]mendments of pleadings
3 to conform to the proofs should not be allowed when they raise new issues not included in the original
4 pleadings and upon which the adverse party had no opportunity to defend.” *Id.* (internal quotation
5 marks and citations omitted). This requires an evaluation of:

6 (1) whether facts or legal theories are being changed and (2) whether the opposing
7 party will be prejudiced by the proposed amendment. Frequently, each principle
8 represents a different side of the same coin: If new facts are being alleged, prejudice
9 may easily result because of the inability of the other party to investigate the
10 validity of the factual allegations while engaged in trial or to call rebuttal witnesses.
11 *Id.* at 910.

12 At issue here are facts relating to Ford’s good faith in responding to Putnam Ford’s numerous
13 relocation requests. These relocation requests have no connection to the audit process. Putnam Ford
14 did not allege bad faith in its Protest and, as such, these facts were not and are not relevant to the issues
15 presented to the Board. In fact, when Putnam Ford included a request for the production of documents
16 regarding relocation, Ford objected to the request as irrelevant. (*See Respondent’s Responses to*
17 *Protestants’ Requests for the Production of Documents* at 19 (objecting to Request No. 31 on the
18 grounds that documents seeking information about relocation requests are irrelevant).) Such
19 information has no bearing on whether performing a repair at an unauthorized location is “false” or
20 whether the decision to conduct the audit was retaliatory. The Board agreed and ALJ Skrocki sustained
21 Ford’s objection. *Rulings on Objections to Requests for Production of Documents* (Nov. 9, 2023) at
22 3, ln. 1 (sustaining objection to Request No. 31). During conferral and the subsequent discovery
23 hearing, Putnam Ford certainly did not argue that claims of Section 3065.2 bad faith were part of its
24 existing Protest.

25 Putnam Ford never sought to amend its Protest after having been told by the Board that the
26 issue of relocation was irrelevant. As such, Ford did not use discovery to develop facts regarding the
27 relocation requests, such as all of Putnam Ford’s, or other Putnam entities, documents, phone records,
28 or electronic communications regarding relocation requests; relations with other OEMs and related
facilities; evidence regarding the typical relocation process within Ford; evidence regarding Putnam
Ford’s initial decision to relocate to a sub-par facility at the beginning of the franchise relationship; or

1 communications regarding Putnam Ford’s failure to observe its contractual commitments to secure a
2 new facility no later than May 1, 2022. Ford is prejudiced by the introduction of this issue because it
3 was unable to develop its factual theories and properly defend against this claim. Even if the Board
4 had jurisdiction to hear a stand-alone claim that Ford violated Section 3065.2(i)(2)(D), it should not
5 do so here because it is highly prejudicial and inequitable.

6 **D. Evidence to Be Excluded**

7 Because the Board may not hear a Section 3065.2 claim, it should not consider any evidence
8 that solely relates to the allegations that Ford “[d]irectly or indirectly, [took] or threaten[ed] to take
9 any adverse action against a franchisee for seeking compensation or exercising any right pursuant to
10 this section, by any action including, but not limited to, the following : . . (D) Failing to act other than
11 in good faith.” Veh Code, § 3065.2(i)(2)(D).

12 This includes allegations and speculative testimony that Ford acted in bad faith in handling
13 Putnam Ford’s relocation and satellite service requests. This accounts for approximately half the
14 testimony presented at the Hearing as well as much of designated testimony. While the totality of the
15 evidence shows that Ford acted with good faith and, indeed Putnam Ford was constantly changing its
16 requests at great expense to Ford, this rabbit hold of inquiry is wholly unnecessary.

17 **III. THE RECORD SHOWS FORD ACTED IN GOOD FAITH RESPONDING TO**
18 **PUTNAM FORD’S EVER-CHANGING RELOCATION REQUESTS**

19 The evidence overwhelmingly demonstrates that Ford acted in good faith in responding to
20 every one of Putnam Ford’s relocation requests. The reason for any delay was entirely due to Putnam
21 Ford’s indecisiveness. Putnam Ford’s Authorized Location was always intended to be temporary and
22 it was contractually required to secure a new facility by May 2022. Yet throughout 2021 and 2022, it
23 toggled between several potential facilities—at great expense and effort on Ford’s part—without ever
24 making a formal request to relocate. Putnam Ford then blew its deadline to secure a new facility by
25 May 2022. After Ford learned Putnam Ford was violating its SSA and the Warranty Manual, Putnam
26 Ford made a written facility request. It then proceeded to change its mind—again, and again, and
27 again. Every time, Ford started the process to approve a new facility, expending a great deal of
28 resources on each of Putnam Ford’s requests. Ford even approved a relocation request, noticed the

1 market, which lead to a Protest, only to have Putnam request a different location again. And Ford
2 approved that request and noticed the market again. If the facts demonstrate bad faith, it is Putnam
3 Ford's. This side show should not be allowed to derail this audit Protest, and if considered at all, it
4 should be seen as what it is—Putnam Ford's bad faith and disregard for its business partner.

5 **A. The Authorized Location Was Approved as a Temporary Location**

6 The location of the Putnam Ford dealership has a long history that predates the opening of
7 Putnam Ford. In a letter dated January 27, 2021, Ford conditionally approved Putnam Ford as a Ford
8 franchisee operating at 790 North San Mateo (the "790 Location"). (Ex. P-101; Kamenetsky: 8/12/24,
9 281:7-14.) At that time, it was Ford's understanding that Putnam would ultimately provide a new,
10 permanent, image compliant Ford facility. (Ex. R-349-006 to 007.)

11 But Putnam Ford lost the 790 Location **after** Ford conditionally approved Putnam Ford as a
12 dealer. (Vasquez: 8/8/24, 71:21-25.) Putnam Ford then requested to relocate to the Authorized
13 Location at 885 North San Mateo. (Kamenetsky: 8/13/24, 108:21-109:1.) Ford suggested that Putnam
14 Ford move into Mr. Putnam's GMC location to address the limited capacity. (Vasquez: 8/12/24 59:12-
15 60:18.) The Authorized Location **was never intended to be permanent**. (*Id.* 59:2-6; Kamenetsky:
16 8/13/24, 108:21-109:1 (San Mateo was approved as a temporary facility only).) Among other things,
17 the Authorized Location lacked adequate service capacity. (A. Vasquez: 8/12/24, 59:7-11.)²⁴ In a
18 March 2021 Conditional Letter of Approval conditionally approving a dealership at the Authorized
19 Location, Putnam Ford agreed it would secure a final, permanent location by May 2, 2022. (Ex. P-

21
22 ²⁴ Mike Gogolewski, a former market representation manager in the San Francisco Region, testified
23 he had very little involvement in Putnam Ford proposing the use of the Authorized Location after
24 Putnam Ford lost the 790 Property. (Gogolewski: 8/15/24, 57:12-15.) Mr. Gogolewski had a limited
25 role in authorizing new facilities, that largely involved the distance of the proposed location to other
26 dealerships and whether the building needed to be retrofitted. (*Id.* 100:8-17.) He was a liaison between
27 the dealer and the franchising group in Dearborn, Michigan. (*Id.* 100:18-21.) As such, Mr. Gogolewski
28 was unaware that the Authorized Location had only three service stalls as of March 2021 (*id.* 57:16-
19); he flatly denies having conversations with Mr. Vasquez in early 2021 about a need to add service
capacity (*id.* 75:13-18). Mr. Gogolewski never performed an assessment of service capacity at the
Authorized Location precisely because it was a temporary location only. (*Id.* 74:10-13.) The goal was
to find a new, permanent space and secure that space within the first year. (Ex. P-102.)

1 102.001; Kamenetsky: 8/13/24, 111:13-19.) Relocating to a permanent facility was the methodology
2 for resolving the shortfall in service capacity “from day one.” (Gogolewski: 8/15/24, 118:17-21.)²⁵

3 Mr. Putnam admitted that the Barn is not an authorized location of Ford; it is a Nissan facility.
4 (Ex. R-327-012, (K. Putnam Dep. 1073:4-16).) He also acknowledged that Nissan required that all of
5 its authorized facilities be used exclusively for Nissan operations. (*Id.*, 1073:25-1074:3.)

6 **B. Putnam Ford Blew the May 2022 Deadline and Never Submitted a Written**
7 **Relocation Request**

8 Mr. Gogolewski was a Ford Market Representation Manager in 2021 through August 2022 in
9 San Francisco. (Gogolewski: 8/15/24, 94:5-13.) During that time, Putnam Ford had indicated an intent
10 to move to a Buick GMC location, but it never submitted a written request to do so. (*Id.* 94:19-95: 16;
11 *see also* Ex. R-349-007 (“I recall the original proposal was replacing the Buick GMC franchise in that
12 building).) This was consistent with Putnam Ford’s prior offer in 2020, around the time that Putnam
13 Ford moved into the Authorized Location, to relocate to the Putnam GMC location. (Vasquez: 8/12/24,
14 59:12-60:18.) Despite the lack of a formal request, Ford helped Putnam Ford with a potential
15 relocation by working on design plans for that location. (Gogolewski: 8/15/24, 95:8-19.)

16 Putnam Ford then changed its mind. (Ex. R-349-007 to 008 (“I recall Putnam offering a few
17 different proposals, that they kind of changed their mind on several occasions.”); Vasquez: 8/12/24,
18 60:24-61:2 (testifying Putnam Ford put a hold on the GMC location and started working on other
19 offers).) Mr. Gogolewski visited the Nissan Facility because Putnam Ford informally proposed
20 relocating to that location. (Gogolewski: 8/15/24, 73:17-21.) Mr. Gogolewski worked with Putnam
21 Ford “extensively” on relocating to the Nissan Facility. (*Id.* 95:20-24.) This included providing design
22 and layout assistance and cost assessments. (*Id.* 95:25-96:4.) Although the Nissan Facility was an
23 active Nissan dealership, Mr. Putnam told Mr. Gogolewski that he planned to terminate the Nissan
24 franchise so the space would be available. (*Id.* 116:3-16.)

25
26
27 ²⁵ Ms. Swann testified that she was “concerned with approving or requesting and supporting a
28 secondary location” because “it doesn’t guarantee that [Putnam Ford is] wanting to move forward with
the [permanent] facility itself.” (Swann: 8/16/24, 228:17-22.)

1 In Spring 2022, Mr. Gogolewski visited the Nissan Facility to try and get a commitment to
2 relocate from Putnam Ford because they had not submitted a formal request for relocation. (*Id.* 73:22-
3 24; Vasquez: 8/8/24, 85:10-22 (estimating the visit was in April 2022).) Mr. Gogolewski was also
4 evaluating the Nissan Facility as a potential permanent facility for Putnam Ford, and he walked the
5 complete exterior of the location and looked inside the Barn. (Gogolewski: 8/15/24, 101:11-15;
6 Vasquez: 8/12/24, 57:24-58:2 (testifying stopped by facility while they were on their way to lunch).)²⁶

7 But Putnam Ford did not relocate in 2021 or 2022 because “Putnam kept changing locations
8 with [Ford].” (Gogolewski: 8/15/24, 96:5-9.) Had he been given the option, Mr. Gogolewski
9 “absolutely” would have supported a relocation to the GMC facility and would have supported
10 relocating to the Nissan Facility as an exclusive Ford facility. (*Id.* 96:10-25.) By the time Mr.
11 Gogolewski left his position as market representative in August 2022, Putnam Ford never submitted a
12 request for a satellite service location to Mr. Gogolewski. (*Id.* 97:1-8). Likewise, when he left, Mr.
13 Gogolewski was not aware that Putnam Ford was doing unauthorized service at the Nissan Facility,
14 including the Barn. (*Id.* 97:15-21.) He certainly never authorized Putnam Ford to do service work at
15 either location (*id.* 97:22-98:1), nor did he have the authority to do so (*id.* 98:2-12).

16 **C. Putnam Ford Violates the SSA and Warranty Manual and Tries to Cover Its**
17 **Tracks**

18 Mr. Putnam readily admitted that the Barn is not an authorized location of Ford; it is a Nissan
19 facility. (Ex. R-327-012 (K. Putnam Dep. 1073:4-16).) He also acknowledged that Nissan required its
20 authorized facilities be used exclusively for Nissan operations. (Ex. R-327-012 to 013, 1073:25-
21 1074:3.) Nonetheless, Putnam Ford came up with a work around for its Ford service issues that allowed
22 it to avoid its contractual obligation to relocate—use the Nissan Facility and the Barn to perform
23 service. (*See, e.g.*, Ex. J-02 (stipulation that Putnam Ford was performing work at an unauthorized
24 location).)

25
26 ²⁶ Mr. Gogolewski did not “tour” the Barn. (Gogolewski: 8/15/24, 101:16-21.) “We just looked, and I
27 remember we left from there.” (*Id.* 101:22-102:19; *accord id.* 58:3-9 (testifying they walked by the
28 Barn, up to the rolling gate, walking inside the entry, and left; they did not talk to any technicians
while there).) Mr. Vasquez admitted he did not disclose that Putnam Ford was performing warranty
work at the Barn during that visit. (Vasquez: 8/12/24, 56:14-57:23.)

1 In October 2022, Mr. Putnam had a meeting with Ms. Swann to discuss possible relocation to
2 the Nissan Facility. (Swann: 8/16/24, 95:23-96:20; Swann: 9/21/23, 792:3-4, 805:2-8.) At that time,
3 Ms. Swann did not have any knowledge that Putnam Ford was using the Barn. (Swann: 8/16/24, 96:19-
4 20.) During the meeting, Mr. Putnam made a comment that “Ford knew they were servicing vehicles
5 at the Nissan facility,” that “caught [Ms. Swann] off guard.” (Swann: 9/21/23, 805:21-807:3; *accord*
6 Swann: 8/15/24, 97:10-25 (testifying Mr. Putnam mentioned he was using the Barn during the tour),
7 209:25-210:14).) The comment was “out of the blue[,]” and Ms. Swann believed Mr. Putnam “was
8 actually saying it to kind of sneak it in as if [she] knew, and [she] didn’t.” (*Id.*, 807:23-25; *accord*
9 Swann: 8/16/24: 120:20-121:10.) Ms. Swann told Mr. Putnam that Putnam Ford was not to service
10 vehicles at an unauthorized location. (Swann: 8/16/24, 210:8-14.) She explained that Putnam Ford
11 would need to submit a written request to add the Barn location to the SSA. (Swann: 8/15/24, 98:7-
12 11.)

13 **D. Putnam Ford’s Multiple Relocation Requests**

14 After being caught using an unauthorized facility, Putnam Ford began making written requests
15 for relocation and communicating changes to those requests orally. The requests are detailed below.
16 Despite Putnam Ford’s capricious behavior, Ford diligently worked on every request in good faith.
17 Every time Ford received a new request, the approval process started all over again. (Swann: 8/16/24,
18 202:24-203:2.) At no point did Ms. Swann request that any one at Ford “slow roll” or delay any of the
19 facility requests. (*Id.* 205:25-206:7.) Likewise, Ms. Hughes “spent a lot of time on pushing through
20 all of the requests that Putnam Ford has made.” (Hughes: 8/15/24, 240:4-5.)

21 i. Written Request 1: Satellite Service at the Barn

22 Following the October 2022 meeting, during which Ms. Swann told Mr. Putnam that Putnam
23 Ford was not to perform service work at an unauthorized location, Putnam Ford submitted a written
24 request to use the Barn dated October 25, 2022. Ex. P-104.²⁷ Putnam Ford continued to use the Barn
25

26
27 ²⁷ Mr. Kamenetsky agreed that, even if Ford approved the request as early as October 31, 2022, all of
28 the charge-back disallowances from June 2022 through October 2022, would still have been performed
at an unauthorized location. (Kamenetsky: 8/13/24, 100:24-102:14.)

1 following this request, despite expressly representing to Ford that it had ceased all use of the Barn.
2 (Ex. R-303; Vasquez: 8/12/24, 33:2-15.)²⁸

3 Ms. Swann testified that the normal practice when receiving a facility request is that the market
4 representation manager processes them. (Swann: 8/16/24, 99:15-19.) Consistent with this practice,
5 Ms. Hughes processed the Putnam Ford request and sent the request to a Ford team in Dearborn,
6 Michigan. (*Id.* 99:18-100:13.) The Ford team was tasked with identifying “the proximity and impact
7 on other dealers, whether it is meeting the state law and other requirements and then they would
8 provide [the region] a recommendation and/or ask for any other questions or documents that they need
9 and then ultimately make a decision.” (*Id.* 99:24-100:4.)

10 Ford never approved or denied this request because “the second request came on top of this
11 one; so [Ford] never fully processed this one.” (Swann: 8/16/24, 100:7-20; 126:20-23.)

12 ii. Written Request 2: Relocation and Satellite Service at Bayswater

13 On December 13, 2022, Putnam Ford submitted a new written request to relocate its entire
14 operations to the Nissan Facility. (Ex. P-106.) As part of this request, Putnam Ford also requested that
15 Ford authorize the use of 925 Bayswater for additional stalls. (*Id.*) Consistent with Ford practice, the
16 request was sent to the Ford team in Dearborn, Michigan and Ms. Swann had discussions with the
17 Ford team about the request. (Swann: 8/16/24, 109:2-14; 111:5-16.)

18 Ms. Swann and Ms. Hughes visited the Nissan Facility on January 19, 2023, to tour the Nissan
19 Facility in connection with the proposed relocation. (Hughes: 8/15/24, 135:1-18; Swann: 8/16/24,
20 118:24-119:2.)²⁹ After that tour, around January 2023, Mr. Vazquez called Ms. Swann and informed
21

22 _____
23 ²⁸ When confronted with this timeline at the Hearing, Mr. Vazquez then tried to backtrack, claiming
24 he did not know whether work stopped. (Vasquez: 8/12/24, 33:16-34:6.) But, in March 2023, Mr.
25 Vasquez testified at his deposition that customer pay repairs were performed at the Barn, not warranty
26 repairs. (Vasquez: 8/12/24, 52:13-53:23.) Indeed, Putnam Ford stipulated that **all** the warranty repairs
disallowed as false practices were performed at a location other than the Authorized Location, which
included repairs from October 2022 to February 2023. (Ex. J-02-001; Vasquez: 8/12/24, 36:6-37:13.)

27 ²⁹ When Ms. Swann observed Ford vehicles being serviced at the Nissan Facility, she told Mr. Putnam
28 he could not service Ford vehicles there. (Swann: 8/16/24, 133:12-18.) He brazenly responded that
those were vehicles for Nissan customers. (*Id.* 133:19, 134:8-9.)

her that he wanted to “scrap this plan and move forward with . . . Bayswater . . as their request.” (Swann: 8/16/24, 112:10-14; 126:20-23 (“the October request became the December request that became the January request that became other requests down the road; so each—essentially we – we would receive new requests.”).) Because Putnam Ford changed its mind again, Ford never made a decision on the December 2022 Nissan Facility request. (*Id.* 117:15-17.)

iii. “Request” 3: Mr. Putnam Attempts to Get a Ford Entry-Level Employee to Add the Nissan Facility as Part of the SSA Renewal Paperwork

During the SSA renewal process, Mr. Putnam contacted a Ford specialist, which is an entry-level position, and instructed her to put the Nissan Facility address on the updated contract. (Swann: 8/15/24, 214:8-15.) Ms. Swann learned about Mr. Putnam’s subterfuge when she received a call from the specialist. (*Id.* 214:8-11, 214:24-215:2.) Ms. Swann told Mr. Putnam he could not change the SSA in this way. (*Id.* 214:16-20.) She testified that she “perceived [Mr. Putnam’s actions] to be that he was trying to essentially sneak the address in for the facility that he didn’t occupy and that [the entry-level employee] wouldn’t have noticed it. And it was just – that was concerning to me.” (*Id.* 215:10-14.)

iv. Written Request 4: Complete Relocation to 925 Bayswater

Although Putnam Ford orally indicated in January 2023 that it planned to change its relocation request to 925 Bayswater (Swann: 8/16/24, 112:10-14), it did not submit a written relocation request until April 19, 2023 (Ex. P-119). Ms. Swann was not enthusiastic about relocating the entire dealership to 925 Bayswater, but she supported it anyway. (Swann: 8/16/24, 211:11-15.) The 925 Bayswater location was on a side street, not the main street, and it sacrificed visibility from the main road. (*Id.* 211:17-25.) But Ms. Swann was aware of Putnam Ford’s concerns and was “trying to consider it from that perspective. But it wasn’t essentially what I thought was the ideal location.” (*Id.* 212:1-4.)

Ford approved Putnam Ford’s request to relocate the entire facility at 925 Bayswater, subject to clearance of the market, but denied the included request to use the Nissan Facility for temporary service work. (*Id.*; Kamenetsky: 8/13/24, 114:12-18; Ex. R-339; Hughes: 8/15/24, 232:18-22.) The Nissan Facility continued to be the facility of a competitive line-make, for which Mr. Putnam agreed it would maintain facilities exclusive to Nissan. (Ex. R-326-006, Nissan PMK Dep. 23:4-7; Ex. R-327-012, Putnam: 9/25/23, 1073:25-1074:3.) Mr. Putnam accepted and agreed to Ford’s modified

1 acceptance on June 28, 2023. (Kamenetsky: 8/13/24, 128:18-25; Ex. R-339.) Ford proceeded to notice
2 the market in support of Putnam Ford's request to relocate the day after Mr. Putnam signed the
3 conditional approval for relocation. (Kamenetsky: 8/13/24, 129:1-24, 131:12-17, 132:12-15; Ex. R-
4 340; Ex. R-341; Ex. R-342.) Two dealerships filed protests; one was resolved. (Kamenetsky: 8/13/24,
5 133:16-21.)

6 v. Written Request 5: Relocation to Nissan Facility

7 Although Ford had gone through the process of approving the relocation and noticing the
8 market, Putnam Ford again changed its mind. In late 2023, Ms. Hughes spoke with Mr. Vasquez and
9 he raised changing the relocation request back to the Nissan Facility. (Hughes: 8/15/24, 235:16-23.)
10 Ms. Hughes informed Mr. Vazquez that Ford:

11 [W]ould consider the request but made it clear that [Ford was] in no way asking
12 them to go back to [the Nissan Facility] and that that was entirely determined by
13 them; that ultimately our priority was that they just fulfill their facility commitment;
14 so, if, you know, we were going to continue to change locations, that obviously
15 doesn't help us accommodate that.

16 And I also ended by saying that I wanted to make it abundantly clear that they were
17 unable to do any business operations at the location they were requesting a
18 relocation [the Nissan Facility] to until they had the written express consent of Ford
19 Motor Company, to which he laughed.

20 (Hughes: 8/15/24, 235:25-236:13.)

21 Putnam sent its formal written relocation request in a letter dated December 6, 2023.
22 (Kamenetsky: 8/13/24, 136:15-22, 137:14-138:4; Ex. R-343.) On February 20, 2024, Ford provided
23 conditional approval of Putnam Ford's relocation request to the Nissan Facility. (Kamenetsky:
24 8/13/24, 138:14-17, 139:7-16; Ex. R-344; Hughes: 8/15/24, 232:23-25.) Yet again, Ford noticed the
25 market on behalf of Putnam Ford. (Kamenetsky: 8/13/24, 142:15-21.) Ford of Serramonte filed a
26 protest. (*Id.* 144:15-18.) That protest was still pending at the time of the Hearing, and, as such, the
27 relocation of the Putnam Ford franchise is on hold due to an automatic stay entered in the Serramonte
28 Protest. (*Id.* 144:15-24; R-345.)³⁰

³⁰ At the time of submitting this brief, the market has been cleared.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

But, of course, the Board need not reach the issue of bad faith. Rather, as detailed above, the Board lacks jurisdiction to hear a Section 3065.2 claim because this Protest was not presented to the Board as a Section 3065.4 protest to determine a labor rate. Likewise, Section 3065 does not provide any claim that a manufacturer has acted in bad faith. Nor should the Board entertain a theory that was first included in a Pre-Hearing Brief days before the Hearing, and without any formal motion to amend the Protest to add a claim, as it is highly prejudicial to Ford.

Ford complied with Sections 3065.³¹ Putnam Ford was selected for an audit because of its own failure to adhere to Ford's standards, not because Ford was upset about the labor rate request and protest, or for any other Putnam-concocted reason. Every single claim that Ford charged back was false, as falsely certifying that every claim complies with the Warranty Manual is false. The Board should overrule the Protest, uphold the 552 disallowances and permit Ford to charge back the full amount of the disallowances, or \$502,821.56.

56

FORD MOTOR COMPANY’S POST-HEARING OPENING BRIEF

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: January 10, 2025

GREENBERG TRAURIG, LLP

By: /s/ Steven M. Kelso
 Steven M. Kelso
 April C. Connally
 H. Camille Papini-Chapla

 Attorneys for Respondent

 Ford Motor Company

PROOF OF SERVICE

CAPTION: KP AUTO, LLC, dba Putnam Ford of San Mateo v. FORD MOTOR COMPANY

BOARD: NEW MOTOR VEHICLE BOARD

PROTEST NOS.: **PR-2826-23**

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 10, 2025, I served the foregoing **FORD MOTOR COMPANY'S PROST HEARING OPENING BRIEF** on each party in this action, as follows:

Gavin M. Hughes
Robert A. Mayville, Jr.
Law Offices of Gavin M. Hughes
3436 American River Dr., Ste. 10
Sacramento, CA 95864
Telephone: 916-900-8022
Email: gavin@hughesdealerlaw.com
mayville @hughsdealerlaw.com

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 January 10, 2025, at Denver, Colorado.

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

/s/

ATTACHMENT 1

ATTACHMENT 1: Summary of Non-Location Based Disallowed Claims

	R.O#	Ln#	Reason	RO Bates	Amount	Ex. J-04 cite
1	0000012445	A	Hard copy of the repair order wasn't provided; unable to provide the required repair order documents to support the repair claimed; labor operation 14M02A is not the appropriate labor operation for the repair	FORD0040579-40586	\$66.00	003-005
2	0000012445	C	Hard copy of the repair order wasn't provided; unable to provide the required repair order documents to support the repair claimed; repair line "C" is an unauthorized add-on repair	FORD0040579-40586	\$7,455.57	005-006
3	0000012559	A	Labor operation to remove and install the transmission assembly was not claimed	FORD0030250-30300	\$4,751.67	008-009
4	0000012559	D	Repair is warranty solicitation which is prohibited; customer satisfaction program 21N01 is not a mandatory recall; the technician did not verify any concern with the cooling fans; repair was not needed	FORD0030250-30300	\$313.93	009-012
5	0000012794	A	Transmission cooler replacement is not required or supported by the technician comments; no warrantable defect documented to justify transmission cooler replacement; duplicate labor is not reimbursable	FORD0028531-28584	\$5,889.20	014-016
6	0000012804	E	TSB 22-2139 and labor operation 222139S do not apply to the repair since the main control was not overhauled - it was replaced	FORD0028585-28620	\$2,164.24	016-018
7	0000012833	A	Several parts billed out are included in the 6079 Engine Overhaul Gasket Kit; in addition some of the "if needed" parts listed in TSB 21-2269 were replaced without technician comments to support replacement	FORD0028621-28699	\$8,278.63	018-020

8	0000012851	B	Repair order does not include the required Cost Cap; duplicate labor time; torque converter and solenoid assembly replacement are not supported by the technician comments provided; no warrantable defect identified with either component; labor operations 7001D2 and 7000AZJ are not supported by the technician comments provided	FORD0028700-28740	\$5,741.60	020-022
9	0000012917	A	The 4.0 hours for additional diagnosis and the 5.5 hours of actual time for the wiring harness is not supported by the technician comments provided; no additional diagnosis time was needed based on the information provided	FORD0028741-28788	\$3,163.55	022-024
10	0000012950	B	Wiring Harness replacement, inverter replacement and the handle/hook assemblies are not supported by the technician comments provided; no warrantable defect or rationale provided to support replacement; actual time claimed for additional diagnosis is not supported by the technician comments provided	FORD0028867-28959	\$10,531.19	025-027
11	0000012950	F	Repair is not supported by the technician comments provided; repair line "F" has no customer concern documented on the hard copy; no explanation of why the repair was required; no warrantable defect was documented on line "F" or line "B"	FORD0028867-28959	\$451.26	028-030
12	0000012950	G	Repair is not supported by the technician comments provided; repair line "G" has no customer concern documented on the hard copy; no explanation of why the repair was required; no warrantable defect was documented on line "G" or line "B"	FORD0028867-28959	\$451.26	030-031

13	0000013083	B	Additional 1.0 hour of diagnosis time is not required when the TCM has CTC P0606	FORD0014661-14717	\$1,010.15	043-044
14	0000013085	E	21M06 is a customer satisfaction program, not a mandatory recall; no customer concern reported or documented on the repair order; repair is not supported by the technician comments; technician did not verify the concern or meet the documentation requirements for a warranty repair	FORD0014724-14776	\$373.66	046-048
15	0000013090	B	Repair is warranty solicitation which is prohibited; customer satisfaction program 21N08 is not a mandatory recall; the customer did not report or have concerns related to the engine shudder; repair was not needed	FORD0014781-14821	\$264.00	049-051
16	0000013097	F	5.0 hours of actual time is not supported by the time records provided; there is 0 hours of clock time for line F	FORD0014826-14917	\$1,100.00	052-053
17	0000013191	C	Diagnosis time is not reimbursable under the 14M02 guidelines; TCM was not determined to be the root cause of the customer concern; no warrantable component identified; 2014 vehicle with limited extended warranty	FORD0015398-15459	\$550.00	070-071
18	0000013216	A	Customer concern turned out to be a normal vehicle characteristic; dealers are not permitted to claim NPF for identifying product features or characteristics	FORD0016630-16657	\$330.00	078-079

19	0000013221	A	Labor operation 04320A is not supported by the technician comments provided; technician was directed to remove the dash, but was notified to stop working on the vehicle since it was being brought back; additional diagnosis time is not supported by the technician comments or the time records provided	FORD0016742-16763	\$2,420.00	081-082
20	0000013244	E	Repair is warranty solicitation; customer satisfaction program 21N01 is not a mandatory recall; customer did not report or have any concerns related to the engine cooling fan; repair line "E" was an add-on repair; repair was not needed	FORD0014942-14960	\$315.93	085-087
21	0000013264	C	Repair is warranty solicitation; customer satisfaction program 20N03 is not a mandatory recall; customer did not report or have any concerns related to the tailgate; repair was not needed based on the repair order documentation	FORD0015082-15125	\$373.66	093-095
22	0000013277	A	Several parts billed out are also included in the 6079 Engine Overhaul Gasket Kit	FORD0013826-13898	\$6,712.51	099-101
23	0000013339	A	TSB 22-2015 mentioned at the beginning of the technician comments does not apply to this vehicle; TSB 22-2015 applies to the 2022 F-Super Duty 10R140 Automatic Transmission	FORD0029136-29246	\$2,860.23	111-112
24	0000013339	E	Transmission heat exchanger replacement is not supported by the comments provided; duplicate labor time; 3.5 hours of actual time claimed for tear down and inspection of the transmission was not necessary	FORD0029136-29246	\$12,534.97	113-116
25	0000013401	B	Repair order does not include the required Cost Cap	FORD0029548-29599	\$4,163.13	126-128

26	0000013471	A	The 4.0 hours for additional diagnosis time is not supported by the technician comments provided	FORD0030568-30611	\$1,351.00	139-141
27	0000013507	B	Cost Cap is missing; since repair total is above the threshold, a Cost Cap is required	FORD0031011-31142	\$5,791.39	145-147
28	0000013577	E	Line "E" is an unapproved add-on repair; Line "E" is not present on the hard copy and the hard copy is missing the required authorization from Service Management	FORD0031483-31532	\$88.00	157-158
29	0000013730	B	Repair is warranty solicitation, which is prohibited; customer satisfaction program 21N13 is not a mandatory recall; customer didn't report or have any concerns related to the door locks; repair was not needed	FORD0032217-32253	\$1,563.65	179-180
30	0000013897	B	Repair order doesn't include the required Cost Cap; duplicate labor time with the transmission overhaul; MTINSPECT is only to be claimed if the assembly cannot be repaired; no warrantable defect identified with either component	FORD0034025-34065	\$5,790.13	217-219
31	0000013987	A	Improper labor operations were claimed; technician comments support transmission removal/installation and transmission overhaul - neither of these labor operations were claimed	FORD0034025-34065	\$2,971.60	242-243
32	0000013998	A	Labor operation 14022A is not supported by the technician comments provided; no software updates available; TCM was not replaced	FORD0035318-35369	\$132.00	245-246
33	0000014009	A	Duplicate labor; labor time is included in the transmission removal and installation labor operation 7000A	FORD0032824-32915	\$5,925.61	246-247

34	0000014009	E	With a hole in the block it is not necessary to perform the engine tear down for inspection; labor operation 6007E1 is not required or supported by the technician comments provided	FORD0032824-32915	\$7,941.79	247-249
35	0000014026	A	Technician comments don't have a technician ID associated with them; unsupported actual time; labor operations are not supported by the technician comments provided; engine air filter replacement is not warrantable; actual time claimed for tear down and inspection of the engine was not necessary - was replaced under the Low Time In Service Policy (LTIS)	FORD0033009-33060	\$9,444.49	251-253
36	0000014041	A	Required diagnostic steps for DTC P0420 (PC/ED manual Pinpoint test HF) was not completed as required; no warrantable defect identified; replacement not justified	FORD0043141-43201	\$10,098.24	254-256
37	0000014050	A	Dealer unable to provide the required repair order documents to support the repair claimed; repair not supported by the technician comments provided; unable to confirm all required diagnosis was performed and unable to determine if the proper repair was made	FORD0043285-43288	\$3,590.00	260-262
38	0000014123	C	Repair order documentation does not include the required Cost Cap; main control and solenoid assembly replacement is not supported by the technician comments provided; no warrantable defect documented	FORD0034483-34538	\$4,920.56	279-281
39	0000014165	C	Repair line "C" is an unapproved add-on repair; repair line "C" is nowhere to be found on the original hard copy; dealerships are not permitted to claim No Problem Found (NPF) on add-on repairs	FORD0034625-34653	\$220.00	285-286

40	0000014205	A	3.0 hours of actual time claimed for tear down and inspection of the transmission was not necessary; transmission assembly was replaced under the Low Time in Service (LTIS) policy	FORD0034738-34778	\$8,627.09	290-292
41	0000014207	A	Actual time included contacting the TAC and FSE - this portion of the actual time is not reimbursable under warranty	FORD0034810-34851	\$990.80	294-295
42	0000014270	C	Time records for repair line "C" is 0.09 hours - maximum actual time that can be claimed is 0.1 hour	FORD0035755-35792	\$110.00	308-309
43	0000014270	E	Time records for repair line "E" is 0.07 hours - maximum actual time that can be claimed is 0.1 hour	FORD0035755-35792	\$110.00	309-311
44	0000014349	D	Repair line "D" is an unapproved add-on repair; repair line is not written on the hard copy and there is no authorization from Service Management	FORD0037630-37696	\$1,636.00	327-328
45	0000014365	B	Brake rotor replacement is not required based on the brake rotor thickness measurements documents; no warrantable defect identified with the brake rotors	FORD0035443-35478	\$417.27	336-337
46	0000014452	A	Repair was ineffective; excessive transmission fluid quantity was billed out	FORD0036423-36492	\$2,246.39	359-361
47	0000014452	F	Labor operation 7000A50 to flush the torque converter is not required or supported by the technician comments provided	FORD0036423-36492	\$6,898.98	361-362
48	0000014487	B	Labor operations 7000A50, 7001D1 and AD are not supported by the technician comments provided; no mention of monitoring PIDS and no explanation provided to support the additional diagnosis time	FORD0036889-36970	\$6,806.98	368-370

49	0000014579	A	22N02 is a customer satisfaction program - not a mandatory recall; no customer concern reported or document on the repair order	FORD0023097-23121	\$423.42	385-387
50	0000014641	A	This is a repeat repair; prior repair (RO 11254) involved improper repair procedures; on the previous repair there is no documentation to support proper transmission cooler flushing or replacement as required by WSM 307-02; labor operation 7000A50 to flush the torque converter is not supported by the technician comments	FORD0025159-25242	\$6,174.55	400-402
51	0000014784	A	Main control replacement is not supported by the technician comments provided; no warrantable defect documented and no details explaining why the main control needs to be replaced; labor operations are not supported by the technician comments provided; actual time claimed for additional diagnosis is not supported by the technician comments	FORD0025619-25705	\$5,630.46	423-425
52	0000014795	B	Repeat repair; prior repair (RO 11559) involved improper repair procedures; previous repair had no documentation to support proper transmission cooler flushing or replacement as required by WSM 307-02; on this repair the repair order does not include the required Cost Cap; torque converter replacement is not supported by the technician comments provided and no warrantable defect identified; missing NVH heat shields that were not reinstalled on the prior repair are not warrantable	FORD0025754-25868	\$6,725.28	426-429
53	0000014880	A	Duplicate labor; labor time is included in the 21M01D claimed on repair line "D"	FORD0037216-37261	\$1,080.11	439-440

54	0000014880	D	Repair is not supported by the technician comments (no technician comments provided)	FORD0037216-37261	\$952.53	441-442
55	0000014891	A	Hard copy of the repair order was not provided to the auditor for review upon request; dealer was unable to provide the required repair order documents to support the repair claimed	FORD0037299-37303; 40598-40607	\$578.29	444-445
56	0000014990	C	Hard copy of the repair order was not provided to the auditor for review upon request; dealer was unable to provide the required repair order documents to support the repair claimed	FORD0039020-39102	\$7,097.35	457-458
57	0000014990	D	Hard copy of the repair order was not provided to the auditor for review upon request; dealer was unable to provide the required repair order documents to support the repair claimed	FORD0039020-39102	\$1,760.00	458-459
58	0000014990	G	Hard copy of the repair order was not provided to the auditor for review upon request; dealer was unable to provide the required repair order documents to support the repair claimed; repair line "G" is an unauthorized add-on repair	FORD0039020-39102	\$427.25	460-461
59	0000015092	A	Labor operation 8005D was not necessary; coolant leak from the weep hole can be verified with a simple visual inspection; in addition the customer had already identified the source of the leak	FORD0039964-39997	\$2,399.01	473-474
60	0000015164	A	The 1.0 hours of additional diagnosis time is not supported by the technician comments provided	FORD0040116-40153	\$910.47	479-481
61	0000015313	F	Repair line "F" is an unapproved add-on repair; no service management approval/signature for the add-on repair line	FORD0038446-38483	\$88.00	502-503

62	000015362	A	Hard copy of the repair order was not provided to the auditor for review upon request; dealer was unable to provide the required repair order documents to support the repair claimed	FORD0038612-38617; 40608-40618	\$264.00	508-509
63	000015362	B	Hard copy of the repair order was not provided to the auditor for review upon request; dealer was unable to provide the required repair order documents to support the repair claimed	FORD0038612-38617; 40608-40618	\$776.12	509-510
64	0000015371	A	Main control replacement is not supported by the technician comments provided; no warrantable defect documented and no details explaining why the main control needs to be replaced	FORD0038646-38723	\$5,465.95	511-513
65	0000015371	B	Labor operation 2001B3T to machine the rear brake rotors is not supported by the technician comments provided	FORD0038646-38723	\$471.22	513-514
66	0000015372	A	Root cause was not a warrantable item; repair is not reimbursable under warranty	FORD0039568-39612	\$2,162.12	514-515
67	0000015455	A	The oil filter is included with the engine long block assembly; replacement of the oil filter is not required or supported by the technician comments provided	FORD0041018-41069	\$11,536.77	528-530
68	0000015481	A	Replacement of the upper intake manifold and oil filter adaptor are not supported by the technician comments; no mention of why the oil filter adaptor was replaced	FORD0041105-41125	\$11,998.01	531-533
69	0000015574	A	Technician did not follow the Workshop manual instructions; no repair was required; technician elected to replace the customers EVSE; no warrantable defect, test result or explanation documented to justify replacement under warranty	FORD0040782-40801	\$853.16	544-546

70	0000015794	A	The 1.0 hour of actual time claimed is not supported by the time records provided; total clock time for repair line "A" is 0.73 hour	FORD0040288-40310	\$220.00	565-566
71	0000015866	D	Repair is warranty solicitation, which is prohibited; customer satisfaction program 22N06 is not a mandatory recall; customer didn't report or have any concerns related to the rear axle mounting bolt; repair was not needed	FORD0040426-40450	\$1,142.65	572-574
72	0000015958	A	Repair is warranty solicitation, which is prohibited; customer satisfaction program 22N06 is not a mandatory recall; customer didn't report or have any concerns related to the rear axle mounting bolt; repair was not needed	FORD0040531-40542	\$1,142.65	577-579
73	0000014564	A	Mileage was misstated on this repair order and warranty claim; no warranty coverage for casual part 8501	FORD0023401-23427	\$2,340.76	580-581
74	0000013057	A	Hard copy of the repair order was not provided to the auditor upon request	FORD0040587-40592	\$1,558.03	582

Total \$244,116.47

ATTACHMENT 2

Attachment 2: Chart of Attorney-Client Privilege Objections

Citation	Summary of Objection	Ruling
Owens: 8/6/24, 89:22-91:21	Ford seeks to introduce photographs attached to the original allegation that Putnam Ford was performing repairs at an unauthorized location, and Plaintiff's counsel ("PC") used his objection to invade the attorney-client privilege ("ACP").	Objection is overruled and Exhibit R-322 is admitted.
Owens: 8/6/24, 92:14-94:10	PC objects to Mr. Owens not having "the foundation to testify to the allegation because the allegation is not before us" and defense counsel ("DC") counters PC is through his objections, commenting on ACP, which is prohibited by rule or Section 913 of the Evidence Code.	Objection is overruled and the witness' answer will stand.
Owens: 8/6/24, 227:23-229:6	DC objects to question to Mr. Owens as seeking information covered by the ACP and instructs Mr. Owens not to answer and asks that the Judge admonish Counsel for asking questions that he knows forces DC to invoke ACP.	Objection is overruled
Owens: 8/6/24, 232:2-237:4	PC asks Mr. Owens "do you know whether or not Mr. Kanouse was involved in the review of Putnam's labor rate request." DC objects as ACP.	Sustained. Judge states "Mr. Hughes. . . . Please do refrain from either commenting or unnecessarily bringing the aspect of Ford's attorney in these proceedings" (Mr. Owens: 8/6/24, 235:22-236:1)
Owens: 8/7/24, 16:8-18:8	PC asks Mr. Owens if he knows who Mark Robinson is. DC objects that "proving the contents of a document without it being admitted into evidence is not a foundational question; rather, it is a comment on the exercise of attorney-client privilege..."	Objection overruled.

Attachment 2: Chart of Attorney-Client Privilege Objections

Citation	Summary of Objection	Ruling
Owens: 8/7/24, 19:15-21	PC asks Mr. Owens about Ex. P-111.001, an email chain. DC objects that “the predicate of the [question], the reference to Ford legal request is a comment on the exercise of attorney-client privilege” and moves to have that portion of the question stricken.	Objection Overruled.
Owens: 8/7/24, 20:15-25:16	PC moves to admit Ex. P-111 and DC objects on the grounds that pages 2 and 3 are irrelevant information surrounding the exercise of the ACP (redactions on an email chain) and argues “by admitting this exhibit, because it was produced in discovery is turning on its head the assertion of attorney-client privilege and the information that must be provided to counsel so they can ascertain the basis of the privilege...By having this in the record now, you are putting Ford in the position of having to rebut any inferences that can be drawn by this being in the record.”	Admits Exhibit 111 into evidence as the only reference to attorney is in the “re” line.
Owens: 8/7/24, 25:17-27:11	DC renews objection to Ex. P-111 –by admitting Exhibit, including the pages that only have redactions, PC is inherently commenting on the exercise of ACP.	Ex. P-111 remains into evidence.
Owens: 8/7/24, 32:16-35:4	PC asks Mr. Owens who “told” him Ms. Swann took the photos and DC objects citing ACP.	N/A: PC withdraws question.
Owens: 8/7/24, 36:12-37:7	PC asks Mr. Owen again about how he came to the information in Ex. P-111. DC	Objection overruled; the request for sanctions is not granted..

Attachment 2: Chart of Attorney-Client Privilege Objections

Citation	Summary of Objection	Ruling
	objects as it invades ACP and moves for sanctions.	
Owens: 8/7/24, 40:9-41:11	PC asks Mr. Owens if he made an effort to look through documentation to determine how he was assigned the Putnam allegation; DC objects as the question could include interactions with counsel; so he exercises attorney-client privilege to the extent PC asks the witness questions about whether he did something while working with counsel.	Judge agrees with DC approach that the witness “may assume that every question is predicated with other than communications with counsel.”
Owens: 8/7/24, 52:13-54:8	PC asks Mr. Owens if how he knows that the source of the allegation was the region. DC exercises attorney-client privilege.	Sustained
Owens: 8/7/24, 55:1-55:18	PC asks Mr. Owens if he was certain that Ms. Crawford didn’t send him a separate email with the request for him to commence on the allegation. DC objects – states that PC is drawing an inference from the exercise of attorney-client privilege.	Sustains that it has been asked and answered
Owens: 8/7/24, 56:25-62:19	PC asks Mr. Owens who provided the three photos to him. DC objects – relevance and exercise to invade the attorney-client privilege.	Judge overrules the objection.
Owens: 8/7/24, 63:11-23	PC asks Mr. Owens if he would have seen them for the first time in the allegation tracker; DC objects – inherently invading the exercise of the attorney-client privilege.	Judge Overrules

Attachment 2: Chart of Attorney-Client Privilege Objections

Citation	Summary of Objection	Ruling
Owens: 8/7/24, 64:19-65:25	PC asks Mr. Owens “is this the first allegation audit that you have seen initiated by counsel?” DC objects – attempting to draw an inference from ACP. DC moves for sanctions.	Judge denies sanctions; but sustains the objection.
Owens: 8/7/24, 66:10-24	PC asks Mr. Owens if, other than the Putnam audit, there are any other of the allegation audits where he communicated with Ford’s outside counsel before or during the audit. DC objects as inherently it seeks to invade ACP.	Sustained
Owens: 8/7/24, 127:3-128:15	PC asks Mr. Owens with whom he shared his findings with. DC objects as it seeks to invade ACP.	Sustains DC’s objection.
Owens: 8/7/24, 134:2-135:25	PC asks Mr. Owens if he knows where the region sent the information. DC objects as ACP.	Sustains DC’s objection.
Owens: 8/7/24, 168:16-170:20; 171:3-172:5	PC asks Mr. Owens if he would have sent Ex. R-310 to Ms. Swann had he not received Ex. P-111 from Ms. Crawford. DC objects as ACP.	Judge asks PC to repeat the question and keep it strict and narrow and avoid any implication that might involve any attorney-client privilege.
Owens: 8/7/24, 174:14-175:5	PC asks Mr. Owens if he searched for and provided documents to DC before the hearing. DC objects as ACP.	Sustained
Owens: 8/7/24, 182:17-183:19	PC asks the Judge to read into the record portions of the transcript showing that Mr. Owens and DC had a discussion during a break and Mr. Owens changed his testimony. DC objects – attorney-client privilege	Sustained – PC is not allowing the reading into the record.
Kamenetsky: 8/13/24, 221:3-225:1	PC asks Mr. Kamenetsky if he has any reason to believe that Ms. Swann’s	Overrules to the extent Mr. Kamenetsky can answer if Ms. Swann made a

Attachment 2: Chart of Attorney-Client Privilege Objections

Citation	Summary of Objection	Ruling
	January 19, 2023 visit was for the purpose of gathering information for counsel to be used in the labor rate litigation. DC objects – ACP. PC argues privilege would not apply under the crime-fraud exception (“I don’t think privilege attached to future unlawful acts and that is, sort of, what we are – we are arguing in this case that the—there was an intention to retaliate for the labor rate submission.”)	comment to him that gave him reason to believe that the actions of Ford were retaliatory.
Gogolewski: 8/15/24, 20:4-19	PC asks Mr. Gogolewski if he is familiar with the Putnam Ford labor rate request. DC objects – ACP and asks that the Judge allow the witness to exclude from his answer any communications with counsel and things that he learned from counsel.	Judge agrees – states that question to Gogolewski should not include any comments from Gogolewski involving his discussion with or learning from any attorney who represents Ford in this matter.
Swann: 8/16/24, 141:5-24	PC asks Ms. Swann who she discussed here January visit with. DC objects on ACP and states that he would like it if Ms. Swann could treat the question as other than any discussions with counsel as a built-in predicate.	Judge agrees with DC’s limitation – “outside of my discussions with counsel, who did I discuss this with?”
Swann: 8/16/24, 142:6-144:4	PC asks Ms. Swann if she was represented by GT in her first deposition in 2023; DC objects – inference could be drawn through privileged communications to which Ford is incapable of dealing with and rebutting because of the nature of ACP	Sustained.
Swann: 8/16/24, 167:24-170:1	PC asks Ms. Swann about P-120; DC objects on ACP; top portion of email is irrelevant and the only reason have the top	Sustained – exhibit P-120 not admitted

Attachment 2: Chart of Attorney-Client Privilege Objections

Citation	Summary of Objection	Ruling
	portion of the header information was so they can evaluate the privilege claim – inappropriate to try to get a witness to testify about it now.	
Swann: 8/16/24, 188:20-192:25	PC asks Ms. Swann if region determined whether Putnam service location would be protestable at either location; DC objects on ACP.	Judge advises PC to rephrase the question; Judge doesn't understand how Exhibit 147 relates to – and then PC withdraws the question

ATTACHMENT 3

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Protest of:) OAH Case No.
KPAUTO, LLC, dba PUTNAM FORD OF) 2023-050701
SAN MATEO,)
)
Protestant,)
) NMVB No.
v.) PR-2759-21
)
FORD MOTOR COMPANY,)
)
Respondents.)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE WIM VAN ROOYEN

THURSDAY, SEPTEMBER 21, 2023

REMOTE PROCEEDING, VOLUME IV

Pages 784 - 864

9:02 A.M. to 10:49 A.M. PST

Reported by Elizabeth A. Willis-Lewis, CSR 12155

1 APPEARANCES:
2 ADMINISTRATIVE LAW JUDGES: HON. WIM VON ROOYEN
3 HON. ANTHONY SKROCKI
4
5 FOR THE PROTESTANT:
6 LAW OFFICES OF GAVIN M. HUGHES
7 BY: GAVIN M. HUGHES, ESQ.
8 ROBERT A. MAYVILLE, JR., ESQ.
9 4630 Arden Way, Suite 1
10 Sacramento, California 95864
11 916-900-9022
12 gavin@hughesdealerlaw.com
13 mayville@hughesdealerlaw.com
14
15 FOR THE RESPONDENT:
16 GREENBERG TRAUIG, LLP
17 BY: STEVEN M. KELSO, ESQ.
18 APRIL C. CONNALLY, ESQ.
19 GWEN J. YOUNG, ESQ.
20 ELAYNA M. FIENE, ESQ.
21 1144 15th Street, Suite 3300
22 Denver, Colorado 80202
23 kelsos@gtlaw.com
24 april.connally@gtlaw.com
25 youngg@gtlaw.com
elayna.fiene@gtlaw.com

ALSO PRESENT: ANDREY KAMENETSKY

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX

PAGE

WITNESS: LASHAWNE SWANN

Direct Examination By Ms. Fiene 791

Cross-Examination By Mr. Hughes 814

Re-Direct Examination By Ms. Fiene 847

1 Q. How long have you worked for Ford?

2 A. For 28 years.

3 Q. What is your current position with Ford?

4 A. I am the San Francisco Regional Manager.

5 Q. We will talk about your responsibilities as a
6 regional manager in a few minutes, but how long have you
7 worked in the automotive industry?

8 A. For just over 28 years.

9 Q. Did you do any other kind of work before
10 joining Ford?

11 A. I did. So when I was in college I was a part
12 of the Ford Marketing Sales and Service desk, but I
13 worked for two summers picking parts in the Los Angeles
14 Parts Depot.

15 Q. What does that mean? What were you doing
16 there?

17 A. So a parts picker, like if a dealer orders
18 parts from Ford for servicing a vehicle what happens is
19 that comes across on, like, an order and as a parts
20 picker I would pick that. I would get a list of parts
21 that were ordered by our dealer and I'd pick those, put
22 them in a box, and we would essentially prepare them to
23 be shipped out to the dealer the next day. So I did
24 that for two summers in a row and it was a union
25 environment, but I worked 89 days because in that

1 A. Yes, I have met with them.

2 Q. When was the first time you met Mr. Putnam?

3 A. I met Mr. Putnam for the first time in October
4 of last year.

5 Q. And why did you meet with him in October?

6 A. There -- he requested a meeting so that we
7 could review the proposed location or area they were
8 interested in moving the dealership to.

9 Q. Who attended that meeting?

10 A. It was John Pasqal [sic], one of our network
11 development specialists, myself, Kent Putnam, and there
12 was someone else from Putnam there. I can't remember
13 who it was. I can't remember if it was Al or if it was
14 Andrey. I can't remember.

15 ADMINISTRATIVE LAW JUDGE VAN ROOYEN: I am
16 sorry to interject. If both Ms. Fiene and yourself,
17 Ms. Swann -- if you can just make sure you keep your
18 voices raised. Especially when you trail off at the end
19 of the sentence, it is really hard to hear. I would
20 appreciate that. I just want to make sure I get all
21 your testimony for the court reporter too. Thank you.

22 THE WITNESS: Sure. I will restate that. So
23 for that visit it was John Pasqal, who is the network
24 development specialist, myself, Kent Putnam and I can't
25 remember who the other person was. It was -- I think it

1 was Andrey or Al Vasquez.

2 BY MS. FIENE:

3 Q. During that meeting did Mr. Putnam say he
4 wanted to relocate Putnam Ford?

5 A. Yes.

6 Q. Why did he say he wanted to relocate?

7 A. Ultimately the current facility was inadequate
8 to meet the needs and growth that they were experiencing
9 and planning for.

10 Q. Did he say anything else during this October
11 meeting?

12 A. Yes. We went on a tour of the -- a couple of
13 the facilities. One was the building that had been
14 considered and then he also went to a tour of a body
15 shop that he was interested in purchasing at that time
16 for consideration and then we went back to his office
17 and we met there.

18 Q. And during that meeting did you have any other
19 discussions?

20 A. Yes. We reviewed a rendering that had, I
21 think, been designed for a dealership. We talked about
22 their plan and at one point during that discussion
23 Mr. Putnam indicated that -- he made a comment that they
24 were -- that Ford knew they were servicing vehicles at
25 the Nissan facility. And that was when we were talking

1 about the size of the current facility and needed to do
2 something. But that, quite frankly, caught me off
3 guard.

4 Q. Why did it catch you off guard?

5 A. Because they are not allowed to. That wasn't
6 an approved place for business.

7 Q. So he told you that Putnam Ford was servicing
8 vehicles at the Nissan facility. And that is not
9 allowed?

10 A. Well, no. What he said was that, "Ford knows
11 we are servicing vehicles at the" -- "They know we are
12 servicing vehicles at the Nissan facility."

13 Q. How did you respond?

14 A. Just -- I mean, quite frankly, it was
15 surprising. So I just said, "Hey, you are not allowed
16 to do that. It is a violation of your sales and service
17 agreement."

18 Q. Were you surprised to hear that Putnam Ford was
19 servicing vehicles at the Nissan facility?

20 A. Absolutely. Yes.

21 Q. How did that make you feel?

22 A. Well, it was really just how it was mentioned
23 because it was out of the blue so I felt like he was
24 actually saying it to kind of sneak it in as if I knew,
25 and I didn't. I had no knowledge of that. And so that

1 was just a little bit uncomfortable.

2 Q. Is it unusual for a dealer to service
3 operations at an unapproved facility?

4 A. Absolutely. Yes.

5 Q. Have you ever worked with a dealer who serviced
6 vehicles at an unauthorized facility?

7 A. Never.

8 Q. And how did you -- what did you tell
9 Mr. Putnam, if anything?

10 A. Well, just simply that that was not allowed.
11 "You are not allowed to service outside." So ultimately
12 there was a violation of the sale and service agreement.

13 Q. And after you explained that to him what did
14 you expect him to do?

15 A. To stop -- to stop servicing vehicles there.

16 Q. After that first meeting with Mr. Putnam in
17 October did you return to Putnam Ford?

18 A. I did. My next visit was in January of this
19 year.

20 Q. January of 2023?

21 A. Yes. Sorry.

22 Q. Why did you return at that time?

23 A. To assess the facility again. We wanted to go
24 out. This time I went with Melissa Hughes, who is my
25 Network Department Manager and she and I went out to

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

REPORTER'S CERTIFICATION

I, ELIZABETH A. WILLIS-LEWIS, Certified
Shorthand Reporter 12155 in and for the State of
California, do certify that I was appointed to act as
stenographic reporter in the above-entitled proceedings;
that I reported the same in stenotype and thereafter had
transcribed the same as appears by the foregoing
transcript; that said transcript is a full, true, and
correct statement of the proceedings and evidence in
said matter to the best of my ability.

I FURTHER CERTIFY: That I am not interested in
the outcome of said action, nor connected with, nor
related to, any of the parties of said action or to
their respective counsel.

IN WHEREOF, I have hereunto set my hand this
6th day of October, 2023.

Elizabeth A. Willis-Lewis
Elizabeth A. Willis-Lewis, CSR No. 12155

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Protest of:) OAH Case No.
KPAUTO, LLC, dba PUTNAM FORD OF) 2023-050701
SAN MATEO,)
)
Protestant,)
) NMVB No.
v.) PR-2759-21
)
FORD MOTOR COMPANY,)
)
Respondents.)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE WIM VAN ROOYEN

WEDNESDAY, SEPTEMBER 20, 2023

REMOTE PROCEEDING, VOLUME III

Pages 502 - 783

9:02 A.M. to 5:03 P.M. PST

Reported by Elizabeth A. Willis-Lewis, CSR 12155

1 APPEARANCES:

2 ADMINISTRATIVE LAW JUDGES: HON. WIM VON ROOYEN, OAH

3 HON. ANTHONY SKROCKI, NMVB

4 HON. TAMMY BAYNE, NMVB

5

6 FOR THE NMVB: ROBIN PARKER, DAWN KINDEL, TIM CORCORAN
7 (Present until technical glitch)

8 FOR THE PROTESTANT:

9 LAW OFFICES OF GAVIN M. HUGHES

10 BY: GAVIN M. HUGHES, ESQ.
11 ROBERT A. MAYVILLE, JR., ESQ.
12 4630 Arden Way, Suite 1
13 Sacramento, California 95864
14 916-900-9022
15 gavin@hughesdealerlaw.com
16 mayville@hughesdealerlaw.com

17

18 FOR THE RESPONDENT:

19 GREENBERG TRAUIG, LLP
20 BY: STEVEN M. KELSO, ESQ.
21 APRIL C. CONNALLY, ESQ.
22 GWEN J. YOUNG, ESQ.
23 ELAYNA M. FIENE, ESQ.
24 1144 15th Street, Suite 3300
25 Denver, Colorado 80202
kelsos@gtlaw.com
april.connally@gtlaw.com
youngg@gtlaw.com
elayna.fiene@gtlaw.com

26

27 ALSO PRESENT: BRITTANY SCHULTZ, ANDREY KAMENETSKY

28

29

30

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX

PAGE

WITNESS: MAHER "MIKE" SWEIS

Direct Examination By Mr. Kelso 509

Cross-Examination By Mr. Hughes 583

Re-Direct Examination By Mr. Kelso 635

WITNESS: DAVID MARTINEZ

Direct Examination by Mr. Kelso 649

Cross-Examination By Mr. Hughes 651, 683, 698

Examination By Administrative Law Judge van Rooyen 681

697

Re-Direct Examination by Mr. Kelso 750

ReCross-Examination by Mr. Hughes 771

Further Redirect Examination by Mr. Kelso 778

1 Q. What lot are you talking about?

2 A. They have a lot which is across from Kia, which
3 is, like, set up for Dodge and Kia and Ford. So all the
4 cars are parked all the way in the back so you have to
5 go get your own car.

6 Q. And on Exhibit 20 -- or Exhibit AA, your
7 declaration, that last paragraph...

8 A. Which?

9 Q. The very end of the thing, paragraph 28.

10 A. 28?

11 Q. Yeah. Is that true? I am bad at describing.
12 It is line 8. If you -- on the tab in there is a 20.
13 It is paragraph 20.

14 A. 28, okay. I see it.

15 What is your question? I am sorry.

16 Q. Is that true?

17 A. "When Nissan executives toured the Nissan of
18 Burlingame facility, I was directed to close The Barn
19 doors, remove the Ford vehicles to the top floor of the
20 parking lot at Chevy, and assure the Ford service
21 technicians were out of sight."

22 Yes. And to add to that, I was actually there
23 when the executives came in, and we were all in our
24 uniforms and they were taking pictures of me.

25 Q. In your Ford shirt?

1 A. Yeah.

2 Q. Why were you doing these things that you
3 describe in paragraph 28?

4 A. Well, we did them every -- certain months when
5 the Nissan executives came to look at their facility.
6 They didn't want them to know that we were working in
7 the facility so we were instructed to get everybody out
8 of there, which, again, is not best practices, and move
9 the employees, either hide them or bring them down to
10 the main service department. And again, the reason why
11 I am reinstating [sic] this is because this is totally
12 abnormal. This is the kind of stuff that stressed me
13 out working.

14 Q. You said "they" told you. Who is "they"?

15 A. Al Vasquez. He is one of the partners.

16 Q. Can I direct your attention in this book to
17 Exhibit X? That is just going to be a few back.

18 A. X?

19 Q. Yeah.

20 (Respondent's Exhibit X was marked for
21 identification.)

22 BY MR. KELSO:

23 Q. Without describing what is in this, can you
24 just say what is Exhibit X?

25 A. It is an e-mail or text from the service

1 say "you," I should have defined that better. I mean,
2 you know, you as a party, not you personally.

3 MR. HUGHES: Your Honor, may I add to my
4 objection?

5 ADMINISTRATIVE LAW JUDGE VAN ROOYEN: Yes.

6 MR. HUGHES: I also think that it is entirely
7 irrelevant. We know that The Barn was in use. Whether
8 or not Putnam was not disclosing its use to Nissan, I
9 don't think has any bearing on the issues that are
10 relevant to what is to be decided in this matter by Your
11 Honor.

12 MR. KELSO: May I respond?

13 ADMINISTRATIVE LAW JUDGE VAN ROOYEN: You don't
14 need to respond to that. I am going to overrule the
15 objection. I will admit it, and then you-all can argue
16 the weight I should give to it in argument.

17 Exhibit X is admitted.

18 (Respondent's Exhibit X was admitted into
19 evidence.)

20 BY MR. KELSO:

21 Q. Mr. Martinez, can you please explain to the
22 judge what is going on here in Exhibit X?

23 A. Yes, sir. We are talking about the same page,
24 right?

25 Q. Yeah.

1 A. So I am not sure who Sam is. I don't know if
2 he is the sales manager or the service manager, but this
3 was --

4 Q. Sales manager or service manager where?

5 A. Oh, I am sorry. At Nissan of Burlingame.

6 Q. Okay.

7 A. And it is a reminder that it is a meeting with
8 Nissan executives, and it was --

9 Q. Is that Mr. William Testner [sic]?

10 A. Yes.

11 Q. All right. Go ahead. I didn't mean to
12 interrupt you. I am sorry.

13 A. And this was sent to me to remove the employees
14 from the facility.

15 Q. All right. Back when you first began working
16 for Putnam, were there open repair orders for you to
17 complete?

18 A. Yeah, there was repair orders open from Kevin
19 Lindner, and repair orders from the service writer that
20 was with me. Can't think of what his name is.

21 COURT REPORTER: I am sorry. I didn't hear the
22 end of that answer. I am sorry.

23 MR. KELSO: I think he said he can't remember
24 the name -- his name right now. Is that what you said,
25 sir?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

REPORTER'S CERTIFICATION

I, ELIZABETH A. WILLIS-LEWIS, Certified
Shorthand Reporter 12155 in and for the State of
California, do certify that I was appointed to act as
stenographic reporter in the above-entitled proceedings;
that I reported the same in stenotype and thereafter had
transcribed the same as appears by the foregoing
transcript; that said transcript is a full, true, and
correct statement of the proceedings and evidence in
said matter to the best of my ability.

I FURTHER CERTIFY: That I am not interested in
the outcome of said action, nor connected with, nor
related to, any of the parties of said action or to
their respective counsel.

IN WHEREOF, I have hereunto set my hand this
7th day of October, 2023.

Elizabeth A. Willis-Lewis
Elizabeth A. Willis-Lewis, CSR No. 12155

2:41



SC 

2 People >



Today 2:40 PM

Sam Chowaiki

Nissan of Burlingame

Tuesday, Dec 13, 2022
from 1:30 PM to 3 PM

1 PM

2 PM Nissan Burlingame NREDI Gensler Consult Site Meeting
Nissan of Burlingame

3 PM

4 PM



WT Invitation from
William Tessmer



Invitees

4 >

⑦ Iliana Evstatieva
⑦ Kent Putnam
⑦ Ropo Sanni

⑦ rpeterson@putnamauto.com

Alert

15 minutes before ⌵

Notes

Looking forward to our meeting!



Facility Inspection

Ok I will have the guys out for that time



iMessage



VIA EMAIL

t Steven M. Kelso (Colorado Bar No. 29099)
April C. Connally (Colorado Bar No. 53464)
H. Camille Papini-Chapla (California Bar No. 282893)
Greenberg Traurig, LLP
1144 15th Street, Suite 3300
Denver, CO 80202
Telephone: 303.572.6500
Facsimile: 303.572.6540
Email: kelsos@gtlaw.com
april.connally@gtlaw.com
papinichapla@gtlaw.com

Attorneys for Respondent
FORD MOTOR COMPANY

New Motor Vehicle Board

Received
1-10-25

FILED

New Motor Vehicle Board

Date: 1-10-25

By: am

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-2826-23

**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
November 7, 2024, as amended, Respondent Ford Motor Company ("Ford") submits its proposed
findings of facts and conclusions of law.

1 **DECISION**

2 Dwight Nelsen, Administrative Law Judge (ALJ), New Motor Vehicle Board, State of
3 California, heard this matter on August 6-8, 12-13, 15-16, and November 7, 2024, by videoconference
4 from Sacramento, California.

5 Gavin M. Hughes and Robert A. Mayville, Jr., Attorneys at Law, Law Offices of Gavin M.
6 Hughes, represented protestant KPAuto, LLC, doing business as Putnam Ford of San Mateo (“Putnam
7 Ford”).

8 Steven M. Kelso, Elayna M. Fiene, and H. Camille Papini-Chapla, Attorneys at Law,
9 Greenberg Traurig, LLP, represented respondent Ford Motor Company (“Ford”).

10 **PROCEDURAL BACKGROUND**

11 1. Putnam Ford filed the instant protest, No. 2826-23, on May 26, 2023 (“Protest”)
12 pursuant to California Vehicle Code 3065 (“Section 3065”). The Protest alleges that Ford violated
13 Section 3065 because: (1) it disallowed warranty claims pursuant to a warranty audit that were neither
14 false nor fraudulent (Protest ¶ 11), and (2) Ford “selected Protestant and conducted the Audit in an
15 unreasonable, punitive, and unfairly discriminatory manner.” (*Id.* ¶ 12.) Putnam Ford seeks a
16 determination that Ford failed to comply with the requirements of Section 3065 and issue a final order
17 under Section 3065(e)(5). (*Id.* at 3 (Prayer Nos. 1 & 2).)

18 2. Putnam Ford’s Protest did not allege a violation of Vehicle Code Section 3065.2
19 (including neither subsections (i)(2)(g) nor (i)(2)(d)). (*See generally* Protest.) Nor did Putnam Ford
20 file a protest pursuant to Vehicle Code Section 3065.4 or state that the Protest was to determine a labor
21 rate. (*See id.*)

22 3. Administrative Law Judge (“ALJ”) Dwight Nelsen held a Prehearing Conference on
23 May 22, 2024. The Board issued an Order Regarding Pre-Hearing Matters directing parties to file and
24 serve, inter alia: Pre-Hearing Motions, Pre-Hearing Briefs, and deposition designations by Monday,
25 July 29, 2024; counter-designations by Wednesday, July 31, 2024; and witness lists by Friday, August
26 2, 2024.

27 4. The Board heard oral argument on all Prehearing Motions on August 6, 2024,
28 immediately prior to the commencement of the hearing.

- a. Ford's unopposed Motion in Limine to Protect to the Integrity of the Hearing. Granted.
- b. Ford's unopposed Motion in Limine Regarding Technology Procedures for Parties, Witnesses, and Counsel During Virtual Hearing. Granted
- c. Ford's Motion in Limine Regarding Evidence and Argument Putnam Ford's Use of Unauthorized Facility Was Justified. Protestant Opposed this Motion. The Board Denied the motion without prejudice, and Ford was "free to make proper objections during the course of the hearing when the evidence that they have identified is sought by [counsel for Protestant]." (Hr'g Tr.: 8/6/24, 18:22-19:1.)
- d. Ford's Motion in Limine Precluding Testimony Outside A Witness's Personal Knowledge. Protestant Opposed this Motion. The Board Denied the motion without prejudice, and Ford was "free to make proper objections during the course of the hearing when the evidence that they have identified is sought by [counsel for Protestant]." (Hr'g Tr.: 8/6/24, 18:22-19:1.)
- e. Ford's Motion in Limine to Exclude Evidence and Argument Putnam Ford was Unaware of Terms of SSA. Protestant Opposed this Motion. The Board Denied the motion without prejudice, and Ford was "free to make proper objections during the course of the hearing when the evidence that they have identified is sought by [counsel for Protestant]." (Hr'g Tr.: 8/6/24, 18:22-19:1.)

5. The Board also heard oral motions and argument on August 6, 2024, and ruled as follows:

- a. Granted Ford's oral motion to exclude witnesses during the testimony of other witnesses, with the exception of a single corporate representative. (H'rg Tr.: 8/6/24, 20:5-14, 21:15-22:6.)
- b. Granted Ford's unopposed motion to seal Exhibit J-3 in its entirety, but permitting public disclosure of limited citation for the purpose of briefing and the Board's Order. (H'rg Tr.: 8/6/24, 24:14-26:24, 27:15-17.)

1 c. Denied without prejudice Ford’s motion precluding Protestants from intentionally
2 eliciting attorney-client privilege objections with the intent to draw inferences in
3 Putnam Ford’s favor that Ford’s counsel directed the audit for the purpose of
4 retaliation. (Hr’g Tr.: 8/6/24, 33:2-40:25.) Protestant opposed this motion, and the
5 court stated “the best way to approach this is . . . when an issue comes up . . . I think
6 a proper objection is – is the best way to approach it. So I’m not restricting [Ford’s
7 counsel;] from raising any such objection during the hearing, and I invite him to do
8 so.” (H’rg Tr.: 8/6/24, 40:17-25.) These objections are discussed in detail in the
9 Conclusions of Law below.

10 d. Denied Ford’s oral motion to preclude Mr. Kent Putnam from testifying because he
11 was not disclosed on the witness list. (H’rg Tr.: 8/6/24, 41:7-23.)

12 6. The Hearing was held via videoconference on August 6-8, 12-13, 15-16, and November
13 7, 2024.

14 7. During the Hearing, Protestant sought to compel the attendance of four witnesses
15 located in California and employees of Ford, but who were not subpoenaed, and five out-of-state
16 witnesses who were employees of Ford and were not subpoenaed. Ford agreed to produce the
17 witnesses located in California without waiving its objection to the failure to procure subpoenas. The
18 parties filed briefs on whether the Board could compel the testimony of the out-of-state witnesses, and
19 it heard oral argument on the matter on August 16, 2024. (H’rg Tr.: 8/16/24, 239:16-278:8.) The Board
20 denied Protestant’s motion to compel.

21 8. After the end of oral testimony, Plaintiffs moved to introduce additional deposition and
22 hearing designations. Ford opposed the request as untimely and on the basis that some of the
23 designations were inadmissible under *Berroteran v. Superior Court* (2022) 12 Cal.5th 867. The Court
24 granted Protestant’s motion in part and denied it in part and admitted Protestant’s transcript
25 designations and Ford’s counter-designations, as outlined in its November 7, Corrected Order
26 Granting in Part and Denying in Part Protestants Request for Post-Hearing Deposition Designations.
27 The Court admitted Exhibits P-1-47, P-154, P-156, P-157, P-158, P-159, P-160, P-161 and R-355 and
28 R-356.

9. The Board held a hearing on November 7, 2024, to hear Putnam Ford's objections to Ford's counter-designations. It overruled in part and sustained in part Protestant's objections, and admitted Exhibits R-349, R-350, R-351, R-352, R-353, and R-354. (Hr'g Tr: 11/7/24, 12:24-14:2.)

RELEVANT LAW

10. Section 3065 governs the terms and implementation of warranty agreements between dealers (or franchisees) and manufacturers/distributors (or franchisors). Pursuant to Section 3065(e)(1), a franchisor may conduct an audit of a franchisee’s warranty records “on a reasonable basis” after a claim is paid or credit issues. The franchisor “may not select a franchisee for an audit, or perform an audit, in a punitive, retaliatory, or unfairly discriminatory manner.” Veh. Code, § 3065(e)(1).

11. During the course of an audit, a franchisor may not disapprove or charge back previously approved claims “unless the claim is false or fraudulent, repairs were not properly made, repairs were inappropriate to correct a nonconformity with the written warranty due to an improper act or omission of the franchisee, or for material noncompliance with reasonable and nondiscriminatory documentation and administrative claims submission requirements.” Veh. Code, § 3065(e)(2). If the franchisor disallows a previously approved claim, “the franchisor shall provide to the franchisee, within 30 days, a written disapproval notice stating the specific grounds upon which the claim is disapproved.” Veh. Code, § 3065(e)(3). The franchisor must provide a reasonable appeal process of an audit. Veh. Code, § 3065(e)(3).

12. Within six months of receipt of the written disapproval notice or completion of the appeal process, a franchisee may file a protest to determine whether the franchisor complied with Section 3065(e). Veh. Code, § 3065(e)(6). In such a Section 3065 protest, the franchisor has the burden of proof. Veh. Code § 3065(e)(6). If the board sustains the charge-back or dismisses the protest, “the franchisor shall have 90 days after issuance of the final order or dismissal to make the chargeback, unless otherwise provided in a settlement agreement. Veh. Code, § 3065(e)(5).

FINDINGS OF FACT

1 **I. THE PARTIES**

2 13. Putnam Ford is a Ford new motor vehicle dealer and is an authorized Ford franchisee
3 within the meaning of Vehicle Code Sections 331.1, 3065.2, and 3065.4.

4 14. Kent Putnam and Alvaro Vasquez are owners of Putnam Ford, and Mr. Vasquez works
5 as the General Manager of Putnam Ford. (Ex. R-331-006; Ex. R-332-006.) Andrey Kamenetsky is the
6 group operations manager and CFO of Putnam Automotive Group. (Kamenetsky: 8/12/24, 229:12-
7 14.)

8 15. Ford is a manufacturer and distributor of Ford vehicles and is a franchisor within the
9 meaning of Vehicle Code Sections 331.2, 3065.2, and 3065.4.

10 16. On January 27, 2021, Ford and Putnam Ford entered into a Sales and Service
11 Agreement (“SSA”). (Ex. J-01.) At all times relevant to this protest, Protestant’s authorized location
12 at which it could operate its dealership was at 885 N. San Mateo Drive, San Mateo, California
13 (“Authorized Location”). (Ex. J-02, Stipulation.)

14 **II. THE FORD SSA AND WARRANTY MANUAL**

15 17. The SSA governs where a Ford new motor vehicle dealer may operate. Pursuant to
16 Paragraph 5 of the SSA, “[t]he Dealer shall establish and maintain at the DEALERSHIP LOCATION
17 approved by the Company DEALERSHIP FACILITIES of satisfactory appearance and condition and
18 adequate to meet the Dealer's responsibilities under this agreement.” (Ex. J-01-020, ¶ 5(a) (“Locations
19 and Facilities”) (capitalization in original).)¹ “DEALERSHIP FACILITIES” is defined as “the land
20 areas, buildings and improvements established at the DEALERSHIP LOCATION in accordance with
21 the provisions of paragraph 5 of this agreement.” (Ex. J-01-014, ¶ 1(l) (capitalization in original).) A
22 dealer

23 [S]hall not move or substantially modify or change the usage of any of the
24 DEALERSHIP LOCATION or FACILITIES for COMPANY PRODUCTS, nor
25 shall the Dealer . . . **directly or indirectly establish or operate in whole or in part**
26 any other locations or facilities for the sale or service of COMPANY

27
28 ¹ Some words and phrases are defined terms in the SSA, and the definitions are locations in Section 1, J-01-013 to 015.

1 **PRODUCTS** or the sale of used vehicles without the prior written consent of the
2 Company.

3 (Ex. J-01-020, ¶ 5(c) (emphasis added) (capitalization in original).) “COMPANY PRODUCTS”
4 means

5 (1) new passenger cars, (2) new trucks and chassis, . . . (3) parts and accessories
6 therefor, as from time to time are offered for sale by the Company to all authorized
7 Ford dealers as such for resale, plus such other products as may be offered for sale
8 by the Company to the Dealer from time to time.

9 (Ex. J-01-013, ¶ 1(a).)

10 18. Any Ford vehicle that is purchased as a new vehicle, regardless of when it was
11 purchased or the condition of the vehicle at the time of service, is considered a “new vehicle” and,
12 therefore, a “company product.” (Hughes: 8/15/24, 129:1-3 164:25-165:17.)

13 19. In addition to an obligation to adhere to the terms of the SSA, the Dealer is required to
14 perform warranty service on Company Products in accordance with the Ford Warranty and Policy
15 Manual (“Warranty Manual”). (Ex. J-01-019, ¶ 4(b)(1).) The SSA obligated Putnam Ford to comply
16 with the Warranty Manual. (Ex. J-01-017, 019, 020, ¶¶ 2(i), 3(f), 4(b)(4).) Specifically, in the SSA,
17 Ford and Putnam Ford agreed that Putnam Ford “shall submit claims to [Ford] for reimbursement for
18 the parts and labor used in performing warranty . . . in accordance with the provisions of the Warranty
19 Manual” (Ex. J-01-020, ¶ 4(b)(4).) The Warranty Manual requires, among other things, that
20 **“Warranty repairs must be performed at an authorized Ford or Lincoln dealership.”** (Ex. J-03-
21 006, § 1.1.03 (emphasis added).)

22 20. Ford has the right to audit warranty claims. (*See* Ex. J-03-0185, § 7.3.00.) According
23 to the Warranty Manual:

24 **7.3.03 FALSE PRACTICES**

25 The submission of false claims to the Company violates [the dealer’s] Sales and
26 Service Agreement(s) and is a sufficiently substantial breach of faith between the
27 Company and the dealer to warrant termination. . . .

28 The Company may elect to conduct an audit for any Dealer. This action may be
 taken when allegations of improper warranty practices have been made.

 The following list contains examples of False Claim Categories, but is not all
 inclusive:

1 [] The knowing submission of claims with omissions of material facts or substantial
2 violations of program requirements.

3

4 [] Work not performed as claimed. . . .

5 (Ex. J-03-186.)

6 21. The Warranty Manual also bestows authority on the Dealer Principal/Owner Operator
7 to submit warranty claims and provides the following information regarding the certification of every
8 warranty claim:

9 **Important:** . . . [T]he authorization to submit [a warranty claim] is based on
10 knowledge and compliance with the following statement:

11 **“I certify that the information on this claim is accurate and, unless shown, the
12 services were performed at no charge to the owner. To my knowledge, this
13 repair contains no parts repaired or replaced that are connected in any way
14 with any accident, negligence or abuse and is compliant with Ford Warranty
15 & Policy.”**

16 In practice, submission of a repair to Ford Motor Company for payment
17 consideration signifies confirmation by the Dealer Principal or delegate that the
18 repair conforms to the statement above.

19 (Ex. J-03-006 to 007, § 1.1.04 (emphasis in original).)

20 **III. PUTNAM FORD’S LABOR RATE PROTEST FOR \$436.76 PER HOUR**

21 22. On August 24, 2021, Putnam Ford submitted to Ford a request to increase its warranty
22 labor rate. (Ex. R-336-014 (Labor Rate Protest Decision).) Putnam Ford represented to Ford that its
23 retail labor rate was \$436.76. (*Id.*) Ford denied the request, finding the represented rate was materially
24 inaccurate or fraudulent. (Ex. R-336-017 to 021.) Putnam Ford filed the Labor Rate Protest over this
25 denial in December 2021. (Ex. R-336-007, 021.)

26 23. In an order dated June 28, 2024, the Board overruled the Labor Rate Protest. (Ex. R-
27 336-002, 055.) The Board found that Putnam Ford’s submission and determination of its retail labor
28 rate of \$436.76 per hour was materially inaccurate. (Ex. R-336-048.) In reaching its conclusions, the
29 Board expressly found that the testimony of Ford witnesses John Becic, Allen Kanouse, and Mike
30 Sweis was credible. (*Id.*) It made no such finding regarding the credibility of the Putnam Ford
31 witnesses, including Mr. Putnam and Mr. Kamanetsky. (*See generally id.*) The Board held that there
32 were numerous inconsistencies, discrepancies, and irregularities in Putnam Ford’s warranty labor rate

1 submission to Ford, which included “the impossible hourly rates that could not plausibly be entered
2 into the repair order system; the large discrepancies between actual hours and sold hours; customer
3 labor charges associated with zero sold or actual hours; and the presence of flat rate charges.” (Ex. R-
4 336-048.) While the Board declined to reach the issue of fraud as unnecessary to its decision, it
5 expressly found that fraud was “one possible inference that could be drawn from the evidence.” (Ex.
6 R-336-052.)

7 24. Additionally, the Board affirmed the Administrative Law Judge’s order granting Ford’s
8 motion of sanctions against Putnam Ford for failure to produce documents relating to the location of
9 repairs during discovery. (Ex. R-336-010.) As a sanction, the Board entered a finding of fact that some
10 of the repairs in the submission for the warranty labor rate increase were performed at a location other
11 than Putnam Ford’s Authorized Location. (*Id.*)

12 **IV. THE WARRANTY STUDY AND AUDIT**

13 25. Putnam Ford submits warranty claims to Ford so it can be paid for the warranty repairs
14 that it performs on new Ford vehicles under warranty. (Vasquez: 8/12/24, 54:4-7.) Mr. Vazquez agreed
15 Putnam Ford is required to abide by Ford’s Warranty Manual. (*Id.* 54:8-11.) Pursuant to the Warranty
16 Manual, Ford may conduct a warranty audit based on an allegation of false practices. (Ex. J-03-186,
17 § 7.3.03 (“The Company may elect to conduct an audit for any Dealer. This action may be taken when
18 allegations of improper warranty practices have been made.”).)

19 **A. Ford’s Audit Process**

20 26. Ford has three different types of warranty audits: Phase 3 audits, a required follow-up
21 audit, and an allegation or warranty study audit. (Owens: 8/6/24, 75:10-20.) A Phase 3 audit occurs as
22 part of a three-phase process relating to warranty scores and involves consulting with the dealership.
23 (*Id.* 76:22-77:10.) Follow-up audits are mandatory audits that occur between seven and 18 months
24 after Ford conducts an audit and identifies a false finding. (*Id.* 76:11-21.) Allegation audits, which is
25 the type of audit at issue here, begin with a report, or allegation, to Ford of improper warranty practices
26 at a dealership. (*Id.* 81:19-23.) Allegations can come from customers, dealership employees, or Ford
27 corporate employees. (*Id.* 82:23-83:4.) Allegation audits make up approximately half of the work of
28

1 the Global Warranty Team. (*Id.* 86:18-87:2.) Ford gives allegation audits top priority because it takes
2 allegations of false claims very seriously. (*Id.* 83:7-14.)

3 27. When the Global Warranty Team receives an allegation, it enters the allegation into a
4 tracker and assigns an auditor to perform an initial investigation. (*Id.* 81:23-82:1, 84:1-2.)

5 28. The assigned auditor then investigates the allegation remotely by reviewing the
6 information provided and any other potential false claims at the dealership. (*Id.* 84:5-11.) An allegation
7 investigation is **not** an audit because it is a preliminary investigation only and Ford cannot charge back
8 a claim at this phase. (*Id.* 85:2-12.) If the auditor is unable to substantiate the allegation or unable to
9 identify any potential false claims, the auditor closes the allegation and takes no further action. (*Id.*
10 84:23-25.)

11 29. If the auditor substantiates the allegation, the auditor will proceed to a warranty study.
12 (*Id.* 85:13-15.) The auditor may perform the study remotely or at the dealership and review select
13 repair orders (“ROs”) and other relevant documents to evaluate the allegation. (*Id.* 85:17-86:7.) A
14 warranty study is **not** an audit; at this stage, Ford will not perform charge-backs even if it identifies
15 false claims. (*Id.* 86:8-14.) If the auditor does not identify any false claims, the warranty study is closed
16 out as a consulting action, and no audit is conducted. (*Id.* 86:15-17.)

17 30. If the auditor finds evidence of false claims during the warranty study, the auditor may
18 decide to conduct a warranty audit. (*Id.* 86:13-15.) The warranty audit begins with a request of all the
19 ROs to review. (*Id.* 133:19-20.) The auditor will then review each individual RO to ensure that the
20 repair was performed properly, the technician followed the service publications, and the technician
21 performed the repair in accordance with the Warranty Manual requirements. (*Id.* 133:20-134:1.) If
22 analysis of an RO demonstrates sufficient failings, the auditor writes the warranty claim up as a
23 disallowance and schedules it for a charge-back. The auditor prepares a disallowance summary and
24 conducts a claims review meeting with the dealer at which the auditor reviews every disallowance and
25 explains the basis for the charge-back. (*Id.* 216:5-11.)

1 31. Ford’s warranty auditors belong to the Global Warranty Operations Group.² (*Id.* 73:8-
2 14.) Global Warranty Operations is not connected with the Ford team that handles labor rate requests.
3 (*Id.* 73:15-21.) Mr. Owens is not aware of any employees in the warranty labor rate group asking
4 Global Warranty Operations to audit a dealer because they were displeased with the dealer. (*Id.* 74:6-
5 75:9.)

6 **B. The Auditor: John Owens**

7 32. During the relevant period, Sharita Crawford was the manager of the Global Warranty
8 Operations group, and she was responsible for assigning allegations for investigations to Ford auditors.
9 (*Id.* 84:2-6.) She assigned the Putnam Ford allegation to Mr. Owens. (*Id.* 87:20-24.)

10 33. Mr. Owens selected Putnam Ford for an audit, performed the audit, and testified at the
11 Hearing over the course of two days. He is currently employed at Ford as a warranty auditor (*id.* 65:8-
12 9) and has worked for Ford since January 2001 (*id.* 65:6-7). Mr. Owens graduated from the FORD
13 ASSET Program, became certified in bumper-to-bumper automotive repair, and proceeded to work as
14 a technician for an authorized Ford dealer. (*Id.* 65:23-67:2.) After working as a technician, he joined
15 Ford as a Service Engineer working on Ford’s technical service hotline. (*Id.* 68:9-69:10.) He worked
16 as a service engineer for 6.5 years and then became a field service engineer for 8.5 years, during which
17 time he provided in-person, technical support to dealerships having trouble repairing a Ford vehicle.
18 (*Id.* 69:14-70:13.) For the last six to seven years, he has worked as a Ford warranty auditor. (*Id.* 72:8-
19 9.) As a warranty auditor, he reviews a dealership’s ROs and supporting documents to determine
20 whether the technician properly performed the repair pursuant to all rules and requirements of the
21 Warranty Manual, service publications, shop manuals, and technical services bulletins. (*Id.* 72:10-23.)
22 In his current role, he has performed approximately 50 warranty audits; of those, approximately 20 to
23 25 were allegation audits. (*Id.* 73:4-5, 86:23-87:2.)

24
25
26
27
28 ² At the Hearing, Mr. Owens used the phrases “Global Warranty Team” and “Global Warranty
Operations Group” interchangeably.

1 34. As ALJ Nelsen noted during the hearing, “From what I've heard of Mr. Owens’s
2 testimony, it sounds like he's well qualified and well -- very knowledgeable about extensive operations
3 of -- at least of the Ford Company.” (Hr’g. Tr.: 8/6/24, 125:13-16.)

4 **C. The Allegation that Putnam Ford Submitted False Claims for Warranty Repairs**
5 **Performed at an Unauthorized Location**

6 35. Putnam Ford, through Mr. Putnam and Mr. Vazquez, intentionally decided to service
7 vehicles at Nissan of Burlingame (“Nissan Facility”), which includes the Barn. (Vasquez: 8/8/24, 81:5-
8 10.)³ This included using the Nissan Facility for warranty repair work from at least 2021 through 2023.
9 (See Ex. R-336-010; Ex. J-02.)

10 36. Mr. Putnam admitted that the Barn is not an authorized location of Ford; it is a Nissan
11 facility. (Ex. R-327-012, Putnam Dep. 1073:4-16.) He also acknowledged that Nissan required that its
12 authorized locations be used exclusively for Nissan operations. (*Id.* 1073:25-1074:3.)⁴ It is
13 “absolutely” unusual for a dealer to service vehicles at an unapproved location. (Swann: 9/21/23,
14 808:2-7.)

15 37. Ford received an allegation that Putnam Ford was performing repairs at an
16 unauthorized location. (Owens: 8/6/24, 88:14-15.) The San Francisco region, and specifically regional
17 manager Ms. LaShawn Swann, was the source of the allegation, and the pictures associated with the
18
19

20
21 ³ At all relevant times, Nissan of Burlingame operated at 101 California Drive, Burlingame, California
22 (“Nissan Facility”). (Ex. R-326-006, Nissan PMK Dep. 23:4-7.) Included with this property are some
23 service stalls, somewhat separated from the rest of the Nissan Facility, colloquially referred to as the
24 “Barn.” (*Id.*)

25 ⁴ Mr. Putnam did not want Nissan to know that Putnam Ford was using the Barn for Ford service.
26 When Mr Vasquez knew that Nissan executives were coming to the Nissan Facility for an inspection,
27 Mr. Vasquez told the Ford service manager, David Martinez, to close the Barn doors, remove all the
28 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; (text message
sent to Mr. Martinez to remove the Ford employees from the Barn due to an upcoming Nissan visit).)
Testimony from September 2023 is from the Labor Rate Protest Hearing. During the instant Hearing,
ALJ Nelsen granted Ford’s oral motion for the Board to take official notice of testimony and evidence
from the Labor Rate Protest Hearing. (Hr’g Tr.: 8/13/24, 195:17-196:5.)

1 allegation. (Owens: 8/6/24, 92:3-4; 8/7/24, 163:4-8.)⁵ Prior to receiving the allegation, Mr. Owens had
2 never heard of Putnam Ford and was unaware of the pending Labor Rate Protest. (*Id.* 88:2-12.)

3 38. Mr. Owens believed performing warranty work at an unauthorized location qualified
4 as a false warranty claim because performing repairs “in an unauthorized location is not allowed by
5 [the Warranty Manual] or the Sales and Service Agreement. So, by submitting those claims to Ford
6 Motor Company, the dealer is agreeing or confirming that those repairs complied with all Warranty
7 and Policy Manual requirements.” (Owens: 8/6/24, 129:5-11.)

8 39. The allegation was accompanied by pictures showing Ford vehicles being repaired at
9 the Nissan Facility. (*Id.* 88:17-18, 89:15-18, 90:3-91:21; Ex. R-322.)⁶ Mr. Owens used the license
10 plate numbers of the vehicles in the pictures to locate VINs, which he in turn used to search for
11 warranty claims. (Owens: 8/6/24, 94:14-23.) Based on Mr. Owens’s testimony and his
12 contemporaneous notes, it was apparent that three of the four vehicles in the photos had warranty
13 claims submitted around the time Ms. Hughes took the pictures. (*Id.* 95:1-17, 96:4-7; Ex. R-308.) The
14 pictures also showed the work identified in the warranty claims was in process. (Owens: 8/6/24, 96:8-
15 11.) For example, Exhibit R-322-003 shows a vehicle with a powertrain assembly below the vehicle,
16 and that car has a warranty claim for an engine replacement. (*Id.* 96:16-19.) There is also a vehicle
17 with the driveline removed, which is necessary for a warranty repair on the transmission. (*Id.* 96:20-
18 25.)

19 40. Based on the information collected, Mr. Owens determined there was reason to believe
20 that Putnam Ford submitted false warranty claims. (*Id.* 97:12-16.) Additionally, he searched through
21

22
23 ⁵ Ms. Swann learned that Putnam Ford was performing repairs at an unauthorized facility when Mr.
24 Putnam mentioned this to her in October 2022. (Swann: 8/16/24, 209:14-210:14) In January 2023, Ms.
25 Swann and Ms. Hughes toured the Nissan Facility in connection with a relocation request. (Hughes:
26 8/15/24, 135:1-18.) Prior to the visit, Ms. Swann and Ms. Hughes discussed that Putnam Ford might
be performing unauthorized service work at the Nissan Facility. (*Id.* 136:22-137:3.) Both Ms. Swann
and Ms. Hughes found this concerning. (*Id.* 137:4-7.) They collectively decided that if they saw Ford
vehicles during the visit, Ms. Hughes would try to get pictures of them. (*Id.* 138:10-16.)

27 ⁶ The photos at issue were taken by Ms. Hughes while she and Ms. Swann toured the Nissan Facility
28 on January 19, 2023. (Hughes: 8/15/24, 144:13-19; Ex. P-107.) Ms. Swann directed Ms. Hughes to
send the photos to the franchising team in Dearborn, Michigan. (Swann: 8/16/24, 145:8-25.)

1 the rest of the dealership’s warranty claims for the nine-month scope permitted by California law, and
2 found a milage misstatement, which also would have served as an independent basis for a warranty
3 study. (*Id.* 97:18-22.) Mr. Owens shared his findings with his supervisor, Ms. Crawford, and
4 recommended a warranty study. (*Id.* 98:9-16.) Ms. Crawford immediately assigned Mr. Owens to do
5 the warranty study. (*Id.* 98:19-23.) Had Mr. Owens believed that the allegation had no merit, he could
6 have closed out the allegation with no action taken. (*Id.* 97:23-98:1.)

7 **D. The Putnam Ford Warranty Study**

8 41. Mr. Owens generated a letter dated March 28, 2023, notifying Putnam Ford that Ford
9 would conduct a warranty study with the dealership. (*Id.* 101:10-102:9; Ex. R-309.) The letter was
10 signed by Ms. Swann. (Owens: 8/6/24, 101:25-102:3.) Through the letter, Ford notified Putnam Ford
11 that if the warranty study uncovers false practices, Ford may elect to proceed with an warranty audit.
12 (*Id.* 102:24-103:5.) But “if improper warranty practices are not confirmed, the action will be closed as
13 a study outside of the warranty audit process.” (*Id.* 103:7-10; *accord* Ex. R-309.)

14 42. Because of the size of the dealership and the number of warranty claims, Mr. Owens
15 opted to perform the warranty study in-person. (Owens: 8/6/24, 103:11-18.) He planned to begin the
16 warranty study with an opening meeting to discuss agenda items with the dealer and answer any
17 question the dealer might have. (*Id.* 112:1-4.) He would also present the dealer with an initial list of
18 ROs that he would like to review. (*Id.* 112:4-6; *see also* Ex. R-311 (4/3/23 opening meeting agenda).)

19 43. On April 3, 2023, Mr. Owens met with Mr. Vasquez, Gavin Hughes (counsel for
20 Putnam Ford in this litigation⁷), Kent Putnam, and others in a conference room at Mr. Putnam’s
21 Chevrolet dealership. (Owens: 8/6/24, 113:5-6, 114:7-115:6.) Mr. Owens only got through the
22 greetings and introduction when Mr. Hughes introduced himself as an attorney and “essentially took
23 over the meeting.” (*Id.* 115:7-15.) At that time, Mr. Hughes asked Mr. Owens if he was aware of the
24 labor rate lawsuit; Mr. Owens stated he was aware that there was one, but that was all he knew. (*Id.*
25 115:15-17.) Mr. Hughes gave Mr. Owens a copy of the protest in the labor rate lawsuit, announced
26

27 ⁷ Putnam Ford’s own witness, Mr. Vazquez, testified that he could not remember another audit in
28 which he was involved where the dealer’s attorney spoke with the auditor. (Vasquez: 8/12/24, 24:3-7.)

1 that the warranty actions were retaliatory, threatened to sue Ford for the warranty study or any
2 warranty audit, and threatened that Mr. Owens should be expected to be deposed and called as a
3 witness. (*Id.* 115:18-25.) According to Mr. Owens, Mr. Hughes had an aggressive tone, and
4 “essentially ambushed me, made me very uncomfortable, and prevented me from going through my
5 normal opening meeting.” (*Id.* 116:1-4.)

6 44. Mr. Owens eventually completed the opening meeting agenda. (*Id.* 116:5-7.) When
7 asked whether he did anything different in the warranty study as a result of Mr. Hughes badgering,
8 Mr. Owens testified:

9 A I did not.

10 Q Why?

11 A Because I treat all dealers the same. Big, small, important, not important - - in
12 my book, all the dealers should be treated the same, and that’s how I approach
13 things.

13 (*Id.* 116:10-15.)

14 45. Putnam Ford had Mr. Owens work from an office located in Mr. Putnam’s General
15 Motors dealership. (*Id.* 116:17-24.) He set to work. Once he had access to the ROs, Mr. Owens
16 confirmed that the buildings in the pictures attached to the allegation were part of an unauthorized
17 location. (*Id.* 117:11-25.) Mr. Owens spoke to several Putnam Ford technicians and confirmed that the
18 picture of the vehicles he received depicted the Barn. (*Id.* 117:20-25.) He also observed three other
19 Putnam Ford technicians working at the Nissan Facility. (*Id.* 118:19-22.) The Putnam Ford shop
20 foreman was also working out of the Nissan Facility and Mr. Owens discovered Putnam Ford
21 technicians in the Barn and the rest of the Nissan Facility actively working on Ford vehicles. (*Id.*
22 119:14-21.) Mr. Owens analyzed ROs from June 2022 to February 2023, and he interviewed the
23 Putnam Ford technicians to determine how long they had been working at the Nissan Facility. (*Id.*
24 119:25-120:6.) According to Mr. Owens, it would be highly unusual for a technician to work in
25 different buildings throughout the day because their toolboxes are so large and “technicians don’t
26 typically wheel their toolboxes . . . across the parking lot or down the street.” (*Id.* 120:20-121:8.)
27
28

1 46. In addition to information from the Ford technicians, Mr. Owens found other evidence
2 of Ford warranty work being performed at unauthorized locations. He observed several pallets of Ford
3 parts with RO numbers written on them, which is consistent with the requirement that dealerships
4 retain parts that are replaced as part of a warranty repair. (*Id.* 122:22-123:15.) Putnam Ford technicians
5 informed Mr. Owens that the parts department only came to collect the Ford parts every two or three
6 months. (*Id.* 124:1-4.) According to Mr. Owens, “those were just a pile on piles of parts that they had
7 done, indicating to me that they had been doing a lot of warranty repairs in that shop. That’s where
8 those technicians keep their parts while they wait for the parts department to come pick it up.” (*Id.*
9 124:5-9.) Mr. Owens also observed repairs of Ford vehicles under warranty by Putnam Ford
10 technicians in the Barn and the main Nissan Facility. (*Id.* 126:7-21.)

11 47. Mr. Owens ultimately requested the ROs for the six Putnam Ford technicians who
12 confirmed they had been working at the Barn or Nissan Facility during this period. (*Id.* 120:7-19.)
13 After Mr. Owens completed the study, he determined that there was an extensive amount and quantity
14 of false claims. (*Id.* 127:11-14.) He found that “repairs that are being performed in an unauthorized
15 facility[, which] is not allowed by [the Warranty Manual] or the Sales and Service Agreement. So by
16 submitting those claims to Ford Motor Company, the dealer is agreeing or confirming that those repairs
17 complied with all Warranty and Policy Manual requirements.” (*Id.* 129:5-11.) The factual basis for
18 this finding was that six Putnam Ford technicians informed him that they were working in an
19 unauthorized facility. (*Id.* 129:14-16.)⁸

20 48. Based on his findings, Mr. Owens recommended to Ms. Crawford that he upgrade the
21 warranty study to a warranty audit. (*Id.* 127:2-17.) The decision to select Putnam Ford for an audit
22 was made by Mr. Owens in a conversation with Mr. Crawford that was “fairly straightforward” and,
23 based on the presence of false claims, Ms. Crawford “immediately agreed” to the recommendation.
24 (*Id.* 127:18-128:4.) No one else was involved in the decision to audit Putnam Ford. (*Id.* 128:13-15.)
25 Mr. Owens did not select Putnam Ford for a warranty audit to punish Putnam Ford or retaliate, nor
26

27 ⁸ A separate basis for the audit was also that he confirmed a milage misstatement through personally
28 reviewing diagnostic tool equipment. (Owens: 8/6/24, 129:16-18.)

1 does he believe that the decision was unfair; he would have made the same decision for any dealer
2 under the same circumstances. (*Id.* 129:24-130:15.) The decision to conduct the audit was in no way
3 related to the Labor Rate Protest, in response to the protest, or to create leverage; nor did Mr. Owens
4 consider the Labor Rate Protest in his decision to conduct the audit. (*Id.* 130:16-131:16.) In fact, under
5 the Ford process, Mr. Owens could **not** upgrade a study based on a labor rate request. (*Id.* 131:23-
6 132:6.) The decision to audit Putnam Ford was solely in response to the false claims Mr. Owens
7 personally identified in the warranty study. (*Id.* 131:17-22.)

8 **E. Mr. Owens Conducts a Warranty Audit**

9 49. On May 8, 2023, Putnam Ford was notified the warranty study was being upgraded to
10 a warranty audit. (Ex. R-313; Owens: 8/6/24, 132:17-21, 133:1-2.) The scope of the audit was June
11 2022 through February 2023 (Owens: 8/6/24, 133:10-15), and Mr. Owens only reviewed the ROs
12 performed by the six technicians that he confirmed worked at the unauthorized facility⁹ (*id.* 136:2-
13 21). Mr. Owens spent over four weeks reviewing ROs. (*Id.* 213:24-214:1.) Although lengthy, he
14 confirmed that he did not spend more time reviewing the ROs than he would typically spend on any
15 other audit. (*Id.* 134:23-135:19.)

16 50. Mr. Owens testified as to why performing a warranty repair at an unauthorized location
17 rendered a warranty claim false and results in a disallowance.

18 51. **First**, it violates the Warranty Manual:

19 A [Exhibit] J-3, under “False Practices,” you can get down to right above where the
20 bullet points are, it reads, “The following list contains examples of false claim
21 categories that is not all-inclusive.” The bullet points that I selected and associated
22 with this one is the first one, “The knowing submission of claims with omissions
23 of material facts or substantial violations of the program requirements.” . . . And
then I also included “Work not performed as claimed,” since it was done at the
Nissan facility, including the barn.

24
25 ⁹ Mr. Owens testified he used a document provided by Putnam Ford containing a list of technician ID
26 numbers and their corresponding technician names in order to identify which repairs were performed
27 by the six identified technicians. (Owens: 8/6/24, 139:7-140:5; Ex. R-321.) He also testified Putnam
28 Ford employees identified where each technician worked, writing down “Barn” and “Nissan” for
technicians working at those respective locations. (*See* Owens: 8/6/24, 139:18-142:8; Ex. R-321.) Mr.
Owens did not charge back repairs performed by any technicians that he could not confirm was
working at an unauthorized location. (Owens: 8/6/24, 142:24-143:3.)

1 Q Well, how is it work not done as claimed?

2 A So by submitting the claim, the dealer is confirming that they followed all
3 Warranty and Policy Manual requirements. There is another section in the Warranty
4 and Policy Manual, if you'd like to look at that while we're here.

5

6 On page 6, under Warranty and Policy, Section 1.1.03, for dealer principal warranty
7 responsibilities, second paragraph, second sentence reads, "Warranty repairs must
8 be performed at an authorized Ford or Lincoln dealership." Also at the bottom in
9 bold, in quotes, it says, "I certify that the information on this claim is accurate and,
10 unless shown, the services were performed at no charge to the owner. To my
11 knowledge, this repair contains no parts repaired or replaced that are connected in
12 any way with any accident, negligence, or abuse and is compliant with Ford
13 Warranty and Policy." Continuing on to page 7 of J-03, it says, "In practice,
14 submission of a repair to Ford Motor Company for payment consideration signifies
15 confirmation by Dealer Principal or delegate that the repair conforms to the
16 statement above."

17 Q Meaning, this is compliant with Ford Warranty and Policy?

18 A Correct.

19 (*Id.* 160:3-162:4; *accord* Ex. J-03-006 to 007 (certification statement that warranty claim complies
20 with Warranty Manual).)

21 52. **Second**, performing warranty repairs at an unauthorized facility violated Paragraph
22 5(c) of the SSA (Owens: 8/6/24, 162:17-163:2), which states, in relevant part:

23 **5. (c) Changes and Additions.** The Dealer shall not move or substantially modify
24 or change the usage of any of the DEALERSHIP LOCATION or FACILITIES for
25 COMPANY PRODUCTS, nor shall the Dealer . . . directly or indirectly establish
26 or operate in whole or in part any other locations or facilities for the sale or service
27 of COMPANY PRODUCTS or the sale of used vehicles without the prior written
28 consent of the Company. Any such change shall be evidenced by a new Dealership
Facilities Supplement executed by the Dealer and the Company[.]

(Ex. J-01-020 (emphasis and capitalization in original).)

53. Mr. Owens was aware of at least one other Ford dealer who had warranty claims
disallowed because that dealer was performing repairs at an unauthorized facility. (Owens: 8/6/24,
237:13-25, 239:9-12 (testifying he looked at disallowance summary reports for another dealer that had

claims disallowed for performance at an unauthorized facility in order to seek an example of how the other auditor “went about it.”.)

F. The Results of the Audit

54. Ultimately, Mr. Owens examined 562 warranty claims and disallowed 552, for a total disallowance amount of \$502,821.56. (*See generally* Ex. J-04 (Disallowance Summary); Ex. J-05 (ROs); *see also* Owens: 8/6/24, 144:1-13 (explaining contents of Exhibit J-04), 145:12-146:12 (explaining Exhibit J-5 is the supporting documentation for Exhibit J-04), 147:24-25 (disallowance total).)

55. During the Hearing, Mr. Owens discussed six line-item repairs in five different ROs and the corresponding disallowance summaries as examples as to how to review the evidence:

a. **RO 14564, Line A** (Ex. J-04-580; Ex. J-05-Vol. 10-014692 to 14700.) Mr. Owens disallowed this repair primarily for a milage misstatement, which means that the dealer claimed there was a lower milage on the car than the actual milage so that it would qualify as under warranty. (Owens: 8/6/24, 150:21-23, 152:1-2, 152:15-153:20.) The RO indicates that Putnam Ford was waiting on the customer’s authorization for the repair, which indicates that the dealership knew the vehicle was out of warranty. (*Id.* 153:21-154:11; Ex. J-05-Vol. 10-014693 (“Waiting on Authorization customer for repair”).)¹⁰ The secondary reason for the disallowances was the repair being performed at an unauthorized location. (Owens: 8/6/24, 152:2-4, 154:12-25, *see also* 155:1-157:25 (explaining how he can match a specific technician to a specific repair using the information in the RO and Exhibit R-321).) Finally, the RO was disallowed because it includes a cooling system pressure test that was not necessary for the repair. (*Id.* 164:14-18.) The RO states that a visual inspection identified the water pump leak, so no additional test was necessary. (*Id.* 165:2-17, 166:8-15 (explaining these types of tests are “padding” the ticket and claiming extra things that do not need to be done); Ex. J-05-Vol 10-014693 (“Performed a visual inspection . . .and found water pump leak.”).) The disallowance summary also cites to the sections of the Warranty Manual supporting Mr. Owens’s determination of a false practice. (*See* Owens: 8/6/24, 159:6-24, 163:3-164:7, 164:14-25; *compare* Ex. J-04-580 to 581, *with* Ex. J-05-014692 to 14700.)

b. **RO 12559, Line A**. (Ex. J-04-008 to 009; Ex. J-05-Vol. 1-000174 to 000177.) Mr. Owens disallowed this repair because it was performed at an unauthorized location. (Owens: 8/6/24, 171:14, 171:20-174:17.) The secondary reason for disallowance was improper service labor time studies, labor operations, or sublet. (*Id.* 171:15-16.) The RO included an after-the-fact additional repair line, for which the

¹⁰ Putnam Ford presented no evidence rebutting the accuracy of any of the facts underlying any of the disallowances.

1 technician did not obtain authorization from the service management, which
2 violates the Warranty Manual. (*Id.* 176:5-15.) Mr. Owens also noted on the
3 disallowance sheet that the dealer did not claim something to which it would have
been entitled in order to educate Putnam Ford as to the proper way to complete the
warranty request. (*Id.* 174:19-175:5; Ex. J-04-009.)

4 c. **RO 12559, Line D.** (Ex. J-04-009 to 012; Ex. J-05-Vol. 1-000199.) Mr. Owens
5 disallowed this repair for work not performed in the authorized location. (Owens:
6 8/6/24, 177:4, 177:11-16.) He also disallowed the repair as a warranty solicitation.
7 (*Id.* 177:19-22.) Under the specific warranty program at issue, the dealership is only
8 permitted to perform the repair if the vehicle exhibits the concern (e.g., the cooling
9 fan always on or never coming on). (*Id.* 178:9-17.) This is an add-on repair, and
there is no explanation as to whether the cooling fan was not working, nor was there
documentation that there was a problem with the fan. (*Id.* 178:17-179:19; 180:21-
25 (would have disallowed regardless of location of repair).)

10 d. **RO 15372, Line A.** (Ex. J-04-514 to 515; Ex. J-05-Vol. 8-013065 to 013109.) Mr.
11 Owens disallowed this repair for performing the work at an unauthorized location
12 (Owens: 8/6/24, 184:8-13), and for a part being damaged or defective (*id.* 184:13-
13 14). The root cause of the repair was not a warrantable item because the customer
added something to the vehicle that blocked the subject sensors from working. (*Id.*
185:15-186:6.)¹¹

14 e. **RO 14795, Line B.** (Ex J-04-426 to 429; Ex. J-05-Vol. 6-010767 to 010785.) Mr.
15 Owens disallowed this repair because it was not performed at the authorized
16 location. (Owens: 8/6/24, 189:19-190:1.) Additionally, Mr. Owens disallowed it as
17 a repeat repair, for a part being damaged or defective, missing files or record
18 retention, and insufficient documentation of the repair. (*Id.* 190:1-4.) Putnam Ford
19 had performed a prior repair for the same issue on the same vehicle, and
20 documentation showed an improper repair procedure (no documentation showing
21 proper transmission cooler flushing or replacement as required). (*Id.* 192:12-18.)
The failure to flush the fluid after the previous repair can leave contaminants in the
22 transmission which causes additional damage. (*Id.* 193:17-194:17, 196:10-21.) The
23 previous RO did document flushing of the transmission, so contamination worked
24 back into the replacement transmission and caused it to fail. (*Id.* 196:18-21; *see*
25 *also id.* 196:22-198:12 (explaining basis under Warranty Manual for disallowing
26 repeat repairs).) The repair was also disallowed because Putnam Ford did not have
proper documentation of a cost cap, which is a process by which the technician
compares the cost to replace the transmission versus repair the transmission and
selects the most cost-effective option. (*Id.* 199:16-200:20.) Another reason for the
disallowance was that Putnam Ford replaced the torque converter without trying to
clean or flush it as required by Ford. (*Id.* 201:3-17.) The final reason for the
disallowance, was that during the prior repair, the technician failed to replace the
heat shields on the vehicle, and Ford is not responsible to pay for new shields. (*Id.*
202:17-203:19.)

27
28 ¹¹ Putnam Ford could have chosen to use its goodwill fund through Ford to pay for this repair. (Owens:
8/6/24, 187:2-11.)

1 f. **RO 14349, Line D.** (Ex. J-04-327 to 328; Ex. J-05-Vol. 9-014564 to 014630.) Mr.
2 Owens disallowed this repair because it was performed at an unauthorized location.
3 (Owens: 8/6/24, 206:6-19.) He also disallowed the repair as an unauthorized add-
4 on repair. (*Id.* 206:13-14.) Putnam Ford added repair line D after it generated the
5 RO and the service management had not authorized the repair on the hard copy, as
6 required by the Warranty Manual. (*Id.* 207:11-20, 208:1-6, 210:1-5 (testifying it
7 needs to be authorized because service management inspected the vehicle and
8 agreed that it is a warrantable and necessary repair); 210:23-211:9 (identify
9 applicable Warranty Manual provision, Section 1.2.04).)

10 56. Mr. Owens compiled his disallowances in a 583-page document which contained an
11 explanation for every charge-back on the disallowed claim. (Owens, 8/6/24: 144:1-13; *see generally*
12 Ex. J-04 (disallowance summary document).) Although he discussed six disallowances in detail during
13 the hearing, *supra*, he testified that the remaining disallowance write ups are all similar and contain
14 the specific ground(s) on which each claim was disapproved. (Owens, 8/6/24: 212:23-213:3, 213:21-
15 23.) As is typical for any audit, Mr. Owens shared his audit finding with Ms. Crawford, Ms. Swann
16 (regional manager) and Rob Benke (regional parts and service operations manager). (Owens: 8/7/24,
17 125:21-25, 126:16-22, 127:5-7; Ex. J-04.)

18 57. Mr. Owens determined 551 of 552 to be false claims pursuant to the Warranty Manual
19 because they were performed at an unauthorized location. (*See* Ex. J-04.) Where the disallowance was
20 based on performing the repair at an unauthorized location, the disallowance is coded as “work not
21 performed as claimed.” (Owens: 8/7/24, 75:17-76:1.) Of those 551 denied warranty claims, 74 claims
22 were also disallowed for reasons additional to the fact that the repairs were performed at an
23 unauthorized location. *See* Attachment 1: Summary of Non-Location Based Disallowed Claims (citing
24 to specific disallowances in Ex. J-04 in which claims were disallowed for reasons other than location
25 and the corresponding value of the claim). The value of those disallowed claims for reasons beyond
26 the location totaled \$244,116.47. *See id.* at 10.

27 58. After analyzing each RO and completing the write-ups for every disallowance, Mr.
28 Owens scheduled a claims review meeting and a closing meeting with Putnam Ford. (Owens: 8/6/24,
214:7-17; Ex. R-318.) The meeting took place on May 24, 2023, and Mr. Owens, Ms. Crawford, and

1 Ms. Swann attended on behalf of Ford; Mr. Putnam, Mr. Vasquez, Mr. Kamenetsky, Parts and Service
2 Director Troy Davis, and Service Manager Marc Freschet attended on behalf of Putnam Ford. (Owens:
3 8/6/24, 220:11-12; Ex. R-316; Ex. R-318.) Mr. Owens was prepared to discuss every single
4 disallowance at the meeting. (Owens: 8/6/24, 217:24-218:21.)

5 59. Mr. Owens did not go through all of the disallowances with Putnam Ford because
6 Putnam Ford did not wish to review any of the claims where the disallowance was based on location.
7 (*Id.* 216:12-217:4; Ex. R-318.) Mr. Owens reviewed some of the claims with multiple disallowances,
8 but Mr. Vasquez terminated the review and stated he would give the claims to their lawyer to review.
9 (Owens: 8/6/24, 217:5-9; Ex. R-318.) Mr. Owens offered to set up a Webex meeting to answer any
10 questions Putnam Ford might have about the claims, but Putnam Ford never took advantage of the
11 offer. (Owens: 8/6/24, 217:10-23; Ex. R-318.) The closing meeting immediately followed the
12 premature end of the claims review. (Owens: 8/6/24, 218:22-25.)

13 60. The day after the meeting, Mr. Owens sent Mr. Putnam, Mr. Vasquez, and Mr.
14 Kamenetsky the Closing Meeting Packet, the Disallowance Summary Report, and a 30-Day Action
15 Plan. (Owens: 8/6/24, 220:13-221:14 (summarizing documents provided to Putnam Ford); Ex. R-316
16 (email).) He sent an email with the closing letter and related documents to finalize the audit on June
17 12, 2023. (Owens: 8/6/24, 221:15-222:22; Ex. R-317.) The total charge-back was \$502,821.56.
18 (Owens: 8/6/24, 223:23-25.)

19 61. Mr. Owens notified Putnam Ford in writing of its right to appeal the audit to an
20 independent appeal board within Ford. (*Id.* 224:16-225:5, 226:22-25; Owens: 8/7/24, 165:23-166:5;
21 Ex. R-315.) Any time Ford audits a dealership, the dealership can appeal any of the auditor's findings
22 to the policy board. (Owens: 8/7/24, 166:10-12.) The policy board has the authority to reverse any or
23 all of the auditor's decisions. (*Id.* 166:12-14.) Mr. Vasquez initialed a copy of the letter to confirm
24 receipt of the right to appeal. (*See* Owens: 8/6/24, 226:7-20; Ex. R-315.) Putnam Ford did not avail
25 itself to Ford's appeal process. (Owens: 8/6/24, 227:1-3.)

26 **G. Mr. Owens' Decision Was Based Solely on Putnam Ford's False Practices**

27 62. Mr. Owens was unequivocal that his decision to conduct the audit was based
28 exclusively on evidence of false practices, not the Labor Rate Protest or any other extraneous reason.

(*See, e.g.*, Owens: 8/6/24, 127:18-128:4 (decision to perform an audit was made in a conversation with Ms. Crawford that was “fairly straightforward” and, based on the presence of false claims, Ms. Crawford “immediately agreed” to the recommendation), 129:24-130:15 (Mr. Owens did not select Putnam Ford for a warranty audit to retaliate, nor does he believe that the decision was unfair), 130:16-131:16 (decision to conduct the audit was not related to the Labor Rate Protest, in response to the Labor Rate Protest, or to create leverage; nor did Mr. Owens consider the Labor Rate Protest in his decision to conduct the audit), 131:23-132:6 (under the Ford process, Mr. Owens could not upgrade a study based on a labor rate request); 131:17-22 (decision to audit Putnam Ford was solely in response to the false claims Mr. Owens personally identified in the warranty study).)

63. Mr. Owens briefly and nonconsequentially discussed in passing the existence of the Labor Rate Protest with other Ford employees. (Owens: 8/6/24, 229:20-231:13.) In each and every instance, the communication was cursory, merely acknowledging that there was a dispute and did not affect his investigation or the decision to audit Putnam Ford. These limited interactions involved:

- a. **Bill Walsh** (*Id.* 229:9-14 (did not discuss details of labor rate case with Mr. Walsh); Owens: 8/7/24, 154:9-20 (discussion with Mr. Walsh about labor rate case was less than 5 seconds long and did not go beyond that a labor rate existed); 154:21-24 (conversation with Mr. Walsh did not affect his allegation investigation).)
- b. **Allen Kanouse** (Owens: 8/6/24, 234:7-10 (did not know what Mr. Kanouse’s involvement was in the labor rate request); Owens 8/7/24, 152:10-18 (conversation with Mr. Kanouse limited to Mr. Kanouse saying he could not talk about Putnam Ford), 153:24-154:1 (Mr. Kanouse did not have any involvement in the decision to conduct audit of Putnam Ford).)
- c. **Mr. Shire** (Owens: 8/7/24, 155:14-156:7 (conversation was less than five seconds, did not go beyond the fact that the labor rate case existed, and discussion did not affect the allegation investigation or audit in any way).)
- d. **Ms. Crawford** (*Id.* 156:11-157:7 (conversation with Ms. Crawford regarding labor rate was less than a minute, did not discuss details of the case, and did not affect the allegation investigation or decision to initiate an audit).)

1 e. **Ms. Airington** (*Id.* 157:8-158:4 (discussion was about five seconds long and they
2 did not discuss any details of the labor rate raise except that it existed; no part of the
3 discussion affected his allegation investigation or decision to audit Putnam Ford).)

4 64. The first time Mr. Owens learned any meaningful details about the Labor Rate Protest
5 was when Mr. Hughes, counsel for Putnam Ford, gave Mr. Owens a copy of the protest at the opening
6 meeting (*id.* 158:13-16)—after the decision to audit Putnam Ford had been made. It was Putnam Ford
7 that informed Mr. Owens about the labor rate request *after* Mr. Owens was already there to perform a
8 warranty study.

9 **H. Putnam Ford’s Insistence It Was Selected for an Audit in a Retaliatory Manner**
10 **Is Unreliable and Based on Speculation**

11 65. Putnam Ford presented unreliable and speculative testimony from Mr. Vasquez and
12 Mr. Kamenetsky that they believed the audit must have been retaliation for the Labor Rate Protest.

13 66. Mr. Vasquez testified that it was “100 percent obvious to me that [the audit] was
14 retaliatory.” (Vasquez: 8/8/24, 106:14-15.) He was later impeached with his sworn deposition
15 testimony, wherein he was asked whether he had an opinion as to whether the audit was retaliatory,
16 and he testified at the deposition, “I don’t like to form an opinion of things I’m not aware of, you
17 know. **I don’t know.**” (Vasquez, 8/12/24 16:17-17:7 (emphasis added).) In fact, as of the time of his
18 deposition—a full year after the close of the audit—he could not remember any conversation with
19 Mr. Putnam or Mr. Kamenetsky in which they discussed whether the audit was retaliatory. (*Id.* 98:3-
20 12 (time of deposition).)

21 67. Mr. Vasquez based his new opinion on, in part, the fact of the presence of regional and
22 national Ford employees at the closing meeting. (Vasquez: 8/8/24, 106:9-12; *see also* Vasquez:
23 8/12/24, 20:12-16.) Mr. Vasquez would have certainly been aware of this fact at the time of his
24 deposition. (Ex. R-331 (deposition taken June 4, 2024).) Yet, this was also the only Ford audit he had
25 only experienced in his career. (Vasquez: 8/12/24, 20:8-11.) He admitted he had no understanding of
26 how the Ford audit process worked. (*Id.* 18:4-17.) And testimony from Ford personnel indicates that
27 the presence of a “national” representative—here, Ms. Crawford—was based on the high volume of
28 false claims. (Ex. P-157.030 to 031, Crawford Dep. 6/3/24, 46:22-47:7.)

1 68. Mr. Vasquez also based his new opinion that the audit was retaliatory on the fact that
2 Mr. Owens questioned Putnam Ford employees. (Vasquez: 8/8/24, 106:12-15.) Not only was this the
3 only Ford audit in which he took part (Vasquez: 8/12/24 20:8-11), he has never been involved in any
4 audit from any OEM stemming from an allegation (*id.* 20:4-7). He is not familiar with the process.
5 Further, Mr. Owens explained that he spoke with Ford technicians to investigate the veracity of the
6 allegations, among other things. (Owens: 8/6/24, 117:20-25.)

7 69. At the Hearing Mr. Vazquez also testified he believe the audit was retaliatory due to
8 “[t]he lack of communication with Ford. The promptness of them - - of Ford executives responding to
9 our request. The struggles that we have - - that we have had to try and take care of our coming
10 customers. Many, many things.” (Vasquez: 8/12/24, 89:5-9.) Mr. Vasquez’s deposition was taken June
11 4, 2024—two months before his hearing testimony. (*Id.* 98:3-12.) There is no evidence of any lack of
12 communication with Ford during this period; there is no evidence of any “requests” during this period.
13 Mr. Vasquez did not explain how struggles taking care of its customers was an indication of retaliation.
14 Mr. Vasquez did not offer any evidence of the other “many, many things.”

15 70. Ultimately, Mr. Vazquez admitted he had “zero idea what might have led to the
16 warranty study,” he did not know why Ford initiated the warranty audit, and he had no idea whether
17 the study arose out of an allegation. (*Id.* 18:13-25, 19:21-24.) He also never reviewed the 583-page
18 disallowance summary. (*Id.* 78:21-79:2.) As a result, he was unable to point to any write-up or RO
19 and claim that the basis for the disallowance was insufficient. (*Id.* 79:3-10.)

20 71. I find Mr. Vazquez’ claims of retaliation to be unsound, speculative, not based on the
21 evidence, and not credible.

22 72. Mr. Kamenetsky offered speculation that the audit was retaliatory. (Kamenetsky:
23 8/13/24, 58:20-22, 62:15-23.) But Mr. Kamenetsky’s basis for this conclusion was that the Labor Rate
24 Protest was ongoing when the audit occurred. (*Id.* 58:23-59:8.) Aside from this experience with Ford,
25 Mr. Kamenetsky has no other experience with service audits with any OEM. (*Id.* 77:24-78:3; *see also*
26 *id.* 77:19-23 (testifying he had never been to an audit closing meeting before). In fact, Mr. Kamenetsky
27 is not involved in the management of any dealership within Putnam Auto Group. (*Id.* 64:18-65:1.) As
28 of June 2024, a full year after the completion of the audit, Mr. Kamenetsky had never even reviewed

1 the Warranty Manual. (*Id.* 80:13-25.) Mr. Kamenetsky testified that Ms. Swann did not say anything
2 to him that would cause him to believe that the selection of Putnam Ford for an audit was retaliatory.
3 (*Id.* 224:22-225:1.) He also agreed at the Hearing that no one from Ford has ever personally told him
4 that Ford was so mad about the Labor Rate Protest that it was going to punish Putnam Ford. (*Id.* 82:8-
5 13.) Likewise, no one from Ford has ever said anything directly to him that would indicate that Ford
6 intended to punish Putnam Ford for its labor rate request. (*Id.* 82:14-20.)

7 73. Mr. Kamenetsky has never worked as a service advisor, run a service department, or
8 worked as a technician. (*Id.* 71:17-25.) As such, he offered no testimony at trial challenging the basis
9 for disallowance for any specific claim.

10 74. I find Mr. Kamenetsky' claims of retaliation to be unsound, speculative, not based on
11 the evidence, and not credible.

12 75. There is no credible evidence of retaliation by Ford.

13 **CREDIBILITY EVALUATIONS**

14 76. Under the Evidence Code, the trier of fact:
15 may consider in determining the credibility of a witness any matter that has any tendency in
16 reason to prove or disprove the truthfulness of his testimony at the hearing, including but not
17 limited to any of the following:

- 18 (a) His demeanor while testifying and the manner in which he testifies.
- 19 (b) The character of his testimony.
- 20 (c) The extent of his capacity to perceive, to recollect, or to communicate any matter about
- 21 which he testifies.
- 22 (d) The extent of his opportunity to perceive any matter about which he testifies.
- 23 (e) His character for honesty or veracity or their opposites.
- 24 (f) The existence or nonexistence of a bias, interest, or other motive.
- 25 (g) A statement previously made by him that is consistent with his testimony at the hearing.
- 26 (h) A statement made by him that is inconsistent with any part of his testimony at the hearing.
- 27 (i) The existence or nonexistence of any fact testified to by him.
- 28 (j) His attitude toward the action in which he testifies or toward the giving of testimony.

1 (k) His admission of untruthfulness.

2 Evid. Code § 780.

3 77. It is well-settled that the trier of fact may accept part of the testimony of a witness and
4 reject another part even though the latter contradicts the part accepted. *Stevens v. Parke, Davis & Co.*
5 (1973) 9 Cal.3d 51, 67 [citations omitted]. The trier of fact may also “reject part of the testimony of a
6 witness, though not directly contradicted, and combine the accepted portions with bits of testimony or
7 inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected material.”
8 *Id.* at 67-68 (quoting *Nevarov v. Caldwell* (1958) 161 Cal.App.2d 762, 777). Moreover, the trier of
9 fact may reject the testimony of a witness, even an expert, although not contradicted. *Foreman &*
10 *Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890. The testimony of “one credible witness may constitute
11 substantial evidence.” *Kearl v. Bd of Medical Quality Assurance* (1986) 189 Cal.App.3d 1040, 1052.

12 78. The Board finds Mr. Owens, Mr. Gogolewski, Ms. Hughes, and Ms. Swann credible.
13 Mr. Benke was also credible, but his testimony was not necessary to, or considered, in reaching the
14 determination in this case.

15 79. The Board finds that Mr. Vazquez and Mr. Kamenetsky are not credible. Likewise,
16 based on the testimony contained in deposition and transcript designations, evidence presented at trial,
17 and the testimony of other witnesses, the Board finds that Mr. Putnam is likewise not credible.

18 CONCLUSIONS OF LAW

19 **I. FORD COMPLIED WITH SECTION 3065(e)**

20 80. Ford met its burden to prove that it satisfied the requirements of Section 3065(e) in
21 connection with the warranty audit of Putnam Ford and subsequent charge-backs for false warranty
22 claims.

23 81. **First**, every disallowed claim was for a repair performed at an unauthorized location,
24 but falsely certified that the warranty repair was performed in compliance with the Warranty Manual,
25 but performing the repair at an unauthorized location is prohibited by the Warranty Manual. It is also
26 a material violation of the SSA. This rendered every claim false.

27 82. **Second**, Ford satisfied the procedures required by Section 3065.

28

1 83. **Third**, there was no credible evidence that Ford selected Putnam Ford for an audit or
2 performed the audit in a punitive, retaliatory, or unfairly discriminatory manner.

3 84. **Fourth**, the Board does not have jurisdiction to consider Putnam Ford’s untimely claim
4 that Ford acted in bad faith in violation of California Vehicle Code Section 3065.2.

5 85. The Board overrules this Protest.

6 **A. Ford Properly Charged Back False Warranty Claims for Repairs Performed at**
7 **an Unauthorized Location**

8 86. In an audit, “[p]reviously approved claims shall not be disapproved or charged back to
9 the franchisee unless the **claim is false or fraudulent . . .**” Veh. Code, § 3065(e)(2) (emphasis added).
10 Here, Ford correctly determined that all the disallowed claims were “false” within the meaning of
11 Section 3065 because the claims certified they complied with the Warranty Manual but were
12 performed at an unauthorized location, which is prohibited by the Warranty Manual. Further, the
13 claims were false because performing warranty work at an unauthorized location is a violation of the
14 SSA. Because Ford would not have paid claims for repairs performed at an unauthorized facility,
15 representing the warranty claims were performed at the authorized location was a material omission.

16 87. Further, Section 3065 does not prohibit a franchisor from disallowing a false warranty
17 claim where the reason for the falsity is “justified” or “excused.” As such, Putnam’s argument that it
18 was justified in performing warranty service work at an unauthorized location is legally irrelevant.
19 Further, the facts do not support any justification or excuse.

20 i. The Disallowed Claims Were False Because They Erroneously and
21 Misleadingly Certified that the Repairs Were Performed at an Authorized
22 Location

23 88. The Board’s “fundamental task is to ascertain the aim and goal of the lawmakers so as
24 to effectuate the purpose of the statute.” *Cummings v. Stanley* (2009) 177 Cal.App.4th 493, 507–508,
25 [99 Cal.Rptr.3d 284]. “When interpreting statutes, we begin with the plain, commonsense meaning of
26 the language used by the Legislature. If the language is unambiguous, the plain meaning controls.”
27 *Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499, 519, [128
28 Cal.Rptr.3d 658, 257 P.3d 81].. Black’s Law Dictionary defines false as “untrue,” “deceitful; lying,”

1 “not genuine; inauthentic,” and “wrong; erroneous.” False, Black’s Law Dictionary (12th ed 2024);
2 *accord People v. Hughes* (Cal. Ct. App. May 16, 2013) No. F061613, 2013 WL 2103414, at *6 (using
3 a dictionary definition to determine the meaning of “false” in a statute regulating license plates).

4 89. A warranty claim in which the work was performed at an unauthorized location is a
5 false claim because it is untrue, deceitful, wrong, and erroneous. Every time a dealer submits a
6 warranty claim to Ford, it certifies “this repair . . . is compliant with Ford Warranty & Policy.” (Ex. J-
7 03-006 (certification statement), and 007 (submission of a warranty claims confirms that repair
8 conforms with statement); *accord Owens*: 8/6/24, 161:21-162:4 (testimony that submission of warrant
9 claim is a certification that the claim is compliant with Warranty Manual).) Every single disallowed
10 claim was false because the certification was false, untrue, incorrect, erroneous, and misleading.
11 Putnam Ford did not comply with the Warranty Manual in performing the repair. Putnam Ford did not
12 perform the repair at an authorized location, as required by the Warranty Manual and Paragraph 5(c)
13 of the SSA. (*Owens*: 8/6/24, 159:12-162:4 (claim is false because does not comply with Warranty
14 Manual); 162:17-163:2 (claim is false because does not comply with SSA); Ex. J-01-020, ¶ 4(b)(4)
15 (“the Dealer shall submit claims to the Company for reimbursement for the parts and labor used in
16 performing warranty . . . work . . . in accordance with the provisions of the Warranty Manual” and
17 Paragraph 5 (c)); Ex. J-03-006, § 1.1.03 (“Warranty repairs must be performed at an authorized Ford
18 or Lincoln dealership.”). Mr. Putnam and Mr. Vazquez—owners of Putnam Ford—knew that they had
19 to comply with the Warranty Manual. (*Vasquez*: 8/12/24, 54:8-11); Ex. R-332-009 (Putnam Dep.
20 17:12-15).)

21 90. Section 3065(e)(2) does **not** contain any materiality or substantive requirement to
22 justify a charge-back of a false claim. The Legislature did not modify “false” in a way that suggests
23 that the falsity must be of a certain type or magnitude. *Cf. Farnum v. Iris Biotechnologies, Inc.* (2022)
24 86 Cal.App.5th. 602, 611 [302 Cal.Rptr.3d 584] (noting definition of phrase “without justification” in
25 statute at issue was less weighty than the standard in prior caselaw for a “substantial justification”).
26 Indeed, the totality of the subsection¹² indicates that the Legislature was capable of providing

27
28 ¹² Section 3065(e)(2) states as follows:

1 specificity where it so desired. For example, the same subsection refers to “fraudulent,” which requires
2 a degree of intent, and it also references “**material** noncompliance with **reasonable** and
3 **nondiscriminatory** documentation and administrative claims submission requirements.” Veh. Code,
4 § 3065(e)(2) (emphasis added). The Legislature can incorporate adjectives when it desires as much. It
5 left “false” unmodified. Thus, the question here is only whether a claim is “false.”

6 91. This alone should end the inquiry before the Board—the certification of compliance
7 with the Warranty Manual on every disallowed claim is false. But the performance of work at an
8 unauthorized location is false in a second way. Pursuant to the Warranty Manual, a false claim
9 includes, but is not limited to, “[t]he knowing submission of claims with omissions of material facts
10 or substantial violations of program requirements” and “[w]ork not performed as claimed.” (Ex. J-03-
11 186.) The ordinary meaning of the adjective “material” is “[o]f such a nature that knowledge of the
12 item would affect a person’s decision-making; significant; essential.” *County of Kern v. Alta Sierra*
13 *Holistic Exchange Service*, (2020) 46 Cal.App.5th 82, 101 [259 Cal.Rptr.3d 563] (citing (Black’s Law
14 Dict. (8th ed. 2004)). “If an objectively reasonable person would consider the new circumstances
15 significant or important in making a decision about the subject matter of the ordinance, the change in
16 circumstances is material.” *Id.* Putnam Ford’s routine use of the Nissan Facility—a Ford competitor—
17 is material— because it is a breach of the SSA and the Warranty Manual. Putnam Ford’s failure to
18 disclose this to Ford is a material omission. The totality of the record in this case makes obvious that
19 Ford certainly would not have paid the claim if it knew the repair was performed at an unauthorized
20 location. By submitting a claim with a material omission, despite certifying compliance with the
21 Warranty Manual, the claim is false under California law.

22
23
24 Previously approved claims shall not be disapproved or charged back to the
25 franchisee unless the claim is false or fraudulent, repairs were not properly made,
26 repairs were inappropriate to correct a nonconformity with the written warranty due
27 to an improper act or omission of the franchisee, or for material noncompliance
28 with reasonable and nondiscriminatory documentation and administrative claims
submission requirements. A franchisor shall not disapprove or chargeback a claim
based upon an extrapolation from a sample of claims, unless the sample of claims
is selected randomly and the extrapolation is performed in a reasonable and
statistically valid manner.

1 92. Putnam Ford introduced evidence at the Hearing that Ford permits off-site repairs in
2 other, specific situations such as sublet repairs or mobile service. This argument is irrelevant because
3 the off-site exceptions do not apply to any of the disallowed claims at issue in this Protest. (Owens:
4 8/7/24, 87:21-88:2 (testifying Putnam Ford was required to perform all of the disallowed warranty
5 repairs identified in Exhibit J-4 at the Authorized Location).)

6 93. Putnam Ford argued that Ford should have retroactively permitted Putnam Ford to
7 simply resubmit all of the claims as sublets or mobile service claims. (*Id.* 96:9-13). This is not a
8 permissible practice. (*Id.* 96:14-13, 151:5-10.) Once a claim is submitted, no alterations are accepted.
9 (*Id.* 97:9-10.) Putnam Ford had the right to appeal within Ford to raise this issue, but Putnam Ford did
10 not appeal any of the claims to Ford. (*Id.* 97:15-20.) And, regardless, none of the claims were actually
11 sublet or mobile service repairs.

12 ii. Section 3065 Does Not Consider Justifications

13 94. Putnam Ford claims, in effect, that it was justified in performing warranty repairs at an
14 unauthorized facility because its existing facility was inadequate for its service needs. Putnam Ford's
15 justification argument forces the Board to read a new subsection into Section 3065 and expand the
16 statute. This is not only inappropriate under basic principles of statutory construction, but it also would
17 exceed the Board's jurisdiction.

18 95. The Legislature has authorized the Board to “[h]ear and decide, **within the limitations**
19 **and in accordance with the procedure provided**, a protest **presented** by a franchisee pursuant to
20 Section 3060, 3062, 3064, 3065, 3065.1, 3065.3, 3065.4, 3070, 3072, 3074, 3075, or 3076.” Veh. Code
21 § 3050(c). The Legislature was very explicit—the Board may only hear and decide protests “within
22 the limitations” of the specific statutes enumerated. As is relevant here, the Board may hear a protest
23 presented pursuant to Section 3065 for a “determination of whether the franchisor complied with this
24 subdivision [(e)].” Veh. Code § 3065 (e)(6). Thus, the Board may hear and decide only whether Ford
25 complied with Section 3065(e), nothing more. And that determination is limited to whether the claim
26 is “false,” with no modification, and no qualifications added by the Legislature. There is no provision
27 that considers whether the falsity is excused, accidental, or the product of necessity (real or invented).

1 iii. Putnam Ford’s Invented Justification is Not Supported by the Evidence

2 96. Putnam Ford’s violation of the Warranty Manual is not justified.

3 97. **First**, to address any service capacity shortfall, Putnam had other, compliant options
4 that it never considered. (Swann: 8/16/24, 216:18-217:4.) Putnam Ford’s service department could
5 have implemented split shifts and/or nighttime shifts, which creates additional hours for technicians
6 to complete repairs, or mobile service. (*Id*; *see also id.* 219:11-23, 220:3-12.) As Ms. Hughes
7 explained. “[T]here are temporary measures, like multiple shifts at the dealership, that they could
8 utilize in order to increase their capacity. But what they should not have done was to utilize an
9 unauthorized facility and then lie about it.” (Hughes: 8/15/24, 239:20-25.) There is no evidence
10 Putnam Ford considered, let alone implemented, any of these options.

11 98. **Second**, this is a “problem” of which Putnam Ford was well-aware when it sought
12 approval for the Authorized Location. and for which it had ample opportunity to correct. Putnam Ford
13 agreed that the Authorized Location would be temporary, and it would secure a final, permanent
14 location by May 2, 2022. (Kamenetsky: 8/13/24, 108:5-10, 111:1-12; Ex. P-102.001.) But Putnam
15 Ford did not **request** approval for a relocation until the end of December 2022, let alone **secure** a
16 location. (*See* Vasquez: 8/13/24, 111:24-112:2; Ex. P-106 (December 2022 letter requesting to relocate
17 to Nissan Facility).) Putnam Ford was content to circumvent its contractual obligations and delayed
18 requesting relocation after its dishonesty regarding the use of the Nissan Facility came to light.
19 (Vasquez: 8/12/24, 29:20-30:10 (testifying he was unaware of any formal requests by Putnam Ford to
20 Ford requesting authorization to use the Barn prior to October 2022).)¹³ “[I]f [Putnam Ford] had
21 moved forward with their plans to do a facility from day one, [Ms. Hughes] believe[d] that facility
22 would already be up and running.” (Hughes: 8/15/24, 239:14-17.)

23
24
25 _____
26 ¹³ The disallowance period was June 2022 through February 2023. But Putnam Ford requested the use
27 of satellite service facilities at the end of October 2022. Thus, for the months of June, July, August,
28 September, and October, it was violating the Warranty Manual without ever having made any written
request to open a satellite service facility. Therefore, even if somehow Ford’s alleged “bad faith”
forced Putnam to use an unauthorized location, that “bad faith” only “caused” the false claims from—
at most—November through February. The excuse has very limited value.

1 99. **Third**, the actual reason for Putnam Ford’s delay in relocation was its ever-changing
2 requests. Although Putnam Ford claims that Ford was dilatory, the totality of the facts show that
3 Putnam Ford constantly changed its relocation requests, making it effectively impossible for Ford to
4 approve a location. Throughout 2021 and 2022, Putnam Ford vacillated between three possible
5 locations for relocation. Ford evaluated every single one and actively worked to get Putnam Ford to
6 commit to a relocation in a written request. On October 25, 2022, Putnam Ford made its first satellite
7 service request, seeking to use the Barn for overflow service. (Vasquez: 8/12/24, 30:6-10.) Ford began
8 processing the request. Then, in December 2022, Putnam Ford requested to relocate its entire operation
9 to the Nissan Facility. (Kamenetsky: 8/13/24, 111:24-112:2; Ex. P-106.) As part of this request,
10 Putnam Ford also requested that Ford authorize the use of 925 Bayswater—a totally different
11 facility—for additional service stalls. (Ex. P-106.) Ford began processing this new request.

12 100. In January 2023, Putnam Ford orally indicated that it changed its mind regarding the
13 Nissan Facility. (Swann: 8/16/24, 112:10-14 (testifying that around January 2023, Mr. Vasquez called
14 Ms. Swann and informed her that he wanted to “scrap [the Nissan Facility] plan and move forward with
15 . . . Bayswater [] as their request.”).) On April 19, 2023, Putnam Ford requested to relocate the entire
16 operation to 925 Bayswater. (Kamenetsky: 8/13/24, 113:13-19; Ex. P-119.) Ford processed and
17 ultimately approved this third request to relocate, subject to clearance of the market, but denied the
18 use of the Nissan Facility for temporary service work. (Kamenetsky: 8/13/24, 114:12-18; Ex. R-339.)
19 Mr. Putnam accepted and agreed to Ford’s modified acceptance on June 28, 2023. (Kamenetsky:
20 8/13/24, 128:18-25; Ex. R-339-003.) Ford proceeded to notice the market in support of Putnam Ford’s
21 request to relocate the day after Mr. Putnam signed the conditional approval for relocation.
22 (Kamenetsky: 8/13/24, 129:1-24, 131:12-17, 132:12-15; Ex. R-340, Ex. R. 341, R-342.) Two
23 dealerships filed protests; one was resolved. (Kamenetsky: 8/13/24, 133:16-21.)

24 101. Putnam Ford changed its mind again. In late 2023, Ms. Hughes spoke with Mr. Vasquez
25 and he raised changing the relocation request back to the Nissan Facility. (Hughes: 8/15/24, 235:16-
26 23.) Putnam Ford sent its formal written relocation request in a letter dated December 6, 2023.
27 (Kamenetsky: 8/13/24, 136:15-22, 137:14-138:4; Ex. R-343.) On February 20, 2024, Ford provided
28 conditional approval of Putnam Ford’s relocation request to the Nissan Facility. (Kamenetsky:

8/13/24, 138:14-17, 139:7-16; Ex. R-344; Hughes, 8/15/24: 232:23-25.) Yet again, Ford noticed the market on behalf of Putnam Ford. (Kamenetsky: 8/13/24, 142:15-21.) Ford of Serramonte filed a protest. (*Id.* 144:15-18; Ex. R-345.)

102. In sum, Putnam Ford’s argument that it was forced into using an unauthorized facility while Ford idly stood by is simply unsupported by the facts. Putnam Ford had other options but did not use them.

B. Ford Satisfied all Procedural and Administrative Requirements of Section 3065(e)(3)

103. If the franchisor disallows a previously approved claim, the franchisor shall provide to the franchisee, within 30 days after the audit, “a written disapproval notice stating the specific grounds upon which the claim is disapproved.” Veh. Code, § 3065(e)(3). The franchisor must provide a reasonable appeal process. Veh. Code, § 3065(e)(3).¹⁴

104. Ford provided to Putnam Ford the comprehensive Disallowance Summary (Ex. J-04) on May 25, 2023, and again on June 12, 2023, well within thirty days of the claims review and closing meeting on May 24, 2023. (*See* Owens: 8/6/24, 221:10-14 (affirming he sent Ex. J-04 to Putnam Ford on 5/25/23); R-315 (letter from L. Swann to Putnam Ford summarizing closing meetings and that written documentation of the rationale for each charge-back was provided at the May 24, 2023 meeting); Ex. R-316 (5/25/24 email from J. Owens to Putnam Ford attaching Disallowance Summary);

¹⁴ The full text reads as follows:

If the franchisor disapproves of a previously approved claim following an audit, the franchisor shall provide to the franchisee, within 30 days after the audit, a written disapproval notice stating the specific grounds upon which the claim is disapproved. The franchisor shall provide a reasonable appeal process allowing the franchisee a reasonable period of not less than 30 days after receipt of the written disapproval notice to respond to any disapproval with additional supporting documentation or information rebutting the disapproval and to cure noncompliance, with the period to be commensurate with the volume of claims under consideration. If the franchisee rebuts any disapproval and cures any material noncompliance relating to a claim before the applicable deadline, the franchisor shall not chargeback the franchisee for that claim.

Veh. Code § 3065(e)(3).

1 Ex. R-317 (email from J. Owens to K. Putnam & A. Vazquez (6/12/23), with attachment
2 “Disallowance Summary Report”).) The Disallowance Summary identified the basis for each
3 disallowance, with specific citations to the SSA and Warranty Manual supporting the false claims.
4 (Ex. J-04.) And Putnam Ford was notified of, and acknowledged, its right to appeal. (Owens: 8/6/24,
5 224:16-225:5, 226:22-25; Owens: 8/7/24, 165:23-166:5; Ex. R-315.)

6 **C. The Audit was Not Retaliatory**

7 105. A franchisor may conduct an audit of a franchisee’s warranty records “on a reasonable
8 basis” after a claim is paid or credit issues. The franchisor “may not select a franchisee for an audit,
9 or perform an audit, in a punitive, retaliatory, or unfairly discriminatory manner.” Veh. Code, §
10 3065(e)(1). California courts have not expounded on what constitutes retaliation under this statute, so,
11 again, the Board must limit itself to the plain language of the statute. *Cummings*, 177 Cal.App.4th at
12 507–508; *Voices of the Wetlands*, 52 Cal.4th at 519. Retaliation is defined as “[t]he act of doing
13 someone harm in return for actual or perceived injuries or wrongs; an instance of reprisal, requital, or
14 revenge.” RETALIATION, Black's Law Dictionary (12th ed. 2024).

15 106. There is no evidence that Mr. Owens, or anyone at Ford, selected Putnam Ford for an
16 audit “in return” or “as revenge” for some sort of injury from the labor rate request or protest. Rather,
17 the totality of the evidence clearly shows that Mr. Owens followed all standard Ford procedures and
18 selected Putnam Ford for an audit based on evidence that Putnam Ford was performing warranty
19 repairs at an unauthorized location and that there was evidence of a milage misstatement. Neither the
20 Labor Rate Protest, nor any other extraneous reason, impacted his decision in any way.

21 107. Putnam Ford asks the Board to draw an inference of retaliation based on Ford’s exercise
22 of attorney client privilege. This is prohibited by California law and the Board will draw no such
23 inference..

24 i. Mr. Owens Selected Putnam Ford for an Audit Because of Evidence of False
25 Claims Discovered During the Warranty Study

26 108. Mr. Owens, during a conversation with his supervisor, Ms. Crawford, decided to select
27 Putnam Ford for an audit. (Owens: 8/6/24, 127:2-17.) No one else was involved in Mr. Owen’s
28 decision. (*Id.* 128:13-15.) Following Ford’s procedures, Mr. Owens selected Putnam Ford for an audit

only after first investigating the allegation, and then completing a warranty study. (*Id.* 98:9-16, 127:11-14.) His decision was based on the following evidence:

- a. Personally confirming buildings in pictures from the allegation were not part of the authorized facility. (*Id.* 117:11-15.)
- b. Conversations with Putnam Ford technicians confirming that some of the pictures of the vehicles he received from the allegation depicted the Nissan Facility, including the Barn. (*Id.* 117:20-25.)
- c. Conversations with six Putnam Ford technicians in which they disclosed they worked in an unauthorized facility. (*Id.* 129:14-16.)¹⁵
- d. Personally observing the Putnam Ford shop foreman working out of the Nissan Facility and Putnam Ford technicians in the Barn and the Nissan Facility actively working on Ford vehicles. (*Id.* 119:14-21.)
- e. Personally observing several pallets of Ford parts with RO numbers written on them at an unauthorized facility, consistent with the requirement that dealerships retain parts that are replaced pursuant to a warranty repair. (*Id.* 122:22-123:15; 124:1-9.)
- f. Personally observing repairs of Ford vehicles under warranty by Putnam Ford technicians in the Barn and the Nissan Facility. (*Id.* 126:1-21.)

109. Based on the evidence, Mr. Owens determined there was an extensive amount and quantity of false claims. (*Id.* 127:11-14.) He found that “repairs that are being performed in an unauthorized facility[, which] is not allowed by warranty and policy or the Sales and Service Agreement. So, by submitting those claims to Ford Motor Company, the dealer is agreeing or confirming that those repairs complied with all Warranty and Policy Manual requirements.” (*Id.* 129:5-11.)

¹⁵ A separate basis for the audit was also that he confirmed a milage misstatement through personally reviewing diagnostic tool equipment. (Owens: 8/6/24, 129:16-18.) Mr. Owens did not consider any other facts in determining there were false claims. (*Id.* 129:20-21.)

1 110. Only then was Putnam Ford selected for an audit. (*Id.* 127:2-17 (testifying he
2 recommended upgrading the warranty study to an audit based on his findings).) Given the wealth of
3 evidence of wrongdoing, the decision was “fairly straightforward.” (*Id.* 127:18-128:4.)

4 ii. The Evidence Shows the Audit Was Not Retaliatory

5 111. Putnam Ford presented no evidence to substantiate the allegation of retaliation. The
6 testimony of Putnam Ford employees was speculative and the subject of impeachment. Despite
7 claiming certainty this was retaliation, they had no actual knowledge of how Ford conducts audits, nor
8 could they point to a single concrete fact showing that Mr. Owens’ testimony was false. (*See, e.g.*,
9 Vasquez: 8/12/24, 18:4-17 (admitting no understanding of how Ford audit process works), 20:8-11
10 (testifying this was only Ford audit he had only experienced in his career), 19:21-20:7 (he has never
11 been involved in any audit from any OEM stemming from an allegation); Kamenetsky: 8/13/24, 77:24-
12 78:3 (this was the only audit Mr. Kamenetsky had ever been involved in), 82:8-13 (no one from Ford
13 has ever personally told Mr. Kamenetsky that Ford was so mad about the Labor Rate Protest that it
14 was going to punish Putnam Ford), 82:14-20 (no one from Ford has ever said anything directly to him
15 that would indicate that Ford intended to punish Putnam Ford for its labor rate request), 224:22-225:1
16 (testifying Ms. Swann did not say anything to him that would cause him to believe that the selection
17 of Putnam Ford for audit was retaliatory).)

18 112. The Board finds that argument regarding the source of the allegation is irrelevant
19 because conflates the allegation with the audit. The allegation and the investigation of the allegation
20 is not an audit. (Owens: 8/6/24, 85:2-12, 86:8-15.) Section 3065 does not apply to either. By receiving
21 the allegation and investigation, Putnam Ford was not (and could not have been) “selected” for an
22 audit. Moreover, there is no evidence that Ms. Swann, the source of the allegation, sent the allegation
23 to retaliate for the Labor Rate Protest. She was not involved in reviewing or denying the labor rate
24 request. (Swann: 8/16/24, 205:20-24.)

25 **D. Impermissible Invasion of the Attorney Client Privilege**

26 113. The Board may not draw any inferences from Ford’s invocation of attorney-client
27 privilege. Questions designed to invade the attorney-client privilege and requests for inferences to be
28 drawn from the invocation of that privilege (1) violate the rules of privilege, as codified by Section

1 913 of California's Evidence Code; (2) are not designed to obtain relevant evidence; and (3) even if
2 designed to obtain relevant evidence, the objection and accompanying silence is not the sort of
3 evidence on which responsible persons are accustomed to rely in the conduct of serious affairs.

4 114. This proceeding's evidentiary rules are governed by Section 11513 of the Government
5 Code, which states, in relevant part:

6 (c) The hearing need not be conducted according to technical rules relating to
7 evidence and witnesses, except as hereinafter provided. Any relevant evidence shall
8 be admitted if it is the sort of evidence on which responsible persons are
9 accustomed to rely in the conduct of serious affairs, regardless of the existence of
any common law or statutory rule which might make improper the admission of the
evidence over objection in civil actions.

10 ...

11 (e) The rules of privilege shall be effective to the extent that they are otherwise
12 required by statute to be recognized at the hearing.

13 Gov. Code, § 11513(c) & (e).

14 115. Here, California Evidence Code Section 913 must be recognized and applied at the
15 hearing because it prevents the introduction of evidence upon which "a responsible person would not
16 rely in the conduct of serious affairs." *Id.* Under Section 913,

17 If in the instant proceeding or on a prior occasion a privilege is or was exercised
18 not to testify with respect to any matter, or to refuse to disclose or to prevent another
19 from disclosing any matter, **neither the presiding officer nor counsel may**
20 **comment thereon, no presumption shall arise because of the exercise of the**
privilege, and the trier of fact may not draw any inference therefrom as to the
credibility of the witness or as to any matter at issue in the proceeding.

21 Evid. Code, § 913(a) (emphasis added).

22 116. The Assembly Committee on the Judiciary explained that "[i]f comment could be made
23 on the exercise of a privilege and adverse inferences drawn therefrom, a litigant would be under great
24 pressure to forgo his claim of privilege and the protection sought to be afforded by the privilege would
25 be largely negated. **Moreover, the inferences which might be drawn would, in many instances, be**
26 **quite unwarranted.**" Evid. Code, § 913, cmt (emphasis added).

1 117. Section 913 codifies California’s long-standing protection and enforcement of the
2 attorney-client privilege. *Carroll v. Commission on Teacher Credentialing* (2020) 56 Cal.App.5th 365,
3 380 [270 Cal.Rptr.3d 448, 458–459], explained the purpose of this privilege safe-guard:

4 The attorney-client privilege, one of the oldest recognized, allows a client to refuse
5 to disclose, and to prevent others from disclosing, confidential communications
6 with an attorney. The fundamental purpose behind the privilege is to safeguard the
7 confidential relationship between clients and their attorneys so as to promote full
8 and open discussion of the facts and tactics surrounding individual legal matters.
9 The privilege is absolute[.] It prevents disclosure of the communication regardless
10 of its relevance, necessity or other circumstances peculiar to the case.

11 (internal quotation marks and citations omitted). Likewise, an examination tactic that repeatedly elicits
12 a privilege objection “put[s] defendants in an untenable position.” *Id.* at 382. The party invoking
13 privilege is stuck in a catch-22; it:

14 could avoid the negative inference raised by counsel's questions only by disclosing
15 their specific reasons for seeking legal advice, effectively waiving the attorney-
16 client privilege by disclosing the contents of their communication with counsel. It
17 was this choice that section 913 was enacted to prevent. According to legislative
18 comment on the statute, “If comment could be made on the exercise of a privilege
19 and adverse inferences drawn therefrom, a litigant would be under great pressure
20 to forgo his claim of privilege and the protection sought to be afforded by the
21 privilege would be largely negated. **Moreover, the inferences which might be
22 drawn would, in many instances, be quite unwarranted.**”

23 *Id.* (emphasis added) (quoting (Assem. Com. on Judiciary, com. on Evid. Code, § 913, reprinted at
24 29B pt. 3A West's Ann. Evid. Code (2009 ed.) foll. § 913, p. 245)).

25 118. The prohibition of drawing an inference from an attorney-client privilege objection, as
26 codified by the California Evidence Code, is an extension of the rules of privilege. As such, Section
27 913 must be applied here. Gov. Code, § 11513(e).

28 119. Were the invocation of privilege permitted to be weaponized, it would undermine the
privilege itself by forcing Ford into an “untenable position” of having to “effectively waive[] attorney-
client privilege.” *Id.* Even if the question itself could be said to seek relevant evidence, the objection
and the inference that Putnam seeks is inherently unreliable because the alternative is to waive
privilege. And “the inferences which might be drawn would, in many instances, be quite unwarranted.”
Id.

1 120. Moreover, the invocation of privilege does not make any fact any more or less likely.
2 An objection from counsel is not testimony from a witness.

3 121. The Board also rejects any attempt by Putnam Ford to invoke the crime-fraud doctrine.
4 The doctrine has no application here.

5 122. “Evidence Code section 956 is the so-called crime/fraud exception: ‘There is no
6 privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone
7 to commit or plan to commit a crime or a fraud.’” *State Farm Fire & Cas. Co. v. Superior Ct.* (1997)
8 54 Cal.App.4th 625, 643 [62 Cal.Rptr.2d 834, 847], as modified (May 1, 1997). “To invoke the
9 Evidence Code section 956 exception to the attorney-client privilege, the proponent must make a prima
10 facie showing that the services of the lawyer ‘were sought or obtained’ to enable or to aid anyone to
11 commit or plan to commit a crime or fraud. [Citation.]” *Id.* “[E]xtreme caution must be exercised when
12 an accusation is made which will invade the attorney-client relationship in connection with ongoing
13 litigation. *Id.* at 644–45.

14 123. The crime-fraud exception does not apply. Putnam Ford is not seeking to bust privilege
15 and get to the substance of the communications. Even if it were applicable, Putnam Ford should have
16 raised this during discovery, when Ford timely raised the privilege objection. *See, e.g.,* Ex. P-111.003
17 (AC privilege redaction). And Putnam Ford could not raise the crime-fraud exception during discovery
18 because 1) there is no allegation let alone evidence that Ford **committed a crime** or engaged in **fraud**;
19 and 2) there is no evidence that Ford sought the legal advice of counsel to do so.

20 **II. THE BOARD CANNOT AND SHOULD NOT CONSIDER PUTNAM FORD’S**
21 **BELATED SECTION 3065.2 CLAIM FOR BAD FAITH**

22 124. The Board may not and should not hear and decide Putnam Ford’s newly introduced
23 theory that “Ford acted in other than good faith when it refused to approve Putnam [Ford]’s repeated
24 requests for additional noncustomer facing service capacity” and that Ford withheld its approval of its
25 relocation requests in bad faith to “create leverage over Putnam Ford” in the Labor Rate Protest and
26
27
28

1 in the audit in violation of Vehicle Code Section 3065.2(i)(2)(D) (Putnam Pre-Hr’g Br. at 5, 6, 10.)¹⁶
2 This new legal theory was never pled in Putnam Ford’s Protest. The Board does not have jurisdiction
3 to hear this claim.

4 125. In California, “[t]he judicial power of the state is vested in the [courts].” Cal. Const.,
5 art. VI, § 1.

6 An administrative agency may constitutionally hold hearings, determine facts,
7 apply the law to those facts, and order relief—including certain types of monetary
8 relief—so long as (i) **such activities are authorized by statute or legislation** and
9 are reasonably necessary to effectuate the administrative agency’s primary,
legitimate regulatory purposes, and (ii) the ‘essential’ judicial power (i.e., the power
to make enforceable, binding judgments) remains ultimately in the courts, through
review of agency determinations.

10 *McHugh v. Santa Monica Rent Control Bd.* (1989) 49 Cal.3d 348, 372 [261 Cal.Rptr. 318] (emphasis
11 added) (italics omitted). But “any administrative execution of judicial functions must be pursuant to
12 legislative authorization, legislative authorization is inadequate constitutionally if it does not meet the
13 reasonably necessary/legitimate regulatory purpose test or if it seizes the essential judicial power from
14 the courts.” *Hardin Oldsmobile v. New Motor Vehicle Bd.* (1997) 52 Cal.App.4th 585, 589 [60
15 Cal.Rptr.2d 583, 585], *as modified on denial of reh’g* (Feb. 28, 1997) (citing *Bradshaw v. Park* (1994)
16 29 Cal.App.4th 1267, 1275 [34 Cal.Rptr.2d 872]).

17 126. The Board is a creature of statute, and, as such, its authority to adjudicate cases flows
18 from and is limited by its enabling act. *Id.*; *see also* Veh. Code, §§ 3000 *et seq.* The California
19 Legislature has **only** authorized the Board to “[h]ear and decide, **within the limitations and in**
20 **accordance with the procedure provided**, a protest **presented** by a franchisee pursuant to Section
21 3060, 3062, 3064, 3065, 3065.1, 3065.3, 3065.4, 3070, 3072, 3074, 3075, or 3076.” Veh. Code §
22

23
24 ¹⁶ Putnam Ford also alleges Ford violated Vehicle Code Section 3065.2(i)(2)(G) by “conducting or
25 threatening to conduct nonroutine nonrandom warranty, nonwarranty repair, or other service-related
26 audits in response to a franchisee seeking compensation or exercising any right pursuant to [Section
27 3065.2]” (Putnam Pre-Hr’g Br. at 6.) Functionally, this is the same as Putnam Ford’s allegation that
28 Ford selected it for an audit for a retaliatory purpose under Section 3065. Although the Board may not
consider a violation of Section 3065.2, it has considered the same underlying factual theory as part of
the Section 3065 claim. As explained, *supra*, Ford met its burden to show that Ford did not retaliate
against Putnam Ford for the Labor Rate Protest or the underlying request when it selected Putnam
Ford for an audit.

1 3050(c) (emphasis added). The language of Section 3050(c) is explicitly and intentionally narrow. The
2 Board may only hear and decide claims within the “limitations” of the specifically enumerated statutes,
3 and only when the protest is “presented” pursuant to that statute. *Id.*

4 127. To “present” a claim of a violation of Vehicle Code Section 3065.2, a franchisee must
5 file a Section 3065.4 protest for a declaration of the franchisee’s retail labor rate. Veh. Code §
6 3065.4(a) (“If a franchisor fails to comply with Section 3065.2, or if a franchisee disputes the
7 franchisor's proposed adjusted retail labor rate or retail parts rate, **the franchisee may file a protest**
8 **with the board for a declaration of the franchisee’s retail labor rate or retail parts rate.**”) Putnam
9 Ford did not present the Protest pursuant to Vehicle Code Section 3065.4, and Putnam Ford is not
10 seeking a declaration of its retail labor rate or retail parts rate. (*See generally* Protest.) Thus, on the
11 most basic level, the Board may not hear and decide Putnam’s Vehicle Code Section 3065.2 claim
12 because it has not “presented” the claim.

13 128. In fact, no provision of the Vehicle Code provides the Board with authority to hear a
14 standalone claim that a manufacturer violated Vehicle Code Section 3065.2(i)(2)(D) (or any other
15 provision of Section 3065.2) by acting in bad faith. The Legislature has only authorized the Board to
16 hear and decide whether a manufacturer has violated Section 3065.2 when the violation is pled as part
17 of a labor rate protest. Veh. Code § 3065.4(a). As such, any action in which a dealer seeks to allege a
18 violation of Section 3065.2 would have to be brought in a court of general jurisdiction pursuant to
19 either Section 17726 of the Government Code or some other available common law, such a declaratory
20 judgment action or a breach of contract action. *See, e.g., Hardin*, 52 Cal.App.4th at 589 (holding the
21 Board may not hear a protest where the Legislature has not provided the Board with a specific right to
22 decide that particular claim).¹⁷ Even if Putnam Ford had timely sought leave to amend its Protest to
23 include its current Section 3065.2(i)(2)(D) claim, the amendment would be futile because it must be
24 included as part of a labor rate determination.

25
26
27 ¹⁷ The Vehicle Code does not describe the remedy a franchisee would receive if a manufacturer could
28 not meet its burden on a Section 3065.2 claim not tied to a labor rate dispute. As such, the Board has
no authority to provide a prevailing franchisee with any remedy.

1 129. Putnam Ford filed the Protest pursuant to Section 3065 alleging a violation of Section
2 3065(e). (*See generally* Protest.) The Board has jurisdiction to hear and decide the Protest pursuant to
3 the limitations of, and in accordance with, Section 3065. Section 3065 does not provide the Board with
4 any authority to hear and decide a protest challenging whether a manufacturer has complied with
5 Section 3065.2, or whether it acted in bad faith in denying a relocation or request for satellite services.
6 *See generally* Veh. Code § 3065.

7 **E. A Section 3065.2 Claim is Precluded**

8 130. “Claim preclusion applies to matters which were raised or could have been raised, on
9 matters litigated or litigatable in the prior action.” *Howitson v. Evans Hotels, LLC* (2022) 81
10 Cal.App.5th 475, 486 [297 Cal.Rptr.3d 181, 190] (internal quotation marks omitted); *accord LaCour*
11 *v. Marshalls of California, LLC* (2023) 94 Cal.App.5th 1172, 1189–90 [313 Cal. Rptr. 3d 77, 89]
12 (“claim preclusion applies not just to what was litigated, but more broadly to what could have been
13 litigated”). If the matter to be litigated is “within the scope of the [prior] action, related to the subject-
14 matter and relevant to the issues, so that it could have been raised, the judgment is conclusive on it
15 despite the fact that it was not in fact expressly pleaded or otherwise urged.” *Howitson*, 81 Cal.App.5th
16 at 486. There are three elements to claim preclusion:

17 First, the second lawsuit must involve the same ‘ “cause of action” ’ as the first
18 lawsuit. Second, there must have been a final judgment on the merits in the prior
19 litigation. Third, the parties in the second lawsuit must be the same (or in privity
with) the parties to the first lawsuit.”

20 *Id.*

21 131. Here, Putnam Ford argues that “Section 3065.2 (i)(2)(D) prohibits a franchisor from
22 ‘[f]ailing to act other than in good faith.’ (Cal. Veh. Code, § 3065.2, subd. (i)(2)(D).) Ford acted in
23 other than good faith when it refused to approve Putnam’s repeated requests for additional
24 noncustomer facing service capacity.” (Putnam Pre-Hr’g Br. at 6.) As previously discussed, a Section
25 3065.2 claim must be brought as a Section 3065.4 protest. *See* Veh. Code, § 3065.4(a). And the Board
26 has already heard and issued a decision on the merits in the Section 3065.4 protest between Putnam
27 Ford and Ford—the Labor Rate Protest. (*See* Ex. R-336.) Although Putnam Ford did not raise bad
28 faith in the Section 3065.4 protest, it could have included the claim as it was well aware of the alleged

1 bad faith of Ford (not approving the relocation requests and the audit) in advance of the September
2 2023 Labor Rate Protest Hearing.

3 132. Putnam Ford was barred from alleging the audit was retaliatory in the Labor Rate
4 Protest because that issue is properly before the Board in this protest. However, Putnam Ford never
5 sought to argue Ford acted in bad faith under Section 3065.2 or tried to use the relocation to “create
6 leverage over Putnam Ford” in the Labor Rate Protest. It should not be able to take a second bite at
7 the Section 3065.2 apple now that it has received an unfavorable decision from the Board in the Labor
8 Rate Protest. (*See* Ex. R-336-001 and 055 (overruling Putnam’s Section 3065.4 protest).)

9 **F. Putnam Ford May Not Raise a New Claim During a Hearing**

10 133. Even if jurisdiction did not bar the Board from hearing Putnam Ford’s bad faith claim,
11 procedure and equity do. The Board will not *sua sponte*¹⁸ amend the pleadings to conform with the
12 proof presented by Putnam Ford. But an amendment is not permitted because it introduces “new and
13 substantially different issues . . . in the case or the rights of the adverse party prejudiced.” *Garcia v.*
14 *Roberts* (2009) 173 Cal.App.4th 900, 909 [93 Cal.Rptr.3d 286, 293]. “[A]mendments of pleadings to
15 conform to the proofs should not be allowed when they raise new issues not included in the original
16 pleadings and upon which the adverse party had no opportunity to defend.” *Id.* (internal quotation
17 marks and citations omitted). This requires an evaluation of:

18 (1) whether facts or legal theories are being changed and (2) whether the opposing
19 party will be prejudiced by the proposed amendment. Frequently, each principle
20 represents a different side of the same coin: If new facts are being alleged, prejudice
21 may easily result because of the inability of the other party to investigate the
22 validity of the factual allegations while engaged in trial or to call rebuttal witnesses.
23 *Id.* at 910.

24 134. At issue here are facts relating to Ford’s good faith in responding to Putnam Ford’s
25 numerous relocation requests. These relocation requests have no connection to the audit process.
26 Putnam Ford did not allege bad faith in its Protest and, as such, these facts were not and are not relevant
27 to the issues presented to the Board. In fact, when Putnam Ford included a request for the production
28 of documents regarding relocation, Ford objected to the request as irrelevant. (*See* Respondent’s

¹⁸ Putnam Ford has not moved for leave to amend its Protest.

Responses to Protestants’ Requests for the Production of Documents at 19 (objecting to Request No. 31 on the grounds that documents seeking information about relocation requests are irrelevant.) Such information has no bearing on whether performing a repair at an unauthorized location is “false” or whether the decision to conduct the audit was retaliatory. The Board agreed and ALJ Skrocki sustained Ford’s objection. Rulings on Objections to Requests for Production of Documents (Nov. 9, 2023) at 3, ln. 1 (sustaining objection to Request No. 31). During conferral and the subsequent discovery hearing, Putnam Ford certainly did not argue that claims of Section 3065.2 bad faith were part of its existing Protest.

135. Putnam Ford never sought to amend its Protest after having been told by the Board that the issue of relocation was irrelevant. As such, Ford did not use discovery to develop facts regarding the relocation requests, such as all of Putnam Ford’s, or other Putnam entities, documents, phone records, or electronic communications regarding relocation requests; relations with other OEMs and related facilities; evidence regarding the typical relocation process within Ford; evidence regarding Putnam Ford’s initial decision to relocate to a sub-par facility at the beginning of the franchise relationship; or communications regarding Putnam Ford’s failure to observe its contractual commitments to secure a new facility no later than May 1, 2022. Ford is prejudiced by the introduction of this issue because it was unable to develop its factual theories and properly defend against this claim. Even if the Board had jurisdiction to hear a stand-alone claim that Ford violated Section 3065.2(i)(2)(D), it should not and will not do so here because it is highly prejudicial and inequitable.

G. Evidence to Be Excluded

136. Because the Board may not hear a Section 3065.2 claim, it should not consider any evidence that solely relates to the allegations that Ford “[d]irectly or indirectly, [took] or threaten[ed] to take any adverse action against a franchisee for seeking compensation or exercising any right pursuant to this section, by any action including, but not limited to, the following : . . (D) Failing to act other than in good faith.” Veh Code, § 3065.2(i)(2)(D).

137. This includes allegations and speculative testimony that Ford acted in bad faith in handling Putnam Ford’s relocation and satellite service requests. This accounts for approximately half the testimony presented at the Hearing as well as much of designated testimony.

1 **III. THE RECORD SHOWS FORD ACTED IN GOOD FAITH RESPONDING TO**
2 **PUTNAM FORD'S EVER-CHANGING RELOCATION REQUESTS**

3 138. Even if the Board had jurisdiction to consider the issue of bad faith and concluded that
4 the issue was somehow relevant to this protest, the evidence overwhelmingly demonstrates that Ford
5 acted in good faith in responding to every one of Putnam Ford's relocation requests.

6 139. The location of the Putnam Ford dealership has a long history that predates the opening
7 of Putnam Ford. In a letter dated January 27, 2021, Ford conditionally approved Putnam Ford as a
8 Ford franchisee operating at 790 North San Mateo (the "790 Location"). (Ex. P-101; Kamenetsky:
9 8/12/24, 281:7-14.) At that time, it was Ford's understanding that Putnam would ultimately provide a
10 new, permanent, image compliant Ford facility. (Ex. R-349-006 to 007.)

11 140. But Putnam Ford lost the 790 Location **after** Ford conditionally approved Putnam Ford
12 as a dealer. (Vasquez: 8/8/24, 71:21-25.) Putnam Ford then requested to relocate to the Authorized
13 Location at 885 North San Mateo. (Kamenetsky: 8/13/24, 108:21-109:1.) The Authorized Location
14 **was never intended to be permanent.** (*Id.* 59:2-6; Kamenetsky: 8/13/24, 108:21-109:1 (San Mateo
15 was approved as a temporary facility only).)

16 141. In a March 2021 Conditional Letter of Approval conditionally approving a dealership
17 at the Authorized Location, Putnam Ford agreed it would secure a final, permanent location by May
18 2, 2022. (Ex. P-102.001; Kamenetsky: 8/13/24, 111:13-19.) Relocating to a permanent facility was
19 the methodology for resolving the shortfall in service capacity "from day one." (Gogolewski: 8/15/24,
20 118:17-21.)¹⁹

21 142. Mr. Gogolewski was a Ford Market Representation Manager in 2021 through August
22 2022 in San Francisco. (Gogolewski: 8/15/24, 94:5-13.) During that time, Putnam Ford had indicated
23 an intent to move to a Buick GMC location, but it never submitted a written request to do so. (*Id.*
24 94:19-95:16; *see also* Ex. R-349-007 ("I recall the original proposal was replacing the Buick GMC
25 franchise in that building).) This was consistent with Putnam Ford's prior offer in 2020, around the
26 time that Putnam Ford moved into the Authorized Location, to relocate to the Putnam GMC location.

27 ¹⁹ Ms. Swann testified that she was "concerned with approving or requesting and supporting a
28 secondary location" because "It doesn't guarantee that Putnam Ford [is] wanting to move forward with
the [permanent] facility itself." (Swann: 8/16/24, 228:17-22.)

1 (Vasquez: 8/12/24, 59:12-60:18.) Despite the lack of a formal request, Ford helped Putnam Ford with
2 a potential relocation by working on design plans for that location. (Gogolewski: 8/15/24, 95:8-19.)

3 143. Putnam Ford then changed its mind. (Ex. R-349-007 to 008 (“I recall Putnam offering
4 a few different proposals, that they kind of changed their mind on several occasions.”); Vasquez:
5 8/12/24, 60:24-61:2 (testifying Putnam Ford put a hold on the GMC location and started working on
6 other offers).) Mr. Gogolewski visited the Nissan Facility because Putnam Ford informally proposed
7 relocating to that location. (Gogolewski: 8/15/24, 73:17-21.) Mr. Gogolewski worked with Putnam
8 Ford “extensively” on relocating to the Nissan Facility. (*Id.* 95:20-24.) This included providing design
9 and layout assistance and cost assessments. (*Id.* 95:25-96:4.) Although the Nissan Facility was an
10 active Nissan dealership, Mr. Putnam told Mr. Gogolewski that he planned to terminate the Nissan
11 franchise so the space would be available. (*Id.* 116:3-16.)

12 144. In Spring 2022, Mr. Gogolewski visited the Nissan Facility to try and get a commitment
13 to relocate from Putnam Ford because it had not submitted a formal request for relocation. (*Id.* 73:22-
14 24; Vasquez: 8/8/24, 85:10-22 (estimating the visit was in April 2022).) Mr. Gogolewski was also
15 evaluating the Nissan Facility as a potential permanent facility for Putnam Ford, and he walked the
16 complete exterior of the location and looked inside the Barn. (Gogolewski: 8/15/24, 101:11-15;
17 Vasquez: 8/12/24, 57:24-58:2 (testifying stopped by facility while they were on their way to lunch).)²⁰

18 145. But Putnam Ford did not relocate in 2021 or 2022 because “Putnam kept changing
19 locations with [Ford].” (Gogolewski: 8/15/24, 96:5-9.) Had he been given the option, Mr. Gogolewski
20 “absolutely” would have supported a relocation to the GMC facility and would have supported
21 relocating to the Nissan Facility as an exclusive Ford facility. (*Id.* 96:10-25.) By the time Mr.
22 Gogolewski left his position as market representative in August 2022, Putnam Ford never submitted a
23 request for a satellite service location to Mr. Gogolewski. (*Id.* 97:1-8).

24
25
26 ²⁰ Mr. Gogolewski did not “tour” the Barn. (Gogolewski: 8/15/24, 101:16-21.) “We just looked, and I
27 remember we left from there.” (*Id.* 101:22-102:19; *accord id.* 58:3-9 (testifying they walked by the
28 Barn, up to the rolling gate, walking inside the entry, and left; they did not talk to any technicians
while there).) Mr. Vasquez admitted he did not disclose that Putnam Ford was performing warranty
work at the Barn during that visit. (Vasquez: 8/12/24, 56:14-57:23.)

1 146. Putnam Ford came up with an improper work around for its Ford service issues that
2 allowed it to avoid its contractual obligation to relocate—use the Nissan Facility and the Barn to
3 perform service. (*See, e.g.*, Ex. J-02 (stipulation that Putnam Ford was performing work at an
4 unauthorized location).)

5 147. In October 2022, Mr. Putnam had a meeting with Ms. Swann to discuss possible
6 relocation to the Nissan Facility. (Swann: 8/16/24, 95:23-96:20; Swann: 9/21/23, 792:3-4, 805:2-8.)
7 At that time, Ms. Swann did not have any knowledge that Putnam Ford was using the Barn. (Swann:
8 8/16/24, 96:19-20.) During the meeting, Mr. Putnam made a comment that “Ford knew they were
9 servicing vehicles at the Nissan facility,” that “caught [Ms. Swann] off guard.” (Swann: 9/21/23.,
10 805:21-807:3; *accord* Swann: 8/15/24, 97:10-25 (testifying Mr. Putnam mentioned he was using the
11 Barn during the tour), 209:25-210:14).) The comment was “out of the blue[,]” and Ms. Swann believed
12 Mr. Putnam “was actually saying it to kind of sneak it in as if [she] knew, and [she] didn’t.” (*Id.*,
13 807:23-25; *accord* Swann: 8/16/24, 120:20-121:10.) Ms. Swann told Mr. Putnam that Putnam Ford
14 was not to service vehicles at an unauthorized location. (Swann: 8/16/24, 210:8-14.) She explained
15 that Putnam Ford would need to submit a written request to add the Barn location to the SSA. (Swann:
16 8/15/24, 98:7-11.)

17 148. After that conversation, Putnam Ford began making written requests for relocation and
18 communicating changes to those requests orally. The requests are detailed below. Despite Putnam
19 Ford’s capricious behavior, Ford diligently worked on every request in good faith. Every time Ford
20 received a new request, the approval process started all over again. (Swann: 8/16/24, 202:24-203:2.)
21 At no point did Ms. Swann request that any one at Ford “slow roll” or delay any of the facility requests.
22 (Swann: 8/16/24, 205:25-206:7.) Likewise, Ms. Hughes “spent a lot of time on pushing through all of
23 the requests that Putnam Ford has made.” (Hughes: 8/15/24, 240:4-5.)

24 i. Written Request 1: Satellite Service at the Barn

25 149. Following the October 2022 meeting, during which Ms. Swann told Mr. Putnam that
26 Putnam Ford was not to perform service work at an unauthorized location, Putnam Ford submitted a
27
28

1 written request to use the Barn dated October 25, 2022. Ex. P-104.²¹ Putnam Ford continued to use
2 the Barn following this request, despite expressly representing to Ford that it had ceased all use of the
3 Barn. (Ex. R-303; Vasquez: 8/12/24, 33:2-15.)²²

4 150. Ms. Swann testified that the normal practice when receiving a facility request is that
5 the market representation manager processes them. (Swann: 8/16/24, 99:15-19.) Consistent with this
6 practice, Ms. Hughes processed the Putnam Ford request and sent the request to a Ford team in
7 Dearborn, Michigan. (*Id.* 99:18-100:13.) The Ford team was tasked with identifying “the proximity
8 and impact on other dealers, whether it is meeting the state law and other requirements and then they
9 would provide [the region] a recommendation and/or ask for any other questions or documents that
10 they need and then ultimately make a decision.” (*Id.* 99:24-100:4.)

11 151. Ford never approved or denied this request because “the second request came on top of
12 this one; so [Ford] never fully processed this one.” (Swann: 8/16/24, 100:7-20; 126:20-23.)

13 ii. Written Request 2: Relocation and Satellite Service at Bayswater

14 152. On December 13, 2022, Putnam Ford submitted a new written request to relocate its
15 entire operations to the Nissan Facility. (Ex. P-106.) As part of this request, Putnam Ford also
16 requested that Ford authorize the use of 925 Bayswater for additional service stalls. (*Id.*) Consistent
17 with Ford practice, the request was sent to the Ford team in Dearborn, Michigan and Ms. Swann had
18 discussions with the Ford team about the request. (Swann: 8/16/24, 109:2-14; 111:5-16.)

19 153. Ms. Swann and Ms. Hughes visited the Nissan Facility on January 19, 2023, to tour the
20 Nissan Facility in connection with the proposed relocation. (Hughes: 8/15/24, 135:1-18; Swann:

21
22
23 ²¹ Mr. Kamenetsky agreed that, even if Ford approved the request as early as October 31, 2022, all of
24 the charge-back disallowances from June 2022 through October 2022, would still have been performed
at an unauthorized location. (Kamenetsky: 8/13/24, 100:24-101:25, 102:1-14.)

25 ²² When confronted with this timeline at the Hearing, Mr. Vasquez then tried to backtrack, claiming
26 he did not know whether work stopped. (Vasquez: 8/12/24, 33:16-34:6.) But, in March 2023, Mr.
27 Vasquez testified at his deposition that customer pay repairs were performed at the Barn, not warranty
28 repairs. (Vasquez: 8/12/24, 52:13-53:21.) Indeed, Putnam Ford stipulated that **all** the warranty repairs
disallowed as false practices were performed at a location other than the Authorized Location, which
included repairs from October 2022 to February 2023. (Ex. J-02-001; Vasquez: 8/12/24, 36:6-37:13.)

1 8/16/24, 118:24-119:2.)²³ After that tour, around January 2023, Mr. Vazquez called Ms. Swann and
2 informed her that he wanted to “scrap this plan and move forward with . . . Bayswater . . as their
3 request.” (Swann: 8/16/24, 112:10-14; 126:20-23 (“the October request became the December request
4 that became the January request that became other requests down the road; so each—essentially we –
5 we would receive new requests.”).) Because Putnam Ford changed its mind again, Ford never made a
6 decision on the December 2022 Nissan Facility request. (*Id.* 117:15-17.)

7 iii. “Request” 3: Mr. Putnam Attempts to Get a Ford Entry-Level Employee to Add
8 the Nissan Facility as Part of the SSA Renewal Paperwork

9 154. During the SSA renewal process, Mr. Putnam contacted a Ford specialist, which is an
10 entry-level position, and instructed her to put the Nissan Facility address on the updated contract.
11 (Swann: 8/15/24, 214:8-15.) Ms. Swann learned about Mr. Putnam’s subterfuge when she received a
12 call from the specialist. (*Id.* 214:8-11, 214:24-215:2.) Ms. Swann told Mr. Putnam he could not change
13 the SSA in this way. (*Id.* 214:16-20.) She credibly testified that she “perceived [Mr. Putnam’s actions]
14 to be that he was trying to essentially sneak the address in for the facility that he didn’t occupy and
15 that [the entry-level employee] wouldn’t have noticed it. And it was just – that was concerning to me.”
16 (*Id.* 215:10-14.)

17 iv. Written Request 4: Complete Relocation to 925 Bayswater

18 155. Although Putnam Ford orally indicated in January 2023 that it planned to change its
19 relocation request to 925 Bayswater (Swann: 8/16/24, 112:10-14), it did not submit a written relocation
20 request until April 19, 2023 (Ex. P-119). Ms. Swann was not enthusiastic about relocating the entire
21 dealership to 925 Bayswater, but she supported it anyway. (Swann: 8/16/24, 211:11-15.) The 925
22 Bayswater location was on a side street, not the main street, and it sacrificed visibility from the main
23 road. (*Id.* 211:17-25.) But Ms. Swann was aware of Putnam Ford’s concerns and was “trying to
24 consider it from that perspective. But it wasn’t essentially what I thought was the ideal location.” (*Id.*
25 212:1-4.)

26
27 ²³ When Ms. Swann observed Ford vehicles being serviced at the Nissan Facility, she told Mr. Putnam
28 he could not service Ford vehicles there. (Swann: 8/16/24 133:12-18.) Mr. Putnam brazenly and falsely
responded that those were vehicles for Nissan customers. (*Id.* 133:19, 134:8-9.)

1 156. Ford approved Putnam Ford's request to relocate the entire facility at 925 Bayswater,
2 subject to clearance of the market, but denied the included request to use the Nissan Facility for
3 temporary service work. (*Id.*; Kamenetsky: 8/13/24, 114:12-18; Ex. R-339; Hughes: 8/15/24, 232:18-
4 22.) The Nissan Facility continued to be the facility of a competitive line-make, for which Mr. Putnam
5 agreed it would maintain facilities exclusive to Nissan. (Ex. R-326-006, Nissan PMK Dep. 23:4-7; Ex.
6 R-327-012, Putnam: 9/25/23, 1073:25-1074:3.) Mr. Putnam accepted and agreed to Ford's modified
7 acceptance on June 28, 2023. (Kamenetsky: 8/13/24, 128:18-25; Ex. R-339.) Ford proceeded to notice
8 the market in support of Putnam Ford's request to relocate the day after Mr. Putnam signed the
9 conditional approval for relocation. (Kamenetsky: 8/13/24, 129:1-24, 131:12-17, 132:12-15; Ex. R-
10 340; Ex. R-341; Ex. R-342.) Two dealerships filed protests; one was resolved. (Kamenetsky: 8/13/24,
11 133:16-21.)

12 v. Written Request 5: Relocation to Nissan Facility

13 157. Although Ford had gone through the process of approving the relocation and noticing
14 the market, Putnam Ford again changed its mind. In late 2023, Ms. Hughes spoke with Mr. Vasquez
15 and he raised changing the relocation request back to the Nissan Facility. (Hughes: 8/15/24, 235:16-
16 23.) Ms. Hughes informed Mr. Vasquez that Ford:

17 [W]ould consider the request but made it clear that [Ford was] in no way asking
18 them to go back to [the Nissan Facility] and that that was entirely determined by
19 them; that ultimately our priority was that they just fulfill their facility commitment;
20 so, if, you know, we were going to continue to change locations, that obviously
21 doesn't help us accommodate that.

22 And I also ended by saying that I wanted to make it abundantly clear that they were
23 unable to do any business operations at the location they were requesting a
24 relocation [the Nissan Facility] to until they had the written express consent of Ford
25 Motor Company, to which he laughed.

26 (Hughes: 8/15/24, 235:25-236:13.)

27 158. Putnam sent its formal written relocation request in a letter dated December 6, 2023.
28 (Kamenetsky: 8/13/24, 136:15-22, 137:14-138:4; Ex. R-343.) On February 20, 2024, Ford provided
29 conditional approval of Putnam Ford's relocation request to the Nissan Facility. (Kamenetsky:
30 8/13/24, 138:14-17, 139:7-16; Ex. R-344; Hughes: 8/15/24, 232:23-25.) Yet again, Ford noticed the
31 market on behalf of Putnam Ford's relocation effort. (Kamenetsky: 8/13/24, 142:15-21.) Ford of

1 Serramonte filed a protest. (*Id.* 144:15-18.) That protest was still pending at the time of the Hearing,
2 and, as such, the relocation of the Putnam Ford franchise is on hold due to an automatic stay entered
3 in the Serramonte Protest. (*Id.* 144:15-24; R-345)²⁴

4 159. The collective facts show that Ford has acted in good faith. Relocation requires legal,
5 business, and economic considerations unique to every market area. Ford worked diligently on each
6 and every request. There is no evidence that Putnam Ford’s requests were ignored or not given proper
7 consideration. In fact, Mr. Kamenetsky testified that he had “no idea” of Ford’s process for approving
8 a facility. (Kamenetsky: 8/13/24, 103:2-21.) Likewise, he agreed that it was fair to say that there could
9 be lots of complications with three different location requests. (*Id.* 114:9-11.)

10 160. More fundamentally, even if one could conclude that Ford did not always act with
11 appropriate diligence or consideration related to facility requests, the facility requests and Ford’s
12 response thereto are not relevant to this protest of a warranty audit.

13 **ORDER**

14 Protest No. PR-2826-23 filed by protestant KPAuto, LLC, dba Putnam Ford of San Mateo,
15 against respondent Ford Motor Company is OVERRULED.

16
17 Dated: ____ 2025

18 _____
19
20
21
22
23
24
25
26
27
28 ²⁴ The market has been cleared at the time of this Order.

1 *Submitted for Approval*

2 Dated: January 10, 2025

GREENBERG TRAURIG, LLP

3
4
5 By: /s/ Steven M. Kelso
6 Steven M. Kelso
7 April C. Connally
8 H. Camille Papini-Chapla
9 Attorneys for Respondent
10 Ford Motor Company
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE

CAPTION: KP AUTO, LLC, dba Putnam Ford of San Mateo v. FORD MOTOR COMPANY
BOARD: NEW MOTOR VEHICLE BOARD
PROTEST NOS.: **PR-2826-23**

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 10, 2025, I served the foregoing **FORD MOTOR COMPANY'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW** on each party in this action, as follows:

Gavin M. Hughes
Robert A. Mayville, Jr.
Law Offices of Gavin M. Hughes
3436 American River Dr., Ste. 10
Sacramento, CA 95864
Telephone: 916-900-8022
Email: gavin@hughesdealerlaw.com
mayville @hughsdealerlaw.com

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 January 10, 2025, at Denver, Colorado.
I declare under penalty of perjury that the foregoing is true and correct.

/s/ Steven M. Kelso

Received

4-2-25

FILED

New Motor Vehicle Board

Date: 4-2-25

By: am

VIA EMAIL

LAW OFFICES OF GAVIN M. HUGHES
GAVIN M. HUGHES State Bar #242119
ROBERT A. MAYVILLE, JR. State Bar #311069
4360 Arden Way, Suite 1
Sacramento, CA 95864
Telephone: (916) 900-8022
E-mail: gavin@hughesdealerlaw.com
mayville@hughesdealerlaw.com

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-2826-23

PROTESTANT'S POST-HEARING
BRIEF

Pursuant to the Order Establishing Post-Hearing Briefing Schedule dated November 14, 2024, and Amended Order Establishing Post-Hearing Briefing Schedule, Protestant, KPAuto, LLC, dba Putnam Ford of San Mateo ("Putnam"), submits Protestant's Post-Hearing Brief in support of its Protest and in opposition to Respondent, Ford Motor Company's ("Ford"), Post-Hearing Opening Brief.

TABLE OF CONTENTS

Page No.

TABLE OF CONTENTS	2
TABLE OF AUTHORITIES	5
INTRODUCTION.....	6
BACKGROUND	10
<i>Putnam Ford was established to replace a former Ford dealership.</i>	<i>10</i>
<i>Ford representatives visit the Barn and Putnam submits the request to increase its retail labor rate.</i>	<i>11</i>
<i>Putnam Ford seeks formal approval to conduct non-customer facing off-site service operations.</i>	<i>12</i>
<i>Ford starts the allegation audit process while taking depositions in the ongoing labor rate litigation.</i>	<i>13</i>
<i>Ford conducts a warranty study of Putnam Ford, sending a warranty auditor to the dealership in the middle of ongoing discovery in the labor rate litigation.</i>	<i>15</i>
<i>Ford upgrades the warranty study to a warranty audit “almost instantaneously” based on Mr. Owens’s recommendation while Putnam continues efforts to have Ford approve non-customer facing off-site service operations.</i>	<i>16</i>
<i>Discovery in the labor rate litigation continues to be ongoing.</i>	<i>16</i>
<i>Mr. Owens conducts the Audit.</i>	<i>17</i>
<i>Putnam responds to Ford’s retaliatory Audit by filing a Protest with the Board.</i>	<i>17</i>
<i>Four days after Ford issued its Audit closing letter proposing to chargeback Putnam more than half a million dollars, Ford finally responds to Putnam’s request to use the Barn for non-customer facing offsite overflow service operations.</i>	<i>18</i>
<i>Witnesses provide testimony in the merits hearing in Protest No. PR-2759-21.</i>	<i>19</i>
<i>Putnam submits additional requests for non-customer facing offsite overflow service operations attempting, in good faith, to address the issues raised in Ford’s earlier denials; Ford continues to deny the requests within days of receiving these requests.....</i>	<i>19</i>
LEGAL STANDARD	20
DISCUSSION	21

I.	FORD FAILS TO MEET ITS BURDEN TO DEMONSTRATE IT COMPLIED WITH THE REQUIREMENTS OF SECTION 3065(e).	21
A.	The Audit was conducted as Ford prepared for the hearing in the Section 3065.4 Protest.	21
B.	Ms. Swann provided false testimony about her knowledge of the Audit during her deposition in the Section 3065.4 Protest.	25
C.	Ms. Swann attempted to conceal preparations with Ms. Hughes to document the known Ford service work performed at the Nissan location; she also attempted to misrepresent Mr. Putnam’s statements made during the tour of the Nissan Facility.	26
D.	Ford’s prior Regional Manager for the San Francisco Region reacted to Putnam’s labor rate request vowing never to provide any assistance to Putnam if it was within her discretion to deny.	28
E.	Ford’s own document shows Greenberg Traurig to be the source of the allegation giving rise to the initiation of the Audit process.	29
F.	Ford failed to produce any evidence showing the communication of Ms. Swann’s allegation to any Ford employee.	30
G.	Ford failed to produce evidence showing who authorized the initiation of the audit allegation process.	31
H.	Ford’s conduct shows it unlawfully selected Putnam for and performed the Audit in a punitive, retaliatory, and unfairly discriminatory manner.	31
II.	THE PROPOSED CHARGEBACKS ARE NEITHER FALSE NOR FRAUDULENT, BUT THESE FINDINGS ARE UNNECESSARY BECAUSE FORD FAILED TO DEMONSTRATE THE AUDIT WAS NOT PUNITIVE AND IN RETALIATION FOR PUTNAM’S LABOR RATE REQUEST.	34
A.	Section 3065.2 precluded Ford from acting other than in good faith in response to Putnam’s labor rate submission; Ford frustrated Putnam’s requests to add an additional service location to its DSSA which would have cured any material non-compliance with reason code D61.07 in the Audit.	35
B.	The location where a repair is performed is a documentation or administrative claims submission requirement.	40
III.	FORD ARGUES THE BOARD SHOULD IGNORE WHETHER THE AUDIT WAS IN RETALIATION TO THE PUTNAM LABOR RATE REQUEST.	43
IV.	FORD’S ARGUMENT THE AUDIT MUST BE VIEWED IN ISOLATION OF THE ALLEGATION AND WARRANTY STUDY ATTEMPTS TO SIDESTEP THE ISSUE OF FORD’S INTENTION BEHIND THE INITIATION OF THE ALLEGATION AUDIT PROCESS.	45

V.	FORD MISREPRESENTS THE RELEVANCE OF THE FACILITY ISSUE TO ITS AUDIT; APPROXIMATELY 80% OF THE PROPOSED CHARGEBACKS RELY SOLELY ON THE FACILITY ISSUE.	46
----	--	----

CONCLUSION	49
-------------------------	-----------

1 **TABLE OF AUTHORITIES**

2 **CASES**

3
4 *Howitson v. Evans Hotels, LLC* (2022) 81 Cal.App.5th 475 44

5 **STATUTES**

6 Cal. Veh. Code, § 3062, subd. (a)(2) 39
7 Cal. Veh. Code, § 3065, subd. (e)(1) 31, 45
8 Cal. Veh. Code, § 3065, subd. (e)(2) 41
9 Cal. Veh. Code, § 3065, subd. (e)(6) 20
10 Cal. Veh. Code, § 3065.2, subd. (g)(3) 35
11 Cal. Veh. Code, § 3065.2, subd. (i)(2)(D) 35
12 Cal. Veh. Code, § 3065.2, subd. (i)(2)(G) 26, 31
13 Cal. Veh. Code, § 3065.2, subd. (j)..... 32

14 **OTHER AUTHORITIES**

15
16 Aug. 13, 2013, California Bill Analysis, Assembly Committee, 2013-2014 Regular Session, Senate
Bill 155, CA B. An., S.B. 155 Assem., 8/13/2013 42
17 Sep. 6, 2013, California Committee Report, 2013 CA S.B. 155 (NS) 42
18 Stats.2013, c. 512 (S.B. 155), § 14 41
19
20
21
22
23
24
25
26
27
28

INTRODUCTION

In this protest, Respondent, Ford Motor Company (“Ford”), bears the burden to demonstrate it complied with the requirements of Vehicle Code section 3065(e) when it selected Protestant for and subsequently conducted the May 8, 2023, Audit of Protestant (the “Audit”). Section 3065 (e)(1) provides in part “A franchisor shall not select a franchisee for an audit, or perform an audit, in a punitive retaliatory, or unfairly discriminatory manner.” Ford failed to meet its burden to show its selection of KPAuto, LLC, dba Putnam Ford of San Mateo (“Putnam” or “Putnam Ford”) for audit was done in compliance with the requirements of Section 3065(e).

The evidence shows Ford targeted Putnam for audit in direct response to Putnam’s 2021 Labor rate request and the ongoing Section 3065.4 Protest concerning the same. Ford was aware Putnam was using the non-customer-facing service location known as the “Barn” *more than a full year before* Ford initiated the allegation audit process for Putnam, on or about March 3, 2023. Putnam’s use of the Barn was never an issue until Ford determined this could be used to penalize Putnam for seeking a labor rate Ford described as “outrageous”¹ and to gain a tactical advantage in litigation concerning Putnam’s requested labor rate increase.

Ford attempts to shift its burden to Putnam, suggesting Putnam must demonstrate Ford selected Putnam for audit in a punitive, retaliatory, or unfairly discriminatory manner. The fact Ford conducted the Audit a little more than one month before the scheduled commencement of the labor rate merits hearing on April 25, 2023, provides *prima facie* evidence of the correlation between the Audit and the Putnam labor rate request. Moreover, the overlap of the Ford representatives involved in the labor rate litigation and the Audit makes it impossible to find the two events to be unrelated.

Ford failed to provide evidence showing it selected Putnam for the Audit on a reasonable basis. Ford failed to produce evidence the Audit arose through Ford’s normal processes. Ford failed to provide evidence of internal communications regarding the reporting of the allegation that was the purported basis for the Audit. Ford refused to provide testimony from the Ford employees purportedly responsible

¹ See Exhibits R-337 at page 7 of the brief (Ford’s post-hearing brief in the labor rate protest describing and citing Ford witness testimony stating the request was “outrageous” and other adjectives) and R-338 at page 17 of the brief (Ford’s reply brief in the labor rate protest again referring to the rates Putnam was charging as “outrageous”).

1 for approving the initiation of the allegation audit process in regard to Putnam Ford. Instead, the
2 evidence shows the allegation audit process was initiated by LaShawn Swann and Ford's outside counsel
3 while they were actively preparing for the hearing in the Section 3065.4 protest.

4 Most telling is the fact Ford's SF Regional Manager, LaShawn Swann, provided false testimony
5 regarding her knowledge of the ongoing Audit process she set in motion through her direct
6 communications to Ford's outside counsel in the Section 3065.4 labor rate protest. Ford failed to present
7 evidence Ms. Swan raised this issue with *any* Ford employee. In Ms. Swann's April 26, 2023, deposition
8 taken during discovery for the labor rate protest, she brazenly denied knowing about the Audit or the
9 identity of the auditor, Jonathan Owens. It was not until her second deposition, in the current Protest,
10 that after being confronted with documents showing her direct involvement in the initiation of the audit
11 process and her communications with Mr. Owens that she acknowledged her role in the initiation of the
12 Audit.

13 Ford argues the initiation of the allegation audit process should be divorced from the resulting
14 Audit. The theoretical separation of these events is little more than choreographed pretext crafted to
15 portray the Audit as having arisen independent from Putnam's labor rate request and the ongoing
16 litigation. The evidence shows Ford representatives were already aware of Putnam's use of the Barn
17 location for additional service more than one year before Ford's initiation of the allegation audit process.

18 Ford's efforts to divorce the allegation audit process from the Audit must be rejected because it
19 is plain to see the ongoing Section 3065.4 litigation was the impetus for the selection of Putnam Ford
20 for the Audit. The evidence shows Ford was aware of Putnam's use of the Barn location well before the
21 Audit: Ford service representatives routinely visited the Barn location in the ordinary course of business
22 since at least September 2021; Al Vasquez showed Mike Gogolewski the Barn location while Ford
23 service work was being performed in April 2022; and Kent Putnam took Ms. Swann to the Barn on her
24 first visit to Putnam Ford in October 2022 and told her Ford service operations were occurring there.
25 Per Ms. Swann's advice, Putnam immediately formally requested to add the Barn location to its DSSA
26 as an additional authorized Ford service location. However, Ford did not respond to Putnam's October
27 2022 request, and other subsequent requests, until *after* the conclusion of the Audit. Despite Ford's
28 knowledge of Putnam Ford's long-standing use of the Barn for additional Ford service work, Ford did

1 not involve its audit department until March 2023, when it sought to gain an advantage in the Section
2 3065.4 protest and to punish Putnam for pursuing its statutory rights.

3 Ford claims Putnam offers little more than speculation that Ford selected Putnam for audit in a
4 punitive, retaliatory, or unfairly discriminatory manner. Ford fails to acknowledge it remains *Ford's*
5 *burden* to demonstrate it complied with the requirements of Section 3065 when it conducted the Audit
6 and to demonstrate it acted reasonably when it selected Putnam for audit. The totality of the evidence
7 demonstrates Ford's decision to conduct the Audit was more likely than not in retaliation for the pending
8 Section 3065.4 litigation.

9 Ford argues the Board must not draw any inference from Ford's invocation of the attorney-client
10 privilege. However, the Board need not draw *any* inference from Ford's invocations of attorney-client
11 privilege to sustain this protest. There is sufficient evidence in the record to support finding Ford failed
12 to meet its burden to show the Audit was not retaliatory or punitive.

- 13 • Ford failed to produce any documentation showing the source of the allegation aside
14 from its own document listing its outside counsel as the source for the allegation—this
15 document is not privileged (Exh. P-110 (Ford's warranty tracker));
- 16 • Ford failed to produce evidence showing Putnam's October 2022 request to add the
17 Barn location as an authorized service location was ever forwarded to Dearborn for
18 consideration—Ford sat on Putnam's request²;
- 19 • In January 2023, Ms. Swann asked Ms. Hughes to surreptitiously take photographs that
20 would be used to initiate the Audit, while Putnam believed its request for authorization
21 was pending—Putnam was unaware Ford would provide no consideration to Putnam's
22 October 2022 request;
- 23 • Ms. Swann provided false testimony concerning her instructions to Ms. Hughes and her
24 discussions with Kent Putnam (*see, infra*, Part I.C);

26 ² See RT Vol. VII, 99:11-100:16 (Ms. Swann suggesting Ms. Hughes forwarded the request to
27 Dearborn) and RT Vol. VI, 219:19-220:18 (Ms. Hughes testifying the letter was dated before she
28 became the Network Development Manager and she did not recall seeing it and did not know of any
Ford representative who had responded to it). Ms. Hughes started her position in the region in January
of 2023. (RT Vol. VI, 129:16-18)

- Ms. Swann provided false testimony about the facts and circumstances of the Audit to shield this information from discovery in the Section 3065.4 Protest. She provided false testimony because she knew the Audit was punitive and in response to the Putnam labor rate request (*see, infra*, Part I.B);
- Ford failed to produce communications showing how or to where the photos and information were provided that would form the purported basis for the Audit. There is a complete gap in the evidence from the time of Ms. Swann’s January 19, 2023, visit and the March 3, 2023, email string that initiated the allegation audit process. The only record evidence is the allegation tracker showing Greenburg Traurig as the source and an email chain initiated by counsel (Exh. P-110 and Exh. P-111);
- Ford representatives knew the Audit was retaliatory and punitive in response to the Section 3065.4 Protest litigation—Mr. Walsh asked Mr. Owens if the audit of Putnam was related to the labor rate litigation; Mr. Owens acknowledged it was (RT Vol. I, 247:5-11; see also RT Vol. II, 181:10-12 and 16 (“Q. Okay. And when Mr. Walsh made his inquiry about the relation of the labor rate litigation to your investigation, you told him yes, it was; right? A. Yes”).); and
- Mr. Owens contacted other Ford employees directly involved in the review of Putnam’s labor rate request immediately upon receiving the Audit assignment. Mr. Owens spoke with Mr. Kanouse. (Exh. P-150.002, 79:2-4.) Mr. Owens discussed the labor rate litigation with Connie Airington, Tom Shire, and Sharita Crawford. (RT Vol. I, 230:2-13.) Mr. Owens discussed the labor rate litigation with Ms. Crawford several times but less than ten times. (RT Vol. I, 230:14-16.) Mr. Owens communicated with Ms. Swann at least twice prior to Ms. Swann’s deposition in the labor rate litigation. (RT Vol. VII, 84:19-24; Exh. P-112 (showing Ms. Swann communicated with Mr. Owens in March 2023); Exh. P-115 (showing Mr. Owens sent Ms. Swann the email concerning the warranty study at Putnam Ford on March 29, 2023)).

1 **BACKGROUND**

2 *Putnam Ford was established to replace a former Ford dealership.*

3 Putnam reestablished the Ford franchise formerly operated by the defunct Veracom Ford.
4 Putnam Ford originally operated at 790 North San Mateo Drive, the former Veracom Ford location. (RT
5 Vol. III, 68:8-17.) Putnam Ford opened in April of 2020. (RT Vol. III, 68:18-21.) There was urgency
6 to reestablish the Ford dealership because Ford sought to avoid protests from the existing RMA Ford
7 dealers. Ford had one year to reestablish Ford representation in the market to avoid protest rights from
8 the existing RMA Ford dealers. (RT Vol. III, 69:22-70:11.)

9 After the expiration of the lease for 790 North San Mateo Drive, Putnam Ford relocated to 885
10 North San Mateo. (RT Vol. III, 70:22-71:18.) 790 North San Mateo Drive and 885 North San Mateo
11 Drive were both approved properties for the prior Ford dealer, Veracom Ford. (RT Vol. III, 71:5-18.)

12 There were *only three (3) stalls* at the 885 North San Mateo Drive facility at the time Ford
13 approved the relocation. (RT Vol. III, 74:3-10.) However, Ford required Putnam Ford to have *twelve*
14 *service stalls at a minimum*. (RT Vol. III, 74:11-13; Exh. P-102.001.) Mr. Gogolewski told Mr. Vasquez
15 Ford would be flexible and willing to work with Putnam Ford concerning service capacity. (RT Vol.
16 III, 78:20-79:2.) Mr. Vasquez discussed the shortfall in service capacity with Ms. Murphy and Mr.
17 Gogolewski. (RT Vol. IV, 87:1-13.) However, Ford representatives never discussed with nor offered
18 Putnam a Facility Supplement this is a required component of all Ford franchise agreements.

19 Out of necessity and to fulfill its service and warranty obligations, Mr. Vasquez and Mr. Putnam
20 commenced the use of 100 Highland Avenue, referred to throughout the hearing as “the Barn,” for Ford
21 service. (RT Vol. III, 81:5-7.) At that time, the Barn was not being used and had previously been used
22 as supplemental service for Putnam’s General Motors franchises. (RT Vol. III, 81:14-17.) The Barn
23 was never used as a customer facing Ford location. (RT Vol. III, 81:23-83:1; *see also* RT Vol. IV,
24 130:13-131:7 (Mr. Davis describing the process of customers only visiting the Ford branded main
25 location at 885 North San Mateo Drive facility even when repairs were being completed at the Barn).)
26 The Barn was equipped for all Ford repairs, and Putnam never ceased performing service work at its 885
27 North San Mateo Drive facility. (RT Vol. III, 83:10-14.)

1 *Ford representatives visit the Barn and Putnam submits the request to increase its retail*
2 *labor rate.*

3 When Mr. Sweis, Ford’s Field Service Engineer, began calling on Putnam Ford in approximately
4 September 2021, his predecessor, Vincent Demico (the previous Ford Field Service Engineer for Putnam
5 Ford) took Mr. Sweis “right to The Barn.” (Exh. P-143.002, 606:16-607:8; *see also* Exh. P-151.002-
6 .003, 19:16-20:18.) Mr. Demico informed Mr. Sweis Putnam Ford had an off-site service facility. (*Id.*)
7 Putnam was not concealing its use of the Barn. (*Id.*) As Mr. Sweis testified, Putnam’s service manager
8 drove both Mr. Sweis and Mr. Demico to the Barn. (*Id.*) Based on Mr. Demico’s knowledge of the
9 Barn, Putnam Ford began using the Barn prior to September 2021, which was *more than a year* prior to
10 Ms. Swann’s October 2022 Barn visit, and 18 months before Ford decided to initiate the allegation audit
11 process in March 2023.

12 Mr. Sweis visited the Putnam Ford dealership approximately nine or ten times. (Exh. P-151.002,
13 19:10-15.) Almost all of Mr. Sweis’s visits to Putnam Ford were to the Barn; he only visited the main
14 facility once or twice. (Exh. P-151.004, 33:11-18; *see also* Exh. P-151.006-.007, 51:22-52:8; Exh. P-
15 151.013, 76:9-12 (“Every time I was called out, it would be at the Barn, yes”).)

16 On August 24, 2021, Protestant submitted a request to Respondent for an “adjusted labor retail
17 rate.” (Protest No. PR-2759-21, ¶ 6 (Exh. P-103).) On October 26, 2021, Respondent denied Protestant’s
18 retail labor rate adjustment request. (Protest No. PR-2759-21, ¶ 7 (Exh. P-103).) On December 30,
19 2021, Protestant filed a protest challenging Ford’s denial of the Putnam retail labor rate request. (Protest
20 No. PR-2759-21 (Exh. P-103).)

21 Upon receiving the Putnam labor rate request, Ms. Murphy-Austin sent an email to Mr.
22 Gogolewski dated September 1, 2021, Ms. Murphy-Austin wrote, “If they [Putnam] continue to pursue
23 this twice the market average type rate, they won’t see a lick of support from me moving forward.” (Exh.
24 P-154.020, 59:18-25; *see also* Exh. P-155.019-.020, 208:18-209:17.) Ms. Swann replaced Ms. Murphy-
25 Austin as the SF Region Manager shortly thereafter.

26 Mr. Vasquez and Mr. Gogolewski visited the Barn location together in approximately April 2022.
27 (RT Vol. III, 84:14-85:22 and 87:16-24.) Ford vehicles were being worked on at the Barn when Mr.
28 Vasquez visited the location with Mr. Gogolewski. (RT Vol. III, 88:5-8.)

1 On August 8, 2022, as part of discovery in Protest PR-2759-21 (Labor Rate), Respondent sought,
2 among other discovery, documents sufficient to show the physical location at which every repair
3 documented on each Repair Order was made, “including without limitation any repairs made or
4 completed at a location other than Your authorized Ford dealership location.” (Protest No. PR-2759-21,
5 Respondent Requests for Production, No. 40.)³ The timing of Ford’s request confirms Ford was aware
6 of Putnam’s use of the Barn before Ms. Swann claims Ford first discovered the Barn’s use in October
7 2022. Within seven months of Ford’s document request No. 40 on this subject, Ford would initiate the
8 allegation audit of Putnam Ford.

9 *Putnam Ford seeks formal approval to conduct non-customer facing off-site service*
10 *operations.*

11 In October 2022, during Ms. Swann first official visit to Putnam Ford, Kent Putnam took Ms.
12 Swann on a tour of the Putnam Nissan facility. Kent Putnam advised Ms. Swann Putnam Ford was using
13 the Barn for additional service capacity. (RT Vol. VII, 95:23-96:12 and 97:10-14.) On October 25,
14 2022, per Ms. Swann’s instruction, Protestant requested Respondent approve Putnam’s continued use of
15 the 100 Highland Ave. workshop as a non-customer facing overflow service location. (Exh. P-104.)

16 On December 13, 2022, Protestant formally requested to relocate all Ford operations to 101
17 California Drive, Burlingame, CA (the Putnam Nissan location). In addition, Protestant also proposed
18 925 Bayswater Ave., Burlingame, CA for additional non-customer facing off-site service maintenance
19 and repair capacity. (Exh. P-106; *see also* Exh. R-304 (the same letter).) Putnam did not withdraw the
20 October 2022 request to use the Barn for off-site service capacity. (RT Vol. IV, 247:8-22.) It had been
21 a month and a half with no response from Ford concerning the October 2022 request.

22 On December 14, 2022, Kent Putnam executed a declaration in Protest No. PR-2759-21 (Labor
23 Rate Protest) related to discovery of the location of repairs conducted in that Protest. Ford offered the
24 declaration into evidence as Exhibit R-305 in the current matter.

25
26
27 ³ It is critical to note Ford’s document request shows it was aware of Putnam’s use of an offsite service
28 facility well before Ms. Swann’s October 2022 visit. A copy of Ford’s Requests for Production in the
Audit Protest are attached hereto as Exhibit 1. Putnam requests the Board take official notice of Ford’s
Request for Production No. 40 as discussed herein.

1 On January 19, 2023, in response to Mr. Putnam’s December 13, 2022, letter requesting to
2 relocate Protestant’s entire Ford franchise to the Nissan site, LaShawn Swann, Ford Regional Manager,
3 and Melissa Hughes, Market Representation Manager, met with Mr. Putnam to do a walkthrough of the
4 proposed relocation site. (RT Vol. IV, 248:16-249:20.) During the January 19, 2023 walkthrough, Ms.
5 Swann observed Ford vehicles in the Barn. (RT, Vol. VII, 118:8-120:1.) Prior to this visit, Ms. Swann
6 instructed Ms. Hughes to capture pictures of any Ford vehicles being serviced at the Barn or in any
7 Nissan service stall. (RT Vol. VI, 138:10-139:3 and 139:5-14.) January 19, 2023, is also the same date
8 counsel for Ford requested further production in the labor rate protest specifically seeking documents
9 concerning the location where repairs were performed. (RT Vol. V, 217:11-219:21.)

10 *Ford starts the allegation audit process while taking depositions in the ongoing labor*
11 *rate litigation.*

12 On March 3, 2023, the allegation process originated from a source identified as “Greenberg
13 Traurig, LLP”—Ford’s counsel handling the labor rate litigation on behalf of Ford. (Ex. P-110.003)

14 The allegation stated:

15 On January 19, 2023, LaShawn Swann, the Regional Manager of the San Francisco
16 Region visited a facility that Putnam was proposing as a facility to which its dealership
17 could relocate. The facility is referred to in the Putnam organization as “the barn,” and
is probably part of the same dealer group’s Nissan facility.

18 LaShann [sic] snapped a few pictures of Ford vehicles that were being serviced in this
19 non-approved facility.

20 At the time, Mr. Putnam waived away any concern and said all the vehicles were customer
21 pay. Is there a way from the pictures you can tell if Putnam submitted any warranty
22 claims associated with these vehicles for repairs that were being one [sic] around the time
of LaShann’s [sic] visit?

23 (Exh. P-110.)

24 On March 10, 2023, Kent Putnam was deposed in Protest No. PR-2759-21 (Labor Rate).
25 Respondent offered into evidence excerpts from Mr. Putnam’s deposition as Exhibit R-325 in the current
26 matter. Mr. Putnam testified in his deposition there were unapproved facilities affiliated with Putnam
27 Ford, i.e., the Nissan service facility known as the Barn. (Exh. R-325.017.) Mr. Putnam first testified
28 the Barn was the only building on the Nissan property used to repair Ford vehicles. Then pursuant to

1 additional questions from Ford’s counsel,⁴ he testified that in the six months prior to March 10, 2023, it
2 was “possible” that Ford vehicles from Protestant’s dealership were repaired in the Nissan bays by Ford
3 technicians. (Exh. R-325.016-.020.)

4 Ford deposed Mr. Vasquez in the Labor Rate litigation on March 14, 2023. Respondent’s counsel
5 asked about the location of warranty repairs during the deposition. (RT Vol. III, 92:5-15.)

6 On March 27, 2023, Respondent assigned the allegation regarding Protestant’s use of
7 unauthorized facilities for Ford warranty repairs to Jonathan Owens, Respondent’s Warranty Auditor.
8 (RT, Vol. II, 11:28-12:17.) Ford’s selection of Putnam for the allegation audit process was not random.
9 (RT Vol. II, 136:25-137:4.) The allegation audit process predictably resulted in Ford’s initiation of the
10 Audit. (Exh. P-157.008, 11:20-24.) The subject of the email in which Ms. Crawford directed Mr. Owens
11 to upload the allegation into the tracker bears the subject line “RE: Legal Request – Putnam Ford in San
12 Mateo – Servicing Ford Vehicles at Nissan Facility.” (Exh. P-111.)

13 Also on March 27, 2023, Mr. Owens exchanged emails with Ms. Swann and Ms. Hughes
14 concerning the photos taken of the vehicles at the Putnam Nissan facility and Barn on January 19, 2023.
15 (Exh. P-112.)

16 The only emails concerning the initiation of the allegation audit process indicate Ford’s Audit
17 department had “an urgent request to proceed.” (Exh. P-111.001.) Mr. Owens described the allegation
18 to be “a TOP Priority Warranty Allegation to conduct next week.” (RT Vol. II, 47:4-24; Exh. P-
19 113.001.) After confirming warranty claims had been submitted for the three vehicles in the pictures
20 taken by the Region, Mr. Owens recommended Ford proceed with a warranty study of Putnam Ford.
21 (RT Vol. I, 97:10-22.) Upon receiving Mr. Owens’ recommendation to proceed with a warranty study,
22 Sharita Crawford instantaneously assigned Mr. Owens to conduct the warranty study. (RT Vol. I, 98:14-
23 23.)

24
25
26
27
28 ⁴ Asking specifically, “have Ford vehicles been repaired in any of the Nissan bays in the last six months?”

1 *Ford conducts a warranty study of Putnam Ford, sending a warranty auditor to the*
2 *dealership in the middle of ongoing discovery in the labor rate litigation.*

3 On March 28, 2023, Mr. Owens prepared a letter with Ms. Swann's signature notifying Putnam
4 Ford of the warranty study to take place the following Monday. (RT Vol. I, 101:18-102:3; Exh. R-309;
5 Exh. P-115.) Mr. Owens sent Ms. Swann an email concerning the warranty study at Putnam Ford on
6 March 29, 2023. (Exh. P-115.) The letter announcing the warranty study specifically indicated the
7 warranty study could lead to Ford upgrading the warranty study to an audit. (RT Vol. I, 102:23-103:5;
8 Exh. R-309.)

9 Meghan Murphy-Austin, the San Francisco Regional Manager prior to Ms. Swann, was deposed
10 in Protest No. PR-2759-21 (Labor Rate) on March 30, 2023. (Exh. P-154.)

11 On April 3, 2023, Mr. Owens conducted Ford's warranty study concluding the Audit should
12 proceed. During the warranty study, Mr. Owens provided Putnam Ford a list of repair orders he wished
13 to review for the warranty study. (RT Vol. I, 116:16-21.) He requested and obtained permission to
14 interview various dealership employees, including Ford technicians. Mr. Owens spoke to three Ford
15 technicians working from the Barn and Ford technicians working in any Nissan service stalls. (RT Vol.
16 I, 117:8-118:3.) Mr. Owens observed three Ford technicians working from the Barn and three working
17 in some of the Nissan service stalls. (RT Vol. I, 118:16-119:1.)

18 Mr. Owens observed two Ford vehicles being repaired in Nissan service stalls. (Exh. R-312.)
19 Mr. Owens observed four Ford vehicles in the Barn receiving repair and one Ford vehicle outside of the
20 Barn. (Exh. R-312.) Mr. Owens also observed two Ford vehicles being repaired in Nissan service stalls
21 and six Ford vehicles outside the Nissan facility. (Exh. R-312.)

22 Mr. Owens requested all repair orders for the six technicians he identified to be working in the
23 Barn and Nissan service stalls from June of 2022 through February 2023. (RT Vol. I, 119:19-120:10;
24 *see also* Exh. R-312.)

1 *Ford upgrades the warranty study to a warranty audit “almost instantaneously” based*
2 *on Mr. Owens’s recommendation while Putnam continues efforts to have Ford approve*
3 *non-customer facing off-site service operations.*

4 Mr. Owens and Ms. Crawford upgraded the warranty study to a warranty audit. Ms. Crawford
5 agreed with Mr. Owens’ recommendation to upgrade the warranty study to a warranty audit
6 “immediately” and “almost instantaneously.” (RT Vol. I, 126:25-128:18.)

7 On April 19, 2023, Putnam followed up the request to use the Barn for non-customer facing
8 offsite overflow service operations while it continued efforts to relocate the entire Putnam Ford sales
9 and service operation to 925 Bayswater. (Exh. P-119.) Putnam sought to relocate all Ford operations to
10 925 Bayswater while reaffirming Putnam’s request to continue non-customer-facing Ford service
11 operations at the Barn. (RT Vol. IV, 258:16-22.)

12 In considering whether to approve Putnam’s request to relocate to 101 California Drive (former
13 Nissan facility) and Putnam’s request to relocate to the 925 Bayswater Avenue facility, Ford
14 representatives prepared slides to consider the two locations together.⁵ (Exh. P-147; Exh. P-158.046-
15 .047, 53:15-54:9.) Both pages of Exhibit P-147 were considered at the same time and were part of the
16 same document. (Exh. P-158.047, 54:10-23.)

17 *Discovery in the labor rate litigation continues to be ongoing.*

18 During her April 26, 2023, deposition regarding the section 3065.4 labor rate protest, Ms. Swann
19 testified she did not know Jonathan Owens despite the foregoing communication between Mr. Owens
20 and Ms. Swann. (RT Vol. VII, 84:8-18; *see also* Exh. P-112 and P-115.) William Walsh was deposed
21 in Protest No. PR-2759-21 (Labor Rate) on April 27, 2023. (Exh. P-159.) Mr. Walsh was involved in
22 the consideration of Putnam’s labor rate request. (Exh. P-159.008-.009, 14:22-15:3 and .010, 16:4-9
23 (the Ford representatives considering Putnam’s retail labor rate request contacted Mr. Walsh, head of
24 Ford’s audit department, and asked for his opinion even though it was not part of his regular duties).)

25 On May 2, 2023, Kent Putnam was again deposed in Protest No. PR-2759-21. Ford offered
26 excerpts from Mr. Putnam’s deposition as Exhibit R-326. Mr. Putman testified it is possible Ford
27 vehicles were serviced in the 13 service bays in the Nissan facility, separate from the Barn. (Exh. R-
28 326.007.)

⁵ One request **did not** replace the other.

1 *Mr. Owens conducts the Audit.*

2 On May 8, 2023, Ford notified Putnam the warranty study was upgraded to a warranty audit.
3 (Exh. R-313.) The Audit was scheduled to begin on May 8, 2023, and anticipated to conclude on
4 approximately May 26, 2023. (*Id.*)

5 On May 9, 2023, Troy Davis, Putnam’s parts and service director, confirmed to Mr. Owens that
6 three of Protestant’s Ford technicians were assigned to the Nissan facility and three technicians were
7 assigned to the Barn on the Nissan lot. (RT, Vol. I, 140:6-141:3; Exh. R-321; *see also* RT Vol. IV,
8 124:7-25.)

9 On May 24, 2023, Respondent concluded the Audit, held a closing meeting attended by Mr.
10 Owens, Ms. Crawford, and Ms. Swann, and proposed to chargeback Protestant \$502,821.56, almost
11 entirely for the reason the warranty claims were performed at an unauthorized facility. (Exh. J-4.583.)
12 Putnam filed the instant Protest in response on May 26, 2023.

13 All the claims Mr. Owens identified as false claims were repairs that were performed at an
14 unauthorized facility (i.e., the Barn or the Nissan service facility).⁶ (RT Vol. I, 128:19-129:11.)
15 However, the claims at issue were neither false nor fictional—these repairs were actually performed by
16 Putnam Ford. (RT Vol. II, 70:21-25.)

17 Claims associated with reason code D61.07 stating “Service supervision: Repair not performed”
18 do not mean the repairs were not performed. Instead, it indicates the repairs were performed at a location
19 other than Putnam’s authorized Ford facility. (RT Vol. I, 148:1-19; *see also* Exh. P-157.032-.033, 48:23-
20 49:3.) Mr. Owens selected reason code D61.07 as a “generalized bucket” because of a “system
21 limitation”; i.e., Ford does not have a chargeback reason code associated with repairs done at an
22 unauthorized facility. (See RT Vol. II, 75:17-76:1; *see also* Exh. P-157.033-.034, 49:23-50:11.) All of
23 the parts in the Audit claims at issue were installed on customer vehicles. (RT Vol. II, 78:16-25.)

24 *Putnam responds to Ford’s retaliatory Audit by filing a Protest with the Board.*

25 On May 26, 2023, Putnam filed the instant protest with the Board. Putnam alleged Ford
26 conducted the Audit in violation of Vehicle Code section 3065(e)(1). Putnam alleged Ford conducted
27 the Audit in a punitive and retaliatory manner in response to a retail labor rate request made by Putnam
28

⁶ With the exception of one mileage misstatement. (RT Vol. I, 129:12-17.)

1 pursuant to section 3065.2 and Putnam's existing Section 3065.4 Protest, PR-2759-21.

2 Protestant further alleged Respondent conducted the Audit in violation of section
3 3065.2(i)(2)(G). (Protest, ¶ 7.) Section 3065.2(i)(2)(G) provides a franchisor shall not conduct or
4 threaten to conduct a nonroutine or nonrandom warranty audit in response to a franchisee seeking
5 compensation or exercising any right set forth in section 3065.2. Section 3065.2(i)(2)(D) similarly
6 precludes a franchisor from failing to act other than in good faith in response to a labor rate submission.

7 Moreover, the Protest alleges the majority of the proposed chargebacks are based upon the
8 completion of warranty repairs at an additional Putnam Ford service location not formally recognized
9 by Ford. Putnam Ford formally requested approval to conduct additional non-customer facing service
10 operations at the Barn on October 25, 2022—Ford ignored this request. (Protest, ¶ 8.) Ford acted in
11 other than good faith and failed to provide an opportunity for Putnam to cure any material non-
12 compliance through Putnam's repeated requests for approval to use additional non-customer facing
13 service operations.

14 *Four days after Ford issued its Audit closing letter proposing to chargeback Putnam*
15 *more than half a million dollars, Ford finally responds to Putnam's request to use the*
Barn for non-customer facing offsite overflow service operations.

16 On June 12, 2023, Respondent issued its Audit closing letter proposing to chargeback
17 approximately half a million dollars (\$502,821.56). (Exh. R-317.002-.003.)

18 On June 16, 2023, four days after the Audit closing letter and for the *first time*, Ford responded
19 to Putnam's request to formally recognize Putnam's use of the Barn for non-customer facing offsite
20 overflow service operations. Ford denied the request. (Exh. P-133.) Mr. Kamenetsky testified the June
21 16, 2023, letter was the first Ford response Putnam Ford received denying the request to utilize the Barn
22 location for non-customer facing service capacity. (RT Vol. IV, 275:2-5.)

23 Putnam never received a specific response to the October 2022 and December 2022 requests;
24 Ford's June 16, 2023, letter responded to Putnam's April 19, 2023, letter. (RT Vol. IV, 275:2-12.)
25 Respondent's response was approximately eight months after Putnam first requested formal approval to
26 use the Barn for non-customer facing offsite overflow service operations. (*Compare* Exh. P-104 (request
27 on October 25, 2022) *with* Exh. P-133 (response on June 16, 2023).)

1 On July 6, 2023, Putnam requested Ford consider and approve the still pending request to conduct
2 non-customer facing offsite overflow service operations at 925 Bayswater. (Exh. P-134.) Respondent
3 denied the request to conduct non-customer facing offsite overflow service operations at 925 Bayswater
4 by letter dated July 27, 2023. (Exh. P-138.) Respondent denied the request approximately seven (7)
5 months after Putnam first made the request. (Compare Exh. P-106 (request on December 13, 2022) with
6 P-138 (response on July 27, 2023).) Ford's reasons for denying Putnam's request to add required service
7 capacity was purportedly due to the 925 Bayswater location currently being under protest by at least two
8 dealers. (Exh. P-138; RT Vol. V, 25:16-27:8.)

9 *Witnesses provide testimony in the merits hearing in Protest No. PR-2759-21.*

10 Ms. Murphy-Austin testified in the hearing for Protest No. PR-2759-21 (Labor Rate) on
11 September 18, 2023. (Exh. P-155.) Mr. Putnam testified during the merits hearing in Protest No. PR-
12 2759-21 (Labor Rate) on September 25, 2023. Ford offered into evidence excerpts of Mr. Putnam's
13 testimony as Exhibit R-327 in this Protest. Mr. Putnam testified that the address on the repair orders
14 cannot be relied upon to show where repair services were performed. (Exh. R-327.019.)

15 *Putnam submits additional requests for non-customer facing offsite overflow service*
16 *operations attempting, in good faith, to address the issues raised in Ford's earlier*
denials; Ford continues to deny the requests within days of receiving these requests.

17 On October 13, 2023, Putnam again requested approval to conduct non-customer facing offsite
18 overflow service operations at 925 Bayswater explaining the satellite service location would not be
19 protestable. (Exh. P-139; *see also* RT Vol. V, 28:20-29:10.) Within days, on October 19, 2023,
20 Respondent denied Putnam's renewed request to utilize 925 Bayswater for satellite service operations.
21 (Exh. P-140.)

22 On November 6, 2023, the parties in the instant protest entered into the following stipulation:

23 Putnam Ford's franchise agreement reflects as the authorized location 885 N. San Mateo
24 Drive, San Mateo, CA 94401 ("Authorized Location"). Since at least June 2021, Putnam
25 Ford has performed repairs, including warranty repairs, at locations other than the
26 Authorized Location. Putnam Ford stipulates that all the warranty repairs disallowed as
False Practice pursuant to 7.3.03 were performed at a location other than the Authorized
Location.

27 (Exh. J-02.001.)
28

1 The Putnam organization terminated the Nissan franchise previously operated at 101 California
2 Drive. (RT Vol. III, 106:16-24.) Putnam terminated the Nissan franchise in approximately mid-May
3 2024. (RT Vol. V, 42:17-44:20.)

4 On May 17, 2024, Putnam again requested approval to conduct non-customer facing offsite
5 overflow service operations at the former Putnam Nissan facility. (Exh. P-141.) Protestant supported
6 the request with the additional information that it had terminated Nissan operations at 101 California
7 Drive. (*Id.*) Within days, on May 22, 2024, Respondent denied Putnam's request to utilize the former
8 Putnam Nissan facility for satellite service operations. (Exh. P-142.)

9 On June 6, 2024, Ford deposed Mr. Putnam again in the current matter. Ford offered excerpts of
10 Mr. Putnam's deposition testimony designations as Exhibit R-332.

11 On June 28, 2024, the Board issued its Decision overruling Protest No. PR-2759-21 (Labor Rate).
12 Respondent offered into evidence the Board Decision as Exhibit R-336.

13 **LEGAL STANDARD**

14 This protest was filed pursuant to Section 3065. The Protest alleges the Audit was performed in
15 a punitive and retaliatory manner in response to the ongoing litigation between the parties pertaining to
16 Putnam's requested increase to its retail labor rate. Ford must establish it complied with the requirements
17 of Section 3065(e). "In any protest filed pursuant to this subdivision, the franchisor shall have the
18 burden of proof." (Cal. Veh. Code, § 3065, subd. (e)(6).)

19 In addition, Section 3065.2(i)(2)(G), makes it unlawful for a franchisor to conduct a nonrandom
20 audit in response to a franchisee seeking compensation or exercising a right pursuant to Section 3065.2.
21 If the Audit was initiated in violation of Section 3065.2(1)(2)(G), Respondent cannot meet its burden
22 under Section 3065(e)(6) to show it acted reasonably when it conducted the unlawful Audit.

1 **DISCUSSION**

2 I. FORD FAILS TO MEET ITS BURDEN TO DEMONSTRATE IT COMPLIED WITH THE
3 REQUIREMENTS OF SECTION 3065(e).

4 A. **The Audit was conducted as Ford prepared for the hearing in the Section 3065.4**
5 **Protest.**

6 The record shows the many instances where Ford was aware of Putnam’s use of the Barn location
7 for non-customer facing service repair. At the time of its relocation to 885 North San Mateo Drive in
8 2021, Ford advised it would be flexible and willing to work with Putnam Ford concerning service
9 capacity. Nevertheless, Ford refused to provide good faith cooperation after the Putnam labor rate
10 submission in 2021.

11 There were *only three (3) service stalls* at the 885 North San Mateo Drive facility when Ford
12 approved the relocation. (RT Vol. III, 74:3-10.) However, Ford required Putnam Ford to have *twelve*
13 *service stalls at a minimum*. (RT Vol. III, 74:11-13; Exh. P-102.001.) Mr. Gogolewski told Mr. Vasquez
14 Ford would be flexible and willing to work with Putnam Ford concerning service capacity. (RT Vol.
15 III, 78:20-79:2.) Mr. Vasquez discussed the glaring shortfall in service capacity with Ms. Murphy and
16 Mr. Gogolewski at that time. (RT Vol. IV, 87:1-13.)

17 Ms. Murphy-Austin admitted she recalled Putnam “potentially exploring off-site service
18 locations that would be Ford facilities if they were to propose one and we would approve it.” (Exh. P-
19 154.012, 41:9-16; Exh. P-156.009-.010, 9:23-10:5.) When Ms. Murphy-Austin was the San Francisco
20 Regional Manager, Ford was “open to adding service capacity in a Ford-approved building.” (Exh. P-
21 154.012-.013, 41:24-42:11.) The parties’ January 27, 2021, Letter of understanding specifically
22 instructed Putnam to “take the necessary actions to increase service capacity in order to meet the sales
23 and service growth targets.... An increase in service capacity may include, but is not limited to,
24 installation of additional service stalls/bays onsite or offsite....” (Exh. P-101.002.)

25 For a non-customer facing location, Ford would not require any image or branding requirements.
26 (Exh. P-158.016, 22:19-21.) At the time of her deposition, Ms. Karnes could not recall a single instance
27 of when Ford declined to approve a non-customer facing service addition. (Exh. P-158.049-050, 58:20-
28

1 59:9.) There was no legitimate basis to deny Putnam’s request to add the Barn location as an authorized
2 service location.

3 In fact, the evidence showed Ford historically encourages and promotes the expansion of Ford
4 dealership service capacity. For example, Ford provides a program called the Enhanced Service
5 Capacity Facility Program to provide dealers monetary payments to expand service and parts operations.
6 (RT Vol. IV, 158:12-160:4; Exh. P-146.) Similarly, Ms. Murphy-Austin “often” had conversations
7 about expanding service capacity for San Francisco dealers in her role as the San Francisco Regional
8 Manager. (Exh. P-154.014-.015, 43:17-44:4.) Ms. Hughes agreed Ford is generally actively looking to
9 increase service capacity for its dealer network. (RT Vol. VI, 175:13-15.) Generally, “[t]here is a lot of
10 opportunities still within parts and service for both Ford’s dealers and Ford Motor Company, as well as
11 for customer satisfaction that results from increasing capacity.” (RT Vol. VI, 175:23-176:4.) Ms.
12 Hughes agreed Putnam Ford needs additional service capacity. (RT Vol. VI, 176:5-7.)

13 Ford representatives routinely visited the Barn after Putnam began using it for non-customer
14 facing service operations. Mr. Vasquez and Mr. Gogolewski visited the barn location together in
15 approximately April 2022. (RT Vol. III, 84:14-85:22 and 87:16-24.) Ford vehicles were being worked
16 on when Mr. Vasquez visited the location with Mr. Gogolewski. (RT Vol. III, 88:5-8.) Mr. Gogolewski
17 did not advise Mr. Vasquez Putnam Ford would need to add the Barn location to its franchise agreement.
18 (RT Vol. III, 88:9-17.)

19 Mr. Gogolewski admitted he had visited the former Putnam Nissan dealership and the Barn one
20 to two times. (RT Vol. VI, 40:8-21.) Even though Mr. Gogolewski suggested he only saw an old
21 Econoline in the Barn, Mr. Gogolewski’s deposition testimony showed the Econoline was on a lift and
22 being worked on and he saw a Ford vehicle or two in the Barn. (RT Vol. VI, 82:12-83:9 and 84:12-
23 85:14.)

24 When Mr. Sweis, Ford’s Field Service Engineer, began calling on Putnam Ford in approximately
25 September 2021, his predecessor, Vincent Demico (the previous Ford Field Service Engineer for Putnam
26 Ford) took Mr. Sweis “right to The Barn.” (Exh. P-143.002, 606:16-607:8; *see also* Exh. P-151.002-
27 .003, 19:16-20:18.) Mr. Demico told Mr. Sweis Putnam Ford had an off-site facility. (*Id.*) Putnam was
28

1 not concealing its use of the Barn. (*Id.*) As Mr. Sweis testified, Putnam’s service manager drove both
2 Mr. Sweis and Mr. Demico to the Barn. (*Id.*)

3 Mr. Sweis visited the Putnam Ford dealership approximately nine or ten times. (Exh. P-151.002,
4 19:10-15.) Almost all of Mr. Sweis’s visits to Putnam Ford were to the Barn; he only visited the main
5 facility once or twice. (Exh. P-151.004, 33:11-18; *see also* Exh. P-151.006-.007, 51:22-52:8; Exh. P-
6 151.013, 76:9-12 (“Every time I was called out, it would be at the Barn, yes”).)

7 When Ms. Murphy-Austin was the San Francisco Regional Manager, Putnam Ford took her on
8 a tour of the area around Putnam Ford including the Buick GMC facility, the Nissan facility, and the
9 facility Putnam was operating out of for Ford. (Exh. P-154.009-.010, 27:22-28:16.) In reviewing the
10 December 13, 2022, letter to LaShawn Swann (Exh. P-106), Ms. Murphy-Austin indicated “the building
11 that I think is being described is Nissan, and it was one of the many alternatives Kent suggested and one
12 of the ones that we would have been okay with.” (Exh. P-154.023-024, 76:18-77:4.)

13 During an October 2022 visit to Putnam Ford, Mr. Putnam told Ms. Swann Putnam Ford was
14 performing service work at the Barn. (RT Vol. VII, 95:23-96:12 and 97:10-14.) Ms. Swann advised
15 Mr. Putnam he needed to submit a written request to formally add the Barn location to the dealer
16 agreement. (RT Vol. VII, 98:7-11.)

17 The foregoing demonstrates Ms. Swann, Mr. Sweis (and Mr. Demico), Mr. Gogolewski, and Ms.
18 Murphy-Austin had all visited the Barn and Nissan property while Putnam was performing Ford repairs
19 at this location. Putnam was not hiding its use of the Barn from Ford—going so far as to drive Ford
20 representatives to the Barn and Kent Putnam telling Ms. Swann about the ongoing use of the Barn.

21 Ford did not take any action against Putnam’s use of the Barn until Ford saw an opportunity to
22 use the Barn service location as leverage in the labor rate litigation. Ford did not take any action in
23 response to Putnam’s use of the noncustomer facing service location, prior to it being identified as a
24 litigation tool, because Ford representatives admitted 885 North San Mateo Drive did not have enough
25 space for Putnam to perform its service obligations. (Exh. P-143.04, 611:20-612:1 and Exh. P-151.008,
26 53:15-18 (Mr. Sweis agreeing the 885 North San Mateo Drive location is not sufficient to fulfill Putnam
27 Ford’s service obligation on its own); Exh. P-155.015, 204:17-24 and Exh. P-156.020, 27:4-10 (Ms.
28 Murphy-Austin agreeing the 885 North San Mateo Drive location did not have adequate service

1 capacity).) During the Audit closing meeting, Mr. Owens, Ms. Swann, and the head of Ford's audit
2 department (Ms. Crawford) acknowledged Putnam's need for more service capacity.⁷ (RT Vol. III, 98:5-
3 19.)

4 Moreover, Putnam Ford cannot perform heavy duty work involving transmissions or engine pulls
5 or work on F-550s at the 885 North San Mateo Drive location. (RT Vol. IV, 151:7-14.) Mr. DeFrees
6 testified the roof height is too low at 885 North San Mateo Drive to complete repairs for full-size transits,
7 the bigger Ford vans, ambulances, and trucks that have aftermarket roof racks installed or contractor
8 trucks. (RT Vol. IV, 202:12-203:25.) Putnam previously performed such repairs at the Barn. (RT Vol.
9 IV, 151:15-152:11; *see also* RT Vol. IV, 204:19-205:5 (Mr. DeFrees testifying there were not any repairs
10 that could not be performed at the barn location).)

11 Ford created slides as part of its consideration of the proposed relocation of Putnam's sales and
12 service operations that showed the total UIO for Putnam Ford's operations to be 8,154. (Exh. P-147;
13 Exh. P-158.046-.047, 53:15-54:9 (describing Ford's purpose in preparing Exhibit P-147).) To reach the
14 state average UIO per stall for Ford dealers in California, Putnam would have needed 26 stalls (8,154
15 divided by 26 totals approximately 314 UIO per stall compared to the state average of 312). (*Id.*; *see*
16 *also* RT Vol. VII, 65:16-21 (Mr. Benke testifying the metric "UIO per stall" measures units in operation
17 per dealership stall).) The five (5) stalls Putnam has at its current facility is less than *twenty percent* of
18 the stalls necessary to have UIO per stalls at the Putnam facility be anywhere *close* to state average UIO
19 per stall counts.

20 This extreme inadequacy is why Ford permitted operations at the Barn to continue without issue
21 until Ford determined it would use the Barn repairs as litigation leverage and in retaliation for the labor
22 rate request. Even though Ford representatives had been visiting the Barn since September of 2021, at
23 the latest, and Mr. Putnam showed Ms. Swann Putnam Ford was using the Barn for service in October

24 ⁷ In fact, Mr. Owens proposed using an "A" and "B" RO code system to designate those repairs
25 performed at the barn compared to 885 North San Mateo Drive. (RT Vol. III, 98:10-24; *see also* RT
26 Vol. IV, 144:23-145:20 (describing Mr. Owens' suggestion of a Location A and B solution to
27 identifying the location where repairs took place); RT Vol. IV, 268:7-268:15 (Mr. Kamenetsky
28 describing Mr. Owens and Mr. Crawford asking Mr. Davis and Mr. Freschet to come up with a plan to
separate work done at Location A and Location B such that warranty repairs could only take place in
the main facility).) This would allow some operations to continue at the Barn while all warranty work
took place at the authorized Ford facility.

1 of 2022, Ford did not decide to pursue the Audit until March 2023, little more than one month before the
2 Section 3065.4 merits hearing was scheduled to commence on April 25, 2023. For Ford, the Audit
3 became “a TOP Priority Warranty Allegation” (RT Vol. II, 47:4-24; Exh. P-113.001) with “an urgent
4 request to proceed” (Exh. P-111.001).

5 The merits hearing in the labor rate litigation was scheduled to commence on April 25, 2023.
6 Ford wanted the information from the Audit for use in the labor rate litigation where it argued any repairs
7 completed at the Barn would invalidate the Putnam labor rate request, as well as to leverage Putnam to
8 settle when faced with a significant proposed Audit chargeback.

9 **B. Ms. Swann provided false testimony about her knowledge of the Audit during her**
10 **deposition in the Section 3065.4 Protest.**

11 During her April 26, 2023, deposition, Ms. Swann testified she did not know Jonathan Owens.
12 (RT Vol. VII, 84:8-18.) However, at the hearing, she admitted at the time of her deposition she had
13 actually had at least two prior communications with Mr. Owens in scheduling visits to Putnam Ford for
14 the Audit. (RT Vol. VII, 84:19-24; see also Exh. P-112 (showing Ms. Swann communicated with Mr.
15 Owens in March 2023); Exh. P-115 (showing Mr. Owens sent Ms. Swann the email concerning the
16 warranty study at Putnam Ford on March 29, 2023).)

17 Ms. Swann concealed her knowledge of the ongoing allegation audit process and her
18 communications with Mr. Owens to prevent Putnam from using this information in the ongoing labor
19 rate litigation. Ms. Swann was a central participant in the initiation of the allegation audit process
20 because she scheduled the January 19, 2023 visit to Putnam Nissan and instructed Ms. Hughes to take
21 photos of Ford vehicles already known to be serviced there (RT Vol. VI, 143:10-13; RT Vol. VI, 144:18-
22 19; Exh. P-107; RT Vol. VI, 137:17-22). Ms. Swann was also a critical Ford witness in the labor rate
23 litigation. Ms. Swann attempted to conceal the direct connection between the labor rate litigation and
24 the Audit because she had set the retaliatory Audit in motion during her January 19, 2023, visit to the
25 Putnam Nissan facility.⁸ (See Exh. P-110.) Ford did not want Ms. Swann to have to explain the Audit
26

27
28 ⁸ It was clear Ford was precluded from proceeding with a retaliatory audit based on the labor rate
request pursuant to Vehicle Code section 3065.2 (i)(2)(G) which precludes directly *or indirectly* taking
any adverse action against a franchisee by “Conducting ... nonroutine or nonrandom warranty ...

1 was not in retaliation for the labor rate request. Ford now disingenuously argues this issue is irrelevant
2 to the instant protest.

3 C. **Ms. Swann attempted to conceal preparations with Ms. Hughes to document the**
4 **known Ford service work performed at the Nissan location; she also attempted to**
5 **misrepresent Mr. Putnam's statements made during the tour of the Nissan Facility.**

6 Ms. Swann further attempted to distance herself from the premeditated nature of the January 19,
7 2023 visit to Putnam Ford with Ms. Hughes. The purpose of taking photos of Ford vehicles being
8 repaired at the Nissan facility was to show both customer pay and warranty repairs, but especially
9 warranty repairs occurring at an unauthorized location. (RT Vol. VI, 139:5-14.) Ms. Swann's testimony
10 was directly contradicted by the testimony of Ms. Hughes.

11 As an initial matter, Ms. Swann knew repairs were occurring at the Barn as of October 2022,
12 well before the January 19, 2023, visit. Mr. Putnam told her as much. (RT Vol. VII, 95:23-96:12 and
13 97:10-14.) Moreover, Putnam submitted a request to formally acknowledge the use of the Barn in the
14 DSSA, on October 25, 2022. (Exh. P-104.)

15 Ms. Hughes testified the January 19, 2023 visit was her first to Putnam Ford in her role as a
16 network development manager. (RT Vol. VI, 134:22-135:15.) Ms. Swann testified the January 19, 2023
17 visit was her second visit to Putnam Nissan. (RT Vol. VII, 118:8-14.)

18 However, Ms. Swann's testimony and Ms. Hughes's testimony concerning preparations for that
19 visit cannot be reconciled. Ms. Hughes testified she spoke with Ms. Swann in advance of the visit to
20 Putnam Ford. (RT Vol. VI, 136:9-21.) Prior to the visit and before Ms. Hughes had ever been to the
21 Putnam dealership, Ms. Swann told Ms. Hughes she was concerned Putnam might be doing Ford service
22 work at an unauthorized facility called the Barn, at Putnam Nissan. (RT Vol. VI, 136:22-137:16.)

23 In preparation for the visit, Ms. Hughes testified Ms. Swann designated her to be the photo taker
24 during the visit. (RT Vol. VI, 137:17-22.) Ms. Hughes, in fact, took the photos of both the Nissan
25 facility and the Barn. (RT Vol. VI, 138:6-9.)

26 In contrast, Ms. Swann denied knowing Putnam Ford was still doing service work at the Barn.
27 (RT Vol. VII, 118:15-19.) Moreover, Ms. Swann denied telling Ms. Hughes prior to the visit to take

28 audits in response to a franchisee seeking compensation or exercising any right pursuant to this
section." (Cal. Veh. Code, § 3065.2, subd. (i)(2)(G).)

1 pictures of any Ford service work she saw on the Putnam Nissan property. Ms. Swann suggested she
2 started off taking pictures and then turned the picture taking over to Ms. Hughes. (RT Vol. VII, 118:20-
3 119:9; *see also* RT Vol. VII, 119:20-120:1 (denying there was a plan for Ms. Hughes to take the photos
4 and suggesting “we were just taking pictures of the facility”).)

5 In addition, before Ms. Swann and Ms. Hughes ever arrived at the dealership, Ms. Hughes
6 testified Ms. Swann told her “that Mr. Putnam and others potentially in the organization had lied about
7 what had been said in previous conversation.” (RT Vol. VI, 141:6-13.) This was the first impression
8 Ms. Swann provided Ms. Hughes of Putnam Ford before Ms. Hughes had ever met any Putnam
9 representative.

10 Ms. Swann denied telling Ms. Hughes before the visit that “the Putnam people could not be
11 trusted and that they had lied about previous things that were said” or anything along those lines. (RT
12 Vol. VII, 120:2-14.) Ms. Hughes’s testimony is more credible than the testimony of Ms. Swann.

13 Upon describing the visit itself, there continued to be inconsistencies between the testimonies of
14 Ms. Swann and Ms. Hughes. Ms. Hughes testified, during the visit, Ms. Swann and Ms. Hughes saw
15 Ford vehicles being serviced. She said Mr. Putnam indicated the repairs were all customer pay or that
16 all the repairs were retail repairs. (RT Vol. VI, 142:3-25.) She did not recall Mr. Putnam saying anything
17 more and nothing about supposed statements from Kent Putnam that the Ford vehicles under repair were
18 for Ford vehicle owners that for some reason brought their vehicles to the Nissan dealership for service.
19 (RT Vol. VI, 143:1-9.)

20 In contrast, Ms. Swann testified she reminded Mr. Putnam she had previously advised Mr.
21 Putnam that Putnam Ford could not service Ford vehicles at the Putnam Nissan facility. She further
22 testified Mr. Putnam responded by saying the vehicles were for Nissan customers. (RT Vol. VII, 119:10-
23 15.)

24 The testimonies of Ms. Swann and Ms. Hughes concerning the January 19, 2023, visit cannot be
25 reconciled. One testified there was a plan going into the meeting concerning who would take photos;
26 the other denied such a plan. One testified the supervisor called Mr. Putnam a liar before the visit; the
27 other denied having said anything along those lines. One testified Mr. Putnam said the Ford vehicles
28

1 were either customer pay repairs or retail repairs—*nothing else*; the other testified Mr. Putnam said the
2 Ford vehicles being repaired were for Nissan customers.

3 The reason for the inconsistencies is clear. Ms. Swann again attempted to distance herself from
4 the predetermined plan to obtain evidence on January 19, 2023 to start an allegation process that would
5 be certain to result in the Audit. Based on Ms. Hughes’s testimony, Ms. Swann’s testimony can be seen
6 for what it is: an effort to conceal the premeditated and retaliatory nature of the allegation audit process
7 starting with the allegation itself.

8 **D. Ford’s prior Regional Manager for the San Francisco Region reacted to Putnam’s**
9 **labor rate request vowing never to provide any assistance to Putnam if it was within**
10 **her discretion to deny.**

11 Meagan Murphy-Austin was Ms. Swann’s immediate predecessor. In an email to Mike
12 Gogolewski dated September 1, 2021, Ms. Murphy-Austin wrote, “If they [Putnam] continue to pursue
13 this twice the market average type rate, they won’t see a lick of support from me moving forward.”⁹
14 When confronted with her own words of intended retaliation for the Putnam labor rate request, Ms.
15 Murphy-Austin attempted to backtrack on these statements explaining she meant, she would deny
16 Putnam “above-and-beyond-type favors that I would do for dealers that are good partners to Ford Motor
17 Company.” (Exh. P-154.020, 59:18-25; *see also* Exh. P-155.019-.020, 208:18-209:17.)

18 Ms. Murphy-Austin further wrote, “Product, facility money ... Nothing.” She would later testify
19 she meant, “if [Putnam] wanted to make a proposal for something and asked for Ford’s participation and
20 it was something that wasn’t required of us, I wasn’t going to go out of my way to provide funding for
21 a dealer that hasn’t been a good partner to us or to our customers.” (Exh. P-154.021-.022, 60:19-61:9;
22 *see also* Exh. P-155.019-.020, 208:18-209:17.) This was Ms. Murphy-Austin’s direct response to
23 Putnam’s labor rate submission. (Exh. P-154.022, 61:10-12.) Ms. Murphy-Austin’s intention to treat
24 Putnam differently in response to its labor rate request is undeniable. This unambiguous sentiment was
25 no doubt passed on to Ms. Swann whose subsequent actions demonstrate she received the directive loud
26 and clear.

27 ⁹ It is important to note Mike Gogolewski’s time with the Region overlapped with Ms. Swann’s and he
28 was also directly involved in the initial relocation of Putnam to 885 North San Mateo Drive.
Moreover, he actually observed Ford vehicles being serviced in the Barn, on at least one occasion, in
April 2022.

1 Ms. Murphy-Austin did not recall withholding any such support in her role as the San Francisco
2 Regional Manager (Exh. P-154.021, 60:7-13), however, it is plain to see Ford, through Ms. Swann,
3 applied this sentiment when it refused to timely consider, and ultimately rejected, Putnam's request to
4 formally acknowledge the use of its non-customer facing satellite service operations. Ms. Murphy-
5 Austin's email is evidence of Ford's intent to retaliate against Putnam for the labor rate submission, in
6 direct violation of Section 30365.2, subdivision (i)(2)(G). Ford's efforts to wipe the slate clean when it
7 replaced Ms. Murphy-Austin with Ms. Swann is little more than pretext. Ford's treatment of Putnam
8 Ford continued to be punitive and retaliatory and ultimately resulted in the Audit.

9 **E. Ford's own document shows Greenberg Traurig to be the source of the allegation**
10 **giving rise to the initiation of the Audit process.**

11 Ford's allegation tracker entry for the Putnam Ford allegation audit is contained in Exhibit P-
12 110. (Exh. P-110.) The entry describes the allegation arising from Ms. Swann's January 19, 2023, visit
13 to Putnam Ford as described above. (Exh. P-110; *see supra* Part I.C.) The source of the allegation is
14 listed as "Greenberg Traurig, LLP," the same law firm representing Respondent in the Labor Rate
15 litigation.¹⁰ (*Id.*) There was no Audit, let alone a protest filed in response to the Audit, on March 3,
16 2023. The direct involvement of outside counsel assigned to the labor rate litigation with Ford's
17 initiation of the allegation audit process is troubling.

18 Ms. Crawford received the allegation on March 3, 2023. (Exh. P-157.022, 31:16-22; *see also*
19 Exh. P-110 (Date Received column); Exh. P-161.018, 23:8-19.) The source column on the allegation
20 tracker indicates from where the audit department received the information. (Exh. P-157.022-023,
21 31:23-32:1.) Ford failed to produce any document showing the allegation was routed through any normal
22 process at Ford. The only document Ford offered is Exhibit P-110 showing Greenburg Traurig as the
23 source of the allegation.

24
25
26

¹⁰ Mr. Owens suggested it was a mistake to list Greenberg Traurig, LLP as the source of the allegation.
27 (RT Vol. II, 52:2-6.) This is not credible because Mr. Owens suggests the source should instead say
28 the Region, however, he did not have any other discussion with Ms. Swann or Ms. Hughes about the
photos that were taken beyond the discussion contained in the email chain in Exhibit P-112. (RT Vol.
II, 40:3-8.) These discussions occurred after Mr. Owens received the allegation.

1 Moreover, the non-privileged information in the email chain leading to Ms. Crawford telling Mr.
2 Owens he should upload the allegation in the tracker and the allegation would be assigned to him shows
3 the source of the allegation to stem from Greenberg Traurig. (See Exh. P-111.) The first email in the
4 chain is from an attorney from Greenberg Traurig on the same date identified in the allegation tracker—
5 March 3, 2023. (Exh. P-110 and P-111.) The email is sent to Robinson who sends it to Sharita Crawford
6 who sends it to Mr. Owens. (Exh. P-111.)

7 Further, the subject line of the email, which is not redacted or withheld as privileged, states
8 Subject: RE: Legal Request – Putnam Ford in San Mateo – Servicing Ford Vehicles at Nissan Facility.
9 The subject line shows what began as a legal request, quickly resulted in the Audit.

10 To be clear, Protestant does not argue any inference should be drawn from Ford’s invocation of
11 the attorney client privilege. No such inference is necessary. Ford failed to meet its burden because it
12 failed to produce any evidence that can support finding Ford selected Putnam for the Audit on a
13 reasonable basis that was not retaliatory or punitive, and not done in direct response to the Putnam labor
14 rate request.

15 **F. Ford failed to produce any evidence showing the communication of Ms. Swann’s**
16 **allegation to any Ford employee.**

17 Ms. Crawford received an email containing the allegation. (Exh. P-157.013, 16:7-13.) Ms.
18 Crawford testified she did not know who the email was from.¹¹ (Exh. P-157.013, 16:10-16.)

19 Mr. Owens suggested it was a mistake to list Greenberg Traurig, LLP as the source of the
20 allegation. (RT Vol. II, 52:2-6.) This is not credible because Mr. Owens suggests the source should
21 instead say the Region, however, he did not have any other discussion with Ms. Swann or Ms. Hughes
22 about the photos that were taken beyond the discussion contained in the email chain in Exhibit P-112.
23 (RT Vol. II, 40:3-8.) These communications occurred *after* the allegation was already assigned to Mr.
24 Owens.

25
26 ¹¹ Ms. Crawford later attempted to contradict this, suggesting the allegation was from the Region.
27 (Exh. P-157.042, 64:6-18.) However, she did not know if she received an email from Ms. Swann
28 containing the allegation. (Exh. P-157.044, 66:2-4.) Similarly, she did not know if she received an
email from Ms. Hughes containing the allegation. (Exh. P-157.044, 66:5-7.) At the end of her
deposition, Ms. Crawford affirmed again that she still did not know who sent her the allegation. (Exh.
P-157.047, 77:9-23.)

1 Ford did not offer any documents showing how or who communicated the allegation to Ford's
2 audit department. Ms. Swann herself did not testify she provided the allegation to anyone. Ms. Hughes
3 testified she only provided her photos to Ms. Swann; she only later provided them to another person (Mr.
4 Owens) after he was already assigned to investigate the allegation. (RT Vol. VI, 147:13-24.)

5 The only evidence in the record shows Greenberg Traurig to be the source of the allegation that
6 initiated the process that would result in the Audit. Mr. Owens initial reactions to the allegation and the
7 audit process are instructive. First, he initially determined Greenberg Traurig to be the source of the
8 allegation. (Exh. P-110; RT Vol. II, 29:13-15 (Mr. Owens confirming he uploaded the information into
9 the warranty tracker).) Second, he initially understood the allegation audit process was related to the
10 labor rate request. (RT Vol. I, 247:5-11; *see also* RT Vol. II, 181:10-12 and 16).)

11 **G. Ford failed to produce evidence showing who authorized the initiation of the audit**
12 **allegation process.**

13 While Exhibit P-111 indicates Ms. Crawford's intent to assign Mr. Owens to the allegation Audit
14 (Exh. P-111.001), Mr. Owens denied the email from Ms. Crawford assigned Mr. Owens to the allegation
15 Audit. Ford failed to provide any evidence showing how Mr. Owens was assigned to the Audit. Once
16 he was assigned, all of his recommendations—including to conduct the warranty study and escalate the
17 study to an audit were “instantaneously,” “immediately,” and “almost instantaneously,” approved and
18 assigned to him by Ms. Crawford. (RT Vol. I, 98:14-23; RT Vol. I, 126:25-128:18)

19 **H. Ford's conduct shows it unlawfully selected Putnam for and performed the Audit in**
20 **a punitive, retaliatory, and unfairly discriminatory manner.**

21 Vehicle Code section 3065 subdivision (e)(1) provides, “A franchisor shall not select a franchisee
22 for an audit, or perform an audit, in a punitive, retaliatory, or unfairly discriminatory manner.” (Cal.
23 Veh. Code, § 3065, subd. (e)(1).) In addition, the Vehicle Code prohibits a franchisor from “Directly or
24 indirectly” taking any adverse action against a franchisee for seeking compensation or exercising any
25 right pursuant to Section 3065.2, including “Conducting ... nonroutine or nonrandom warranty ... audits
26 in response to a franchisee seeking compensation or exercising any right pursuant to this section.” (Cal.
27 Veh. Code, § 3065.2, subd. (i)(2)(G).)

1 Here, the evidence shows Ford violated both Vehicle Code sections. It is undisputed Ford
2 selected Putnam for a nonroutine and nonrandom warranty audit. (RT Vol. II, 136:25-137:4.) The
3 allegation provided Ford the purported basis to initiate the Audit of Putnam Ford. (Exh. P-157.008,
4 11:20-24; *see also, infra*, Part IV.) Ford does not conduct random audits. (RT Vol. I, 75:21-22.) The
5 LaShawn Swann kabuki dance does not change the fact the Audit was a direct response to the Putnam
6 labor rate request and based upon circumstances known to Ford for at least one and half years before the
7 Audit.

8 As the foregoing sections show (*see, supra*, Parts I.A-G), Ford's selection of Putnam for the
9 allegation audit process was motivated by the ongoing labor rate litigation and to create a half million
10 dollars of potential chargebacks to respond to Putnam's labor rate submission. As the background
11 section above demonstrates, the timelines of the labor rate submission litigation and Ford's process in
12 conducting the labor rate cannot be untangled. (*See also* timeline of events in Proposed Findings of Fact
13 submitted herewith.) As one step of discovery was occurring in the labor rate litigation another step in
14 the Audit process was occurring.

15 Ford's goal was always to identify which repairs were occurring at Putnam Ford to use in the
16 labor rate litigation.¹² Ford advanced the argument customer pay repairs conducted at the Barn could
17 not be considered "qualified repairs" for purposes of Putnam's labor rate submission. (*See* Exh. R-
18 336.050 (Paragraph 16 on page 48 showing Ford argued and presented evidence concerning protestant
19 performing some of the repairs in the Submission at an unauthorized location).) Ford claimed it would
20 not provide reimbursement for warranty work completed at the Barn and therefore any customer pay
21 work completed at the Barn could not be considered a qualified repair "that would have been covered
22 by a manufacturer's warranty if the work had been required and performed during the period of the
23 warranty." (Cal. Veh. Code, § 3065.2, subd. (j).) To support Ford's argument in the labor rate litigation,
24 the Audit was initiated as "urgent" and a "top-priority."

25
26
27
28 ¹² Even though this was always immaterial to Vehicle Code section 3065.2. A qualified repair order
for purposes of Section 3065.2(j) is based on the work perform and not whether the franchisor would
have paid the franchisee for the work performed. (Cal. Veh. Code, § 3065.2, subd. (j).)

1 Ford sought discovery regarding the locations of all repairs as early as August 8, 2022, in the
2 labor rate litigation. As part of discovery in Protest PR-2759-21 (Labor Rate), Respondent requested,
3 among other discovery requests, documents sufficient to show the physical location at which every repair
4 documented on each Repair Order was made, “including without limitation any repairs made or
5 completed at a location other than Your authorized Ford dealership location.” (Protest No. PR-2759-21,
6 Respondent Requests for Production, No. 40.)

7 The location of the repairs was such a central component of Ford’s labor rate litigation argument
8 that instead of relying on authorized methods of discovery before the Board, Ford decided to send Mr.
9 Owens to Putnam Ford to conduct the Audit *while the labor rate litigation was ongoing*. As the evidence
10 showed, at one point during the Audit, Mr. Owens sorted and filtered claims from the six technicians
11 Mr. Owens identified; his “interest went toward the warranty claims that were identified with those six
12 technicians.” (RT Vol. II, 139:7-16.) Mr. Owens shadowed Putnam technicians at the Barn for at least
13 a day watching them complete repairs. (RT Vol. IV, 205:10-206:2.)

14 Mr. Owens asked Mr. DeFrees in which stalls the Putnam Ford employees worked because he
15 was interested in who worked at the Barn and who worked at the main shop. (RT Vol. IV, 223:18-
16 224:6.) Mr. Owens used a list of technician IDs to determine which claims were performed by
17 technicians working at the Barn or the Nissan service facility. (RT Vol. I, 139:7-142:3; Exh. R-321.)
18 The list showed six technicians who worked at either the Barn or the Nissan service facility. (*Id.*)

19 Then Mr. Owens asked for “a lot of repair orders” with a focus on the repairs performed by the
20 six technicians who Mr. Owens identified as working in an unauthorized facility. (RT Vol. I, 136:2-21.)
21 All but two (2) of the 552 chargebacks in Mr. Owens proposed chargebacks were associated with reason
22 code D61.07 which meant that the repairs were performed at a location other than Putnam’s authorized
23 Ford facility. (RT Vol. I, 148:1-19; *see also* Exh. P-157.032-.033, 48:23-49:3.) Once Mr. Owens had
24 his list of technician IDs to determine which claims were performed by technicians working at the Barn
25 or in the Nissan service stalls (*see* RT Vol. I, 139:7-142:3; Exh. R-321), Ford could focus on these
26 technician IDs for the ROs in the labor rate litigation. As Mr. Owens admitted, he did not recall *any*
27 proposed Audit chargebacks for warranty repairs completed at the main facility. (RT Vol. I, 142:4-8.)
28

Vehicle Code sections 3065 subdivision (e)(1) and 3065.2 subdivision (i)(2)(G) both precluded Ford from proceeding with the retaliatory Audit against Putnam for its labor rate submission. Ford unlawfully sought to obtain evidence through Audit while the labor rate litigation was ongoing. Ford initiated the allegation audit process when Ms. Swann visited Putnam on January 19, 2023, to capture photographs of the Ford service work already known to be ongoing.

II. THE PROPOSED CHARGEBACKS ARE NEITHER FALSE NOR FRAUDULENT, BUT THESE FINDINGS ARE UNNECESSARY BECAUSE FORD FAILED TO DEMONSTRATE THE AUDIT WAS NOT PUNITIVE AND IN RETALIATION FOR PUTNAM'S LABOR RATE REQUEST.

The vast majority of the proposed chargebacks are for warranty work that was properly performed. It includes the proposed chargeback of parts actually installed on customers' vehicles when Putnam was fulfilling Ford's warranty obligations to Ford vehicle owners. Putnam is required by the terms of the DSSA to provide warranty work to Ford vehicle owners. Similarly, Putnam is required to provide adequate service facilities to meet these obligations. (Exh. J-1.020.)

The bulk of the proposed chargebacks are because the location of the repairs was not formally recognized in the DSSA. Per the DSSA, all authorized locations must be set forth in the Facility Supplement. However, Ford *never* provided Putnam a Facility Supplement. The stated purpose of the Facility Supplement is to ensure all locations are identified and incorporated into the DSSA. The DSSA even requires this be periodically reviewed to ensure it is current. Nevertheless, *at no point* did Ford ever discuss this critical document with Putnam nor was a Facility Supplement ever provided. (*See* Exh. J-1.020 (provision (5)(b) indicating the parties have executed a Dealership Facilities Supplement).)

It is unnecessary for the Board to issue findings concerning the merits of any of the proposed chargebacks. As argued above, the Audit was retaliatory and punitive and therefore the Audit was conducted in violation of Section 3065(e)(1). Having failed to meet its burden to show the Audit was not punitive and retaliatory, Ford is not entitled to findings regarding the unlawfully conducted Audit. Moreover, the Audit is also unlawful because it was directly in response to Putnam's labor rate submission, which is prohibited pursuant to Section 3065.2(i)(2)(g).

1 A. **Section 3065.2 precluded Ford from acting other than in good faith in response to**
2 **Putnam’s labor rate submission; Ford frustrated Putnam’s requests to add an**
3 **additional service location to its DSSA which would have cured any material non-**
4 **compliance with reason code D61.07 in the Audit.**

5 Section 3065.2, subdivision (i)(2)(D), precluded Ford from acting “other than in good faith” in
6 direct or indirect response to Putnam’s labor rate submission. (Cal. Veh. Code, § 3065.2, subd.
7 (i)(2)(D).) Similarly, Section 3065, subdivision (g)(3) provided Putnam the right to “cure any material
8 noncompliance” if the reasons for Ford’s proposed chargeback are “noncompliance with documentation
9 or administrative claims submission requirements.” (Cal. Veh. Code, § 3065.2, subd. (g)(3); *see also*
10 subd. (c) (providing similar language with the clarification, “If disapproval is based upon noncompliance
11 with documentation or administrative claims submission requirements, the franchisor shall allow the
12 franchisee at least 30 days from the date of receipt of the written disapproval notice to cure any material
13 noncompliance.”))

14 Here, Ford violated both Sections by unreasonably refusing Putnam’s requests to secure formal
15 recognition of its ongoing and necessary use of off-site non-customer facing service operations. Ford
16 representatives repeatedly admitted Putnam’s desperate need for this additional service capacity during
17 the hearing. Mr. Sweis agreed the 885 North San Mateo Drive location is not sufficient to fulfill Putnam
18 Ford’s service obligation on its own. (Exh. P-143.04, 611:20-612:1; Exh. P-151.008, 53:15-18.) Mr.
19 Sweis described the 885 North San Mateo Drive service facility as “very small.” “I believe, two or three
20 bays. It’s a drive-through kind of a system. It’s not open, wide width-wise where you could bring in
21 three separate cars. It was a pass-through type of a system.” (Exh. P-151.004, 33:1-10.) Ms. Murphy-
22 Austin agreed the 885 North San Mateo Drive location did not have adequate service capacity. (Exh. P-
23 155.015, 204:17-24; Exh. P-156.020, 27:4-10.) Mr. Benke similarly agreed Putnam Ford does not have
24 enough service capacity for the customers in its area. (RT Vol. VII, 14:11-18.)

25 Moreover, Putnam Ford cannot perform heavy duty work involving transmissions or engine pulls
26 or work on F-550s at the 885 North San Mateo Drive location. (RT Vol. IV, 151:7-14.) Mr. DeFrees
27 testified there are issues with the roof height at 885 North San Mateo Drive on some repairs for full-size
28 transits, the bigger Ford vans, ambulances, and trucks that have aftermarket roof racks installed or
29 contractor trucks. (RT Vol. IV, 202:12-203:25.) Putnam previously performed such repairs at the Barn.

1 (RT Vol. IV, 151:15-152:11; *see also* RT Vol. IV, 204:19-205:5 (Mr. DeFrees testifying there were not
2 any repairs that could not be performed at the barn location).)

3 The conditional letter of approval Kent Putnam executed for operations at the 885 North San
4 Mateo Drive facility provided for twelve (12) service stalls. (Exh. P-102.001.) There were three (3)
5 stalls at the 885 North San Mateo Drive facility at the time Ford approved the relocation. (RT Vol. III,
6 74:3-10.) Mr. Gogolewski told Mr. Vasquez Ford would be flexible and willing to work with Putnam
7 Ford concerning service capacity. (RT Vol. III, 78:20-79:2.) When Ms. Murphy-Austin was the San
8 Francisco Regional Manager, Ford was “open to adding service capacity in a Ford-approved building.”
9 (Exh. P-154.012-.013, 41:24-42:11.)

10 Despite this early, *pre-labor rate request*, willingness to work with Putnam concerning the
11 obvious need for more service capacity,¹³ Ford unreasonably refused multiple Putnam requests to
12 formally add more non-customer off-site service capacity. Protestant formally requested authorization
13 to use the Barn for non-customer facing offsite overflow service operations on October 25, 2022. (Exh.
14 P-104; *see also* RT Vol. IV, 238:20-241:2 (Mr. Kamenetsky drafted the letter after Ms. Swann’s visit to
15 the Barn to request the Barn be added to the dealer agreement); RT Vol. VII, 99:7-14 (Ms. Swann
16 agreeing Exhibit P-104 is the request Mr. Putnam submitted subsequent to her meeting and discussion
17 in October of 2022).)

18
19
20 ¹³ As discussed above Putnam’s main facility had approximately 20% of the lifts necessary to meet the
21 state average UIO per stall based on the UIO in Putnam’s market area. Moreover, Putnam Ford is not
22 able to timely complete all warranty work at the 885 North San Mateo Drive location. (RT Vol. IV,
23 147:8-16; *see also* RT Vol. IV, 166:8-167:10 (Mr. Davis describing Ford customers are unable to
24 receive complete warranty repair work in as timely a manner as when Putnam Ford utilized the Barn);
25 RT Vol. IV, 216:2-217:1 (Mr. DeFrees indicating customers are receiving the same quality repairs but
26 the speed of those repairs has been impacted).) The space limitations at 885 North San Mateo Drive
27 prevent technicians from working on two vehicles at once and creates time efficiency issues in
28 Putnam’s ongoing service operations. (RT Vol. IV, 147:23-150:1.) Putnam Ford cannot perform
heavy duty work involving transmissions or engine pulls or work on F-550s at the 885 North San
Mateo Drive location. (RT Vol. IV, 151:7-14; *see also* RT Vol. IV, 202:12-203:25 (Mr. DeFrees
testifying there are issues with the roof height at 885 North San Mateo Drive on some repairs for full-
size transits, the bigger Ford vans, ambulances, and trucks that have aftermarket roof racks installed or
contractor trucks).) Putnam previously performed such repairs at the Barn. (RT Vol. IV, 151:15-
152:11; *see also* RT Vol. IV, 204:19-205:5 (Mr. DeFrees testifying there were not any repairs that
could not be performed at the barn location).)

1 Protestant additionally requested authorization to use 925 Bayswater Ave for non-customer
2 facing offsite overflow service operations on December 13, 2022. (Exh. P-106; *see also* RT Vol. IV,
3 246:2-247:7 (Mr. Kamenetsky drafted the letter to expand Putnam Ford's previous request beyond just
4 the Barn but to also offer the entire 101 California Drive property as well as supplemental service work
5 at 925 Bayswater Avenue).) The request to use 925 Bayswater for additional non-customer facing
6 service maintenance and repair capacity did not replace the request to use the Barn for off-site service
7 capacity; it sought to be supplemental capacity for larger vehicles such as Amazon fleet vehicles and
8 box trucks. (RT Vol. IV, 247:8-22.)

9 The record evidence shows no response was forthcoming to either request. Protestant followed
10 up the request to use the Barn for non-customer facing offsite overflow service operations on April 19,
11 2023, while it continued efforts to relocate the entire Putnam sales and service operation to 925
12 Bayswater. (Exh. P-119.) Putnam sought to relocate the entire operations to 925 Bayswater while
13 reaffirming Putnam's request for non-customer-facing maintenance at the Barn. (RT Vol. IV, 258:16-
14 22.)

15 On June 12, 2023, Respondent issued its Audit closing letter proposing to chargeback
16 approximately half a million dollars (\$502,821.56). (Exh. R-317.002-.003.) On June 16, 2023, only
17 *four* days after the Audit closing letter, Respondent responded, *for the first time*, to Putnam's several
18 requests to use the Barn for non-customer facing offsite overflow Ford service operations. Respondent
19 denied the request. (Exh. P-133.) Mr. Kamenetsky testified the June 16, 2023, letter was the first
20 response Putnam Ford received denying the request to utilize the Barn location for non-customer facing
21 service capacity. (RT Vol. IV, 275:2-5.) Putnam never received a response to the October 2022 request
22 or the December 2022 request; Ford's June 16, 2023, letter responded to the April 19, 2023, letter. (RT
23 Vol. IV, 275:2-12.) Ford did not respond to Putnam's October 2022 request because Ms. Swann did
24 nothing with the request. There is no record of Putnam's request being provided to any other Ford
25 employee for consideration.

26 Ford's delay in responding was to allow Ford time to issue the Audit closing letter before issuing
27 the facility denial. Respondent's response was approximately eight months after Putnam first requested
28 Ford formally recognize its ongoing use of the Barn for non-customer facing offsite overflow service

1 operations. (*Compare* Exh. P-104 (request on October 25, 2022) *with* Exh. P-133 (response on June 16,
2 2023).) If Respondent had approved the request, it would have cured the reason Respondent proposed
3 to chargeback Putnam half a million dollars and would have undermined Respondent’s central argument
4 in the Labor Rate litigation. Ms. Swann never advised Ford’s Audit Department of Putnam Ford’s
5 request to utilize the Nissan location for service in October of 2022. (Exh. P-157.024, 33:13-23.)

6 Ford’s June response expressed concerns about co-locating operations with the Nissan franchise.
7 Ms. Karnes helped draft the response to Putnam’s April 19, 2023, letter. (Exh. P-158.022-023, 28:16-
8 29:15; *see also* Exh. P-158.029-.030, 36:8-37:3.) Ms. Karnes was unable to articulate any potential
9 issues with the proposed co-location of the service operations with the Nissan franchise without revealing
10 discussions with counsel; she did not articulate any reason why the proposed co-location might be a
11 problem with the proposal.¹⁴ (Exh. P-158.035, 42:6-14.)

12 On July 6, 2023, Putnam requested Ford consider and approve the still pending request to conduct
13 non-customer facing offsite overflow service operations at 925 Bayswater. (Exh. P-134.) Respondent
14 denied the request to conduct non-customer facing offsite overflow service operations at 925 Bayswater
15 by letter dated July 27, 2023. (Exh. P-138.) Respondent denied the request approximately seven (7)
16 months after Putnam first made the request. (*Compare* Exh. P-106 (request on December 13, 2022) *with*
17 P-138 (response on July 27, 2023).) Ford’s purported reasons for denying the service capacity was due
18 to the 925 Bayswater location currently being under protest by at least two dealers. (Exh. P-138; RT
19 Vol. V, 25:16-27:8.) However, there is no basis for Ford’s purported justification. A satellite service
20 location is only protestable if it is within 2 miles of an existing dealership (Cal. Veh. Code, § 3062, subd.
21

22 ¹⁴ Ford argues Putnam’s requests were “ever-changing.” There were only *two* (2) groups of facilities
23 at issue across all the requests: (1) 101 California Drive and the Barn and (2) 925 Bayswater (the body
24 shop). Putnam articulated reasons for the changes between the letters it sent separated by periods of
25 months. The December 13, 2022, request to use 925 Bayswater for additional non—customer facing
26 service maintenance and repair capacity did not replace the request to use the Barn for off-site service
27 capacity; it sought to be supplemental capacity for larger vehicles such as Amazon fleet vehicles and
28 box trucks. (RT Vol. IV, 247:8-22.) On October 13, 2023, Putnam did not ultimately proceed with
925 Bayswater for the permanent facility because the building would have required filling and
remodeling to make it serviceable which would have taken time, it also lacked a showroom requiring
at least three-years; in comparison 101 California Drive was already a fully functional dealership. (RT
Vol. V, 44:21-45:20.) Thereafter, Putnam reverted to proposing 101 California Drive as the permanent
facility and terminated the Nissan franchise.

1 (a)(2))—none of the protesting dealers would have rights to challenge Ford service at 101 California.

2 Thereafter, Putnam Ford attempted to correct the issues Ford identified with the off-site service
3 locations, however, Ford was hard set against permitting any off-site service because it would undermine
4 Ford’s arguments in both the labor rate litigation and audit protests.¹⁵ On October 13, 2023, Protestant
5 again requested approval to conduct non-customer facing offsite overflow service operations at 925
6 Bayswater explaining the satellite service location would not be protestable. (Exh. P-139; *see also* RT
7 Vol. V, 28:20-29:10.)

8 The site was not protestable because only a Ford dealer within two (2) miles could protest a
9 satellite service facility establishment. (Cal. Veh. Code, § 3062, subd. (a)(2).) Ms. Hughes admitted she
10 had no reason to believe there were any Ford dealers within at least three (3) miles of Putnam Ford. (RT
11 Vol. VI, 154:11-14.) Despite Putnam responding to the reason for Ford’s denial of the 925 Bayswater
12 location for off-site service operations, within days and on October 19, 2023, Respondent considered
13 and denied Putnam’s renewed request to utilize 925 Bayswater for satellite service operations. (Exh. P-
14 140.)

15 On May 17, 2024, Protestant again requested approval to conduct non-customer facing offsite
16 overflow service operations at the former Putnam Nissan facility. (Exh. P-141.) Protestant supported
17 the request with the additional information that it had terminated Nissan operations at 101 California
18 Drive. (*Id.*)

19 Within days, on May 22, 2024, Respondent considered and denied Putnam’s request to utilize
20 the former Putnam Nissan facility for satellite service operations. (Exh. P-142.)

21 Respondent’s denials of the October 13, 2023, request within six (6) days (*compare* Exh. P-139
22 *with* Exh. P-140) and May 17, 2024, request within five (5) days (*compare* Exh. P-141 *with* P-142) show
23 the six and seven-months Respondent delayed in responding to Putnam’s initial requests were
24 unreasonable (*Compare* Exh. P-104 (request on October 25, 2022) *with* Exh. P-133 (response on June
25 16, 2023); *compare* Exh. P-106 (request on December 13, 2022) *with* P-138 (response on July 27,

27 ¹⁵ If the non-customer facing off-site service locations had been approved, it would have been clear the
28 only thing supporting reason code D61.07 in the audit was the timing of the request and approval to
conduct operations at the off-site service locations.

2023)).¹⁶ Respondent delayed its responses to the initial requests to better position itself in the Labor Rate Litigation and Audit.¹⁷ Respondent's first denial of the satellite service requests followed the Audit closing letter and was issued the same week as the Audit closing letter (Exh. R-317.002-.003 (Audit closing letter dated Monday, June 12, 2023); Exh. P-133 (earliest response in the record dated Friday, June 16, 2023).)

Ford's repeated efforts to frustrate Putnam's efforts to secure approval of non-customer facing off-site service operations violated Sections 3065 and 3065.2. Ford was obligated to permit Putnam to cure any material non-compliance in response to the Audit but, Ford persisted in its unreasonable rejection of Putnam's requests to formally add non-customer facing off-site service operations. Ford's goal was to maintain its leverage and litigation argument for the labor rate protest in violation of both Sections 3065 and 3065.2.

B. The location where a repair is performed is a documentation or administrative claims submission requirement.

Ford argues the location where a repair is performed makes the claim false. (Ford's Post-Hearing Brief, 1:5-7.) Ford argues Putnam must comply with Ford's Warranty Manual which limits the location of warranty repairs to the authorized facility. (*Id.* at 4:23-5:5.)

However, Ford cannot transform what is an administrative claim submission requirement into a false claim to preclude Putnam's right to "cure any material noncompliance" pursuant to Section 3065. If Ford could do so, failure to comply with any Warranty Manual requirement would make a claim "false" due to a Ford required statement from the franchisee that the claim complied with the Warranty Manual.

¹⁶ Additionally, for purposes of comparison, other facility requests Mr. Kamenetsky made to add capacity for Volkswagen for two different offsite properties, one offsite property for Honda, and three properties for Toyota. They were each approved in a timely manner. (RT Vol. IV, 243:5-244:16.)

¹⁷ Mr. Kamenetsky further testified to his opinion the Audit was in retaliation for Putnam's retail labor rate request because the labor rate litigation was ongoing while witnesses were being deposed as the audit was taking place. Moreover, the Audit was nonrandom and originated from somewhere within Ford. (RT Vol. V, 58:20-59:8.) When Ford conducted the Audit, it was during labor rate litigation with Putnam Ford when Putnam Ford was under statutory protections from retaliatory audits, followed Putnam's official request to recognize the Barn facility as an authorized facility in October 2022, involved a chargeback that was issued prior to Ford denying Putnam's request in June of 2023, and continued to withhold approval thereafter. (RT Vol. V, 58:20-62:23.)

1 Here, there is no claim the repairs were not performed and that parts were not installed on
2 customer cars necessary to repair warrantable product defects. Claims associated with reason code
3 D61.07 stating “Service supervision: Repair not performed” do not mean the repairs were not performed.
4 Instead, it indicates the repairs *were* performed at a location other than Putnam’s authorized Ford facility.
5 (RT Vol. I, 148:1-19; *see also* Exh. P-157.032-.033, 48:23-49:3.) Mr. Owens selected the reason code
6 D61.07 as a “generalized bucket” because of a “system limitation”; i.e., Ford does not have a chargeback
7 reason code associated with repairs done at an unauthorized facility. (*See* RT Vol. II, 75:17-76:1; *see*
8 *also* Exh. P-157.033-.034, 49:23-50:11.) All of the parts in the Audit claims at issue were installed on
9 customer vehicles. (RT Vol. II, 78:16-25.)

10 A false or fraudulent claim typically involves repair that never occurred or was unnecessary. The
11 location where a warranty repair is completed does not make that repair “false or fraudulent.” (*See* Cal.
12 Veh. Code, § 3065, subd. (e)(2).) Instead, the issue of the repair location must be treated as a
13 documentation and submission requirement. Ford must demonstrate its requirement that all Putnam Ford
14 warranty repairs must be completed at the undersized and ill-equipped 885 North San Mateo Drive
15 location warranty instead of a superior noncustomer facing location on the Putnam campus, to be a
16 “reasonable and nondiscriminatory documentation and administrative claims submission
17 requirement[.]”¹⁸ (*Id.*)

18 To the extent Ford argues there is ambiguity that the location where a repair is performed makes
19 the repair false or if it is instead a documentation or administrative claim submission requirement, the
20 legislative history shows the location of a repair should fall under what the Legislature understood to be
21 a documentation or administrative claim submission requirement. In 2013, the California Legislature
22 amended 3065 through the enactment of S.B. 155.¹⁹ (Stats.2013, c. 512 (S.B. 155), § 14.) As recognized
23 by the author of S.B. 155, “In addition to preserving a well-organized and cost-effective distribution
24 system of motor vehicles, franchise laws seek to address the disparity in bargaining power between
25

26 ¹⁸ As discussed elsewhere in this brief, Ford’s requirement of the location here was unreasonable and
27 discriminatory. Ford failed to provide any reasonable consideration of Putnam’s requests for non-
28 customer facing off-site service operations—Ford focused instead on using the location requirement as
leverage against Putnam in the labor rate litigation.

¹⁹ Attached hereto as Exhibit 2 is a copy of 2013 Cal. Legis. Serv. Ch. 512 (S.B. 155) for ease of
reference. Exhibit 2 contains the full text of S.B. 155 as enacted by the California legislature.

1 multi-national auto manufacturers and California’s motor vehicle franchises that are primarily owned
2 and operated as family businesses.” (Aug. 13, 2013, California Bill Analysis, Assembly Committee,
3 2013-2014 Regular Session, Senate Bill 155, CA B. An., S.B. 155 Assem., 8/13/2013 at p. 3.)²⁰ Part of
4 the intent underlying S.B. 155 was to prevent manufactures from “[d]isapproving California motor
5 vehicle franchise warranty and incentive program claims for technical reasons, such as disapproving a
6 claim based on an improper signature. Some manufacturers do not offer an appeals process to correct
7 the simple, technical mistake.” (*Id.* at p. 4.)

8 As the sponsor stated with respect to Vehicle Code section 3065, “Manufacturers often
9 disapprove (pre-or post-audit) warranty claims for very technical reasons, and some do not offer an
10 opportunity to correct mistakes – costing the dealer tens to hundreds of thousands of dollars in
11 reimbursement for work already performed.” (Sep. 6, 2013, California Committee Report, 2013 CA
12 S.B. 155 (NS) at p. 3.)

13 In the instant matter, Putnam attempted to cure this technical noncompliance when it formally
14 requested Ford to add the Barn location to its DSSA. Putnam’s ongoing use of the Barn was already
15 known to Ford since at least late 2021. Ford took no action on Putnam’s October 2022 request. (*See*
16 Exh. P-133 (showing the first response to the requests); Exh. R-317.002-.003 (showing Ford’s Audit
17 closing letter four days before the first response to the requests dating back to October 2022).) Instead,
18 Ford sat on the request to preserve its choreographed justification to conduct the Audit.

19 As referenced by the Legislature, Putnam is being faced with costs of hundreds of thousands of
20 dollars for work it performed on Ford’s behalf. The location where the repairs occurred forms a technical
21 reason for Ford to seek to deny the claims even though there was no issue of shop competency concerning
22 the Audit repairs at issue. (RT Vol. II, 125:1-17.) Moreover, all the technicians who performed the
23 Audit repairs at issue were current on their technician certifications. (RT Vol II, 124:23-25.) Similarly,
24 Mr. Sweis admitted the technicians at the Barn were “generally good techs,” were adequately trained,
25 and the Barn location was better equipped than the main facility. The Barn was equipped to handle any
26 Ford service work that came in. (Exh. P-143.007, 614:5-21.)

27
28

²⁰ A copy of the cited analysis is attached hereto as Exhibit 3 for ease of reference.

1 Because the location where the repairs were performed did not impact the quality of the repairs
2 themselves, Ford’s required location for the repairs is properly viewed as an administrative claims
3 submission requirement. The location of a repair is not a basis to find the repair to be false or fraudulent
4 pursuant to Section 3065.²¹ Putnam should have been permitted to cure any material noncompliance
5 with the location where repairs were performed (for example, by submitting requests the locations be
6 approved), however, Ford failed to provide any consideration to those cure efforts in violation of Section
7 3065.²²

8 III. FORD ARGUES THE BOARD SHOULD IGNORE WHETHER THE AUDIT WAS IN
9 RETALIATION TO THE PUTNAM LABOR RATE REQUEST.

10 Section 3065(e)(1) plainly states “A franchisor shall not select a franchisee for an audit, or
11 perform an audit, in a punitive, retaliatory, or unfairly discriminatory manner.” The Audit was a direct
12 response to the Putnam labor rate request, made pursuant to Section 3065.2, and the subsequent
13 litigation. Ford claims this issue is not before the Board and should have been raised in the Section
14 3065.4 protest (*see* Ford’s Post-Hearing Brief, 42:8-48:16)—it was.

15 Ford filed a motion *in limine* to exclude evidence concerning whether or not the Audit was in
16 retaliation of the labor rate request and therefore a violation of Section 3065.2(i)(2)(G). The ALJ
17 assigned to the hearing granted Ford’s motion on the basis this was already at issue in the instant protest
18 contesting the Audit.²³

19 Specifically, at page 5 of the Order, the assigned ALJ notes Ford sought to preclude Putnam from
20 offering argument or evidence Respondent: “(a) hindered protestant’s request to relocate its dealership,
21

22 ²¹ Ford references a finding in the labor rate decision by stating “While the Board declined to reach the
23 issue of fraud as unnecessary to its decision, it expressly found that fraud was “one possible inference
24 that could be drawn from the evidence.” (Ford’s Post-Hearing Brief, 6:20-22 (citing Exh. R-336.052).)
25 The portion of the decision describing this as an inference that could be drawn *declines* to draw such
an inference. This was an argument Ford advanced in the labor rate litigation—the Board did not
accept it or base its decision on it.

26 ²² Mr. Owens never discussed or considered opportunities of Putnam Ford to cure any of the proposed
chargeback. (RT Vol. II, 96:4-100:13 (for example, by marking certain repairs field service action
repairs).)

27 ²³ A true and correct copy of the August 15, 2023, Order Resolving Motions Argued at Prehearing
28 Conference in the labor rate protest (PR-2759-21) is attached hereto as Exhibit 4. Putnam requests the
Board take official notice of the order.

1 and (b) performed a warranty audit of protestant’s repair orders from June 2022 through February 2023.”
2 The ALJ granted Ford’s Motion precluding Putnam from raising arguments in the labor rate litigation
3 that are relevant to this protest.²⁴ As the ALJ held, “Although respondent [Ford] strongly disputes that
4 it engaged in any retaliatory adverse conduct towards protestant, respondent observes that protestant will
5 have the opportunity to litigate that issue in the other protest.” (Exhibit 4 hereto, p. 5.) As a result, Ford
6 prevailed in its motion *in limine* by deferring the retaliation and relocation request issues to the Board in
7 this Protest. Ford has no reasonable basis to now argue Putnam should be precluded from making these
8 arguments and presenting relevant evidence now.

9 Additionally, Ford argues Putnam should be precluded from relying on Section 3065.2 in support
10 of its Protest. (Ford’s Post-Hearing Brief, 23:19-23 and 42:8-48:16.) Ford argues “Putnam Ford’s
11 Protest did not allege a violation of Section 3065.2(i)(2)(G) or (i)(2)(D).” (*Id.* at 23:19.) Moreover, Ford
12 argues “Putnam Ford’s Protest does not mention or discuss any allegations of bad faith.” (*Id.* at 23:21-
13 22.)

14 Ford misrepresents the allegations in the Protest. The Protest specifically alleges Ford’s Audit
15 was “conducted in violation of Section 3065.2 (i)(2)(G).” (Protest at ¶ 7.) Moreover, paragraph 8 of the
16 Protest specifically placed at issue the facts underlying Ford’s bad faith by ignoring Putnam’s request to
17 operate off-site non-customer facing service operations. (Protest at ¶ 8.) Section 3065.2 (i)(2)(D), in
18 the same subdivision as (i)(2)(G), was placed at issue by the Protest. Further, Ford cannot claim
19 ignorance of these issues because over a year before the merits hearing in this Protest began, Ford was
20 seeking to preclude Putnam from making these same arguments in the labor rate litigation and suggesting
21 they should instead be heard during this Audit protest. (Exhibit 4 hereto, p. 5.) Consideration of Section
22
23

24 ²⁴ Ford argues the ALJ’s order was limited to “Putnam Ford [being] barred from alleging the audit was
25 retaliatory in the Labor Rate Protest.” (Ford’s Post-Hearing Brief, 46:15-16.) This is inconsistent with
26 the ALJ granting Ford’s Motion which sought to also preclude evidence that Ford hindered Putnam’s
27 requests to relocate its dealership (including the off-site non-customer facing service operations).
28 (Exhibit 4 hereto, p. 5.) Additionally, cannot substantiate doctrine of claim preclusion because there
was never a final judgment on the merits. (*See* Ford’s Post-Hearing Brief, 45:15-46:20 (citing
Howitson v. Evans Hotels, LLC (2022) 81 Cal.App.5th 475, 486).) Putnam’s evidence and arguments
were never heard on their merits because they were precluded as a matter of procedure due to Ford’s
motion *in limine*.

3065.2 is proper in a Section 3065 protest when a franchisor retaliates against a franchisee for a labor rate submission by auditing the franchisee.

IV. FORD'S ARGUMENT THE AUDIT MUST BE VIEWED IN ISOLATION OF THE ALLEGATION AND WARRANTY STUDY ATTEMPTS TO SIDESTEP THE ISSUE OF FORD'S INTENTION BEHIND THE INITIATION OF THE ALLEGATION AUDIT PROCESS.

Ms. Crawford testified the allegation caused Ford to initiate the Audit. (Exh. P-157.008, 11:20-24.) Ford, however, argues the audit should be viewed in isolation of Ms. Swann and other Ford representatives' conduct leading to the allegation.

Ford's argument must be rejected because Section 3065 prohibits the *selection* of a franchisee for an audit in a punitive, retaliatory, or unfairly discriminatory manner. (Cal. Veh. Code, § 3065, subd. (e)(1).) Ford cannot dispute it was the warranty study and Mr. Owens's recommendation to escalate the study to an audit which led to the Audit. It was when Ms. Crawford agreed with Mr. Owens' recommendation to upgrade the warranty study to a warranty audit "immediately" and "almost instantaneously" which led to the actual Audit being conducted. (RT Vol. I, 126:25-128:18.)

Similarly, when Mr. Owens reviewed the allegation and determined it to be substantiated, he recommended to Ms. Crawford that Ford should proceed with the warranty study. Sharita Crawford instantaneously assigned Mr. Owens to conduct the warranty study. (RT Vol. I, 98:14-23.)

Mr. Owens was assigned to verify the allegation because Ms. Crawford assigned Mr. Owens the allegation on March 27, 2023. (RT Vol. I, 87:20-88:1; RT Vol. II, 28:12-17.) The allegation Mr. Owens was assigned to investigate concerned facts and circumstances already known to Ford. Putnam Ford was performing Ford service repairs at a facility Ford refused to approve (RT Vol. I, 88:13-15).

In early 2023, Ford wanted to audit Putnam without appearing to target Putnam Ford. It choreographed Ms. Swann's January 19, 2023, visit to capture photographic evidence that would be used to initiate the allegation audit process that was certain to result in the Audit. The circumstances surrounding the creation of the allegation and everything thereafter was part of Ford's selection of Putnam Ford for the Audit.

V. FORD MISREPRESENTS THE RELEVANCE OF THE FACILITY ISSUE TO ITS AUDIT; APPROXIMATELY 80% OF THE PROPOSED CHARGEBACKS RELY SOLELY ON THE FACILITY ISSUE.

Ford argues, of the 551 warranty claims Ford denied in the Audit, “74 claims were also disallowed for reasons additional to the fact that the repairs were performed at an unauthorized location. [Citation to Ford’s Attachment 1.] The value of those disallowed repairs totaled \$244,116.47” (Ford’s Post-Hearing Brief, 18:7-12.) “In fact, of the \$502,821.56 in disallowances, \$244,116.47, from 72 claims, were also disallowed for reasons unrelated to location of the repair.” (*Id.* at 33:21-23.)

Based on the plain text of Ford’s own audit report, Ford is wrong. Ford’s Attachment 1 has an entire column devoted to the “reason” a specified “amount” is subject to a disallowance unrelated to location of the repair. (*See* Ford’s Post-Hearing Brief, Attachment (the fourth and sixth columns).) However, reviewing the cited pages from Exhibit J-04 routinely and repeatedly show the next sentence from the Audit report, which Ford omits from the “reason” column in Attachment 1, clarifies the amount the additional reason applies to.

In aggregate, Ford relies on 35 of 72 claims whose total chargeback amount is *only* supported by the facility reason for disallowance. As a result, Ford’s claim of 72 claims independent of the facility issue must be reduced to at most 37 claims—approximately 7% of the overall 551 claims at issue in the Audit.

Similarly, removing the value of proposed chargebacks relying *solely* on the facility issue reduces Ford’s \$244,116.47 by \$132,407.29. More than half of what Ford represented was “disallowed for reasons unrelated to location of the repair” were not. Ford’s figure should instead have been \$111,709.18—approximately a *fifth* (20%) of the overall chargebacks at issue.

Ford misrepresented how much of the Audit depends *entirely* on the location issue in an attempt to misdirect the Board away from the importance of the issue. However, as the evidence showed, at one point during the Audit, Mr. Owens sorted and filtered claims from the six technicians Mr. Owens identified; his “interest went toward the warranty claims that were identified with those six technicians.” (RT Vol. II, 139:7-16.) The focus of the Audit was on the location issue and the real number of proposed chargebacks relying solely on that issue bear that out.

Putnam prepared and attaches hereto as Exhibit 5 a chart showing each of the 35 repairs in Ford's Attachment 1 where Ford misrepresented how much of the chargeback amount was independently supported by an alternative reason. The columns in Putnam's Exhibit are as follows: (1) "Court" showing the Court from Ford's Attachment 1 for ease of cross-reference; (2) "RO# - Line" showing the RO and Line number for the claim; (3) "Ford's Alternative Reason" showing, verbatim, the reason Ford provided for a non-location based disallowance from Ford's Attachment 1; (4) "Ford's Listed Amount" showing the amount Ford claimed was supported by a non-location based disallowance; (5) "Extent of Alternative Reason Chargeback" the actual extent of the chargeback supported by Ford's Alternative Reason;²⁵ and (6) "Ford overstates the non-location based disallowance by this amount" showing the amount by which Ford overstated the Amount in the sixth column of Ford's Attachment 1.

The number of Ford misrepresentations is extensive and summarized in Exhibit 5 hereto. However, taking some examples below illustrates the problems with Ford's Attachment 1.

Example from Count 3: Considering Count 3, Ford's Attachment 1 suggests the \$4,751.67 chargeback amount is independently supported by "Labor operation to remove and install the transmission assembly was not claimed." As Mr. Owens testified, the note cited and relied on by Ford did not independently support any chargeback. Instead, "it's something the dealer was entitled to, but did not claim." (RT Vol. I, 174:18-175:5.) There is no amount associated with the alternative reason—indeed, the "reason" actually supported Putnam claiming and receiving *more* in warranty reimbursement for the repair. The \$4,751.67 for this court in Ford's Attachment 1 is based solely on a location-based disallowance and must be removed from Ford's total.

Example from Count 5: Considering Count 5, Ford's Attachment 1 suggests the \$5,889.20 chargeback amount is independently supported by "Transmission cooler replacement is not required or supported by the technician comments; no warrantable defect documented to justify transmission cooler replacement; duplicate labor is not reimbursable." However, immediately following these statements in Exhibit J-04 are the following specific disallowances related to each reason: "Disallow \$105.27 for the cooler and 2.3 hours of labor." "Disallow 2.6 hours of duplicate labor time." (Exh. J-04.014-.016.) In

²⁵ Generally, the extent is stated explicitly in the Audit report Ford cited and following immediately after the language Ford quotes in the "Reason" column of its Attachment 1.

1 aggregate, the alternative reasons identified by Ford only support \$105.27 in parts chargebacks and 4.9
2 hours in labor chargebacks (or \$1,078.00).²⁶ Ford's Attachment 1 overstates the "amount" column by
3 \$4,705.93 for this count (\$5,889.20 less \$105.27 in parts less \$1,078.00 in labor).

4 **Example from Count 8:** Considering Court 8, Ford's Attachment 1 references a missing Cost
5 Cap. The missing Cost Cap does not render the entire amount subject to an independent reason for the
6 proposed chargeback. Instead, "Due to the missing Cost Cap, all repair costs above the \$1,500 threshold
7 for automatic transmissions is disallowed." (Exh. J-04.020-.022.) As a result, Ford overstates the
8 "amount" column by \$1,500.00—the amount of the Cost Cap.

9 **Example from Count 67:** Ford's Attachment 1 represented Ford had an independent reason to
10 chargeback \$11,528.19 for this claim besides the facility issue. Ford lists as the reason "The oil filter is
11 included with the engine long block assembly; replacement of the oil filter is not required or supported
12 by the technician comments provided." Contrary to Ford's representation, only a \$8.58 chargeback
13 would be supported by this reason. "Disallow \$8.58 in parts." (Exh. J-04.529.) The *only* independent
14 chargeback Ford's Audit lists for Count 67 concerns the cost of replacing the oil filter—not the remaining
15 \$11,528.19, which is an amount of proposed chargeback based *solely* on reason code D61.07.

16 As noted above, the foregoing are only examples. There are thirty-one other misrepresentations
17 in Ford's attachment 1 summarized in Exhibit 5 hereto.

18 Putnam maintains Ford should be precluded from proceeding with any of the \$502,821.56
19 proposed chargeback because the Audit was punitive, retaliatory, and unfairly discriminatory. Similarly,
20 Ford failed to permit Putnam to cure any material non-compliance and treated Putnam other than in good
21 faith by ignoring Putnam's non-customer facing off-site service requests. These violations of Section
22 3065 prevent Ford from satisfying its burden of proof pursuant to Section 3065.

23 To the extent Ford is permitted to proceed with chargebacks unrelated to reason code D61.07,
24 Ford admits of the \$502,821.56 in disallowances, \$258,705.09 rely solely on reason code D61.07.
25 (Ford's Post-Hearing Brief, 33:21-23 (\$502,821.56 less the \$244,116.47 identified by Ford alleged based
26

27 ²⁶ Putnam's warranty reimbursement rate for labor is \$220 per hour for all claims at issue in the Audit.
28 (See all ROs at issue in Exh. J-05; alternatively, see last page of the labor rate litigation decision (Exh.
R-336) finding the labor rate Ford set for Putnam of \$220 per hour as of October 26, 2021 would
remain in effect.)

on reasons unrelated to location of the repair.) \$132,407.29 of the \$244,116.47 figure articulated by Ford are based solely on reason code D61.07. (Exhibit 5 hereto.) As a result, Ford is only able to show \$111,709.18 of its proposed chargeback is based on reasons unrelated to location of the repair. If any chargeback is permitted for reasons unrelated to reason code D61.07, it should be limited to \$111,709.18.

CONCLUSION

The evidence shows it is more likely than not that Ford initiated the Audit in a retaliatory and punitive manner in response to the 2021 labor rate submission and the ongoing litigation regarding the same. Protestant does not carry the burden to demonstrate the Audit was punitive and retaliatory. Instead, it is Ford's burden to show the Audit was conducted on a reasonable basis that was not motivated by the ongoing Section 3065.4 Labor Rate litigation. It is not possible to interpret the evidence to support a finding that Ford did not select Putnam Ford for Audit on a retaliatory and punitive basis. Even if the Board does not definitively conclude the Audit was retaliatory and punitive, there is sufficient evidence showing the Audit was most likely retaliatory and punitive. The Board need not reach the ultimate conclusion the Audit was retaliatory and punitive to render a decision and findings sustaining this Protest.

Ford was aware of Putnam Ford's use of the Barn location for additional Ford service long before it initiated the allegation audit process. The potential use of the Barn was discussed with Ford representatives, including Mr. Gogolewski, upon Putnam's relocation to its current location of 885 North San Mateo Drive in 2021. Mr. Gogolewski also visited the Barn location and actually observed Ford service work taking place at the Barn location in the Spring of 2022. Ford field service engineers routinely visited the Barn location to advise and educate Putnam's service technicians in regard to warranty repairs since at least September 2021. Mr. Putnam brought Ms. Swann to the Barn location in October 2022 when she advised Putnam to make a formal request to add this location to the DSSA, which Putnam did. However, Ms. Swann took no action on Putnam's request and instead participated in Ford's choreographed effort to initiate the allegation audit process while pretending the Audit was unrelated to Putnam's labor rate request and ongoing litigation regarding the same.

Ford routinely encourages and provides financial incentives for its dealer network to expand service capacity. Ford's refusal to authorize Putnam's known use of the Barn location was for the sole

1 purpose of maintaining a perceived ligation advantage in the labor rate litigation and to generate a
2 \$502,821 bargaining chip in the form of the proposed Audit chargebacks. Again, Ford took no action in
3 response to Putnam's October 2022 request to formally acknowledge Putnam's expanded service
4 operations. Instead, Ford responded with the Audit.

5 The targeted selection of Putnam Ford for the Audit is unlawful. The Board need not issue
6 findings concerning the Audit results because Ford was not lawfully permitted to pursue the Audit in the
7 first place.

8 Ultimately, Ford is unable to meet its burden to show it complied with its obligations pursuant to
9 Section 3065(e) when conducting the Audit. The record evidence supports a Board decision sustaining
10 this protest.

11
12
13 Dated: April 2, 2025

LAW OFFICES OF
GAVIN M. HUGHES


15 By 
16 Gavin M. Hughes
17 Robert A. Mayville, Jr.
18 Attorneys for Protestant
19
20
21
22
23
24
25
26
27
28

EXHIBIT 1

1 Steven M. Kelso (Colorado Bar No. 29099)
Gwen J. Young (Colorado Bar No. 14736)
2 H. Camille Papini-Chapla (California Bar No. 282893)
Greenberg Traurig, LLP
3 1144 15th Street, Suite 3300
Denver, CO 80202
4 Telephone: 303.572.6500
Facsimile: 303.572.6540
5 Email: kelsos@gtlaw.com
Youngg@gtlaw.com
6 papinichapla@gtlaw.com

7 Attorneys for Respondent
FORD MOTOR COMPANY

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

11 In the Matter of the Protest of
12 KPAUTO, LLC, dba PUTNAM FORD OF SAN
MATEO,

13 Protestant,

14 v.

15 FORD MOTOR COMPANY,
16 Respondent.

Protest No. PR-2759-21

**RESPONDENT'S REQUEST FOR
IDENTIFICATION AND PRODUCTION
OF DOCUMENTS TO PROTESTANT
KPAUTO, LLC**

17 Respondent Ford Motor Company ("Ford" or "Respondent") propounds the following
18 requests for identification and production of documents on Protestant KPAuto, LLC.

19 **INSTRUCTIONS AND DEFINITIONS**

20 1. As set in the Pre-Hearing Conference Order, production shall take place no later than
21 Friday, November 4, 2022, at 4:00 p.m. (Pacific Time). Ford requests production of documents at the
22 law office of Greenberg Traurig, LLP, 1144 15th Street, Suite 3300, Denver, Colorado, 80202 as they
23 are kept in the usual course of business or organized and labeled to correspond with the applicable
24 request. In lieu of producing original documents for inspection and copying, Protestant may furnish
25 to counsel for Ford true and exact copies of each document as they are kept in the usual course of
26 business or organized and labeled to correspond with the applicable request.

27 2. Ford specifies the form of electronically stored information as detailed in Attachment
28 1, Specifications for Forms of ESI Production.

1 3. Unless the individual request specifies otherwise, the time period of the requests is
2 January 1, 2021, forward.

3 4. After the date of Protestant's responses to the Requests, supplementation is required
4 to the full extent specified in the California Rules of Civil Procedure and the California
5 Administrative Code.

6 5. Except with respect to individual requests that define these terms differently, "You,"
7 "Your," "KPAUTO," and "Protestant" refers to Protestant KPAUTO, LLC, any predecessor entities,
8 current and former subsidiaries, parents, related management companies, Putnam Automotive
9 Group, Putnam Auto, Putnam Automotive Dealer Group, and any other person authorized or
10 purporting to act on its behalf, including their attorneys, shareholders, servants, agents, employees,
11 consultants and representatives.

12 6. "Ford" refers to Respondent Ford Motor Company and its respective current and
13 former subsidiaries, affiliates, attorneys, shareholders, employees, consultants and representatives,
14 agents or any other person authorized or purporting to act on its behalf.

15 7. "Protest" means this litigation, including Protest No. PR-2759-21, and all issues
16 raised by or in any way relating to the subject matter of this litigation.

17 8. "Person" includes any natural person or entity, including any private, business, or
18 governmental entity or association.

19 9. "Dealer Agreement" means Ford Sales and Service Agreement between You and
20 Ford, including the Ford Sales and Service Agreement Standard Provisions, and all amendments to
21 that agreement.

22 10. "Warranty" refers to a "[w]arranty" as that term is defined in California Vehicle
23 Code, Section 3065.25.

24 11. "Repair" or "Repairs" means work performed by technicians or mechanics on a motor
25 vehicle, including inspections or diagnostic work, to resolve problems or issues related to the
26 function of the motor vehicle.

27 12. "Retail Customers" or "Retail Customer" means Your Repair customer(s) whose
28 Repairs are not completely covered by or paid for pursuant to a Warranty.

1 13. “Hourly Retail Labor Rate” is the rate that You charge Retail Customers, per hour,
2 for labor associated with Repairs.

3 14. “Retail Labor Charge” is the total amount You charge Retail Customers for labor
4 associated with a Repair.

5 15. “Repair Orders” refer to the repair orders You produced to Ford in connection with
6 Your submission for a labor rate increase, including the original submission and supplemental
7 submission.

8 16. “A/HRS” has the same meaning as it is used on Your Repair Orders.

9 17. “S/HRS” has the same meaning as it is used on Your Repair Orders, which You
10 provided to Ford as part of Your submission for a labor rate increase.

11 18. Warranty labor rate has the same definition as used in the California Vehicle Code.

12 19. “Document” is used in the broadest sense, including “writings” as the term is used in
13 Section 250 of the California Evidence Code, and is intended to include electronically stored
14 information and the original and all drafts and non-identical copies of any writings, printed matter or
15 computer-readable matter of any kind in the possession, custody or control of You or Your agents,
16 including but not limited to, all written material, whether typed, handwritten, printed, photocopied or
17 otherwise, drawings, graphs, charts, photographs, phone-records, tape recordings and all
18 transcriptions of such recordings, microfilm, microfiche, tapes, discs, other computer readable
19 records or programs and other data compilations from which information can be, if necessary,
20 obtained and translated, by You through detection devices into reasonably usable form. Without
21 limitation, “document” also includes letters, memoranda, notes, forms, transcripts, statements,
22 recordings, calendars, diaries, file folders, indexes, and any computer-stored files, databases or other
23 electronically stored information.

24 20. “Any” or “all” means any and all.

25 21. “Relating to” or “related to” means bearing upon, concerning, addressing,
26 constituting, defining, describing, containing, embodying, reflecting, identifying, stating, discussing,
27 responding to, referring to, dealing with, generated wholly or partly in response to or because of, or
28 in any way pertaining to the given subject.

22. The words “communication” or “communications” means all forms by which information or documents can be transmitted or exchanged between or among persons, including, but not limited to, meetings, conversations, other face-to-face exchanges, letters, memoranda, policy statements, notes, facsimiles, telephone conversations, voicemail messages, electronic messaging systems (such as text messaging or direct messaging), electronic mail, notes of any of the foregoing, and the like.

23. For purposes of these requests, the following shall be deemed inclusive of each other in such a way as to call for the broadest possible response to the discovery request in question: singular and plural; masculine, feminine and neuter; conjunctive and disjunctive.

24. If a claim of privilege or work product is asserted concerning any documents for which identification or production is requested, provide sufficient factual information for other parties to evaluate the merits of that claim, including, if necessary, a privilege log identifying the following:

- a. the date of the document;
- b. its subject matter;
- c. the type of document (e.g., letter, memo, report, minutes and the like);
- d. the identities of all persons who authored, sent, or received the; and
- e. the basis for the privilege claimed.

25. In Your written responses to the following requests, please type the requests to which You are responding immediately before Your response. Upon counsel's request, undersigned counsel will provide these requests in Word format.

REQUESTS FOR PRODUCTION

1. Produce those documents consisting of or referencing communications (including without limitation, notes of oral communications) between Your representatives and any representative of Frog Data, LLC, including without limitation all data and electronically stored information. The time period for this request is January 1, 2020 forward.

2. To the extent not produced in response to the immediately preceding request, produce all agreements with Frog Data, LLC.

1 3. To the extent not produced in response to a preceding request, produce all work
2 product of any representative of Frog Data, LLC.

3 4. Produce internal correspondence and communications referencing or discussing any
4 work Frog Data, LLC has performed for You.

5 5. To the extent not produced in response to a preceding request, produce internal
6 correspondence and communications referencing or discussing any proposed or contemplated work
7 that was to be done by Frog Data, LLC, regardless of whether that work was ever undertaken.

8 6. To the extent not produced in response to a preceding request, produce those
9 documents consisting of or referencing communications (including without limitation, notes of oral
10 communications) between or among Your representatives, or between You and any other person or
11 entity, including Ford, any other dealer, or dealer association, regarding this Protest.

12 7. To the extent not produced in response to a preceding request, produce those
13 documents consisting of or referencing communications (including without limitation, notes of oral
14 communications) between or among Your representatives, or between You and any other person or
15 entity, including Ford, any other dealer, or dealer association, regarding warranty labor rates.

16 8. To the extent not produced in response to a preceding request, produce those
17 documents consisting of or referencing communications (including without limitation, notes of oral
18 communications) between or among Your representatives, or between You and any other person or
19 entity, including Ford, any other dealer, or dealer association, regarding actual or potential requests
20 for an increase of the Ford warranty labor rate.

21 9. To the extent not produced in response to a preceding request, produce those
22 documents consisting of or referencing communications (including without limitation, notes of oral
23 communications) between or among Your representatives, or between You and any other person or
24 entity, including Ford, any other dealer, or dealer association, regarding Your Hourly Retail Labor
25 Rate.

26 10. To the extent not produced in response to a preceding request, produce those
27 documents consisting of or referencing communications (including without limitation, notes of oral
28 communications) between or among Your representatives, or between You and any other person or

1 entity, including Ford, any other dealer, or dealer association, regarding retail labor rates in the State
2 of California.

3 11. To the extent not produced in response to a preceding request, produce those
4 documents consisting of or referencing communications (including without limitation, notes of oral
5 communications) between or among Your representatives, or between You and any other person or
6 entity, including Ford, any other dealer, or dealer association, regarding California Vehicle Code,
7 Sections 3065.2 or 3056.4.

8 12. To the extent not produced in response to a preceding request, produce those
9 documents consisting of or referencing communications (including without limitation, notes of oral
10 communications) between or among Your representatives, or between You and any other person or
11 entity, including Ford, any other dealer, or dealer association, regarding Assembly Bill Number 179,
12 from which Section 3065.2 was enacted, and Assembly Bill Number 2017, which was a previous bill
13 similar to Assembly Bill Number 179.

14 13. Produce those documents discussing, explaining, or referencing the Hourly Retail
15 Labor Rate You advertise to consumers, whether through media or at Your dealership.

16 14. Produce those documents discussing, explaining, or referencing the Hourly Retail
17 Labor Rate You charge Retail Customers, including without limitation any internal memoranda or
18 policies.

19 15. To the extent not produced in response to the immediately preceding request, produce
20 all rate tables, lists, summaries, charts, or other documents that identify Your Hourly Retail Labor
21 rates based on the nature or type of Repair.

22 16. Produce those documents discussing, explaining, or referencing the Hourly Retail
23 Labor Rate collected from Retail Customers.

24 17. Produce those documents concerning, regarding, explaining, discussing, describing,
25 or referencing the methodology, calculations, or process for determining the Retail Labor Charge for
26 a Retail Customer.

1 18. Produce those documents showing what information or data is manually input into the
2 software, app, or program generating Repair Orders by You, including data entry made by You into
3 Your computer systems that are not visually displayed on the print-out of the Repair Orders.

4 19. Associated with any software or computer application used to generate the Repair
5 Orders or any other repair orders for Retail Customers, produce the portion of any manuals,
6 instruction guides, training materials, or documents regarding the input of a labor rate.

7 20. Produce all documents concerning, regarding, explaining, discussing, describing, or
8 referencing A/HRS in relation to calculating the Retail Labor Charge.

9 21. Produce all documents concerning, regarding, explaining, discussing, describing, or
10 referencing the expected value of A/HRS in relation to specific categories of Repairs or certain
11 Repairs.

12 22. Produce all documents concerning, regarding, explaining, discussing, describing, or
13 referencing A/HRS in relation to non-Warranty Repairs.

14 23. Produce all documents concerning, regarding, explaining, discussing, describing, or
15 referencing S/HRS in relation to calculating the Retail Labor Charge.

16 24. Produce all documents concerning, regarding, explaining, discussing, describing, or
17 referencing the expected value of S/HRS in relation to specific categories of Repairs or certain
18 Repairs.

19 25. Produce all documents concerning, regarding, explaining, discussing, describing, or
20 referencing S/HRS in relation to non-Warranty Repairs.

21 26. Produce the “customer pay repair guide” You reference in paragraph 11 of the
22 Protest.

23 27. Produce all documents analyzing, evaluating, discussing, concerning, or relating to
24 the “customer pay repair guide” You reference in paragraph 11 of the Protest.

25 28. Produce every time repair guide every used at Your Ford dealership, whether it is a
26 guide that is published by a third-party (such as Chilton, Mitchells, or All-Data), factory, custom, or
27 other.

1 29. Produce documents sufficient to show what time repair guide was used with respect
2 to each Repair Order.

3 30. Produce documents sufficient to show how any time repair guide was used with
4 respect to each Repair Order.

5 31. To the extent not produced in response a preceding request, produce those documents
6 consisting of or referencing communications (including without limitation, notes of oral
7 communications) between or among Your representatives, or between You and any other person or
8 entity, including Ford, any other dealer, or dealer association, regarding the “customer pay repair
9 guide” You reference in paragraph 11 of the Protest.

10 32. Produce all documents concerning, regarding, explaining, discussing, or describing
11 how the “customer pay repair guide” “is the same or similar to the guide used by Respondent in
12 determining the amount of dealer reimbursement for each warranty repair,” as You have claimed in
13 paragraph 11 of the Protest.

14 33. Produce all complaints by a customer or any other person or entity, whether received
15 directly or indirectly with respect to the amount charged or labor rate for Your vehicle repair
16 services, and those documents reflecting efforts to resolve customer complaints, and the resolution
17 of those complaints.

18 34. Produce all documents containing, responding to, concerning, regarding, explaining,
19 discussing, or describing any customer refund, in whole or in part, related to the Retail Labor
20 Charge.

21 35. Produce all documents containing, responding to, concerning, regarding, explaining,
22 discussing, or describing a reduction, in whole or in part, related to the Retail Labor Charge or an
23 Hourly Retail Labor Rate for a Retail Customer.

24 36. To the extent not produced in response to a preceding request, produce those
25 documents consisting of or referencing communications (including without limitation, notes of oral
26 communications) between or among Your representatives, or between You and any other person or
27 entity, including Ford, any other dealer, or dealer association criticizing Ford’s Warranty Labor
28 Rates.

- 1 37. Produce documents reflecting payment received from customers for the Repair
2 Orders.
- 3 38. Produce accounting copies of every Repair Order.
- 4 39. Associated with the Repair Orders, produce documents sufficient to show any
5 refunds, rebates, or other thing of value provided to the corresponding customer that is not reflected
6 on the accounting copy of the corresponding Repair Order.
- 7 40. Produce documents sufficient to show the physical location at which every repair
8 documented on each Repair Order was made, including without limitation any repairs made or
9 completed at a location other than Your authorized Ford dealership location.
- 10 41. Produce accounting copies of every repair order from Your Ford dealership since You
11 began dealer operations.
- 12 42. Associated with the repair orders sought in the immediately preceding request,
13 produce documents sufficient to show the physical location at which every warranty repair was
14 made, including without limitation any warranty repairs made or completed at a location other than
15 Your authorized Ford dealership location.
- 16 43. Documents sufficient to identify Your service managers.
- 17 44. Produce documents sufficient to identify the technicians that worked on the Repair
18 Orders.
- 19 45. Produce the pay plans for your technicians. Ford does not seek to know the specific
20 compensation of any specific person, but rather how technicians are paid generally.
- 21 46. To the extent not produced in response to a preceding request, produce documents
22 sufficient to identify how and how much your technicians are paid, whether by an hourly rate (and
23 how hours are determined), salary, or otherwise. Ford does not seek to know the specifical
24 compensation for any specific person, but rather how and how much technicians are paid generally
- 25 47. Produce all surveys completed by Your employees related to Your dealership's
26 service operations, whether the survey was conducted by You, Ford, or any other person or entity,
27 and including any analyses, compilations or reports related to such surveys.
- 28

1 48. Produce those documents showing the availability, efficiency, or utilization of service
2 appointments at Your dealership, including availability, efficiency, utilization or scheduling of
3 service technicians.

4 49. Produce those documents showing Your customer loyalty or retention with respect to
5 Your service customers.

6 50. Produce Your financial information, including, but not limited to, monthly, quarterly,
7 consolidated, year-end and 13th period financial statements (including journals, schedules or other
8 documents prepared or notated reflecting year-end or 13th period adjustments to Your financial
9 statements), balance sheets, income statements, statements of operations, statements of cash flows,
10 statements of stockholder's or member's equity, statements of changes in financial position, and
11 statements of sources and uses of cash, or any summaries of any one or more of the foregoing, as
12 well as all notes to those statements, regardless of whether such financial statements or parts thereof
13 are compiled, reviewed, audited, or unaudited, and including all such financial statements of any
14 other entity that includes, in whole or part, Your financial information. For purposes of this request
15 only, "Your" refers to Protestant, its current and former subsidiaries, affiliates, successors, or entities
16 with fictitious names, but does not include principals, attorneys, servants, employees, consultants
17 and representatives, or agents. Excluded from this request are the financial statements that You have
18 actually provided to Ford in the normal course of business.

19 51. To the extent not produced in response to a preceding request, produce those
20 communications, reports, memoranda, and other documents (other than dealer financial statements
21 submitted to Ford in the normal course of business) stating, showing, discussing, or analyzing Your
22 profitability in servicing vehicles, parts, and/or accessories, including, but not limited to,
23 departmental analyses, expense analyses, operational analyses, and working capital analyses.

24 52. Produce all service or parts related projections, financial projections, forecasts or
25 other prospective or pro forma estimates, and business plans prepared by or for You.

26 53. Produce every print, radio, television and cable advertisements with respect to Your
27 dealership operations in the last year that references a labor rate.

28

1 54. Produce all written reports and all data and other documentation used in formulating
2 the opinions in each such report prepared in connection with this Protest by each person who You
3 may call as an expert witness in this Protest.

4 55. Produce all documents reviewed, created, or received in connection with this lawsuit
5 by any person who may provide expert or lay opinion testimony, whether or not such documents
6 were relied upon by the person in the formulation of his or her lay or expert opinions.

7 56. Produce documents sufficient to show the details of every analysis or calculation
8 performed by Your expert associated with this Protest, including the input and output, and clear
9 identification of all variables, regardless of whether the results are incorporated into any report, or
10 are used to formulate any opinion.

11 57. Produce all documents which You may seek to introduce at any hearing on these
12 Protests.

13 58. Produce all demonstrative exhibits that You may seek to use at any hearing on these
14 Protests.

15
16 Dated: August 8, 2022

GREENBERG TRAURIG, LLP

17
18 By: /s/ Steven M. Kelso
19 H. Camille Papini-Chapla
20 Steven M. Kelso
21 Gwent J. Young
22 Attorneys for Respondent
23 Ford Motor Company
24
25
26
27
28

SPECIFICATIONS FOR FORM OF ESI PRODUCTION

Overview: ESI shall be produced as TIFF/JPG image files with accompanying OCR/Extracted text, metadata and image load files preserving the integrity of the electronic document's contents and maintaining the parent-child relationship with respect to emails-attachments.

Production Folders: restricted to 1,000 files per subfolder

- DATA
- IMAGES
- NATIVES
- TEXT

Required Metadata and Database Fields:

- Load File Type: Delimited, with a .DAT file extension utilizing following default delimiters:

Delimiter	Character	ASCII Value	
Comma	,	(020)	
Quote	"	(254)	
Newline	␣	(174)	
Multi-Value (Do not follow with space)	;	(059)	

- Dates Format: MM/DD/YYYY (07/12/2010) - Date Fields do not accept partial, invalid dates or time
- Unless otherwise specified, process documents using Universal Coordinated Time (UTC) HH:MM (13:30)
- Utilize "Time fields" listed in Metadata chart below
- File Paths: Path to Native or Extracted Text/OCR files
- All text should be exported as ASCII or Unicode
- Each document should be represented on one line in the load file
- All requested fields should be in the load file whether data exists or not

Images:

- Load File Type: .LFP or .OPT
- Black & White Group IV Single-Page Tiff Images (300 DPI)
- Color images should be provided in single-page .JPG format
- Tiff/JPG images for all documents except Excels
- Excels should be provided natively inserting a placeholder image
- Process email messages as B&W tiffs
- Documents should be branded with a unique image ID and the file name should reflect the beginning ID

Native Documents:

- Native file names should match the BEGDOC# for that specific record
- Native files should be located in their own directory (ie. NATIVES), and the file path referenced in the accompanying delimited text (.DAT) load file
 - A single page placeholder image shall also be provided that indicates the file was produced in native format and contains the unique bates number of the corresponding file
- Container files such as .Rar and .Zip should be extracted and processed as separate documents

Text:

- Document-level text files should be provided for both paper (OCR) and electronic files (extracted text)
- Text file names should match the BEGDOC# for the corresponding record
- Place text files in their own directory (ie. TEXT) and reference file path in .DAT load file
- The Extracted Text should contain the FULL text of the document and not body only
- Place Holder pages should contain the Extracted Text of the native document

Hard Copy Files (Originating in paper format):

- Provide document level OCR and custodian information

Table of Requested Fields:

All	BegDoc	Beginning Bates Number
	Enddoc	Ending Bates Number
	BegAtt	Beginning Bates number of first document in an attachment range
	EndAtt	Ending Bates number of last document in an attachment range
	FileExt	File Extension
Email	From	Sender Name
	To	Recipient(s) of message (Multi-Entry Field)
	CC	CC Recipient Names (Multi-Entry Field)
	BCC	BCC Recipient Names (Multi-Entry Field)
	Subject	Subject line extracted from an email message
	Datesent	Sent Date of an email message (Date field)
	DateSentTime	Sent Time of an email message (Time field)
	AttachTitle	Attachment Title (Multi-Entry Field)
	NumAttach	Number of Email Attachments
EDocs	DateCreated	Date file was created mm/dd/yyyy: (Date field)
	DateModified	Last Modified Date (Date field)
	DateCreatedTime	Time file was created: (Time field)
	DateModifiedTime	Time file was last Modified: (Time field)
	Title	Title field extracted from metadata of non-email document
	Author	Author of document
	LastAuthor	Last Author to save document
	Company	Company field from eDoc
	Filename	Name of the original digital file
	Filesize	File size
	Filetype	Application (Word, Outlook, Etc.)

1 **PROOF OF SERVICE**

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

3 BOARD: NEW MOTOR VEHICLE BOARD

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

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

7 On August 8, 2022, I served the foregoing **RESPONDENT'S REQUEST FOR**
8 **IDENTIFICATION AND PRODUCTION OF DOCUMENTS TO PROTESTANT KPAUTO,**
LLC on each party in this action, as follows:

9 Gavin M. Hughes
10 Law Offices of Gavin M. Hughes
3436 American River Dr., Ste. 10
11 Sacramento, CA 95864
Telephone: 916-900-8022
12 Email: gavin@hughesdealerlaw.com
mayville @hughsdealerlaw.com

13 Attorneys for Protestants

- 14 ☐ (BY MAIL) I caused such envelope to be deposited in the United States mail at Denver,
15 Colorado, with postage thereon fully prepaid. I am readily familiar with the firm's
16 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.
- 17 ☐ (BY FACSIMILE) The facsimile machine I used complied with California Rules of
18 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
19 transmission, a copy of which is attached to this Affidavit.
- 20 ☐ (BY FEDERAL EXPRESS) I caused such envelope to be delivered by air courier, with
the next day service.
- 21 ☒ (BY EMAIL) at the email address listed above.

22 Executed on August 8, 2022, at Westminster, Colorado.

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

24 /s/ Steven M. Kelso
25 Steven M. Kelso
26
27
28

EXHIBIT 2

2013 Cal. Legis. Serv. Ch. 512 (S.B. 155) (WEST)

CALIFORNIA 2013 LEGISLATIVE SERVICE

2013 Portion of 2013-2014 Regular Session

Additions are indicated by **Text**; deletions by

~~***~~

Vetoed are indicated by ~~Text~~ ;

stricken material by ~~Text~~ .

CHAPTER 512

S.B. No. 155

MOTOR VEHICLES—MANUFACTURERS AND MANUFACTURING—RULES AND REGULATIONS

AN ACT to amend Sections 3006, 3008, 3012, 3050, 3050.7, 3052, 3056, 3057, 3062, 3063, 3064, 3065, 3065.1, 3066, 3067, 3069.1, 11713.3, and 11713.13 of the Vehicle Code, relating to vehicles.

[Filed with Secretary of State October 3, 2013.]

LEGISLATIVE COUNSEL'S DIGEST

SB 155, Padilla. Vehicles: motor vehicle manufacturers and distributors.

Existing law establishes the New Motor Vehicle Board in the Department of Motor Vehicles, and requires the board to hear and decide certain protests presented by a motor vehicle franchisee. Existing law prescribes procedures to be followed by franchisors, franchisees, and the board regarding claims for warranty reimbursement or incentive compensation. Existing law authorizes franchisors to conduct audits of franchisee warranty records and incentive records on a reasonable basis, and authorizes a franchisor to audit the franchisee's incentive records for 18 months, and warranty records for 12 months, after a claim is paid or credit issued. Existing law prohibits the disapproval of franchisee claims except for good cause, as specified, and requires that a notice of disapproval state the specific grounds upon which the disapproval is based. Existing law gives a franchisee one year from receipt of the notice of disapproval of an incentive compensation payment to appeal the disapproval to the franchisor and file a protest with the board.

This bill would revise these provisions to require, among other things, the franchisor to provide the franchisee with the specific grounds upon which any previously approved claims are disapproved following an audit, and to prohibit a previously approved claim from being charged back to the franchisee except under certain circumstances, including when the claim is false or fraudulent. The bill would require the franchisor to provide a reasonable appeal process to allow the franchisee to respond to any disapproval with additional supporting documentation or information rebutting the disapproval or to cure noncompliance, as provided. The bill would authorize the audit of a franchisee's incentive and warranty records for 9 months after a claim is paid or credit is issued, as specified. The bill would give a franchisee 6 months from the date of receipt of a specified written notice to file a protest with the board, and would specify that in the protest proceeding the franchisor has the burden of proof.

Existing law requires every vehicle franchisor to properly fulfill every warranty agreement made by it and adequately and fairly compensate each of its franchisees for labor and parts used to fulfill that warranty when the franchisee has fulfilled warranty obligations of repair and servicing. Existing law also requires the franchisor to file a copy of its warranty reimbursement schedule or formula with the board, and requires the board to determine the reasonableness of the warranty reimbursement schedule or formula if the franchisee files a notice of protest with the board.

This bill would additionally require a franchisor to adequately and fairly compensate each of its franchisees for labor and parts used to provide diagnostic services under a warranty, and would prohibit a franchisor from replacing, modifying, or supplementing a warranty reimbursement schedule to impose a fixed percentage or other reduction in the time and compensation allowed for warranty repairs not attributable to a specific repair. The bill would also require, if the board determines that the warranty reimbursement schedule or formula fails to provide adequate compensation, the franchisor to correct the failure by amending or replacing the warranty reimbursement schedule and implementing the correction as to all franchisees within 30 days after receipt of the board's order.

Existing law generally requires a manufacturer branch, remanufacturer, remanufacturer branch, distributor, distributor branch, transporter, or dealer of vehicles to be licensed by the Department of Motor Vehicles. Under existing law, it is unlawful for a manufacturer, manufacturer branch, distributor, or distributor branch to engage in specified practices, including requiring a dealer to make a material alteration, expansion, or addition to any dealership facility, unless the required alteration, expansion, or addition is reasonable in light of all existing circumstances, including economic conditions.

This bill would prohibit a required facility alteration, expansion, or addition from being deemed reasonable if it requires that the dealer purchase goods or services from a specific vendor if goods or services of a substantially similar kind, quality, and general design concept are available from another vendor, except as specified. The bill would also prohibit the establishment or maintenance of a performance standard, sales objective, or program for measuring a dealer's sales, service, or customer service performance that may materially affect the dealer, including, but not limited to, the dealer's right to payment under any incentive or reimbursement program or establishment of working capital requirements, unless certain requirements are satisfied. The bill would also prohibit a manufacturer, manufacturer branch, distributor, or distributor branch from taking or threatening to take any adverse action against a dealer pursuant to a published export or sale-for-resale prohibition because the dealer sold or leased a vehicle to a customer who either exported the vehicle to a foreign country or resold the vehicle, unless the dealer was provided an export or sale-for-resale prohibition policy, in writing, prior to the sale or lease and the dealer knew or should have known of the customer's intent to export or resell the vehicle, as specified. Because a violation of these provisions would be a crime, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares all of the following:

- (a) The distribution, sale, and service of new motor vehicles in the State of California vitally affect the general economy of this state and the public welfare.
- (b) The new motor vehicle franchise system, which operates within a strictly defined and highly regulated statutory scheme, assures the consuming public of a well-organized distribution system for the availability and sale of new motor vehicles throughout the state, provides a network of quality warranty, recall, and repair facilities to maintain those vehicles, and creates a cost-effective method for the state to police those systems through the licensing and regulation of private sector franchisors and franchisees.
- (c) California franchise laws require manufacturers to provide reasonable reimbursement to dealers for warranty work, but fail to establish guidelines for determining whether a reimbursement is reasonable. Unlike many states, California does not require franchisors to provide an appeal process where dealers can dispute warranty and incentive claim denials or audit chargebacks.

(d) Franchisors sometimes establish strict export policies where a paid sales incentive is subject to being charged back in the event that a vehicle is exported, even when the dealership did not know, or in the exercise of reasonable diligence should not have known, of the intended exportation. Unlike many states, California does not prohibit those chargebacks in circumstances where the dealer did not have knowledge of or reason to know of the intended exportation, such as when the dealer has collected sales tax or the vehicle has been registered.

(e) Many franchisors measure dealership sales, service, and customer service performance against standards based upon performance averages that may not adequately take into account a dealer's local market. Unlike many states, California does not provide criteria for the establishment of performance standards.

(f) Franchisors sometimes establish facility models that require dealers to purchase goods or services from specific vendors even if a dealer can obtain substantially similar goods or services from an alternative local vendor.

(g) It is the intent of this act to ensure that new motor vehicle dealers are treated fairly by their franchisors, that dealers are reasonably compensated for performing warranty repairs on behalf of their franchisor, that dealers are not subject to adverse action when vehicles are exported and the dealer did not know or have reason to know, that performance standards are reasonable, and that dealers be allowed to obtain required goods or services through vendors of their choosing.

SEC. 2. Section 3006 of the Vehicle Code is amended to read:

<< CA VEHICLE § 3006 >>

3006. The board shall organize and elect a president from among its members for a term of one year at the first meeting of each year. The newly elected president shall assume his **or her** duties at the conclusion of the meeting at which he **or she** was elected. Reelection to office during membership is unrestricted.

SEC. 3. Section 3008 of the Vehicle Code is amended to read:

<< CA VEHICLE § 3008 >>

3008. (a) All meetings of the board shall be open and public, and all persons shall be permitted to attend any meeting of the board, except that the board may hold executive sessions to deliberate on the decision to be reached upon the evidence introduced in a proceeding conducted in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

(b) At all meetings of the board, open or executive, involving an appeal from a decision of the Director of Motor Vehicles^{***}, the director or his **or her** authorized representative may attend, present the position of the department, and **then** shall absent himself **or herself** from any executive session at the request of any member of the board.

(c) Within the limitations of its powers and authority^{***}, and in the event of disagreement between the board and the director regarding the decision to be reached^{***}, the decision of the board shall be final.

SEC. 4. Section 3012 of the Vehicle Code is amended to read:

<< CA VEHICLE § 3012 >>

3012. Each member of the board shall receive a per diem of one hundred dollars (\$100) for each day actually spent in the discharge of official duties, and he **or she** shall be reimbursed for ^{***} traveling and other expenses necessarily incurred in

the performance of his ~~or her~~ duties-***. **The** per diem and reimbursement shall be wholly defrayed from funds that shall be provided in the annual budget of the department.

SEC. 5. Section 3050 of the Vehicle Code is amended to read:

<< CA VEHICLE § 3050 >>

3050. The board shall do all of the following:

(a) Adopt rules and regulations in accordance with Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code governing those matters that are specifically committed to its jurisdiction.

(b) Hear and determine, within the limitations and in accordance with the procedure provided, an appeal presented by an applicant for, or holder of, a license as a new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch, or representative when the applicant or licensee submits an appeal provided for in this chapter from a decision arising out of the department.

(c) Consider any matter concerning the activities or practices of any person applying for or holding a license as a new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch, or representative pursuant to Chapter 4 (commencing with Section 11700) of Division 5 submitted by any person. A member of the board who is a new motor vehicle dealer may not participate in, hear, comment, advise other members upon, or decide any matter considered by the board pursuant to this subdivision that involves a dispute between a franchisee and franchisor. After that consideration, the board may do any one or any combination of the following:

(1) Direct the department to conduct investigation of matters that the board deems reasonable, and make a written report on the results of the investigation to the board within the time specified by the board.

(2) Undertake to mediate, arbitrate, or otherwise resolve any honest difference of opinion or viewpoint existing between any member of the public and any new motor vehicle dealer, manufacturer, manufacturer branch, **distributor**, distributor branch, or representative.

(3) Order the department to exercise any and all authority or power that the department may have with respect to the issuance, renewal, refusal to renew, suspension, or revocation of the license of any new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch, or representative as that license is required under Chapter 4 (commencing with Section 11700) of Division 5.

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

(e) Notwithstanding subdivisions (c) and (d), the courts have jurisdiction over all common law and statutory claims originally cognizable in the courts. For those claims, a party may initiate an action directly in any court of competent jurisdiction.

SEC. 6. Section 3050.7 of the Vehicle Code is amended to read:

<< CA VEHICLE § 3050.7 >>

3050.7. (a) The board may adopt stipulated decisions and orders, without a hearing pursuant to Section 3066, to resolve one or more issues raised by a protest or petition filed with the board. Whenever the parties to a protest or petition submit a proposed stipulated decision and *** order of the board, a copy of the proposed stipulated decision and order shall be transmitted by the executive director of the board to each member of the board. The proposed stipulated decision and order shall be deemed to be adopted by the board unless a member of the board notifies the executive director of the board of an objection thereto within 10 days after that board member has received a copy of the proposed stipulated decision and order.

(b) If the board adopts a stipulated decision and order to resolve a protest filed pursuant to Section 3060 **or 3070** in which the parties stipulate that good cause exists for the termination of the franchise of the protestant, and the order provides for a conditional or unconditional termination of the franchise of the protestant, paragraph (2) of subdivision (a) of Section 3060 **and paragraph (2) of subdivision (a) of Section 3070**, which **require** a hearing to determine whether good cause exists for termination of the franchise, is inapplicable to the proceedings. If the stipulated decision and order provides for an unconditional termination of the franchise, the franchise may be terminated without further proceedings by the board. If the stipulated decision and order provides for the termination of the franchise, conditioned upon the failure of a party to comply with specified conditions, the franchise may be terminated upon a determination, according to the terms of the stipulated decision and order, that the conditions have not been met. If the stipulated decision and order provides for the termination of the franchise conditioned upon the occurrence of specified conditions, the franchise may be terminated upon a determination, according to the terms of the stipulated decision and order, that the stipulated conditions have occurred.

SEC. 7. Section 3052 of the Vehicle Code is amended to read:

<< CA VEHICLE § 3052 >>

3052. (a) On or before the 10th day after the last day on which reconsideration of a final decision of the department can be ordered, the *** **applicant or licensee** may file an appeal with the executive director of the board. The appeal shall be in writing and shall state the grounds therefor. A copy of the appeal shall be mailed by the appellant to the department, and the department shall thereafter be considered as a party to the appeal. The right to appeal is not affected by failure to seek reconsideration before the department.

(b) An appeal is considered to be filed on the date it is received in the office of the executive director of the board, except that an appeal mailed to the executive director by means of registered mail is considered to be filed with the executive director on the postmark date.

(c) The appeal shall be accompanied by evidence that the appellant has requested the administrative record of the department and advanced the cost of preparation of that record. The complete administrative record includes the pleadings, all notices and orders issued by the department, any proposed decision by an administrative law judge, the exhibits admitted or rejected, the written evidence, and any other papers in the case. All parts of the administrative record requested by the appellant may be filed with the appeal together with the appellant's points and authorities. If the board orders the filing of additional parts of the administrative record, the board may order prior payment by the appellant of the cost of providing those additional parts.

(d) Except as provided in subdivisions (e) and (f), a decision of the department may not become effective during the period **in which** an appeal may be filed, and the filing of an appeal shall stay the decision of the department until a final order is made by the board.

(e) When a decision has ordered revocation of a dealer's license, the department may, on or before the last day upon which an appeal may be filed with the board, petition the board to order the decision of the department into effect.

(f) With respect to the department's petition filed pursuant to subdivision (e), the department shall have the burden of proof. The board shall act upon the petition within 14 days or prior to the effective date of the department's decision, whichever is later. The board may order oral argument on the petition before the board. ***

SEC. 8. Section 3056 of the Vehicle Code is amended to read:

<< CA VEHICLE § 3056 >>

3056. When the order reverses the decision of the department, the board may direct the *** **department to reconsider** the matter in the light of its order and may direct the department to take **any** further action as is specially enjoined upon it by law. In all cases the board shall enter its order within 60 days after the filing of the appeal, except in the case of unavoidable delay in supplying the administrative record, in which event the board shall make its final order within 60 days after receipt *** **of the record.**

SEC. 9. Section 3057 of the Vehicle Code is amended to read:

<< CA VEHICLE § 3057 >>

3057. The board shall fix an effective date for its orders not more than 30 days from the day the order is served upon the parties or remand the case to the department for fixing an effective date. A final order of the board shall be in writing and copies *** **of the order** shall be delivered to the parties personally or sent **to** them by registered mail. The order shall be final upon its delivery or mailing and no reconsideration or rehearing **by the board** shall be permitted.

SEC. 10. Section 3062 of the Vehicle Code is amended to read:

<< CA VEHICLE § 3062 >>

3062. (a)(1) Except as otherwise provided in subdivision (b), if a franchisor seeks to enter into a franchise establishing an additional motor vehicle dealership-***, **or seeks to relocate an existing motor vehicle dealership, that has** a relevant market area *** **within which** the same line-make is *** represented, *** the franchisor shall, in writing, first notify the board and each franchisee in that line-make in the relevant market area of the franchisor's intention to establish an additional dealership or to relocate an existing dealership-***. Within 20 days of receiving the notice, satisfying the requirements of this section, or within 20 days after the end of an appeal procedure provided by the franchisor, a franchisee required to be given the notice may file with the board a protest to the *** **proposed dealership establishment or relocation described in the franchisor's notice.** If, within this time, a franchisee files with the board a request for additional time to file a protest, the board or its executive director, upon a showing of good cause, may grant an additional 10 days to file the protest. When a protest is filed, the board shall inform the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor may not establish **the proposed dealership** or relocate the **existing** dealership until the board has held a hearing as provided in Section 3066, nor thereafter, if the board has determined that there is good cause for not permitting the **establishment of the proposed dealership or relocation of the existing** dealership. In the event of multiple protests, hearings may be consolidated to expedite the disposition of the issue.

(2) If a franchisor seeks to enter into a franchise that authorizes a satellite warranty facility to be established at, or relocated to, a proposed location that is within two miles of a dealership of the same line-make, the franchisor shall first give notice in writing of the franchisor's intention to establish or relocate a satellite warranty facility at the proposed location to the board and each franchisee operating a dealership of the same line-make within two miles of the proposed location. Within 20 days of receiving the notice satisfying the requirements of this section, or within 20 days after the end of an appeal procedure provided by the franchisor, a franchisee required to be given the notice may file with the board a protest to the establishing or relocating of the satellite warranty facility. If, within this time, a franchisee files with the board a request for additional time to file a protest, the

board or its executive director, upon a showing of good cause, may grant an additional 10 days to file the protest. When a protest is filed, the board shall inform the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor may not establish or relocate the proposed satellite warranty facility until the board has held a hearing as provided in Section 3066, nor thereafter, if the board has determined that there is good cause for not permitting the satellite warranty facility. In the event of multiple protests, hearings may be consolidated to expedite the disposition of the issue.

(3) The written notice shall contain, on the first page thereof in at least 12-point bold type and circumscribed by a line to segregate it from the rest of the text, the following statement:

“NOTICE TO DEALER: You have the right to file a protest with the NEW MOTOR VEHICLE BOARD in Sacramento and have a hearing on your protest under the terms of the California Vehicle Code if you oppose this action. You must file your protest with the board within 20 days of your receipt of this notice, or within 20 days after the end of any appeal procedure that is provided by us to you. If within this time you file with the board a request for additional time to file a protest, the board or its executive director, upon a showing of good cause, may grant you an additional 10 days to file the protest.”

(b) Subdivision (a) does not apply to either of the following:

(1) The relocation of an existing dealership to a location that is both within the same city as, and within one mile from, the existing dealership location.

(2) The establishment at a location that is both within the same city as, and within one-quarter mile from, the location of a dealership of the same line-make that has been out of operation for less than 90 days.

(c) Subdivision (a) does not apply to a display of vehicles at a fair, exposition, or similar exhibit if actual sales are not made at the event and the display does not exceed 30 days. This subdivision may not be construed to prohibit a new vehicle dealer from establishing a branch office for the purpose of selling vehicles at the fair, exposition, or similar exhibit, even though the event is sponsored by a financial institution, as defined in Section 31041 of the Financial Code or by a financial institution and a licensed dealer. The establishment of these branch offices, however, shall be in accordance with subdivision (a) where applicable.

(d) For the purposes of this section, the reopening of a dealership that has not been in operation for one year or more shall be deemed the establishment of an additional motor vehicle dealership.

(e) As used in this section, the following definitions apply:

(1) “Motor vehicle dealership” or “dealership” means an authorized facility at which a franchisee offers for sale or lease, displays for sale or lease, or sells or leases new motor vehicles.

(2) “Satellite warranty facility” means a facility operated by a franchisee where authorized warranty repairs and service are performed and the offer for sale or lease, the display for sale or lease, or the sale or lease of new motor vehicles is not authorized to take place.

SEC. 11. Section 3063 of the Vehicle Code is amended to read:

<< CA VEHICLE § 3063 >>

3063. In determining whether good cause has been established for not entering into **a franchise** or relocating an ~~***~~ **existing dealership of** the same line-make, the board shall take into consideration the existing circumstances, including, but not limited to, all of the following:

- (a) Permanency of the investment.
- (b) Effect on the retail motor vehicle business and the consuming public in the relevant market area.
- (c) Whether it is injurious to the public welfare for an additional franchise to be established **or an existing dealership to be relocated.**
- (d) Whether the franchisees of the same line-make in **the** relevant market area are providing adequate competition and convenient consumer care for the motor vehicles of the line-make in the market area, which shall include the adequacy of motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel.
- (e) Whether the establishment of an additional franchise would increase competition and therefore be in the public interest.
- (f) For purposes of this section, the terms “motor vehicle dealership” and “dealership” shall have the same meaning as defined in Section 3062.**

SEC. 12. Section 3064 of the Vehicle Code is amended to read:

<< CA VEHICLE § 3064 >>

3064. (a) Every franchisor shall specify to its franchisees the delivery and preparation obligations of **the** franchisees prior to delivery of new motor vehicles to retail buyers. A copy of the delivery and preparation obligations, which shall constitute the franchisee's only responsibility for product liability between the franchisee and the franchisor but ~~***~~ shall not in any way affect the franchisee's responsibility for product liability between the purchaser and either the franchisee or the franchisor, and a schedule of compensation to be paid **to** franchisees for the work and services they shall be required to perform in connection with **those** delivery and preparation obligations shall be filed with the board by franchisors, and shall constitute the compensation as set forth on **the** schedule. The schedule of compensation shall be reasonable, with the reasonableness thereof being subject to the approval of the board, **if** a franchisee files a notice of protest with the board. In determining the reasonableness of the schedules, the board shall consider all relevant circumstances, including, but not limited to, the time required to perform each function that the dealer is obligated to perform and the appropriate labor rate.

(b) Upon delivery of the vehicle, the franchisee shall give a copy of the delivery and preparation obligations to the purchaser and a written certification that ~~***~~ **the franchisee** has fulfilled these obligations.

SEC. 13. Section 3065 of the Vehicle Code is amended to read:

<< CA VEHICLE § 3065 >>

3065. (a) Every franchisor shall properly fulfill every warranty agreement made by it and adequately and fairly compensate each of its franchisees for labor and parts used to fulfill that warranty when the franchisee has fulfilled warranty obligations of **diagnostics, repair, and servicing** and shall file a copy of its warranty reimbursement schedule or formula with the board. The warranty reimbursement schedule or formula shall be reasonable with respect to the time and compensation allowed **to** the franchisee for the warranty ~~***~~ **diagnostics, repair, and servicing**, and all other conditions of the obligation. The reasonableness of the warranty reimbursement schedule or formula shall be determined by the board if a franchisee files a ~~**~~ protest with the board. **A franchisor shall not replace, modify, or supplement the warranty reimbursement schedule to impose a fixed percentage or other reduction in the time and compensation allowed to the franchisee for warranty repairs not attributable to a specific repair. A franchisor may reduce the allowed time and compensation applicable to a specific warranty repair only upon 15 days' prior written notice to the franchisee. Any protest challenging a reduction in time and compensation applicable to specific parts or labor operations shall be filed within six months following the**

franchisee's receipt of notice of the reduction, and the franchisor shall have the burden of establishing the reasonableness of the reduction and adequacy and fairness of the resulting compensation.

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

(c) If any franchisor disallows a franchisee's claim for a defective part, alleging that the part, in fact, is not defective, the franchisor shall return the part alleged not to be defective to the franchisee at the expense of the franchisor, or the franchisee shall be reimbursed for the franchisee's cost of the part, at the franchisor's option.

(d)(1) All claims made by franchisees pursuant to this section shall be either approved or disapproved within 30 days after their receipt by the franchisor. Any claim not specifically disapproved in writing within 30 days from receipt by the franchisor shall be deemed approved on the 30th day. *** All claims made by franchisees under this section and Section 3064 for labor and parts shall be paid within 30 days **after** approval.

(2) **A franchisor shall not disapprove a claim unless the claim is false or fraudulent, repairs were not properly made, repairs were inappropriate to correct a nonconformity with the written warranty due to an improper act or omission of the franchisee, or for material noncompliance with reasonable and nondiscriminatory documentation and administrative claims submission requirements.**

(3) **When any claim is disapproved, the franchisee who submits it shall be notified in writing of its disapproval within the required period, and each notice shall state the specific grounds upon which the disapproval is based. The franchisor shall provide for a reasonable appeal process allowing the franchisee at least 30 days after receipt of the written disapproval notice to provide additional supporting documentation or information rebutting the disapproval. If disapproval is based upon noncompliance with documentation or administrative claims submission requirements, the franchisor shall allow the franchisee at least 30 days from the date of receipt of the notice to cure any material noncompliance. If the disapproval is rebutted, and material noncompliance is cured before the applicable deadline, the franchisor shall approve the claim.**

(4) **If the franchisee provides additional supporting documentation or information purporting to rebut the disapproval, attempts to cure noncompliance relating to the claim, or otherwise appeals denial of the claim and the franchisor continues to deny the claim, the franchisor shall provide the franchisee with a written notification of the final denial within 30 days of completion of the appeal process, which shall conspicuously state "Final Denial" on the first page.**

(5) Failure to approve or pay within the above specified time limits, in individual instances for reasons beyond the reasonable control of the franchisor, shall not constitute a violation of this article.

(6) **Within six months after either receipt of the written notice described in paragraph (3) or (4), whichever is later, a franchisee may file a protest with the board for determination of whether the franchisor complied with the requirements of this subdivision. In any protest pursuant to this subdivision, the franchisor shall have the burden of proof.**

(e)(1) Audits of franchisee warranty records may be conducted by the franchisor on a reasonable basis *** for a period of **nine months after a claim is paid or credit issued. *** A franchisor shall not select a franchisee for an audit, or perform an audit, in a punitive, retaliatory, or unfairly discriminatory manner. A franchisor may conduct no more than one random audit of a franchisee in a nine-month period. The franchisor's notification to the franchisee of any additional audit within a nine-month period shall be accompanied by written disclosure of the basis for that additional audit.**

(2) Previously approved claims shall not be disapproved or charged back to the franchisee unless the claim is false or fraudulent, repairs were not properly made, repairs were inappropriate to correct a nonconformity with the written warranty due to an improper act or omission of the franchisee, or for material noncompliance with reasonable and nondiscriminatory documentation and administrative claims submission requirements. A franchisor shall not disapprove or chargeback a claim based upon an extrapolation from a sample of claims, unless the sample of claims is selected randomly and the extrapolation is performed in a reasonable and statistically valid manner.

(3) If the franchisor disapproves of a previously approved claim following an audit, the franchisor shall provide to the franchisee, within 30 days after the audit, a written disapproval notice stating the specific grounds upon which the claim is disapproved. The franchisor shall provide a reasonable appeal process allowing the franchisee a reasonable period of not less than 30 days after receipt of the written disapproval notice to respond to any disapproval with additional supporting documentation or information rebutting the disapproval and to cure noncompliance, with the period to be commensurate with the volume of claims under consideration. If the franchisee rebuts any disapproval and cures any material noncompliance relating to a claim before the applicable deadline, the franchisor shall not chargeback the franchisee for that claim.

(4) If the franchisee provides additional supporting documentation or information purporting to rebut the disapproval, attempts to cure noncompliance relating to the claim, or otherwise appeals denial of the claim and the franchisor continues to deny the claim, the franchisor shall provide the franchisee with a written notification of the final denial within 30 days of completion of the appeal process, which shall conspicuously state "Final Denial" on the first page.

(5) The franchisor shall not chargeback the franchisee until 45 days after receipt of the written notice described in paragraph (3) or paragraph (4), whichever is later. Any chargeback to a franchisee for warranty parts or service compensation shall be made within 90 days of ~~***~~ receipt of that written notice. If the franchisee files a protest pursuant to this subdivision prior to the franchisor's chargeback for denied claims, the franchisor shall not offset or otherwise undertake to collect the chargeback until the board issues a final order on the protest. If the board sustains the chargeback or the protest is dismissed, the franchisor shall have 90 days following issuance of the final order or the dismissal to make the chargeback, unless otherwise provided in a settlement agreement.

(6) Within six months after either receipt of the written disapproval notice or completion of the franchisor's appeal process, whichever is later, a franchisee may file a protest with the board for determination of whether the franchisor complied with this subdivision. In any protest pursuant to this subdivision, the franchisor shall have the burden of proof.

(f) If a false claim was submitted by a franchisee with **the** intent to defraud the franchisor, a longer period for audit and any resulting chargeback may be permitted if the franchisor obtains an order from the board.

SEC. 14. Section 3065.1 of the Vehicle Code is amended to read:

<< CA VEHICLE § 3065.1 >>

3065.1. (a) All claims made by a franchisee for payment under the terms of a franchisor incentive program shall be either approved or disapproved within 30 days after receipt by the franchisor. When any claim is disapproved, the franchisee who submits it shall be notified in writing of its disapproval within the required period, and each notice shall state the specific grounds upon which the disapproval is based. Any claim not specifically disapproved in writing within 30 days from receipt shall be deemed approved on the 30th day. ~~***~~

(b) Franchisee claims for incentive program compensation shall not be disapproved unless the claim is false or fraudulent, the claim is ineligible under the terms of the incentive program as previously communicated to the franchisee,

or for material noncompliance with reasonable and nondiscriminatory documentation and administrative claims submission requirements.

(c) The franchisor shall provide for a reasonable appeal process allowing the franchisee at least 30 days after receipt of the written disapproval notice to respond to any disapproval with additional supporting documentation or information rebutting the disapproval. If disapproval is based upon noncompliance with documentation or administrative claims submission requirements, the franchisor shall allow the franchisee at least 30 days from the date of receipt of the written disapproval notice to cure any material noncompliance. If the disapproval is rebutted, and material noncompliance is cured before the applicable deadline, the franchisor shall approve the claim.

(d) If the franchisee provides additional supporting documentation or information purporting to rebut the disapproval, attempts to cure noncompliance relating to the claim, or otherwise appeals denial of the claim, and the franchisor continues to deny the claim, the franchisor shall provide the franchisee with a written notification of the final denial within 30 days of completion of the appeal process, which shall conspicuously state "Final Denial" on the first page.

(e) Following the disapproval of a claim, a franchisee shall have six months from receipt of the written notice described in either subdivision (a) or (d), whichever is later, to file a protest with the board for determination of whether the franchisor complied with subdivisions (a), (b), (c), and (d). In any hearing pursuant to this subdivision or subdivision (a), (b), (c), or (d), the franchisor shall have the burden of proof.

(f) All claims made by franchisees under this section shall be paid within 30 days following approval. Failure to approve or pay within the above specified time limits, in individual instances for reasons beyond the reasonable control of the franchisor, do not constitute a violation of this article.

*** (g)(1) Audits of franchisee incentive records may be conducted by the franchisor on a reasonable basis, and for a period of nine months after a claim is paid or credit issued. *** A franchisor shall not select a franchisee for an audit, or perform an audit, in a punitive, retaliatory, or unfairly discriminatory manner. A franchisor may conduct no more than one random audit of a franchisee in a nine-month period. The franchisor's notification to the franchisee of any additional audit within a nine-month period shall be accompanied by written disclosure of the basis for that additional audit.

(2) Previously approved claims shall not be disapproved and charged back unless the claim is false or fraudulent, the claim is ineligible under the terms of the incentive program as previously communicated to the franchisee, or for material noncompliance with reasonable and nondiscriminatory documentation and administrative claims submission requirements. A franchisor shall not disapprove a claim or chargeback a claim based upon an extrapolation from a sample of claims, unless the sample of claims is selected randomly and the extrapolation is performed in a reasonable and statistically valid manner.

(3) If the franchisor disapproves of a previously approved claim following an audit, the franchisor shall provide to the franchisee, within 30 days after the audit, a written disapproval notice stating the specific grounds upon which the claim is disapproved. The franchisor shall provide a reasonable appeal process allowing the franchisee a reasonable period of not less than 30 days after receipt of the written disapproval notice to respond to any disapproval with additional supporting documentation or information rebutting the disapproval and to cure any material noncompliance, with the period to be commensurate with the volume of claims under consideration. If the franchisee rebuts any disapproval and cures any material noncompliance relating to a claim before the applicable deadline, the franchisor shall not chargeback the franchisee for that claim.

(4) If the franchisee provides additional supporting documentation or information purporting to rebut the disapproval, attempts to cure noncompliance relating to the claim, or otherwise appeals denial of the claim, and the franchisor

continues to deny the claim, the franchisor shall provide the franchisee with a written notification of the final denial within 30 days of completion of the appeal process, which shall conspicuously state “Final Denial” on the first page.

(5) The franchisor shall not chargeback the franchisee until 45 days after the franchisee receives the written notice described in paragraph (3) or (4), whichever is later. If the franchisee cures any material noncompliance relating to a claim, the franchisor shall not chargeback the dealer for that claim. Any chargeback to a franchisee for incentive program compensation shall be made within 90 days *** after the franchisee receives that written notice. If the board sustains the chargeback or the protest is dismissed, the franchisor shall have 90 days following issuance of the final order or the dismissal to make the chargeback, unless otherwise provided in a settlement agreement.

(6) Within six months after either receipt of the written notice described in paragraph (3) or (4), a franchisee may file a protest with the board for determination of whether the franchisor complied with this subdivision. If the franchisee files a protest pursuant to this subdivision prior to the franchisor's chargeback for denied claims, the franchisor shall not offset or otherwise undertake to collect the chargeback until the board issues a final order on the protest. In any protest pursuant to this subdivision, the franchisor shall have the burden of proof.

(h) If a false claim was submitted by a franchisee with the intent to defraud the franchisor, a longer period for audit and any resulting chargeback may be permitted if the franchisor obtains an order from the board.

SEC. 15. Section 3066 of the Vehicle Code is amended to read:

<< CA VEHICLE § 3066 >>

3066. (a) Upon receiving a *** protest pursuant to Section 3060, 3062, 3064, 3065, 3065.1, 3070, 3072, 3074, 3075, or 3076, the board shall fix a time within 60 days of the order, and place of hearing, and shall send by registered mail a copy of the order to the franchisor, the protesting franchisee, and all individuals and groups that have requested notification by the board of protests and decisions of the board. Except in a case involving a franchisee who deals exclusively in motorcycles, the board or its executive director may, upon a showing of good cause, accelerate or postpone the date initially established for a hearing, but the hearing may not be rescheduled more than 90 days after the board's initial order. For the purpose of accelerating or postponing a hearing date, “good cause” includes, but is not limited to, the effects upon, and any irreparable harm to, the parties or interested persons or groups if the request for a change in hearing date is not granted. The board or an administrative law judge designated by the board shall hear and consider the oral and documented evidence introduced by the parties and other interested individuals and groups, and the board shall make its decision solely on the record so made. Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code and Sections 11507.3, 11507.6, 11507.7, 11511, 11511.5, 11513, 11514, 11515, and 11517 of the Government Code apply to these proceedings.

(b) In a hearing on a protest filed pursuant to Section 3060, 3062, 3070, or 3072, the franchisor shall have the burden of proof to establish that there is good cause to modify, replace, terminate, or refuse to continue a franchise. The franchisee shall have the burden of proof to establish that there is good cause not to enter into a franchise establishing or relocating an additional motor vehicle dealership.

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

(d) A member of the board who is a new motor vehicle dealer may not participate in, hear, comment, or advise other members upon, or decide, a matter involving a protest filed pursuant to this article unless all parties to the protest stipulate otherwise.

SEC. 16. Section 3067 of the Vehicle Code is amended to read:

<< CA VEHICLE § 3067 >>

3067. (a) The decision of the board shall be in writing and shall contain findings of fact and a determination of the issues presented. The decision shall sustain, conditionally sustain, overrule, or conditionally overrule the protest. Conditions imposed by the board shall be for the purpose of assuring performance of binding contractual agreements between franchisees and franchisors or otherwise serving the purposes of this article **or Article 5 (commencing with Section 3070)**. If the board fails to act within 30 days after the hearing, within 30 days after the board receives a proposed decision where the case is heard before an administrative law judge alone, or within a period necessitated by Section 11517 of the Government Code, or as may be mutually agreed upon by the parties, then the proposed action shall be deemed to be approved. Copies of the board's decision shall be delivered to the parties personally or sent to them by registered mail, as well as to all individuals and groups that have requested notification by the board of protests and decisions by the board. The board's decision shall be final upon its delivery or mailing and a reconsideration or rehearing is not permitted.

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

SEC. 17. Section 3069.1 of the Vehicle Code is amended to read:

<< CA VEHICLE § 3069.1 >>

3069.1. Sections 3060 to 3065.1, inclusive, do not apply to a franchise authorizing a dealership, as defined in ~~***~~ subdivision **(d)** of Section 3072.

SEC. 18. Section 11713.3 of the Vehicle Code is amended to read:

<< CA VEHICLE § 11713.3 >>

11713.3. It is unlawful and a violation of this code for a manufacturer, manufacturer branch, distributor, or distributor branch licensed pursuant to this code to do, directly or indirectly through an affiliate, any of the following:

(a) To refuse or fail to deliver in reasonable quantities and within a reasonable time after receipt of an order from a dealer having a franchise for the retail sale of a new vehicle sold or distributed by the manufacturer or distributor, a new vehicle or parts or accessories to new vehicles as are covered by the franchise, if the vehicle, parts, or accessories are publicly advertised as being available for delivery or actually being delivered. This subdivision is not violated, however, if the failure is caused by acts or causes beyond the control of the manufacturer, manufacturer branch, distributor, or distributor branch.

(b) To prevent or require, or attempt to prevent or require, by contract or otherwise, a change in the capital structure of a dealership or the means by or through which the dealer finances the operation of the dealership, if the dealer at all times meets reasonable capital standards agreed to by the dealer and the manufacturer or distributor, and if a change in capital structure does not cause a change in the principal management or have the effect of a sale of the franchise without the consent of the manufacturer or distributor.

(c) To prevent or require, or attempt to prevent or require, a dealer to change the executive management of a dealership, other than the principal dealership operator or operators, if the franchise was granted to the dealer in reliance upon the personal qualifications of that person.

(d)(1) Except as provided in subdivision (t), to prevent or require, or attempt to prevent or require, by contract or otherwise, a dealer, or an officer, partner, or stockholder of a dealership, the sale or transfer of a part of the interest of any of them to another person. A dealer, officer, partner, or stockholder shall not, however, have the right to sell, transfer, or assign the franchise, or a right thereunder, without the consent of the manufacturer or distributor except that the consent shall not be unreasonably withheld.

(2)(A) For the transferring franchisee to fail, prior to the sale, transfer, or assignment of a franchisee or the sale, assignment, or transfer of all, or substantially all, of the assets of the franchised business or a controlling interest in the franchised business to another person, to notify the manufacturer or distributor of the franchisee's decision to sell, transfer, or assign the franchise. The notice shall be in writing and shall include all of the following:

(i) The proposed transferee's name and address.

(ii) A copy of all of the agreements relating to the sale, assignment, or transfer of the franchised business or its assets.

(iii) The proposed transferee's application for approval to become the successor franchisee. The application shall include forms and related information generally utilized by the manufacturer or distributor in reviewing prospective franchisees, if those forms are readily made available to existing franchisees. As soon as practicable after receipt of the proposed transferee's application, the manufacturer or distributor shall notify the franchisee and the proposed transferee of information needed to make the application complete.

(B) For the manufacturer or distributor, to fail, on or before 60 days after the receipt of all of the information required pursuant to subparagraph (A), or as extended by a written agreement between the manufacturer or distributor and the franchisee, to notify the franchisee of the approval or the disapproval of the sale, transfer, or assignment of the franchise. The notice shall be in writing and shall be personally served or sent by certified mail, return receipt requested, or by guaranteed overnight delivery service that provides verification of delivery and shall be directed to the franchisee. A proposed sale, assignment, or transfer shall be deemed approved, unless disapproved by the franchisor in the manner provided by this subdivision. If the proposed sale, assignment, or transfer is disapproved, the franchisor shall include in the notice of disapproval a statement setting forth the reasons for the disapproval.

(3) In an action in which the manufacturer's or distributor's withholding of consent under this subdivision or subdivision (e) is an issue, whether the withholding of consent was unreasonable is a question of fact requiring consideration of all the existing circumstances.

(e) To prevent, or attempt to prevent, a dealer from receiving fair and reasonable compensation for the value of the franchised business. There shall not be a transfer or assignment of the dealer's franchise without the consent of the manufacturer or distributor, which consent shall not be unreasonably withheld or conditioned upon the release, assignment, novation, waiver, estoppel, or modification of a claim or defense by the dealer.

(f) To obtain money, goods, services, or another benefit from a person with whom the dealer does business, on account of, or in relation to, the transaction between the dealer and that other person, other than for compensation for services rendered, unless the benefit is promptly accounted for, and transmitted to, the dealer.

(g)(1) Except as provided in paragraph (3), to obtain from a dealer or enforce against a dealer an agreement, provision, release, assignment, novation, waiver, or estoppel that does any of the following:

(A) Modifies or disclaims a duty or obligation of a manufacturer, manufacturer branch, distributor, distributor branch, or representative, or a right or privilege of a dealer, pursuant to Chapter 4 (commencing with Section 11700) of Division 5 or Chapter 6 (commencing with Section 3000) of Division 2.

- (B) Limits or constrains the right of a dealer to file, pursue, or submit evidence in connection with a protest before the board.
- (C) Requires a dealer to terminate a franchise.
- (D) Requires a controversy between a manufacturer, manufacturer branch, distributor, distributor branch, or representative and a dealer to be referred to a person for a binding determination. However, this subparagraph does not prohibit arbitration before an independent arbitrator, provided that whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of, or relating to, that contract, arbitration may be used to settle the controversy only if, after the controversy arises, all parties to the controversy consent in writing to use arbitration to settle the controversy. For the purpose of this subparagraph, the terms “motor vehicle” and “motor vehicle franchise contract” shall have the same meaning as defined in Section 1226 of Title 15 of the United States Code. If arbitration is elected to settle a dispute under a motor vehicle franchise contract, the arbitrator shall provide the parties to the arbitration with a written explanation of the factual and legal basis for the award.
- (2) An agreement, provision, release, assignment, novation, waiver, or estoppel prohibited by this subdivision shall be unenforceable and void.
- (3) This subdivision does not do any of the following:
- (A) Limit or restrict the terms upon which parties to a protest before the board, civil action, or other proceeding can settle or resolve, or stipulate to evidentiary or procedural matters during the course of, a protest, civil action, or other proceeding.
- (B) Affect the enforceability of any stipulated order or other order entered by the board.
- (C) Affect the enforceability of any provision in a contract if the provision is not prohibited under this subdivision or any other law.
- (D) Affect the enforceability of a provision in any contract entered into on or before December 31, 2011.
- (E) Prohibit a dealer from waiving its right to file a protest pursuant to Section 3065.1 if the waiver agreement is entered into after a franchisor incentive program claim has been disapproved by the franchisor and the waiver is voluntarily given as part of an agreement to settle that claim.
- (F) Prohibit a voluntary agreement supported by valuable consideration, other than granting or renewing a franchise, that does both of the following:
- (i) Provides that a dealer establish or maintain exclusive facilities, personnel, or display space or provides that a dealer make a material alteration, expansion, or addition to a dealership facility.
- (ii) Contains no waiver or other provision prohibited by subparagraph (A), (B), (C), or (D) of paragraph (1).
- (G) Prohibit an agreement separate from the franchise agreement that implements a dealer's election to terminate the franchise if the agreement is conditioned only on a specified time for termination or payment of consideration to the dealer.
- (H)(i) Prohibit a voluntary waiver agreement, supported by valuable consideration, other than the consideration of renewing a franchise, to waive the right of a dealer to file a protest under Section 3062 for the proposed establishment or relocation of a specific proposed dealership, if the waiver agreement provides all of the following:

- (I) The approximate address at which the proposed dealership will be located.
 - (II) The planning potential used to establish the proposed dealership's facility, personnel, and capital requirements.
 - (III) An approximation of projected vehicle and parts sales, and number of vehicles to be serviced at the proposed dealership.
 - (IV) Whether the franchisor or affiliate will hold an ownership interest in the proposed dealership or real property of the proposed dealership, and the approximate percentage of any franchisor or affiliate ownership interest in the proposed dealership.
 - (V) The line-makes to be operated at the proposed dealership.
 - (VI) If known at the time the waiver agreement is executed, the identity of the dealer who will operate the proposed dealership.
 - (VII) The date the waiver agreement is to expire, which may not be more than 30 months after the date of execution of the waiver agreement.
- (ii) Notwithstanding the provisions of a waiver agreement entered into pursuant to the provisions of this subparagraph, a dealer may file a protest under Section 3062 if any of the information provided pursuant to clause (i) has become materially inaccurate since the waiver agreement was executed. Any determination of the enforceability of a waiver agreement shall be determined by the board and the franchisor shall have the burden of proof.
- (h) To increase prices of motor vehicles that the dealer had ordered for private retail consumers prior to the dealer's receipt of the written official price increase notification. A sales contract signed by a private retail consumer is evidence of the order. In the event of manufacturer price reductions, the amount of the reduction received by a dealer shall be passed on to the private retail consumer by the dealer if the retail price was negotiated on the basis of the previous higher price to the dealer. Price reductions apply to all vehicles in the dealer's inventory that were subject to the price reduction. Price differences applicable to new model or series motor vehicles at the time of the introduction of new models or series shall not be considered a price increase or price decrease. This subdivision does not apply to price changes caused by either of the following:
- (1) The addition to a motor vehicle of required or optional equipment pursuant to state or federal law.
 - (2) Revaluation of the United States dollar in the case of a foreign-make vehicle.
- (i) To fail to pay to a dealer, within a reasonable time following receipt of a valid claim by a dealer thereof, a payment agreed to be made by the manufacturer or distributor to the dealer by reason of the fact that a new vehicle of a prior year model is in the dealer's inventory at the time of introduction of new model vehicles.
- (j) To deny the widow, widower, or heirs designated by a deceased owner of a dealership the opportunity to participate in the ownership of the dealership or successor dealership under a valid franchise for a reasonable time after the death of the owner.
- (k) To offer refunds or other types of inducements to a person for the purchase of new motor vehicles of a certain line-make to be sold to the state or a political subdivision of the state without making the same offer to all other dealers in the same line-make within the relevant market area.
- (l) To modify, replace, enter into, relocate, terminate, or refuse to renew a franchise in violation of Article 4 (commencing with Section 3060) of Chapter 6 of Division 2.
- (m) To employ a person as a representative who has not been licensed pursuant to Article 3 (commencing with Section 11900) of Chapter 4 of Division 5.

- (n) To deny a dealer the right of free association with another dealer for a lawful purpose.
- (o)(1) To compete with a dealer in the same line-make operating under an agreement or franchise from a manufacturer or distributor in the relevant market area.
- (2) A manufacturer, branch, or distributor or an entity that controls or is controlled by, a manufacturer, branch, or distributor, shall not, however, be deemed to be competing in the following limited circumstances:
- (A) Owning or operating a dealership for a temporary period, not to exceed one year at the location of a former dealership of the same line-make that has been out of operation for less than six months. However, after a showing of good cause by a manufacturer, branch, or distributor that it needs additional time to operate a dealership in preparation for sale to a successor independent franchisee, the board may extend the time period.
- (B) Owning an interest in a dealer as part of a bona fide dealer development program that satisfies all of the following requirements:
- (i) The sole purpose of the program is to make franchises available to persons lacking capital, training, business experience, or other qualities ordinarily required of prospective franchisees and the dealer development candidate is an individual who is unable to acquire the franchise without assistance of the program.
- (ii) The dealer development candidate has made a significant investment subject to loss in the franchised business of the dealer.
- (iii) The program requires the dealer development candidate to manage the day-to-day operations and business affairs of the dealer and to acquire, within a reasonable time and on reasonable terms and conditions, beneficial ownership and control of a majority interest in the dealer and disassociation of any direct or indirect ownership or control by the manufacturer, branch, or distributor.
- (C) Owning a wholly owned subsidiary corporation of a distributor that sells motor vehicles at retail, if, for at least three years prior to January 1, 1973, the subsidiary corporation has been a wholly owned subsidiary of the distributor and engaged in the sale of vehicles at retail.
- (3)(A) A manufacturer, branch, and distributor that owns or operates a dealership in the manner described in subparagraph (A) of paragraph (2) shall give written notice to the board, within 10 days, each time it commences or terminates operation of a dealership and each time it acquires, changes, or divests itself of an ownership interest.
- (B) A manufacturer, branch, and distributor that owns an interest in a dealer in the manner described in subparagraph (B) of paragraph (2) shall give written notice to the board, annually, of the name and location of each dealer in which it has an ownership interest, the name of the bona fide dealer development owner or owners, and the ownership interests of each owner expressed as a percentage.
- (p) To unfairly discriminate among its franchisees with respect to warranty reimbursement or authority granted to its franchisees to make warranty adjustments with retail customers.
- (q) To sell vehicles to a person not licensed pursuant to this chapter for resale.
- (r) To fail to affix an identification number to a park trailer, as described in Section 18009.3 of the Health and Safety Code, that is manufactured on or after January 1, 1987, and that does not clearly identify the unit as a park trailer to the department. The configuration of the identification number shall be approved by the department.

(s) To dishonor a warranty, rebate, or other incentive offered to the public or a dealer in connection with the retail sale of a new motor vehicle, based solely upon the fact that an autobroker arranged or negotiated the sale. This subdivision shall not prohibit the disallowance of that rebate or incentive if the purchaser or dealer is ineligible to receive the rebate or incentive pursuant to any other term or condition of a rebate or incentive program.

(t) To exercise a right of first refusal or other right requiring a franchisee or an owner of the franchise to sell, transfer, or assign to the franchisor, or to a nominee of the franchisor, all or a material part of the franchised business or of the assets of the franchised business unless all of the following requirements are met:

(1) The franchise authorizes the franchisor to exercise a right of first refusal to acquire the franchised business or assets of the franchised business in the event of a proposed sale, transfer, or assignment.

(2) The franchisor gives written notice of its exercise of the right of first refusal no later than 45 days after the franchisor receives all of the information required pursuant to subparagraph (A) of paragraph (2) of subdivision (d).

(3) The sale, transfer, or assignment being proposed relates to not less than all or substantially all of the assets of the franchised business or to a controlling interest in the franchised business.

(4) The proposed transferee is neither a family member of an owner of the franchised business, nor a managerial employee of the franchisee owning 15 percent or more of the franchised business, nor a corporation, partnership, or other legal entity owned by the existing owners of the franchised business. For purposes of this paragraph, a "family member" means the spouse of an owner of the franchised business, the child, grandchild, brother, sister, or parent of an owner, or a spouse of one of those family members. This paragraph does not limit the rights of the franchisor to disapprove a proposed transferee as provided in subdivision (d).

(5) Upon the franchisor's exercise of the right of first refusal, the consideration paid by the franchisor to the franchisee and owners of the franchised business shall equal or exceed all consideration that each of them were to have received under the terms of, or in connection with, the proposed sale, assignment, or transfer, and the franchisor shall comply with all the terms and conditions of the agreement or agreements to sell, transfer, or assign the franchised business.

(6) The franchisor shall reimburse the proposed transferee for expenses paid or incurred by the proposed transferee in evaluating, investigating, and negotiating the proposed transfer to the extent those expenses do not exceed the usual, customary, and reasonable fees charged for similar work done in the area in which the franchised business is located. These expenses include, but are not limited to, legal and accounting expenses, and expenses incurred for title reports and environmental or other investigations of real property on which the franchisee's operations are conducted. The proposed transferee shall provide the franchisor a written itemization of those expenses, and a copy of all nonprivileged reports and studies for which expenses were incurred, if any, within 30 days of the proposed transferee's receipt of a written request from the franchisor for that accounting. The franchisor shall make payment within 30 days of exercising the right of first refusal.

(u)(1) To unfairly discriminate in favor of a dealership owned or controlled, in whole or in part, by a manufacturer or distributor or an entity that controls or is controlled by the manufacturer or distributor. Unfair discrimination includes, but is not limited to, the following:

(A) The furnishing to a franchisee or dealer that is owned or controlled, in whole or in part, by a manufacturer, branch, or distributor of any of the following:

(i) A vehicle that is not made available to each franchisee pursuant to a reasonable allocation formula that is applied uniformly, and a part or accessory that is not made available to all franchisees on an equal basis when there is no reasonable allocation formula that is applied uniformly.

(ii) A vehicle, part, or accessory that is not made available to each franchisee on comparable delivery terms, including the time of delivery after the placement of an order. Differences in delivery terms due to geographic distances or other factors beyond the control of the manufacturer, branch, or distributor shall not constitute unfair competition.

(iii) Information obtained from a franchisee by the manufacturer, branch, or distributor concerning the business affairs or operations of a franchisee in which the manufacturer, branch, or distributor does not have an ownership interest. The information includes, but is not limited to, information contained in financial statements and operating reports, the name, address, or other personal information or buying, leasing, or service behavior of a dealer customer, and other information that, if provided to a franchisee or dealer owned or controlled by a manufacturer or distributor, would give that franchisee or dealer a competitive advantage. This clause does not apply if the information is provided pursuant to a subpoena or court order, or to aggregated information made available to all franchisees.

(iv) Sales or service incentives, discounts, or promotional programs that are not made available to all California franchises of the same line-make on an equal basis.

(B) Referring a prospective purchaser or lessee to a dealer in which a manufacturer, branch, or distributor has an ownership interest, unless the prospective purchaser or lessee resides in the area of responsibility assigned to that dealer or the prospective purchaser or lessee requests to be referred to that dealer.

(2) This subdivision does not prohibit a franchisor from granting a franchise to prospective franchisees or assisting those franchisees during the course of the franchise relationship as part of a program or programs to make franchises available to persons lacking capital, training, business experience, or other qualifications ordinarily required of prospective franchisees.

(v)(1) To access, modify, or extract information from a confidential dealer computer record, as defined in Section 11713.25, without obtaining the prior written consent of the dealer and without maintaining administrative, technical, and physical safeguards to protect the security, confidentiality, and integrity of the information.

(2) Paragraph (1) does not limit a duty that a dealer may have to safeguard the security and privacy of records maintained by the dealer.

(w)(1) To use electronic, contractual, or other means to prevent or interfere with any of the following:

(A) The lawful efforts of a dealer to comply with federal and state data security and privacy laws.

(B) The ability of a dealer to do either of the following:

(i) Ensure that specific data accessed from the dealer's computer system is within the scope of consent specified in subdivision (v).

(ii) Monitor specific data accessed from or written to the dealer's computer system.

(2) Paragraph (1) does not limit a duty that a dealer may have to safeguard the security and privacy of records maintained by the dealer.

(x)(1) To unfairly discriminate against a franchisee selling a service contract, debt cancellation agreement, maintenance agreement, or similar product not approved, endorsed, sponsored, or offered by the manufacturer, manufacturer branch, distributor, or distributor branch or affiliate. For purposes of this subdivision, unfair discrimination includes, but is not limited to, any of the following:

(A) Express or implied statements that the dealer is under an obligation to exclusively sell or offer to sell service contracts, debt cancellation agreements, or similar products approved, endorsed, sponsored, or offered by the manufacturer, manufacturer branch, distributor, or distributor branch or affiliate.

(B) Express or implied statements that selling or offering to sell service contracts, debt cancellation agreements, maintenance agreements, or similar products not approved, endorsed, sponsored, or offered by the manufacturer, manufacturer branch, distributor, or distributor branch or affiliate, or the failure to sell or offer to sell service contracts, debt cancellation agreements, maintenance agreements, or similar products approved, endorsed, sponsored, or offered by the manufacturer, manufacturer branch, distributor, or distributor branch or affiliate will have any negative consequences for the dealer.

(C) Measuring a dealer's performance under a franchise agreement based upon the sale of service contracts, debt cancellation agreements, or similar products approved, endorsed, sponsored, or offered by the manufacturer, manufacturer branch, distributor, or distributor branch or affiliate.

(D) Requiring a dealer to actively promote the sale of service contracts, debt cancellation agreements, or similar products approved, endorsed, sponsored, or offered by the manufacturer, manufacturer branch, distributor, or distributor branch or affiliate.

(E) Conditioning access to vehicles or parts, or vehicle sales or service incentives upon the sale of service contracts, debt cancellation agreements, or similar products approved, endorsed, sponsored, or offered by the manufacturer, manufacturer branch, distributor, or distributor branch or affiliate.

(2) Unfair discrimination does not include, and nothing shall prohibit a manufacturer from, offering an incentive program to vehicle dealers who voluntarily sell or offer to sell service contracts, debt cancellation agreements, or similar products approved, endorsed, sponsored, or offered by the manufacturer, manufacturer branch, distributor, or distributor branch or affiliate, if the program does not provide vehicle sales or service incentives.

(3) This subdivision does not prohibit a manufacturer, manufacturer branch, distributor, or distributor branch from requiring a franchisee that sells a used vehicle as "certified" under a certified used vehicle program established by the manufacturer, manufacturer branch, distributor, or distributor branch to provide a service contract approved, endorsed, sponsored, or offered by the manufacturer, manufacturer branch, distributor, or distributor branch.

(4) Unfair discrimination does not include, and nothing shall prohibit a franchisor from requiring a franchisee to provide, the following notice prior to the sale of the service contract if the service contract is not provided or backed by the franchisor and the vehicle is of the franchised line-make:

“Service Contract Disclosure

The service contract you are purchasing is not provided or backed by the manufacturer of the vehicle you are purchasing. The manufacturer of the vehicle is not responsible for claims or repairs under this service contract.

Signature of Purchaser”

(y) To take or threaten to take any adverse action against a dealer pursuant to an export or sale-for-resale prohibition because the dealer sold or leased a vehicle to a customer who either exported the vehicle to a foreign country or resold the vehicle in violation of the prohibition, unless the export or sale-for-resale prohibition policy was provided to the dealer in writing prior to the sale or lease, and the dealer knew or reasonably should have known of the customer's intent to export or resell the vehicle in violation of the prohibition at the time of sale or lease. If the dealer causes the vehicle to be registered in this or any other state, and collects or causes to be collected any applicable sales or use tax due to this state, a rebuttable presumption is established that the dealer did not have reason to know of the customer's intent to export or resell the vehicle.

(z) As used in this section, "area of responsibility" is a geographic area specified in a franchise that is used by the franchisor for the purpose of evaluating the franchisee's performance of its sales and service obligations.

SEC. 19. Section 11713.13 of the Vehicle Code is amended to read:

<< CA VEHICLE § 11713.13 >>

11713.13. It is unlawful and a violation of this code for any manufacturer, manufacturer branch, distributor, or distributor branch licensed under this code to do, directly or indirectly through an affiliate, any of the following:

(a) Prevent, or attempt to prevent, by contract or otherwise, a dealer from acquiring, adding, or maintaining a sales or service operation for another **line-make** of motor vehicles at the same or expanded facility at which the dealer currently operates a dealership if the dealer complies with any reasonable facilities and capital requirements of the manufacturer or distributor.

(b) Require a dealer to establish or maintain exclusive facilities, personnel, or display space if the imposition of the requirement would be unreasonable in light of all existing circumstances, including economic conditions. In any proceeding ~~***~~ in which the reasonableness of a facility or capital requirement is an issue, the manufacturer or distributor shall have the burden of proof.

(c) Require, by contract or otherwise, a dealer to make a material alteration, expansion, or addition to any dealership facility, unless the required alteration, expansion, or addition is reasonable in light of all existing circumstances, including economic conditions **and advancements in vehicular technology. This subdivision does not limit the obligation of a dealer to comply with any applicable health or safety laws.**

(1) A required facility alteration, expansion, or addition shall not be deemed reasonable if it requires that the dealer purchase goods or services from a specific vendor when goods or services of substantially similar kind, quality, and general design concept are available from another vendor. Notwithstanding the prohibitions in this paragraph, a manufacturer, manufacturer branch, distributor, or distributor branch may require the dealer to request approval for the use of alternative goods or services in writing. Approval for these requests shall not be unreasonably withheld, and the request shall be deemed approved if not specifically denied in writing within 20 business days of receipt of the dealer's written request. This paragraph does not authorize a dealer to impair or eliminate the intellectual property or trademark rights of the manufacturer, manufacturer branch, distributor, or distributor branch, or to permit a dealer to erect or maintain signs that do not conform to the intellectual property usage guidelines of the manufacturer, manufacturer branch, distributor, or distributor branch. This paragraph shall not apply to a specific good or service if the manufacturer, manufacturer branch, distributor, or distributor branch provides the dealer with a lump-sum payment or series of payments of a substantial portion of the cost of that good or service, if the payment is intended solely to reimburse the dealer for the purchase of the specified good or service.

(2) In any proceeding in which a required facility alteration, expansion, or addition is an issue, the manufacturer-*, manufacturer branch, distributor, distributor branch, or affiliate shall have the burden of proof.**

(d)(1) Fail to pay to a dealer, within 90 days of termination, cancellation, or nonrenewal of a franchise, all of the following:

(A) The dealer cost, plus any charges made by the manufacturer or distributor for vehicle distribution or delivery and the cost of any dealer-installed original equipment accessories, less any amount invoiced to the vehicle and paid by the manufacturer or distributor to the dealer, for all new and undamaged vehicles with less than 500 miles in the dealer's inventory that were acquired by the dealer from the manufacturer, distributor, or another new motor vehicle dealer franchised to sell vehicles of the same line-make, in the ordinary course of business, within 18 months of termination, cancellation, or nonrenewal of the franchise.

(B) The dealer cost for all unused and undamaged supplies, parts, and accessories listed in the manufacturer's current parts catalog and in their original packaging, except that sheet metal may be packaged in a comparable substitute for the original package.

(C) The fair market value of each undamaged sign owned by the motor vehicle dealer and bearing a common name, trade name, or trademark of the manufacturer or distributor if acquisition of the sign was required or made a condition of participation in an incentive program by the manufacturer or distributor.

(D) The fair market value of all special tools, computer systems, and equipment that were required or made a condition of participation in an incentive program by the manufacturer or distributor that are in usable condition, excluding normal wear and tear.

(E) The dealer costs of handling, packing, loading, and transporting any items or inventory for repurchase by the manufacturer or distributor.

(2) This subdivision does not apply to a franchisor of a dealer of new recreational vehicles, as defined in subdivision (a) of Section 18010 of the Health and Safety Code.

(3) This subdivision does not apply to a termination that is implemented as a result of the sale of substantially all of the inventory and fixed assets or stock of a franchised dealership if the dealership continues to operate as a franchisee of the same line-make.

(e)(1)(A) Fail to pay to a dealer of new recreational vehicles, as defined in subdivision (a) of Section 18010 of the Health and Safety Code, within 90 days of termination, cancellation, or nonrenewal of a franchise for a recreational vehicle line-make, as defined in Section 3072.5, the dealer cost, plus any charges made by the manufacturer or distributor for vehicle distribution or delivery and the cost of any dealer-installed original equipment accessories, less any amount invoiced to the vehicle and paid by the manufacturer or distributor to the dealer, for a new recreational vehicle when the termination, cancellation, or nonrenewal is initiated by a recreational vehicle manufacturer. This paragraph only applies to new and unused recreational vehicles that do not currently have or have had in the past, material damage, as defined in Section 9990, and that the dealer acquired from the manufacturer, distributor, or another new motor vehicle dealer franchised to sell recreational vehicles of the same line-make in the ordinary course of business within 12 months of the termination, cancellation, or nonrenewal of the franchise.

(B) For those recreational vehicles with odometers, paragraph (1) shall apply to only those vehicles that have no more than 1,500 miles on the odometer, in addition to the number of miles incurred while delivering the vehicle from the manufacturer's facility that produced the vehicle for delivery to the dealer's retail location.

(C) Damaged recreational vehicles shall be repurchased by the manufacturer provided there is an offset in value for damages, except recreational vehicles that have or had material damage, as defined in Section 9990, may be repurchased at the manufacturer's option provided there is an offset in value for damages.

(2) Fail to pay to a dealer of new recreational vehicles, as defined in subdivision (a) of Section 18010 of the Health and Safety Code, within 90 days of termination, cancellation, or nonrenewal of a franchise, all of the following:

(A) The dealer cost for all unused and undamaged supplies, parts, and accessories listed in the manufacturer's current parts catalog and in their original packaging, except that sheet metal may be packaged in a comparable substitute for the original package.

(B) The fair market value of each undamaged sign owned by the motor vehicle dealer and bearing a common name, trade name, or trademark of the manufacturer or distributor if acquisition of the sign was required or made a condition of participation in an incentive program by the manufacturer or distributor.

(C) The fair market value of all special tools, computer systems, and equipment that were required or made a condition of participation in an incentive program by the manufacturer or distributor that are in usable condition, excluding normal wear and tear.

(D) The dealer costs of handling, packing, loading, and transporting any items or inventory for repurchase by the manufacturer or distributor.

(f)(1) Fail, upon demand, to indemnify any existing or former franchisee and the franchisee's successors and assigns from any and all damages sustained and attorney's fees and other expenses reasonably incurred by the franchisee that result from or relate to any claim made or asserted by a third party against the franchisee to the extent the claim results from any of the following:

(A) The condition, characteristics, manufacture, assembly, or design of any vehicle, parts, accessories, tools, or equipment, or the selection or combination of parts or components manufactured or distributed by the manufacturer or distributor.

(B) Service systems, procedures, or methods the franchisor required or recommended the franchisee to use if the franchisee properly uses the system, procedure, or method.

(C) Improper use or disclosure by a manufacturer or distributor of nonpublic personal information obtained from a franchisee concerning any consumer, customer, or employee of the franchisee.

(D) Any act or omission of the manufacturer or distributor for which the franchisee would have a claim for contribution or indemnity under applicable law or under the franchise, irrespective of and without regard to any prior termination or expiration of the franchise.

(2) This subdivision does not limit, in any way, the existing rights, remedies, or recourses available to any person who purchases or leases vehicles at retail.

(g)(1) Establish or maintain a performance standard, sales objective, or program for measuring a dealer's sales, service, or customer service performance that may materially affect the dealer, including, but not limited to, the dealer's right to payment under any incentive or reimbursement program or establishment of working capital requirements, unless both of the following requirements are satisfied:

(A) The performance standard, sales objective, or program for measuring dealership sales, service, or customer service performance is reasonable in light of all existing circumstances, including, but not limited to, the following:

(i) Demographics in the dealer's area of responsibility.

(ii) Geographical and market characteristics in the dealer's area of responsibility.

(iii) The availability and allocation of vehicles and parts inventory.

(iv) Local and statewide economic circumstances.

(v) Historical sales, service, and customer service performance of the line-make within the dealer's area of responsibility, including vehicle brand preferences of consumers in the dealer's area of responsibility.

(B) Within 30 days after a request by the dealer, the manufacturer, manufacturer branch, distributor, distributor branch, or affiliate provides a written summary of the methodology and data used in establishing the performance standard, sales objective, or program for measuring dealership sales or service performance. The summary shall be in detail sufficient to permit the dealer to determine how the standard was established and applied to the dealer.

(2) In any proceeding in which the reasonableness of a performance standard, sales objective, or program for measuring dealership sales, service, or customer service performance is an issue, the manufacturer, manufacturer branch, distributor, distributor branch, or affiliate shall have the burden of proof.

(3) As used in this subdivision, “area of responsibility” shall have the same meaning as defined in subdivision (z) of Section 11713.3.

SEC. 20. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

EXHIBIT 3

Date of Hearing: August 13, 2013

ASSEMBLY COMMITTEE ON JUDICIARY

Bob Wieckowski, Chair

SB 155 (Padilla) – As Amended: June 10, 2013

SENATE VOTE: 36-0

SUBJECT: MOTOR VEHICLES: MANUFACTURERS AND DEALERS

KEY ISSUE: SHOULD CAR DEALERS RECEIVE STRONGER PROTECTIONS AGAINST ADVERSE ACTIONS BY AUTO MANUFACTURERS IN CERTAIN CIRCUMSTANCES?

FISCAL EFFECT: As currently in print this bill is keyed fiscal.

SYNOPSIS

This bill is sponsored by the California New Car Dealers Association to modify the relationship between motor vehicle dealers and manufacturers. Among other things, the bill requires a 15-day notice for decreases in compensation according to reimbursement schedules when dealers repair a vehicle under a manufacturer's warranty, requires certain procedures for warranty and incentive claim processing (relating to disapproval, appeal, notice, protest), shortens the time periods by which warranty repairs and incentive program charges may be audited, and makes changes with regard to export and resale policies, facility improvements, and performance standards. Additional provisions limit disapproval or chargeback of claims on the basis of extrapolation from a sample of claims. The proposed amendments reflect lengthy negotiations between the dealers and the manufacturers and are believed to substantially reduce, if not completely remove, the manufacturers' opposition. Due to time constraints, should the bill pass out of this Committee, these amendments would be adopted in the Appropriations Committee.

SUMMARY: Modifies the relationship between motor vehicle dealers and manufacturers to improve protections for dealers. Specifically, this bill:

- 1) Modifies automobile warranty repair rules regarding disapproval, appeal, notice, protest, and audit requirements, including:
 - a) Imposes limits on changes to the warranty reimbursement schedule, as specified, including requiring 15 days' prior written notice for reduction in time and compensation.
 - b) Provides that a protest challenging a warranty reimbursement reduction must be filed within six months of the franchisee's notice of the reduction, and the franchisor shall have the burden of proof, as specified.
 - c) Prohibits a franchisor from disapproving a claim unless the claim is false or fraudulent or for other specified reasons.
 - d) Requires notification in writing of disapproval of a claim, as specified.

- e) Requires a reasonable appeal process, including a right to cure material noncompliance and notification of final denial, as specified.
- f) Allows a franchisee to protest to the New Motor Vehicle Board (the Board) a denial of an appeal, in which protest the franchisor has the burden of proof.
- g) Regarding audits:
 - i) Limits the availability and frequency of audits of franchisee warranty records by the franchisor, as specified.
 - ii) Provides similar disapproval, notice, appeal, and protest processes to those in paragraph (1) above.
 - iii) Prohibits disapproving or charging back a claim based upon an extrapolation from a sample of claims, unless the sample of claims is selected randomly and the extrapolation is performed in a reasonable and statistically valid manner.
- 2) Modifies the franchisor incentive program provisions with disapproval, appeal, notice, protest, and audit requirements similar to the warranty requirements in paragraph (1) above.
- 3) Prohibits manufacturers from taking adverse action against a dealer because the dealer sold or leased a vehicle to a customer who exported the vehicle to a foreign country or resold the vehicle in violation of an export or resale prohibition, unless the prohibition was provided to the dealer in writing prior to the sale or lease, and the dealer knew or reasonably should have known of the customer's intent to export or resell the vehicle, as specified.
- 4) Prohibits a manufacturer from establishing or maintaining a performance standard or like program, as specified, that may materially affect the dealer unless both of the following requirements are satisfied:
 - a) The performance standard or like program is reasonable in light of all existing circumstances, including such factors as demographics in the dealer's area of responsibility.
 - b) Within 30 days after a request by the dealer, the manufacturer provides a written summary of the methodology and all data used in establishing the performance standard or like program in detail sufficient to permit the dealer to determine how the standard was established and applied to the dealer.
- 5) Provides that a required facility alteration, expansion, or addition shall not be deemed reasonable if it requires that the dealer purchase goods or services from a specific vendor when substantially similar goods or services are available from another vendor, with specified limitations, including that the manufacturer may require pre-approval for alternative goods or services, as specified.

EXISTING LAW:

- 1) Charges the Department of Motor Vehicles (DMV) with licensing and regulating dealers, manufacturers, and distributors of motor vehicles who conduct business in California.

(Vehicle Code Section 3000 *et seq.* All references hereinafter are to this code unless otherwise noted.)

- 2) Regulates warranty agreements, as follows:
 - a) Requires that the franchisor file with the Board a reimbursement schedule for work and services that franchisees shall be required to perform. Requires the schedule of compensation to be reasonable, with reasonableness subject to the approval of the Board if the franchisee protests. In determining the reasonableness of the schedules, requires the Board to consider all relevant circumstances. (Subsection 3065(a).)
 - b) Requires that all claims made by franchisees pursuant to this section shall be either approved or disapproved within 30 days after, with notification and prompt payment requirements. Allows for individual failures to abide by the specified time limits in circumstances beyond the reasonable control of the franchisor. (Section 3065(d).)
 - c) Allows that audits of franchisee warranty records may be conducted by the franchisor on a reasonable basis, and for a period of 12 months after a claim is paid or credit issued. Forbids disapproval of claims except for good cause. (Section 3065(e).)
- 3) Regulates incentive program claims. Provides similar restrictions as those on warranty agreements in 2). (Section 3065.1.)
- 4) Prohibits manufacturers from taking specified actions against dealers, including requiring, by contract or otherwise, a dealer to make a material alteration, expansion, or addition to any dealership facility, unless the required alteration, expansion, or addition is reasonable in light of all existing circumstances, including economic conditions. (Section 11713.13.)

COMMENTS: According to the author:

The sale and service of motor vehicles is important to California's economy. California motor vehicle franchises employ over 110,000 people and in 2011, motor vehicle sales and service resulted in over \$60 billion in economic activity. To protect such an important industry, California, like every other state, has enacted motor vehicle franchise laws.

In addition to preserving a well-organized and cost-effective distribution system of motor vehicles, franchise laws seek to address the disparity in bargaining power between multi-national auto manufacturers and California's motor vehicle franchises that are primarily owned and operated as family businesses.

California's motor vehicle franchise protection laws however, did not anticipate certain punitive practices taken by automobile manufacturers, which have become a growing concern. The punitive actions include:

- Undercompensating California motor vehicle franchises by unilaterally reducing the flat-rate time schedules for factory warranty repairs, even when a franchise is using a nationally recognized flat rate schedule for non-warranty repair work.

- Disapproving California motor vehicle franchise warranty and incentive program claims for technical reasons, such as disapproving a claim based on an improper signature. Some manufacturers do not offer an appeals process to correct the simple, technical mistake.
- Auditing samples of California motor vehicle franchise warranty claims and then extrapolating the number of disapproved claims from the sample to arrive at a final disapproval rate.
- Holding California motor vehicle franchises strictly liable for exported vehicles, even if the export occurred unbeknownst to the franchise.
- Implementing unreasonable performance standards for California motor vehicle franchises based upon statewide data that do not take into account differences in local markets.
- Requiring that California motor vehicle franchises use factory-mandated vendors for dealer facility improvements, even when similar goods or services are available for a better price from local California vendors.

... [SB 155] would strengthen California's dealer franchise protection laws by implementing various provisions to protect California motor vehicle franchises from punitive actions taken by manufacturers

Proposed Revisions To Warranty Reimbursement. Currently, manufacturers reimburse dealers for the cost of repairs that dealers make under manufacturer warranty. A manufacturer typically reimburses according to a schedule that it has prepared, and the sponsor states that manufacturers have recently made unrealistic cuts to reimbursements. This bill requires 15 days' prior written notice before the manufacturer may change its reimbursements, which may give franchisees time to adjust to the change.

Also, existing law requires that manufacturer reimbursements be reasonable, and it allows dealers to protest these reimbursements to the New Motor Vehicle Board (NMVB). The sponsor writes that it is not clear when and under what circumstances these protests can take place, and this bill clarifies those conditions. Specifically, the bill provides that, within six months after receipt of a written notice of a denial of a claim, a franchisee may file a protest with the board for determination of whether the franchisor complied with the claim denial requirements.

Warranty and Incentive Claim Processing. The sponsor states: "Manufacturers often disapprove (pre- or post-audit) warranty claims for very technical reasons, and some do not offer an opportunity to correct mistakes — costing the dealer tens to hundreds of thousands of dollars in reimbursement for work already performed. Growing numbers of manufacturers are auditing samples of claims, and extrapolating the result to arrive upon a final chargeback amount."

This bill requires that manufacturers not disapprove a claim unless it has specified defects, such as that the claim is false or fraudulent or repairs were not properly made. Also, the bill prescribes procedures for notifying a dealer of disapproval of a claim, providing an appeal process (including attempts to cure noncompliance), and other related activities. Finally, the bill

restricts chargeback based on extrapolation, requiring that the sample of claims be selected randomly and the extrapolation be performed in a reasonable and statistically valid manner. Supporters believe that these provisions will reduce problems relating to disapprovals.

Export Policies. According to the sponsor: "Given vehicle allocation limits to high-demand countries like China and Korea, a large number of 'straw purchaser' rings acquire new vehicles from California dealers for export. All manufacturers have policies prohibiting dealers from selling vehicles for export – most on a strict liability basis where dealer knowledge of the planned exportation is irrelevant."

This bill would prohibit manufacturers from taking adverse action against such dealers based on their consumers' actions unless the dealers knew or reasonably should have known of the customer's intent to export or resell the vehicle in violation of the prohibition at the time of sale or lease. Additionally, this bill specifies that state registration or tax collection creates a rebuttable presumption that the dealer did not have reason to know of the consumer's intent. Effectively, this reverses the manufacturers' allegedly common practice.

Facility Improvements. Existing law prohibits manufacturers from requiring dealers to make certain changes to any dealership facility, unless the required change is reasonable in light of all existing circumstances. This bill specifies that a change is not reasonable if it requires that the dealer purchase goods or services from a specific vendor when substantially similar goods or services are available from another vendor, but the bill also contains protections for manufacturers' intellectual property, for example regarding signage. This bill also allows manufacturers to require pre-approval, which shall not be unreasonably withheld, for alternative goods and services. The sponsor argues that this provision allows a "Buy California" policy that improves upon current practice.

Performance Standards. This bill imposes two requirements on manufacturer performance standards for measuring a dealer's sales, service, or customer service performance that may materially affect the dealer. The first is that the standard be reasonable in light of all circumstances, including some of the dealer's local and individual circumstances as specified in the bill. The second is that, upon dealer request, the manufacturer must provide certain details, as specified in the bill, such that the dealer can determine how the standard was established and applied to the dealer. The sponsor contends that this corrects a common manufacturer practice.

Continuing Dispute Regarding Manufacturers' Audit Timelines. Despite lengthy negotiations and agreement on many amendments, the dealers and manufacturers appear to remain some small but significant difference apart on the issue of audit timelines.

Manufacturers are entitled to audit dealers' records regarding claims made under warranty and incentive programs. Currently, warranty records may be audited every 12 months, and incentive claims may be audited every 18 months. The frequency of these audits is a sensitive point between manufacturers, who are legitimately concerned about the potential for false or inflated claims, and dealers who are justifiably eager to avoid undue recordkeeping and disruption of settled accounts. As proposed to be amended, the bill changes these periods to 9 months for both types of audits. On this point the Alliance of Automobile Manufacturers writes:

CNCDA seeks to restrict audit times for warranty and incentive claims to become among the most restrictive in the country. Current law requires us to make warranty repair and

performance incentive payments within 30 days of submission by a dealer and allows up to 18 months to audit claims. SB 155 artificially and imprudently compresses the audit period to nine months. 43 states currently allow at least a 12 month audit period. The nine month audit period is too short to adequately ensure that such payments are deservedly entitled and does not reflect standard accounting standards of either government agencies or private sector entities.

The Alliance has consistently opposed 9-month audit time periods as too brief and thereby creating a disparate and unfair relationship between two businesses. We are unaware of any long-term systemic issue with the current statutory time frames allowed in California law. The Alliance member companies are prepared, however, to accept a 12-month audit period, despite the challenges that those timeframes would present to them.

Late Request For Amendments From Importers and Exporters. Last week a request for amendments was delivered to the author and Committee by North American Automobile Trade Association and the American Automotive Shippers Association, consisting of members who import and export automobiles. These groups argue that the bill should do more to prohibit anti-competitive restrictions manufacturers place on dealers and purchasers regarding imports and exports. These suggestions have not been adopted by the author, and it is believed they would be opposed by the manufacturers.

Prior Related Legislation: SB 642 (Padilla, Chapter 342, Statutes of 2011) prohibited or restricted certain contracting terms between vehicle manufacturers and their franchised dealers, among other things.

SB 424 (Padilla, Chapter 12, Statutes of 2009) allowed a franchisee to house one or more vehicle franchise at the same location and allowed franchisees that have contracts terminated because of a manufacturer's or distributor's bankruptcy to continue to sell new cars in their inventory for up to six months, among other things.

REGISTERED SUPPORT / OPPOSITION:

Support

California New Car Dealers Association (sponsor)
California Motorcycle Dealers Association

Opposition

Association of Global Automakers
Alliance of Automobile Manufacturers

Analysis Prepared by: Kevin G. Baker and Tom Watts / JUD. / (916) 319-2334

EXHIBIT 4

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE
NEW MOTOR VEHICLE BOARD
STATE OF CALIFORNIA**

In the Matter of the Protest of:

**KPAUTO, LLC dba PUTNAM FORD OF SAN MATEO,
Protestant**

vs.

FORD MOTOR COMPANY, Respondent

Agency Case No. PR-2759-21

OAH Case No. 2023050701

**ORDER RESOLVING MOTIONS ARGUED AT PREHEARING
CONFERENCE**

On August 11, 2023, Administrative Law Judge Wim van Rooyen, Office of Administrative Hearings (OAH), State of California, heard oral argument on various motions by videoconference from Sacramento, California. Gavin Hughes, Attorney at Law, Law Offices of Gavin M. Hughes, represented KPAuto, LLC, doing business as Putnam Ford of San Mateo (protestant). Steven Kelso, Gwen Young, April Connally, and Elayna Fiene, Attorneys at Law admitted pro hac vice, Greenberg Traurig, LLP,

represented Ford Motor Company (respondent). This order resolving the motions follows.

General Background

The parties are familiar with the factual and procedural background of this case. In short, protestant is a Ford dealership obligated to provide warranty service on eligible Ford vehicles. Respondent reimburses protestant for such warranty service at an hourly warranty labor reimbursement rate. California law requires that the warranty labor reimbursement rate be equal to the dealer's retail labor rate, the rate the dealer charges its retail paying customers for repairs not covered by warranty. (Veh. Code, § 3065, subd. (b).)

Vehicle Code section 3065.2 provides a detailed mechanism for the dealer to establish or modify its retail labor rate for purposes of determining the warranty labor reimbursement rate. Summarized in broad terms, the dealer submits to the manufacturer sequences of repair orders specified by statute. (Veh. Code, § 3065.2, subds. (a)(1) & (b).) The retail labor rate is then calculated by dividing the total labor charges from "qualified repair orders" submitted by the total number of hours that generated those charges. (*Id.*, subd. (a)(2); see also *id.*, subds. (c) & (h).) 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." (*Id.*, subd. (j).)

Vehicle Code section 3065.2 also establishes a comprehensive procedure for the manufacturer to contest the material accuracy of the retail labor rate calculated by the dealer, including various time and notification requirements. (Veh. Code, § 3065.2,

subs. (d)-(f).) As part of the manufacturer's notification to the dealer regarding the retail labor rate contest, the manufacturer must provide a full explanation of all reasons for the contest, evidence substantiating the manufacturer's position, a copy of all calculations used by the manufacturer, and a proposed adjusted retail labor rate. (*Id.*, subd. (d)(1).) A manufacturer may not directly or indirectly take, or threaten to take, any adverse action against a dealer for exercising the dealer's rights under Vehicle Code section 3065.2. (See *id.*, subd. (i).)

If a manufacturer fails to comply with section 3065.2, or if a dealer disputes the manufacturer's proposed adjusted retail labor rate, the dealer may file a protest with the New Motor Vehicle Board (Board) for a declaration of the appropriate retail labor rate. (See Veh. Code, § 3065.4.) In any such protest, the manufacturer has the burden of proving that it complied with section 3065.2 and that the dealer's calculation of the retail labor rate is materially inaccurate or fraudulent. (*Id.*, subd. (a).)

The Protest and Proceedings Before the Board

On December 30, 2021, protestant filed with the Board Protest No. PR-2759-21 (Protest) against respondent. The Protest alleges that on August 24, 2021, protestant submitted to respondent a request to increase protestant's hourly retail labor rate from \$177 to \$436.76. In a letter dated October 26, 2021, respondent denied that request on the basis that the requested retail labor rate was materially inaccurate or fraudulent. Respondent proposed an adjusted hourly retail labor rate of \$220. According to the Protest, respondent failed to comply with Vehicle Code section 3065.2's requirements to properly contest protestant's calculation of the retail labor rate and propose an adjusted retail labor rate. Protestant requests an order sustaining the Protest, declaring protestant's requested rate as the appropriate retail labor rate, and awarding compensation and prospective relief.

Respondent timely responded to the Protest. The matter proceeded before the Board and its own administrative law judges for purposes of all discovery and law and motion matters.

Transfer of the Protest to OAH

On May 18, 2023, Board staff filed a Request to Set Hearing (RSH) with OAH. Board staff represented that discovery involving the Protest was complete. Thus, the RSH requested that the matter only be set for a “hearing on the merits” before OAH. OAH scheduled the hearing for September 18-21 and 25-28, 2023, with a prehearing conference (PHC) and mandatory settlement conference on August 11, 2023.

Pending Motions

Prior to the PHC, respondent filed three motions with OAH: (1) a motion in limine regarding technology procedures for parties, witnesses, and counsel during virtual hearing (Technology Procedures Motion); (2) a motion in limine regarding evidence and argument that respondent engaged in adverse conduct towards protestant (Adverse Conduct Motion); and (3) a second motion to compel protestant to produce documents responsive to respondent’s request for production of documents (RFP) No. 40, along with an accompanying motion for sanctions (Discovery/Sanctions Motion). In addition to written briefing, the parties provided oral argument at the PHC concerning the motions. Each motion is addressed separately below.

TECHNOLOGY PROCEDURES MOTION

Respondent’s Technology Procedures Motion requests an order that “precludes the parties, their witnesses, and their counsel from performing or allowing anything

that would assist any witness's testimony in any way that would not be permitted at an in-person hearing or trial." At oral argument, respondent acknowledged that ethics rules already prevent all counsel from engaging in any form of witness tampering. Nevertheless, respondent clarified that the requested order would primarily help non-lawyer parties and witnesses understand their obligations. Protestant does not oppose the motion. Consequently, the motion is granted.

ADVERSE CONDUCT MOTION

Respondent's Adverse Conduct Motion requests an order excluding evidence and argument that respondent engaged in adverse conduct towards protestant for requesting a retail labor rate increase in violation of Vehicle Code section 3065.2, subdivision (i). Respondent's exclusion request includes evidence and argument that respondent: (a) hindered protestant's request to relocate its dealership, and (b) performed a warranty audit of protestant's repair orders from June 2022 through February 2023.

Respondent argues that the instant Protest does not allege that respondent engaged in retaliatory adverse conduct in violation of Vehicle Code section 3065.2, subdivision (i). It only alleges a dispute concerning the calculation of protestant's retail labor rate. On May 25, 2023, protestant filed a separate protest concerning respondent's alleged retaliatory adverse conduct (Protest No. PR-2826-23), which remains pending before the Board. Although respondent strongly disputes that it engaged in any retaliatory adverse conduct towards protestant, respondent observes that protestant will have the opportunity to litigate that issue in the other protest. However, evidence of retaliatory adverse conduct would be irrelevant to the issues presented by the instant Protest and unduly prejudicial.

Protestant opposes the Adverse Conduct Motion. It argues that the Protest raises the broader issue of whether respondent complied with Vehicle Code section 3065.2, which includes subdivision (i) prohibiting retaliatory adverse conduct. Additionally, protestant contends that it did not specifically plead respondent's retaliatory adverse conduct in the Protest because the conduct had not yet occurred at the time of the Protest's filing. Finally, protestant requests that if respondent's motion is granted, protestant be given leave to amend the Protest to allege such retaliatory adverse conduct.

Administrative hearings allow for the admission of relevant evidence. (Gov. Code, § 11513, subd. (c).) "Relevant evidence" means evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)

Contrary to protestant's argument, the Protest does not broadly allege failure to comply with all of Vehicle Code section 3065.2's requirements. It specifically alleges that respondent failed to comply with Vehicle Code section 3065.2's requirements to contest protestant's calculation of the retail labor rate and propose an adjusted retail labor rate. Even liberally construed, the Protest does not plead any retaliatory adverse conduct. Although such conduct allegedly occurred after the Protest's filing, protestant did not timely seek leave to amend the Protest. Permitting an amendment broadening the scope of issues approximately a month prior to hearing would be unfair and unduly prejudicial to respondent.

Because the Protest does not raise the issue of retaliatory adverse conduct, any evidence or argument concerning such alleged conduct is irrelevant as a matter of law. Additionally, the alleged retaliatory adverse conduct involves distinct factual subject matter that would involve undue consumption of hearing time. For example, the warranty audit involves a completely different set of repair orders than those involved in protestant's retail labor rate calculation. For these reasons, respondent's Adverse Conduct Motion is granted.

DISCOVERY/SANCTIONS MOTION

Brief History of Discovery Dispute

Respondent's RFP No. 40 requested protestant to produce documents showing the physical location at which repairs were performed for each of the repair orders submitted in support of protestant's requested retail labor rate increase. The reason for propounding RFP No. 40 is respondent's contention that repair orders involving repairs performed at a location other than protestant's approved dealership location would not constitute "qualified repair orders." Respondent argues that if protestant performed any repairs at issue at an unapproved location, use of the associated repair orders in the calculation of protestant's retail labor rate would render it materially inaccurate.

Protestant responded to RFP No. 40 with several objections. It did not produce any responsive documents.

On October 13, 2022, the Board's administrative law judge assigned to law and motion, Anthony Skrocki, overruled protestant's objections and granted respondent's first motion to compel production of documents responsive to RFP No. 40. During the parties' subsequent meet-and-confer efforts, protestant represented that: (1) the

repair orders at issue all reference protestant's approved dealership location; (2) no responsive documents other than the repair orders existed; and (3) all repairs associated with protestant's request for a retail labor rate increase were performed at protestant's approved dealership location. However, respondent claims that depositions of protestant's employees and owners later contradicted protestant's third representation.

On May 24, 2023, respondent filed a second motion to compel documents responsive to RFP No. 40 before Judge Skrocki. That motion also sought an award of attorney's fees and costs and other appropriate discovery sanctions. On June 22, 2023, Judge Skrocki heard oral argument on the motion. At the motion hearing, Judge Skrocki directed the parties to confer in an attempt to reach a stipulation as to the discovery sanctions protestant would be subject to if respondent's motion were granted. The parties conferred, but never reached agreement on a stipulation. For unknown reasons, Judge Skrocki never ruled on the motion.

Motion's Refiling before OAH

On August 10, 2023, a day before the PHC, respondent filed the Discovery/Sanctions Motion with OAH. It consists of a refiling of respondent's second motion to compel previously heard by Judge Skrocki along with a motion for sanctions specifically requesting issue and evidentiary sanctions. Protestant opposes the Discovery/Sanctions Motion.

At the PHC, both parties requested that the matter be briefly remanded to the Board to reopen discovery and for Judge Skrocki to rule on the Discovery/Sanctions Motion given Judge Skrocki's prior involvement and familiarity with the discovery dispute. However, the parties did not agree to continue the hearing before OAH. Upon

OAH's inquiries to the Board, Board staff indicated that the Board did not intend to take any further action on this matter. That would appear to include reopening of discovery or ruling on any discovery motions. Given the Board's position, it falls to OAH to decide whether reopening discovery is appropriate.

Ruling

After carefully considering the parties' arguments, the undersigned declines to reopen discovery. The matter was transferred to OAH to conduct a hearing on the merits, with the understanding that all discovery had been completed. It is presently set for hearing in approximately one month and the parties declined to stipulate to a continuance of the hearing. There is insufficient time to reopen discovery and conduct additional discovery proceedings before hearing. Instead, the parties are encouraged to expeditiously prepare for hearing.

Consequently, the parties' request to reopen discovery and respondent's Discovery/Sanctions Motion are denied. This order is without prejudice to any party's ability to object at hearing to the offering of evidence or argument concerning matters that should have been previously disclosed or produced in discovery.

ORDER

Accordingly, IT IS ORDERED that:

1. Respondent's motion in limine regarding technology procedures for parties, witnesses, and counsel during virtual hearing is GRANTED. Specifically, all parties, their witnesses, and their counsel shall comply with the following provisions at the virtual hearing:

(a) Witnesses are prohibited from having any windows open on their computers while testifying other than the windows necessary to access the virtual hearing (Zoom) and the exhibits (Case Center).

(b) Counsel and the party representatives shall not open or maintain with any witness any open chat rooms or similarly private spaces within or in addition to the virtual hearing during the course of the witness's testimony. Counsel and the party representatives shall not text, instant message, or exchange e-mails, written notes, or any other form of communication with a witness during the witness's testimony.

(c) Witnesses shall not have any notes, references, scripts of their proposed testimony, documents, or other potential aids for their testimony while testifying, except for case exhibits to which the witness is specifically directed. Before a witness consults a different case exhibit, the witness shall identify the particular exhibit they wish to review and request permission. Additionally, before a witness is directed to review any material other than a case exhibit, counsel shall identify the material for the record and request permission.

2. Respondent's motion in limine regarding evidence and argument that respondent engaged in adverse conduct towards protestant is GRANTED. Protestant is precluded from offering any evidence or presenting argument at hearing that respondent violated Vehicle Code section 3065.2, subdivision (i), by hindering protestant's relocation request, conducting a warranty audit of protestant, or engaging in other retaliatory adverse conduct in connection with protestant's request to increase its retail labor rate.

3. The parties' request to reopen discovery is DENIED. Consequently, respondent's second motion to compel production of documents responsive to its

Request for Production No. 40 and the accompanying motion for discovery sanctions are DENIED because discovery remains closed.

DATE: August 15, 2023

Wim vanRooyen

WIM VAN ROOYEN

Administrative Law Judge

Office of Administrative Hearings

EXHIBIT 5

Response to Respondent's Attachment 1 –

“Summary of Non-Location Based Disallowed Claims”

Court	RO# – Line	Ford's Alternative Reason	Exh. J-04 Cite	Ford's Listed Amount	Extent of Alternative Reason Chargeback	Ford overstates the non-location based disallowance by this amount
3	12559 – A	Labor operation to remove and install the transmission assembly was not claimed	008-009	\$4,751.67	As Mr. Owens testified, the note cited and relied on by Ford did not independently support any chargeback. Instead, “it’s something the dealer was entitled to, but did not claim.” (RT Vol. I, 174:18-175:5.) The entire proposed chargeback for this claim relies on the location of the repair	\$4,751.67
5	12794 – A	Transmission cooler replacement is not required or supported by the technician comments; no warrantable defect documented to justify transmission cooler replacement; duplicate labor is not reimbursable	014-016	\$5,889.20	“Disallow \$105.27 for the cooler and 2.3 hours of labor.” “Disallow 2.6 hours of duplicate labor time.” Total \$105.27 parts; 4.9 hours labor (\$1,078.00)	\$4,705.93
6	12804 – E	TSB 22-2139 and labor operation 222139S do not apply to the repair since the main control was not overhauled - it was replaced	016-018	\$2,164.24	“Disallow 3.0 hours of labor difference between TSB time and SLTS time.” Total 3.0 hours labor (\$660.00)	\$1,504.24
7	12833 – A	Several parts billed out are included in the 6079 Engine Overhaul Gasket Kit; in addition some of the "if needed" parts listed in TSB 21-	018-020	\$8,278.63	“Disallow the duplicate and unsupported parts total of \$311.87.” Total \$311.87 parts	\$7,966.76

		2269 were replaced without technician comments to support replacement				
8	12851 – B	Repair order does not include the required Cost Cap; duplicate labor time; torque converter and solenoid assembly replacement are not supported by the technician comments provided; no warrantable defect identified with either component; labor operations 7001D2 and 7000AZJ are not supported by the technician comments provided	020-022	\$5,741.60	“Due to the missing Cost Cap, all repair costs above the \$1,500 threshold for automatic transmissions is disallowed.” Total Cost Cap not subject to proposed chargeback (\$1,500.00)	\$1,500.00
9	12917 – A	The 4.0 hours for additional diagnosis and the 5.5 hours of actual time for the wiring harness is not supported by the technician comments provided; no additional diagnosis time was needed based on the information provided	022-024	\$3,163.55	“Disallow 9.5 hours of unsupported labor time.” Total 9.5 labor hours (\$2,090.00)	\$1,073.55
13	13083 – B	Additional 1.0 hour of diagnosis time is not required when the TCM has CTC P0606	043-044	\$1,010.15	“Disallow 1.0 of additional diagnosis time.” Total 1.0 labor hour (\$220.00)	\$790.15
22	13277 – A	Several parts billed out are also included in the 6079 Engine Overhaul Gasket Kit	099-101	\$6,712.51	“Disallow \$295.46 of duplicate parts.” Total \$295.46 parts	\$6,417.05
23	13339 – A	TSB 22-2015 mentioned at the beginning of the technician comments does not apply to this vehicle; TSB 22-2015 applies to the 2022 F-Super Duty 10R140 Automatic Transmission	111-112	\$2,860.23	The reason cited by Ford is a note included by Mr. Owens. There is no statement it independently supports any chargeback. (<i>See</i> RT Vol. I, 174:18-175:5 (Mr. Owens describing his use of a note did not independently support	\$2,860.23

					a proposed chargeback).)	
24	13339 – E	Transmission heat exchanger replacement is not supported by the comments provided; duplicate labor time; 3.5 hours of actual time claimed for tear down and inspection of the transmission was not necessary	113-116	\$12,534.97	“Disallow \$219.31 in parts and 2.0 hours of labor related to the transmission heat exchanger portion of this repair.” “Disallow 3.5 hours of labor.” Total \$219.31 parts; 5.5 hours labor hours (\$1,210.00)	\$11,105.66
25	13401 – B	Repair order does not include the required Cost Cap	126-128	\$4,163.13	“Due to the missing Cost Cap, all repair costs above the \$2,500.00 threshold for gasoline engines is disallowed.” Total Cost Cap not subject to proposed chargeback (\$2,500.00)	\$2,500.00
26	13471 – A	The 4.0 hours for additional diagnosis time is not supported by the technician comments provided	139-141	\$1,351.00	“Disalow [sic] 4.0 of unsupported labor.” Total 4.0 labor hours (\$880.00)	\$471.00
27	13507 – B	Cost Cap is missing; since repair total is above the threshold, a Cost Cap is required	145-147	\$5,791.39	“Disallow the repair cost above the threshold of \$1,500.00.” Total Cost Cap not subject to proposed chargeback (\$1,500.00)	\$1,500.00
30	13897 – B	Repair order doesn't include the required Cost Cap; duplicate labor time with the transmission overhaul; MTINSPECT is only to be claimed if the assembly cannot be repaired; no warrantable defect identified with either component	217-219	\$5,790.13	“Due to the missing Cost Cap, all repair costs above the \$1,500 threshold for automatic transmissions is disallowed.” Total Cost Cap not subject to proposed chargeback (\$1,500.00)	\$1,500.00
31	13987 – A	Improper labor operations were claimed; technician comments support transmission removal/installation and	242-243	\$2,971.60	The stated reason cited by Ford does not support a potential chargeback, instead, “The value of the missed labor operations is \$4,004.00.” Putnam	\$2,971.60

		transmission overhaul - neither of these labor operations were claimed			could have claimed an additional \$4,004.00 for the repair but did not.	
33	14009 – A	Duplicate labor; labor time is included in the transmission removal and installation labor operation 7000A	246-247	\$5,925.61	“Disallow 0.5 of duplicate labor.” Total 0.5 labor hours (\$110.00)	\$5,815.61
34	14009 – E	With a hole in the block it is not necessary to perform the engine tear down for inspection; labor operation 6007E1 is not required or supported by the technician comments provided	247-249	\$7,941.79	“Disallow 2.8 hours of labor time.” Total 2.8 labor hours (\$616.00)	\$7,325.79
35	14026 – A	Technician comments don't have a technician ID associated with them; unsupported actual time; labor operations are not supported by the technician comments provided; engine air filter replacement is not warrantable; actual time claimed for tear down and inspection of the engine was not necessary - was replaced under the Low Time In Service Policy (LTIS)	251-253	\$9,444.49	“Disallow 0.3 hour of unsupported actual time claimed.” “Disallow 3.0 hours of unsupported labor time.” “Disallow 1.5 hours of labor.” “Disallow \$25.12 for the air filter.” Total \$25.12 parts; 4.8 labor hours (\$1,056.00)	\$8,363.37
38	14123 – C	Repair order documentation does not include the required Cost Cap; main control and solenoid assembly replacement is not supported by the technician comments provided; no warrantable defect documented	279-281	\$4,920.56	“Due to the missing Cost Cap, all repair costs above the \$1,500 threshold for automatic transmissions is disallowed.” Total Cost Cap not subject to proposed chargeback (\$1,500.00)	\$1,500.00
40	14205 – A	3.0 hours of actual time claimed for tear down and inspection of the transmission was not necessary; transmission assembly was replaced under the Low Time	290-292	\$8,627.09	“Disallow 3.0 hours of labor.” Total 3.0 labor hours (\$660.00)	\$7,967.09

		in Service (LTIS) policy				
41	14207 – A	Actual time included contacting the TAC and FSE - this portion of the actual time is not reimbursable under warranty	294-295	\$990.80	“Disallow 1.0 of unsupported time.” Total 1.0 labor hours (\$220.00)	\$770.80
42	14270 – C	Time records for repair line "C" is 0.09 hours - maximum actual time that can be claimed is 0.1 hour	308-309	\$110.00	“Disallow 0.4 of unsupported actual time.” Total 0.4 labor hours (\$88.00)	\$22.00
43	14270 – E	Time records for repair line "E" is 0.07 hours - maximum actual time that can be claimed is 0.1 hour	309-311	\$110.00	“Disallow 0.4 of unsupported actual time .” Total 0.4 labor hours (\$88.00)	\$22.00
45	14365 – B	Brake rotor replacement is not required based on the brake rotor thickness measurements documents; no warrantable defect identified with the brake rotors	336-337	\$417.27	“Disallow \$137.98 in parts and .3in labor related to the brake rotor replacement.” Total \$137.98 parts; 0.3 labor hours (\$66.00)	\$213.29
47	14452 – F	Labor operation 7000A50 to flush the torque converter is not required or supported by the technician comments provided	361-362	\$6,898.98	“Disallow 0.2 hour of labor for the difference.” Total 0.2 labor hours (\$44.00)	\$6,854.98
48	14487 – B	Labor operations 7000A50, 7001D1 and AD are not supported by the technician comments provided; no mention of monitoring PIDS and no explanation provided to support the additional diagnosis time	368-370	\$6,806.98	“Disallow 2.3 hours of unsupported labor time.” “Disallow \$1,312.02 for these 2 parts.” Total \$1,312.02 parts; 2.3 labor hours (\$506.00)	\$4,988.96
51	14784 – A	Main control replacement is not supported by the technician comments provided; no warrantable defect documented and no details explaining why the main control needs to be replaced; labor operations are not	423-425	\$5,630.46	“Disallow \$505.36.” “Disallow 0.7 hour of unsupported labor time.” “Disallow 1.5 hours of unsupported labor time.” Total \$505.36 parts; 2.2 labor hours (\$484.00)	\$4,641.10

		supported by the technician comments provided; actual time claimed for additional diagnosis is not supported by the technician comments				
53	14880 – A	Duplicate labor; labor time is included in the 21M01D claimed on repair line "D"	439-440	\$1,080.11	“Disallow 1.8 hours of duplicate labor.” Total 1.8 labor hours (\$396.00)	\$684.11
59	15092 – A	Labor operation 8005D was not necessary; coolant leak from the weep hole can be verified with a simple visual inspection; in addition the customer had already identified the source of the leak	473-474	\$2,399.01	“Disallow 0.4 hour of labor time.” Total 0.4 labor hours (\$88.00)	\$2,311.01
60	15164 – A	The 1.0 hours of additional diagnosis time is not supported by the technician comments provided	479-481	\$910.47	“Disallow 1.0 of unsupported time.” Total 1.0 labor hours (\$220.00)	\$690.47
64	15371 – A	Main control replacement is not supported by the technician comments provided; no warrantable defect documented and no details explaining why the main control needs to be replaced	511-513	\$5,465.95	“Disallow \$587.36.” Total \$587.36 parts	\$4,878.59
65	15371 – B	Labor operation 2001B3T to machine the rear brake rotors is not supported by the technician comments provided	513-514	\$471.22	“Disallow 0.6 hour of unsupported labor.” Total 0.6 labor hours (\$132.00)	\$339.22
67	15455 – A	The oil filter is included with the engine long block assembly; replacement of the oil filter is not required or supported by the technician comments provided	528-530	\$11,536.77	“Disallow \$8.58 in parts.” Total \$8.58 parts	\$11,528.19
68	15481 – A	Replacement of the upper intake manifold and oil filter adaptor are not supported by the technician comments;	531-533	\$11,998.01	“Disallow \$279.14 for the unsupported parts.” Total \$279.14 parts	\$11,718.87

		no mention of why the oil filter adaptor was replaced				
70	15794 – A	The 1.0 hour of actual time claimed is not supported by the time records provided; total clock time for repair line "A" is 0.73 hour	565-566	\$220.00	“Disallow 0.3 of unsupported actual time.” Total 0.3 labor hours (\$66.00)	\$154.00

Ford’s Total Overstatement of Non-Location Based Disallowed Claims: \$132,407.29

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE
NEW MOTOR VEHICLE BOARD
STATE OF CALIFORNIA**

In the Matter of the Protest of:

**KPAUTO, LLC dba PUTNAM FORD OF SAN MATEO,
Protestant**

vs.

FORD MOTOR COMPANY, Respondent

Agency Case No. PR-2759-21

OAH Case No. 2023050701

**ORDER RESOLVING MOTIONS ARGUED AT PREHEARING
CONFERENCE**

On August 11, 2023, Administrative Law Judge Wim van Rooyen, Office of Administrative Hearings (OAH), State of California, heard oral argument on various motions by videoconference from Sacramento, California. Gavin Hughes, Attorney at Law, Law Offices of Gavin M. Hughes, represented KPAuto, LLC, doing business as Putnam Ford of San Mateo (protestant). Steven Kelso, Gwen Young, April Connally, and Elayna Fiene, Attorneys at Law admitted pro hac vice, Greenberg Traurig, LLP,

represented Ford Motor Company (respondent). This order resolving the motions follows.

General Background

The parties are familiar with the factual and procedural background of this case. In short, protestant is a Ford dealership obligated to provide warranty service on eligible Ford vehicles. Respondent reimburses protestant for such warranty service at an hourly warranty labor reimbursement rate. California law requires that the warranty labor reimbursement rate be equal to the dealer's retail labor rate, the rate the dealer charges its retail paying customers for repairs not covered by warranty. (Veh. Code, § 3065, subd. (b).)

Vehicle Code section 3065.2 provides a detailed mechanism for the dealer to establish or modify its retail labor rate for purposes of determining the warranty labor reimbursement rate. Summarized in broad terms, the dealer submits to the manufacturer sequences of repair orders specified by statute. (Veh. Code, § 3065.2, subds. (a)(1) & (b).) The retail labor rate is then calculated by dividing the total labor charges from "qualified repair orders" submitted by the total number of hours that generated those charges. (*Id.*, subd. (a)(2); see also *id.*, subds. (c) & (h).) 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." (*Id.*, subd. (j).)

Vehicle Code section 3065.2 also establishes a comprehensive procedure for the manufacturer to contest the material accuracy of the retail labor rate calculated by the dealer, including various time and notification requirements. (Veh. Code, § 3065.2,

subs. (d)-(f).) As part of the manufacturer's notification to the dealer regarding the retail labor rate contest, the manufacturer must provide a full explanation of all reasons for the contest, evidence substantiating the manufacturer's position, a copy of all calculations used by the manufacturer, and a proposed adjusted retail labor rate. (*Id.*, subd. (d)(1).) A manufacturer may not directly or indirectly take, or threaten to take, any adverse action against a dealer for exercising the dealer's rights under Vehicle Code section 3065.2. (See *id.*, subd. (i).)

If a manufacturer fails to comply with section 3065.2, or if a dealer disputes the manufacturer's proposed adjusted retail labor rate, the dealer may file a protest with the New Motor Vehicle Board (Board) for a declaration of the appropriate retail labor rate. (See Veh. Code, § 3065.4.) In any such protest, the manufacturer has the burden of proving that it complied with section 3065.2 and that the dealer's calculation of the retail labor rate is materially inaccurate or fraudulent. (*Id.*, subd. (a).)

The Protest and Proceedings Before the Board

On December 30, 2021, protestant filed with the Board Protest No. PR-2759-21 (Protest) against respondent. The Protest alleges that on August 24, 2021, protestant submitted to respondent a request to increase protestant's hourly retail labor rate from \$177 to \$436.76. In a letter dated October 26, 2021, respondent denied that request on the basis that the requested retail labor rate was materially inaccurate or fraudulent. Respondent proposed an adjusted hourly retail labor rate of \$220. According to the Protest, respondent failed to comply with Vehicle Code section 3065.2's requirements to properly contest protestant's calculation of the retail labor rate and propose an adjusted retail labor rate. Protestant requests an order sustaining the Protest, declaring protestant's requested rate as the appropriate retail labor rate, and awarding compensation and prospective relief.

Respondent timely responded to the Protest. The matter proceeded before the Board and its own administrative law judges for purposes of all discovery and law and motion matters.

Transfer of the Protest to OAH

On May 18, 2023, Board staff filed a Request to Set Hearing (RSH) with OAH. Board staff represented that discovery involving the Protest was complete. Thus, the RSH requested that the matter only be set for a “hearing on the merits” before OAH. OAH scheduled the hearing for September 18-21 and 25-28, 2023, with a prehearing conference (PHC) and mandatory settlement conference on August 11, 2023.

Pending Motions

Prior to the PHC, respondent filed three motions with OAH: (1) a motion in limine regarding technology procedures for parties, witnesses, and counsel during virtual hearing (Technology Procedures Motion); (2) a motion in limine regarding evidence and argument that respondent engaged in adverse conduct towards protestant (Adverse Conduct Motion); and (3) a second motion to compel protestant to produce documents responsive to respondent’s request for production of documents (RFP) No. 40, along with an accompanying motion for sanctions (Discovery/Sanctions Motion). In addition to written briefing, the parties provided oral argument at the PHC concerning the motions. Each motion is addressed separately below.

TECHNOLOGY PROCEDURES MOTION

Respondent’s Technology Procedures Motion requests an order that “precludes the parties, their witnesses, and their counsel from performing or allowing anything

that would assist any witness's testimony in any way that would not be permitted at an in-person hearing or trial." At oral argument, respondent acknowledged that ethics rules already prevent all counsel from engaging in any form of witness tampering. Nevertheless, respondent clarified that the requested order would primarily help non-lawyer parties and witnesses understand their obligations. Protestant does not oppose the motion. Consequently, the motion is granted.

ADVERSE CONDUCT MOTION

Respondent's Adverse Conduct Motion requests an order excluding evidence and argument that respondent engaged in adverse conduct towards protestant for requesting a retail labor rate increase in violation of Vehicle Code section 3065.2, subdivision (i). Respondent's exclusion request includes evidence and argument that respondent: (a) hindered protestant's request to relocate its dealership, and (b) performed a warranty audit of protestant's repair orders from June 2022 through February 2023.

Respondent argues that the instant Protest does not allege that respondent engaged in retaliatory adverse conduct in violation of Vehicle Code section 3065.2, subdivision (i). It only alleges a dispute concerning the calculation of protestant's retail labor rate. On May 25, 2023, protestant filed a separate protest concerning respondent's alleged retaliatory adverse conduct (Protest No. PR-2826-23), which remains pending before the Board. Although respondent strongly disputes that it engaged in any retaliatory adverse conduct towards protestant, respondent observes that protestant will have the opportunity to litigate that issue in the other protest. However, evidence of retaliatory adverse conduct would be irrelevant to the issues presented by the instant Protest and unduly prejudicial.

Protestant opposes the Adverse Conduct Motion. It argues that the Protest raises the broader issue of whether respondent complied with Vehicle Code section 3065.2, which includes subdivision (i) prohibiting retaliatory adverse conduct. Additionally, protestant contends that it did not specifically plead respondent's retaliatory adverse conduct in the Protest because the conduct had not yet occurred at the time of the Protest's filing. Finally, protestant requests that if respondent's motion is granted, protestant be given leave to amend the Protest to allege such retaliatory adverse conduct.

Administrative hearings allow for the admission of relevant evidence. (Gov. Code, § 11513, subd. (c).) "Relevant evidence" means evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)

Contrary to protestant's argument, the Protest does not broadly allege failure to comply with all of Vehicle Code section 3065.2's requirements. It specifically alleges that respondent failed to comply with Vehicle Code section 3065.2's requirements to contest protestant's calculation of the retail labor rate and propose an adjusted retail labor rate. Even liberally construed, the Protest does not plead any retaliatory adverse conduct. Although such conduct allegedly occurred after the Protest's filing, protestant did not timely seek leave to amend the Protest. Permitting an amendment broadening the scope of issues approximately a month prior to hearing would be unfair and unduly prejudicial to respondent.

Because the Protest does not raise the issue of retaliatory adverse conduct, any evidence or argument concerning such alleged conduct is irrelevant as a matter of law. Additionally, the alleged retaliatory adverse conduct involves distinct factual subject matter that would involve undue consumption of hearing time. For example, the warranty audit involves a completely different set of repair orders than those involved in protestant's retail labor rate calculation. For these reasons, respondent's Adverse Conduct Motion is granted.

DISCOVERY/SANCTIONS MOTION

Brief History of Discovery Dispute

Respondent's RFP No. 40 requested protestant to produce documents showing the physical location at which repairs were performed for each of the repair orders submitted in support of protestant's requested retail labor rate increase. The reason for propounding RFP No. 40 is respondent's contention that repair orders involving repairs performed at a location other than protestant's approved dealership location would not constitute "qualified repair orders." Respondent argues that if protestant performed any repairs at issue at an unapproved location, use of the associated repair orders in the calculation of protestant's retail labor rate would render it materially inaccurate.

Protestant responded to RFP No. 40 with several objections. It did not produce any responsive documents.

On October 13, 2022, the Board's administrative law judge assigned to law and motion, Anthony Skrocki, overruled protestant's objections and granted respondent's first motion to compel production of documents responsive to RFP No. 40. During the parties' subsequent meet-and-confer efforts, protestant represented that: (1) the

repair orders at issue all reference protestant's approved dealership location; (2) no responsive documents other than the repair orders existed; and (3) all repairs associated with protestant's request for a retail labor rate increase were performed at protestant's approved dealership location. However, respondent claims that depositions of protestant's employees and owners later contradicted protestant's third representation.

On May 24, 2023, respondent filed a second motion to compel documents responsive to RFP No. 40 before Judge Skrocki. That motion also sought an award of attorney's fees and costs and other appropriate discovery sanctions. On June 22, 2023, Judge Skrocki heard oral argument on the motion. At the motion hearing, Judge Skrocki directed the parties to confer in an attempt to reach a stipulation as to the discovery sanctions protestant would be subject to if respondent's motion were granted. The parties conferred, but never reached agreement on a stipulation. For unknown reasons, Judge Skrocki never ruled on the motion.

Motion's Refiling before OAH

On August 10, 2023, a day before the PHC, respondent filed the Discovery/Sanctions Motion with OAH. It consists of a refiling of respondent's second motion to compel previously heard by Judge Skrocki along with a motion for sanctions specifically requesting issue and evidentiary sanctions. Protestant opposes the Discovery/Sanctions Motion.

At the PHC, both parties requested that the matter be briefly remanded to the Board to reopen discovery and for Judge Skrocki to rule on the Discovery/Sanctions Motion given Judge Skrocki's prior involvement and familiarity with the discovery dispute. However, the parties did not agree to continue the hearing before OAH. Upon

OAH's inquiries to the Board, Board staff indicated that the Board did not intend to take any further action on this matter. That would appear to include reopening of discovery or ruling on any discovery motions. Given the Board's position, it falls to OAH to decide whether reopening discovery is appropriate.

Ruling

After carefully considering the parties' arguments, the undersigned declines to reopen discovery. The matter was transferred to OAH to conduct a hearing on the merits, with the understanding that all discovery had been completed. It is presently set for hearing in approximately one month and the parties declined to stipulate to a continuance of the hearing. There is insufficient time to reopen discovery and conduct additional discovery proceedings before hearing. Instead, the parties are encouraged to expeditiously prepare for hearing.

Consequently, the parties' request to reopen discovery and respondent's Discovery/Sanctions Motion are denied. This order is without prejudice to any party's ability to object at hearing to the offering of evidence or argument concerning matters that should have been previously disclosed or produced in discovery.

ORDER

Accordingly, IT IS ORDERED that:

1. Respondent's motion in limine regarding technology procedures for parties, witnesses, and counsel during virtual hearing is GRANTED. Specifically, all parties, their witnesses, and their counsel shall comply with the following provisions at the virtual hearing:

(a) Witnesses are prohibited from having any windows open on their computers while testifying other than the windows necessary to access the virtual hearing (Zoom) and the exhibits (Case Center).

(b) Counsel and the party representatives shall not open or maintain with any witness any open chat rooms or similarly private spaces within or in addition to the virtual hearing during the course of the witness's testimony. Counsel and the party representatives shall not text, instant message, or exchange e-mails, written notes, or any other form of communication with a witness during the witness's testimony.

(c) Witnesses shall not have any notes, references, scripts of their proposed testimony, documents, or other potential aids for their testimony while testifying, except for case exhibits to which the witness is specifically directed. Before a witness consults a different case exhibit, the witness shall identify the particular exhibit they wish to review and request permission. Additionally, before a witness is directed to review any material other than a case exhibit, counsel shall identify the material for the record and request permission.

2. Respondent's motion in limine regarding evidence and argument that respondent engaged in adverse conduct towards protestant is GRANTED. Protestant is precluded from offering any evidence or presenting argument at hearing that respondent violated Vehicle Code section 3065.2, subdivision (i), by hindering protestant's relocation request, conducting a warranty audit of protestant, or engaging in other retaliatory adverse conduct in connection with protestant's request to increase its retail labor rate.

3. The parties' request to reopen discovery is DENIED. Consequently, respondent's second motion to compel production of documents responsive to its

Request for Production No. 40 and the accompanying motion for discovery sanctions are DENIED because discovery remains closed.

DATE: August 15, 2023

Wim vanRooyen

WIM VAN ROOYEN

Administrative Law Judge

Office of Administrative Hearings

1 **DECLARATION OF SERVICE BY ELECTRONIC MAIL**

2 I, Robert A. Mayville, Jr., declare that I am employed in the County of Sacramento, State of
3 California, that I am over 18 years of age, and that I am not a party to the proceedings identified herein.
4 My business address is 4360 Arden Way, Suite 1, Sacramento, California 95864.

5 I declare that on April 2, 2025, I caused to be served a true and complete copy of:

6
7 ***PROTESTANT'S POST-HEARING BRIEF***

8 *and*

9 ***PROTESTANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW***

10
11 ***KPAuto, LLC, dba Putnam Ford of San Mateo***

12
13 *v.*

14 ***Ford Motor Company***

15 ***Protest No.: PR-2826-23***

16
17 By Electronic Mail:

18 Steven M. Kelso, Esq.
19 April Connally, Esq.
20 H. Camille Papini-Chapla, Esq.
21 Greenberg Traurig, LLP
22 1144 15th Street, Suite 3300
23 Denver, Colorado 80202
24 kelsos@gtlaw.com
25 april.connally@gtlaw.com
26 papinichapla@gtlaw.com

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

28 Executed April 2, 2025, in Sacramento, California.



Robert A. Mayville, Jr.

VIA EMAIL

New Motor Vehicle Board

Received

4-2-25

FILED

New Motor Vehicle Board

Date: 4-2-25

By: am

LAW OFFICES OF GAVIN M. HUGHES
GAVIN M. HUGHES State Bar #242119
ROBERT A. MAYVILLE, JR. State Bar #311069
4360 Arden Way, Suite 1
Sacramento, CA 95864
Telephone: (916) 900-8022
E-mail: gavin@hughesdealerlaw.com
mayville@hughesdealerlaw.com

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-2826-23

PROTESTANT'S PROPOSED FINDINGS
OF FACT AND CONCLUSIONS OF LAW

Pursuant to the Order Establishing Post-Hearing Briefing Schedule dated November 14, 2024, Protestant, KPAuto, LLC, dba Putnam Ford of San Mateo ("Putnam"), submits Protestant's Proposed Findings of Fact and Conclusions of Law.

1 **PROCEDURAL BACKGROUND**

2 I. STATEMENT OF THE CASE

3 1. On May 25, 2023, KPAUTO, LLC, dba PUTNAM FORD OF SAN MATEO (hereafter
4 “Protestant”) filed with the Board a Protest against FORD MOTOR COMPANY (hereafter
5 “Respondent”). Protestant alleged that Respondent conducted an audit (hereafter “Audit”) of Protestant’s
6 warranty and parts operations in violation of Vehicle Code section 3065(e)(1).¹

7 2. Protestant alleges that Respondent conducted the Audit in a punitive and retaliatory
8 manner in response to a retail labor rate request made by Protestant pursuant to section 3065.2 and
9 Protestant’s previous section 3065.4 protest filed with the Board, in Protest No. PR-2759-21.

10 3. Protestant further alleges that Respondent conducted the Audit in violation of section
11 3065.2(i)(2)(G). (Protest, p. 2.) Section 3065.2(i)(2)(G) provides that a franchisor shall not conduct or
12 threaten to conduct a nonroutine or nonrandom warranty audit in response to a franchisee seeking
13 compensation or exercising any right set forth in section 3065.2. Section 3065.2(i)(2)(D) similarly
14 precludes a franchisor from failing to act other than in good faith in response to a labor rate submission.

15 4. The Board issued a Pre-Hearing Conference Order on July 12, 2023, concerning the
16 exchange of discovery in this Protest. The Pre-Hearing Conference Order dates were subsequently
17 amended.

18 5. On November 6, 2023, the Parties entered into the following stipulation:

19 Putnam Ford’s franchise agreement reflects as the authorized location 885 N. San Mateo
20 Drive, San Mateo, CA 94401 (“Authorized Location”). Since at least June 2021, Putnam
21 Ford has performed repairs, including warranty repairs, at locations other than the
22 Authorized Location. Putnam Ford stipulates that all the warranty repairs disallowed as
False Practice pursuant to 7.3.03 were performed at a location other than the Authorized
Location.

23 6. The merits hearing was held via Zoom on August 6-8, 2024, August 12-13, 2024, and
24 August 15-16, 2024. The merits hearing continued via Zoom on September 13, 2024, and November 7,
25 2024.

26 7. The Board heard oral argument on Pre-Hearing Motions on August 6, 2024.

28

¹ All statutory references are to the California Vehicle Code unless noted otherwise.

1 8. The Board granted Respondent’s unopposed Motion in Limine to Protect to the Integrity
2 of the Hearing. The Board granted Respondent’s unopposed Motion in Limine to Protect to the Integrity
3 of the Hearing. The Board granted Respondent’s unopposed Motion in Limine Regarding Technology
4 Procedures for Parties, Witnesses, and Counsel During Virtual Hearing. The Board denied without
5 prejudice Respondent’s Motion in Limine Regarding Evidence and Argument Putnam Ford’s Use of
6 Unauthorized Facility Was Justified; Motion in Limine Precluding Testimony Outside A Witness’s
7 Personal Knowledge; and Motion in Limine to Exclude Evidence and Argument Putnam Ford was
8 Unaware of Terms of SSA.

9 9. At the conclusion of the merits hearing, Administrative Law Dwight V. Nelsen issued an
10 Order Establishing Post-Hearing Briefing Schedule. The record closed upon the completion of the post-
11 hearing briefing on April 25, 2025.

12 II. PARTIES AND COUNSEL

13 10. Protestant is an authorized Ford “franchisee” within the meaning of Vehicle Code
14 sections 331.1, 3065, and 3065.2. At the hearing, Putnam was represented by Gavin M. Hughes, Esq.
15 and Robert A. Mayville, Jr., Esq. of the Law Offices of Gavin M. Hughes.

16 11. Respondent is a “franchisor” within the meaning of Vehicle Code sections 331.2, 3065,
17 and 3065.2. Ford was represented by Steven M. Kelso, Esq., April C. Connally, Esq., and H. Camille
18 Papini-Chapla of Greenberg Traurig LLP.

19 III. SUMMARY OF WITNESS TESTIMONY AND EXHIBITS INTRODUCED

20 12. Respondent called the following witnesses during the merits hearing:
21 Jonathan Owens, a Warranty Auditor for Respondent.

22 13. Protestant called the following witnesses during the merits hearing:
23 Al Vasquez, Protestant’s General Manager and Part Owner;
24 Troy Alexander Davis, Protestant’s Fixed Operations Director;
25 Colt DeFrees, an automotive technician for Protestant;
26 Andrey Kamenetsky, Group Operations Manager and Chief Financial Officer for the broader Putnam
27 organization;
28

1 Michael Gogolewski, Respondent's prior Market Representation Manager for Putnam Ford called
2 pursuant to Evidence Code section 776;

3 Melissa Hughes, Respondent's prior Network Development Manager called pursuant to Evidence Code
4 section 776;

5 Robert Benke, Respondent's Service Performance Manager called pursuant to Evidence Code section
6 776;

7 LaShawn Swann, Respondent's San Francisco Regional Manager called pursuant to Evidence Code
8 section 776;

9 14. The Parties admitted into evidence approximately 80 exhibits including all of Joint
10 Exhibits J-1 through J-5 and Deposition Designations referenced below.

11 15. Pursuant to the November 7, 2024, Corrected Order Granting in Part and Denying in Part
12 Protestant's Request for Post-Hearing Deposition Designations, the Board admitted into evidence
13 Deposition Designations contained in Exhibits as follows and subject to the rulings on specific objections
14 therein:

15 a. Except as to specific page/line citations to which an objection is sustained, Exhibits
16 P-154 and P-159 were admitted as exceptions to the hearsay rule;

17 b. Except as to specific page/line citations to which an objection is sustained, Exhibit P-
18 155 was admitted as an exception to the hearsay rule;

19 c. Except as to specific page/line citations to which an objection is sustained, Exhibits
20 P-156, P-157, P-158, P-160, and P-161 were admitted;

21 d. Exhibit P-147 was admitted; and

22 e. Exhibits R-355 and R-356 were admitted as counter designations.

23 16. Following the hearing on November 7, 2024, the Board also admitted Exhibits R-349, R-
24 350, R-351, R-352, R-353, and R-354 with the exception of parts thereof to which the Board specifically
25 sustained an objection. These Exhibits were counter designations to Protestant's Post-Hearing
26 Deposition Designations.

1 17. During the hearing, the Board also admitted as Deposition Designations Exhibits P-143,
2 P-150, P-151, R-325, R-326, R-327, R-328, R-329, R-330, R-332, R-333, R-334, and R-335.²

3 IV. BURDEN OF PROOF

4 18. Pursuant to Vehicle Code section 3065, subdivision (e)(6), Respondent bears the burden
5 of proof to show it complied with Section 3065 in conducting its audit of Protestant. Specifically,
6 Respondent bears the burden of proof to show it did not select Protestant for an audit, or perform an
7 audit, in a punitive, retaliatory, or unfairly discriminatory manner.

8 19. Section 3065.2, subdivision (i) precluded Respondent from directly or indirectly taking
9 or threatening to take adverse action against Protestant including conducting or threatening to conduct
10 nonroutine or nonrandom warranty, audits in response to Protestant seeking compensation or exercising
11 any right pursuant to Section 3065.2 (Cal. Veh. Code, § 3065.2, subd. (i)(2)(G)) and failing to act other
12 than in good faith (Cal. Veh. Code, § 3065.2, subd. (i)(2)(D)).

13 V. ISSUE PRESENTED

14 20. The issue presented in this protest is whether Respondent sustained its burden of proof to
15 show it complied with Section 3065 in conducting its nonroutine or nonrandom warranty audit of
16 Protestant. (Cal. Veh. Code, § 3065, subd. (e)(6).)

17 VI. APPLICABLE LAW

18 21. Vehicle Code section 3065 provides in relevant part the following:

19 (e)(1) Audits of franchisee warranty records may be conducted by the franchisor on a
20 reasonable basis for a period of nine months after a claim is paid or credit issued. A
21 franchisor shall not select a franchisee for an audit, or perform an audit, in a punitive,
22 retaliatory, or unfairly discriminatory manner. A franchisor may conduct no more than
23 one random audit of a franchisee in a nine-month period. The franchisor's notification to
24 the franchisee of any additional audit within a nine-month period shall be accompanied
25 by written disclosure of the basis for that additional audit.

26 (2) Previously approved claims shall not be disapproved or charged back to the franchisee
27 unless the claim is false or fraudulent, repairs were not properly made, repairs were

28 ² These include designations from Kent Putnam, Putnam's dealer principal; Mike Sweis, a Ford field
service engineer; Allen Kanouse, previously a Ford auditor; Meghan Murphy-Austin, previously the
Ford San Francisco regional manager; Sharita Crawford, Ford's US and Canada warranty consulting /
audit, training and field operations manager; Grace Karnes, Ford's franchising coordinator; William
Walsh, previously Ford's warranty audit supervisor; and Mark Robinson, Ford's global warranty
systems manager.

1 inappropriate to correct a nonconformity with the written warranty due to an improper
2 act or omission of the franchisee, or for material noncompliance with reasonable and
nondiscriminatory documentation and administrative claims submission requirements....

3 (3) If the franchisor disapproves of a previously approved claim following an audit, the
4 franchisor shall provide to the franchisee, within 30 days after the audit, a written
5 disapproval notice stating the specific grounds upon which the claim is disapproved. The
6 franchisor shall provide a reasonable appeal process allowing the franchisee a reasonable
7 period of not less than 30 days after receipt of the written disapproval notice to respond
8 to any disapproval with additional supporting documentation or information rebutting the
9 disapproval and to cure noncompliance, with the period to be commensurate with the
10 volume of claims under consideration. If the franchisee rebuts any disapproval and cures
any material noncompliance relating to a claim before the applicable deadline, the
franchisor shall not chargeback the franchisee for that claim.

11 ...

12 (6) Within six months after either receipt of the written disapproval notice or completion
13 of the franchisor's appeal process, whichever is later, a franchisee may file a protest with
the board for determination of whether the franchisor complied with this subdivision. In
any protest pursuant to this subdivision, the franchisor shall have the burden of proof.
(Cal. Veh. Code, § 3065, subd. (e).)

14 22. Vehicle Code section 3065.2 provides in relevant part the following:

15 (i) A franchisor shall not do any of the following:

16 ...

17 (2) Directly or indirectly, take or threaten to take any adverse action against a
18 franchisee for seeking compensation or exercising any right pursuant to this
19 section, by any action including, but not limited to, the following:

20 ...

21 (D) Failing to act other than in good faith.

22 ...

23 (G) Conducting or threatening to conduct nonroutine or nonrandom
24 warranty, nonwarranty repair, or other service-related audits in response
25 to a franchisee seeking compensation or exercising any right pursuant to
this section.

26 (Cal. Veh. Code, § 3065.2, subd. (i).)

VII. SUMMARY OF RESPONDENT'S CONTENTIONS

23. Respondent argues it complied with Section 3065 in conducting its nonroutine and nonrandom audit of Protestant. Respondent argues it should be entitled to chargeback \$502,821.56 for warranty claims submitted by Protestant.

24. Respondent argues as to all 551 of 552 claims at issue, the repairs were performed at an unauthorized facility and were therefore submitted as false practices pursuant to Ford's Warranty Manual and Ford's Sales and Service Agreement.

25. In addition, Respondent claims \$244,116.47 across 74 claims are subject to chargeback for additional reasons. This leaves approximately 477 claims for \$258,705.09 subject to Ford's proposed chargeback only because the repairs were performed at an unauthorized facility.

26. Respondent claims it selected Protestant for the Audit based on its warranty study. Respondent claims it selected Protestant for the warranty study following verification of a report or allegation of improper warranty practices at Protestant's dealership. Respondent claims it verified the allegations after receipt of the allegation. The Audit Respondent performed was an allegation audit in contrast to a phrase 3 audit or required follow-up audit.

27. Respondent argues the Board cannot consider application of Section 3065.2 in Protestant's Section 3065 Protest. Moreover, Protestant's arguments based on its obligation in the sales and service agreement to perform warranty repairs on one hand but inability to perform those warranty repairs at the undersized authorized facility are legally irrelevant.

VIII. SUMMARY OF PROTESTANT'S CONTENTIONS

28. Respondent fails to meet its burden to demonstrate it complied with the requirements of Vehicle Code section 3065(e) in conducting its Audit of Protestant. The evidence shows Ford selected Putnam for audit in retaliation for the ongoing Section 3065.4 Protest.

29. Ford's Audit would never have proceeded with the allegation concerning use of the Putnam Nissan facility, including the Barn, for service repairs. Ford representatives pre-planned the acquisition of photos of Ford vehicles being repaired at the Putnam Nissan facility. Ms. Swann attempted to conceal this pre-prepared plan to take the photographs that would begin the Audit.

1 30. Multiple Ford representatives had advanced knowledge Putnam was utilizing the Barn.
2 Putnam's temporary facility could not accommodate the service work in Putnam's market—Ford
3 required Putnam to have twelve (12) stalls when the main facility only had three (3). Ford only
4 challenged Putnam's use of non-customer facing supplemental service facilities because Ford shall it as
5 an opportunity to create leverage against Putnam's Section 3065.4 Protest (the labor rate litigation).

6 31. The timelines concerning the Audit and the labor rate litigation are inextricably
7 interlinked. As discovery was ongoing in the labor rate litigation, Ford pursued a warranty audit against
8 Putnam and sought to send an auditor into Putnam's facilities to obtain evidence to be used in the labor
9 rate litigation and create litigation leverage through a proposed chargeback.

10 32. Ford's audit focused on the six (6) technicians performing repairs not at the authorized
11 main Ford facility. The vast majority of the chargebacks at issue concern only the issue of location but
12 were otherwise performed correctly and parts were correctly installed on customer vehicles.

13 33. When Ms. Swann advised Putnam it needed formal authorization to use the Barn for
14 service operations, Putnam requested formal authorization immediately in October 2022. Ford failed to
15 provide good faith consideration to the request and failed to allow Putnam to cure any material
16 noncompliance with the authorization of the location to perform the repairs. Ford only first responded
17 to Putnam's request on June 16, 2023—approximately eight (8) months later and only four (4) days after
18 Ford issued its Audit closing letter on June 12, 2023.

19 34. The retaliatory nature of the Audit shows Ford failed to comply with Section 3065 and
20 3065.2. Ford's failure to comply with Section 3065 precludes Ford from proceeding with the proposed
21 \$502,821.56 chargeback for warranty work Putnam was obligated to prioritize and conduct and which
22 Putnam has already performed for Ford customers.

1 **FINDINGS OF FACT³**

2 I. WITNESS BACKGROUND FINDINGS

3 35. Jonathan Owens Background: He has worked for 23 years for Respondent. He is
4 currently a warranty auditor for Ford. He has worked for Ford as a warranty auditor for six or seven
5 years. He received a two-year college automotive degree through Ford's ASSET Program. He
6 previously worked as an automotive technician at Westland Ford in Ogden, Utah, the Ford dealership
7 sponsoring him in the ASSET Program. He received ASE master certifications while working at
8 Westland Ford. His previous positions with Ford include working as a Service Engineer at Ford's
9 technical service hotline, a Field Service Engineer in Utah, a Process Specialist. (RT Vol. I, 65:1-73:11.)

10 36. Al Vasquez Background: He is currently the general manager of Putnam Ford. He is
11 the Vice president of a few of the corporations and is also general manager of General Motors, Honda,
12 Mazda, and Subaru within the Putnam organization. He has been with the Putnam organization for close
13 to 32 or 33 years. (RT Vol. III, 67:1-20.)

14 37. Troy Alexander Davis Background: He is currently the fixed operations director for both
15 Putnam Ford and Putnam General Motors. He began working for the Putnam organization in January
16 2023. He was previously the service director and fixed operations director at Mercedes Benz in San
17 Francisco for just under eight years. He also worked for Serramonte Ford (one year) and the Price Simms
18 Auto Group (just under three years) as a fixed operations director. He worked for British Motor Cars
19 Distributors as a service director for about eight years. He also worked for Sonnen Motor Cars as a parts
20 and service director for three to four years. Prior to that, he was a service manager for Serramonte
21 Nissan, Isuzu, and Hyundai for just under five years. His first automotive employment was with John
22 Gardner Automotive as a technician for about ten years. (RT Vol. IV, 103:7-107:5.)

23
24
25 ³ References to testimony, exhibits or other parts of the record supporting these findings are intended
26 to be examples of evidence relied upon to reach that finding, and not to be exhaustive. Findings of
27 Fact are organized under topical headings for readability only, and not to indicate an exclusive
28 relationship to the issue denoted by the topic heading. The Board may apply a particular finding to any
of the requirements of Section 3065 or 3065.2. 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 38. Colt DeFrees Background: He is currently an automotive technician for Putnam Ford. He
2 has worked for the Putnam organization since October 17, 2022. He previously worked for Serramonte
3 Ford as a technician for about three years. He has fifteen years of experience working as a technician.
4 He is one of the more senior technicians working for Putnam Ford. When he began working for Putnam,
5 he worked at the Barn. (RT Vol. IV, 198:8-199:16.)

6 39. Andrey Kamenetsky Background: He is the group operations manager and CFO for the
7 Putnam organization. He has been with the Putnam organization for over thirty-one years as of October
8 2024. He has held sales consultant, sales manager, general sales manager, general manager and partner
9 positions for Putnam Toyota. He became the group operations manager for the broader Putnam
10 Organization in April or May of 2020. He became the CFO in 2021 or 2022. He worked on the retail
11 labor rate submission for the Ford franchise which was submitted by a vendor, FrogData. (RT Vol. IV,
12 229:11-232:17.) He drafted letters concerning requests for facility additions and relocations to Ford after
13 the labor rate submission. (RT Vol. IV, 234:17-235:3.)

14 40. Michael Gogolewski Background: He is currently the Lincoln ownership operations
15 manager for the west. He has worked for Ford for just under thirty years. Prior to his current position,
16 he was the Market Representation Manager for the San Francisco Region. He was the San Francisco
17 Market Representation Manager from the fall of 2015 to August 2022. He worked with Putnam
18 concerning its initial establishment at 790 North San Mateo Drive and relocation to 885 North San Mateo
19 Drive. He was responsible for facility actions as a Market Representation Manager. (RT Vol. VI, 10:17-
20 12:11.)

21 41. Melissa Hughes Background: She has worked for Ford Motor Company for just over 12
22 years. Her current position is sales and performance manager for Ford. She has acted in that role since
23 October or November of 2023. She was previously a network development manager for Ford in the San
24 Francisco Region (a position which replaced the title of market representation manager). She replaced
25 Sable Watts Allen who replaced Mr. Gogolewski in the San Francisco region. She started the network
26 development manager position in January of 2023. She was also previously a service performance
27 manager, parts and service operations manager, and service business development specialist. Her first
28 contact with Putnam Ford was a visit to the dealership in her role as network development manager. (RT

Vol. VI, 128:18-135:4.)

42. Robert Benke Background: He has worked as a Ford employee for 27 years. He is currently a service performance manager. He started that role in January of 2023. He is responsible for the San Francisco Region. Mr. Benke has not visited Putnam Ford. (RT Vol. VII, 11:2-14:1.)

43. LaShawn Swann Background: She is the current San Francisco Regional Manager for Ford. (RT Vol. VII, 83:12-84:3.)

II. PUTNAM FORD BACKGROUND

44. Putnam Ford originally operated at 790 North San Mateo Drive. (RT Vol. III, 68:8-17.) Putnam Ford opened in April of 2020. (RT Vol. III, 68:18-21.) There was an urgency to the establishment because there was a one-year deadline to reestablish representation in the market to avoid protest rights of other Ford dealers. (RT Vol. III, 69:22-70:11.)

45. After the lease at 790 North San Mateo Drive was pulled by the owner, Putnam Ford relocated to 885 North San Mateo. (RT Vol. III, 70:22-71:18.) 790 North San Mateo Drive and 885 North San Mateo Drive were both listed as properties for the prior Ford dealer in the market. (RT Vol. III, 71:5-18.)

46. There were three (3) stalls at the 885 North San Mateo Drive facility at the time Ford approved the relocation. (RT Vol. III, 74:3-10.) However, Ford required Putnam Ford to have twelve service stalls at a minimum. (RT Vol. III, 74:11-13; Exh. P-102.001.) Mr. Gogolewski told Mr. Vasquez Ford would be flexible and willing to work with Putnam Ford concerning service capacity. (RT Vol. III, 78:20-79:2.) Mr. Vasquez discussed the shortfall in service capacity with Ms. Murphy and Mr. Gogolewski. (RT Vol. IV, 87:1-13.)

47. Ms. Murphy-Austin admitted she recalled Putnam “potentially exploring off-site service locations that would be Ford facilities if they were to propose one and we would approve it.” (Exh. P-154.012, 41:9-16; Exh. P-156.009-.010, 9:23-10:5.) When Ms. Murphy-Austin was the San Francisco Regional Manager, Ford was “open to adding service capacity in a Ford-approved building.” (Exh. P-154.012-.013, 41:24-42:11.) Ford does not receive a lot of facility requests—there are a manageable number for one person to review. (Exh. P-155.027, 229:3-10.)

1 48. The process Ford would have followed when Ms. Murphy-Austin was the San Francisco
2 Regional Manager in approving an off-site service facility would consider if the facility would meet
3 Ford's authorized guidelines for the brand as well as having adequate capacity, the facility would be
4 viable, and ensuring the franchising department was supportive. (Exh. P-155.026, 228:9-22.) The
5 request could be submitted through either the regional manager or the market representation manager.
6 (Exh. P-156.010-.011, 10:24-11:15.)

7 49. For a non-customer facing location, Ford would not consider any image or branding
8 requirements. (Exh. P-158.016, 22:19-21.) At the time of her deposition, Ms. Karnes could not recall a
9 single instance of when Ford declined to approve a non-customer facing service addition. (Exh. P-
10 158.049-050, 58:20-59:9.)

11 50. Mr. Vasquez and Mr. Putnam decided to use the Barn location for Ford service. (RT Vol.
12 III, 81:5-7.) At that time, the Barn was not being used and had previously been used for General Motors
13 technicians. (RT Vol. III, 81:14-17.) The Barn has never been a customer facing Ford location. (RT
14 Vol. III, 81:23-83:1; *see also* RT Vol. IV, 130:13-131:7 (Mr. Davis describing the process of customers
15 only visiting the 885 North San Mateo Drive facility even when repairs were being completed at the
16 Barn).) The Barn was equipped for all Ford repairs, and Putnam never ceased performing service work
17 at its 885 North San Mateo Drive facility. (RT Vol. III, 83:10-14.)

18 51. Mr. Sweis agreed the technicians at the Barn were "generally good techs," were
19 adequately trained, and was better equipped than the main facility. The Barn was equipped to handle
20 any Ford service work that came in. (Exh. P-143.007, 614:5-21.) Mr. Sweis testified with "100 percent
21 certainty" the Barn is where Putnam Ford did big service jobs. (Exh. P-143.012-.013, 620:16-621:6.)
22 Mr. Sweis admitted "of course" the Barn was beneficial to utilize in conjunction with the authorized
23 location for service. (Exh. P-151.008-.009, 53:23-54:2.)

24 52. The Putnam organization has terminated the Nissan franchise previously operated at 101
25 California Drive. (RT Vol. III, 106:16-24.) The Nissan franchise was terminated approximately in mid-
26 May 2024. (RT Vol. V, 42:17-44:20.)

27 53. Putnam Ford currently has nine technicians. (RT Vol. IV, 116:13-15.) Putnam Ford has
28 enough service business to employ more than nine technicians. (RT Vol. IV, 116:16-18.) Putnam does

1 not have the spots, stalls, or other property to employ more technicians. (RT Vol. IV, 121:20-122:1.)

2 54. When Mr. Davis began working for Putnam in January 2023, Putnam Ford had five stalls
3 in use at the Barn and five lifts. Three technicians worked at the Barn. Putnam Ford also used three
4 stalls in the Nissan service facility with three technicians. (RT Vol. IV, 124:7-25.)

5 III. FORD REPRESENTATIVES HAD ACTUAL KNOWLEDGE PUTNAM WAS USING THE
6 BARN OVER A YEAR BEFORE THE ALLEGATION AUDIT PROCESS BEGAN.

7 55. Ms. Murphy-Austin admitted the Ford representatives that would take the lead on
8 working with Putnam Ford to secure additional service capacity would have either been the market
9 representation manager—Mr. Gogolewski at the time—or herself, the Regional Manager. (Exh. P-
10 156.021, 29:14-24.)

11 56. Mr. Vasquez and Mr. Gogolewski visited the Barn location together in approximately
12 April 2022. (RT Vol. III, 84:14-85:22 and 87:16-24.) Ford vehicles were being worked on when Mr.
13 Vasquez visited the location with Mr. Gogolewski. (RT Vol. III, 88:5-8.) Mr. Gogolewski did not advise
14 Mr. Vasquez Putnam Ford would need to add the Barn location to its franchise agreement. (RT Vol. III,
15 88:9-17.)

16 57. Mr. Gogolewski admitted he had visited the former Putnam Nissan dealership and the
17 Barn one to two times. (RT Vol. VI, 40:8-21.) Even though Mr. Gogolewski suggested he only saw an
18 old Econoline in the Barn, Mr. Gogolewski's deposition testimony showed the Econoline was on a lift
19 and being worked on and he saw a Ford vehicle or two in the Barn. (RT Vol. VI, 82:12-83:9 and 84:12-
20 85:14.)

21 58. As a Market Representation Manager, Mr. Gogolewski was "authorized to make or
22 execute any other agreement relating to the subject matter [of the dealer agreement between Ford and
23 Putnam Ford] on behalf of [Ford]." (Exh. J-1.006 (Terms of the Agreement, Section "E").) When
24 Putnam Ford was established, Mike Gogolewski and Meghan Murphy-Austin discussed where the
25 Putnam Ford operations would take place. (RT Vol. IV, 85:19-86:4 and 86:20-25.) Ms. Murphy-Austin
26 signed documents when Putnam Ford initially became a Ford dealer in her position as acting regional
27 manager. (Exh. P-154.006, 24:15-25.)

59. When Mr. Sweis, Ford's Field Service Engineer,⁴ began calling on Putnam Ford in approximately September 2021, his predecessor, Vincent Demico (the previous Ford Field Service Engineer for Putnam Ford) took Mr. Sweis "right to The Barn." (Exh. P-143.002, 606:16-607:8; *see also* Exh. P-151.002-.003, 19:16-20:18.) Mr. Demico told Mr. Sweis Putnam Ford had an off-site facility. (*Id.*) Putnam was not concealing its use of the Barn. (*Id.*) As Mr. Sweis testified, Putnam's service manager drove both Mr. Sweis and Mr. Domico to the Barn. (*Id.*)

60. When Ms. Murphy-Austin was the San Francisco Regional Manager, Putnam Ford took her on a tour of the area around Putnam Ford including the Buick GMC facility, the Nissan facility, and the facility Putnam was operating out of for Ford. (Exh. P-154.009-.010, 27:22-28:16.) In reviewing the December 13, 2022, letter to LaShawn Swann (Exh. P-106), Ms. Murphy-Austin indicated "the building that I think is being described is Nissan, and it was one of the many alternatives Kent suggested and one of the ones that we would have been okay with." (Exh. P-154.023-024, 76:18-77:4.)

61. Mr. Sweis visited the Putnam Ford dealership approximately nine or ten times.⁵ (Exh. P-151.002, 19:10-15.) Almost all of Mr. Sweis's visits to Putnam Ford were to the Barn; he only visited the main facility once or twice. (Exh. P-151.004, 33:11-18; *see also* Exh. P-151.006-.007, 51:22-52:8; Exh. P-151.013, 76:9-12 ("Every time I was called out, it would be at the Barn, yes").)

IV. TIMELINE OF PROCEEDINGS IN PROTESTS PR-2759-21 AND THE CURRENT MATTER

62. The principal issue on the merits of this protest is Protestant's use of an unauthorized facility to provide warranty service to Ford vehicles. Protestant serviced Ford vehicles at a Nissan facility owned by Protestant's Dealer Principal, Kent Putnam. Warranty service of Ford vehicles was performed at the Nissan service facility known as the "Barn." Evidence regarding this fundamental issue occurs in both the current matter and Protest No. PR-2759-21. The following timeline of events illustrates connections between these two matters:

- August 24, 2021: Protestant submitted a request to Respondent for an "adjusted labor retail rate." (Protest No. PR-2759-21, ¶ 6 (Exh. P-103).)

⁴ Mr. Sweis described his role with Ford as "an extension of corporate." (Exh. P-143.008, 616:20-23.) He indicated he meant, "Corporate has certain policies that the dealership needs to abide by in terms of repair and service. We make sure that they follow the repair procedure." (Exh. P-143.008-.009, 616:24-617:4.)

⁵ These visits occurred between September 2021 when Mr. Sweis first visited Putnam Ford and a few months before his April 13, 2023, deposition. (Exh. P-151.006, 51:18-21.)

- 1 ▪ October 26, 2021: Respondent denied Protestant’s retail labor rate adjustment request.
2 (Protest No. PR-2759-21, ¶ 7 (Exh. P-103).)
- 3 ▪ December 30, 2021: Protestant filed a protest for denial of its request for an adjusted
4 retail labor rate. (Protest No. PR-2759-21 (Exh. P-103).)
- 5 ▪ August 8, 2022: As part of discovery in Protest PR-2759-21, Respondent sought,
6 among other discovery, documents sufficient to show the physical location at which
7 every repair documented on each Repair Order was made, “including without
8 limitation any repairs made or completed at a location other than Your authorized
9 Ford dealership location.” (Protest No. PR-2759-21, Respondent Requests for
10 Production, No. 40.)
- 11 ▪ October 2022: Protestant advised Ms. Swann it was using the Barn for service
12 operations during a tour of the Putnam Nissan facility. (RT Vol. VII, 95:23-96:12
13 and 97:10-14.)
- 14 ▪ October 25, 2022: Protestant requested Respondent approve use of the 100 Highland
15 Ave. (the “Barn”) workshop as a non-customer facing overflow service location.
16 Mike Gogolewski and other Ford representatives had previously seen the workshop
17 location.⁶ (Exh. P-104.)
- 18 ▪ December 13, 2022: Protestant formally requested to relocate all operations to 101
19 California Drive, Burlingame, CA (the Putnam Nissan location). In addition,
20 Protestant also proposed 925 Bayswater Ave., Burlingame, CA for additional non-
21 customer facing off-site service maintenance and repair capacity. (Exh. P-106; *see*
22 *also* Exh. R-304 (the same letter).)
- 23 ▪ December 14, 2022: Mr. Putnam executed a declaration in Protest No. PR-2759-21.
24
 - 25 ○ Respondent offered the declaration into evidence as Exhibit R-305 in the
26 current matter.
 - 27 ○ Mr. Putnam declared that the “Ford franchise agreement authorizes Putnam
28 Ford to conduct service work at the address of 885 N. San Mateo Drive, San
29 Mateo, California. This location was not intended to be the permanent location
30 for Putnam Ford . . .” (Ex. R-305, ¶ 2.)
 - 31 ○ Mr. Putnam declared that for the period of March 10, 2021, through July 7,
32 2021, “all Ford service work was performed at the authorized Ford location.”

⁶ During testimony, Ms. Swann suggested Ms. Hughes may have sent this letter to Dearborn and recalled discussion about it. (RT Vol. VII, 100:5-13.) However, Ms. Hughes started her role in the Region in January of 2023, three months after the letter. (RT Vol. VI, 129:16-18.) In fact, counsel for Respondent objected to evidence concerning testimony from Ms. Hughes concerning the letter because it predated her position in the region. (RT Vol. VI, 217:12-14.) Ms. Hughes confirmed the letter is dated before she was the network development manager in the San Francisco region and she did not recall seeing the letter. (RT Vol. VI, 220:10-18.)

(Ex. R-305, ¶¶ 3, 5.)

- Mr. Putnam further declared that “[e]ach repair order provided to Ford as part of our labor rate submission lists the address of where the repairs were completed. The address is 885 N. San Mateo Drive and is listed on every page of the repair order.” (Ex. R-305, ¶ 6.)
- January 19, 2023: In response to Mr. Putnam’s request to relocate Protestant’s facility to the Nissan site in his December 13, 2022, letter, LaShawn Swann, Ford Regional Manager, and Melissa Hughes, Market Representation Manager, met with Mr. Putnam to do a walkthrough of the proposed relocation site. (RT Vol. IV, 248:16-249:20.)
 - During the walkthrough, Ms. Swann observed Ford vehicles in the “Barn.” (RT, Vol. VII, 118:8-120:1.)
 - Mr. Putnam allegedly told Ms. Swann that the vehicles in the “Barn” were customer pay. (RT, Vol. VII, 133:20-134:9.)
 - January 19, 2023, is the same date counsel for Ford requested further production in the labor rate protest including for documents concerning the location where repairs were performed. (RT Vol. V, 217:11-219:21.)
- March 3, 2023: The allegation starting the allegation audit at issue in this Protest originated from a source identified as “Greenberg Traurig, LLP”—Ford’s counsel handling the labor rate litigation on behalf of Ford. (Ex. P-110.003)
- March 10, 2023: Mr. Putnam was deposed in Protest No. PR-2759-21.
 - Respondent offered into evidence excerpts from Mr. Putnam’s deposition as Exhibit R-325 in the current matter.
 - Mr. Putnam testified in his deposition that there were unapproved facilities affiliated with Putnam Ford, i.e., the Nissan service facility known as the “Barn.” (Exh. R-325.017.)
 - Mr. Putnam first testified that the “Barn” was the only building on the Nissan property used to repair Ford vehicles. Then he testified that in the six months prior to March 10, 2023, it was “possible” that Ford vehicles from Protestant’s dealership were repaired in the Nissan bays by Ford technicians. (Exh. R-325, pp. 016-020.)
- March 14, 2023: Respondent deposed Mr. Vasquez in the Labor Rate litigation. Respondent’s counsel asked about the location of warranty repairs during the deposition. (RT Vol. III, 92:5-15.)
- March 27, 2023: Respondent assigned Jonathan Owens, Respondent’s Warranty Auditor, the allegation regarding Protestant’s use of unauthorized facilities for Ford warranty claims. (RT,

Vol. II, 11:28-12:17.)

- March 28, 2023: Ms. Swann advised Protestant that a Warranty Study was scheduled to review Protestant's service operations. (Exh. R-309.)
- March 30, 2023: Meghan Murphy-Austin, then acting Regional Manager, was deposed in Protest No. PR-2759-21. (Exh. P-154.)
- April 3, 2023: Respondent conducted its Warranty Study concluding the Audit should proceed. Mr. Owens observed two Ford vehicles being repaired in the Nissan service facility. (Exh. R-312.)
- April 4, 2023: Mr. Owens observed four Ford vehicles in the "Barn" receiving repair and one Ford vehicle outside of the "Barn." (Exh. R-312.) Mr. Owens also observed two Ford vehicles inside the Nissan facility receiving repairs and six Ford vehicles outside the Nissan facility. (ExhWill. R-312.)
- April 27, 2023: William Walsh was deposed in Protest No. PR-2759-21. (Exh. P-159.)
- May 2, 2023: Mr. Putnam was deposed in Protest No. PR-2759-21.
 - Respondent offered excerpts from Mr. Putnam's deposition as Exhibit R-326.
 - Mr. Putman testified that it is possible that Ford vehicles were serviced in the 13 service bays in the Nissan facility, separate from the "Barn." (Exh. R-326.007.)
- May 8, 2023: Ms. Swann gave notice to Protestant that Respondent elected to upgrade the Warranty Study to a Warranty Audit. (Exh. R-313.)
- May 9, 2023: Troy Davis, Protestant's parts and service director, confirmed to Mr. Owens that three of Protestant's Ford technicians were assigned to the Nissan facility and three technicians were assigned to the "Barn" on the Nissan lot. (Reporter's Transcript, Vol. I, 140:6-141:3; Ex. R-321.)
- May 24, 2023: Respondent concluded the Audit, held a closing meeting, and proposed to chargeback Protestant \$502,821.56 almost entirely for warranty claims performed at an unauthorized facility. (Exh. J-4.583.)
- May 26, 2023: Protestant filed Protest No. PR-2826-23.
- September 18, 2023: Ms. Murphy-Austin testified in the hearing in Protest No. PR-2759-21. (Ex. P-155.)
- September 25, 2023: Mr. Putnam testified during the merits hearing in Protest No. PR-2759-21.
 - Respondent offered into evidence excerpts of Mr. Putnam's testimony as

Exhibit R-327.

○ Mr. Putnam testified that the address on the repair orders cannot be relied upon to show where repair services were performed. (Exh. R-327.019.)

○ Mr. Putnam testified that it is possible that the “Barn” had been used as early as May 2021. (Exh. R-327.014.)

▪ June 6, 2024: Mr. Putnam was deposed in the current matter.

○ Respondent offered excerpts of Mr. Putnam’s testimony as Exhibit R-332.

▪ June 28, 2024: the Board issued its Decision overruling Protest No. PR-2759-21.

○ Respondent offered into evidence the Board Decision as Exhibit R-336.

○ The Administrative Law Judge (hereinafter “ALJ”) in Protest PR-2759-21 issued evidentiary sanctions against Protestant and entered the “finding of fact that some of the repairs in protestant’s warranty labor rate request submission were performed at a facility other than protestant’s authorized facility at 885 N. San Mateo Drive, San Mateo, California 94401.” (Exh. 336.010.)

V. RESPONDENT DELAYED RESPONSES TO PUTNAM REQUESTS FOR NON-CUSTOMER FACING OFFSITE SERVICE OVERFLOW LOCATIONS TO BETTER SUPPORT ITS LABOR RATE LITIGATION AND RETALIATORY AUDIT.

63. During an October 2022 visit to Putnam Ford, Mr. Putnam told Ms. Swann Putnam Ford was performing service work at the Barn. (RT Vol. VII, 95:23-96:12 and 97:10-14.) Ms. Swann advised Mr. Putnam he needed to submit a written request to add the Barn location to the dealer agreement. (RT Vol. VII, 98:7-11.)

64. Protestant formally requested authorization to use the Barn for non-customer facing offsite overflow service operations on October 25, 2022.⁷ (Exh. P-104; *see also* RT Vol. IV, 238:20-241:2 (Mr. Kamenetsky drafted the letter after Ms. Swann’s visit to the Barn to request the Barn be added to the dealer agreement); RT Vol. VII, 99:7-14 (Ms. Swann agreeing Exhibit P-104 is the request Mr. Putnam submitted subsequent to her meeting and discussion in October of 2022).)

⁷ Mr. Owens testified he did not consider Protestant’s request to use the Barn location for service as part of the Audit. (RT Vol. II, 115:9-24.)

1 65. Protestant additionally requested authorization to use 925 Bayswater Ave for non-
2 customer facing offsite overflow service operations on December 13, 2022. (Exh. P-106; *see also* RT
3 Vol. IV, 246:2-247:7 (Mr. Kamenetsky drafted the letter to expand Putnam Ford’s previous request
4 beyond just the Barn but to also offer the entire 101 California Drive property as well as supplemental
5 service work at 925 Bayswater Avenue).) The request to use 925 Bayswater for additional non—
6 customer facing service maintenance and repair capacity did not replace the request to use the Barn for
7 off-site service capacity; it sought to be supplemental capacity for larger vehicles such as Amazon fleet
8 vehicles and box trucks. (RT Vol. IV, 247:8-22.)

9 66. The record evidence shows no response was forthcoming to either request. Protestant
10 followed up the request to use the Barn for non-customer facing offsite overflow service operations on
11 April 19, 2023, while it continued efforts to relocate the entire Putnam sales and service operation to 925
12 Bayswater. (Exh. P-119.) Putnam sought to relocate the entire operations to 925 Bayswater while
13 reaffirming Putnam’s request for non-customer-facing maintenance at the Barn. (RT Vol. IV, 258:16-
14 22.)

15 67. The change in the proposed destination for the sales and service operations was due to
16 Nissan rejecting the swap of the facilities between the Putnam Ford and Nissan franchises. (RT Vol. IV,
17 259:1-10.) The request to use the Barn for non-customer facing offsite overflow service operations was
18 still pending and would not be rejected until June of 2023. (RT Vol. IV, 261:4-12.)

19 68. In considering whether to approve Putnam’s request to relocate to the 101 California
20 Drive (former Nissan facility) and request to relocate to the 925 Bayswater Avenue facility, Ford
21 representatives prepared slides to consider the two facilities. (Exh. P-147; Exh. P-158.046-.047, 53:15-
22 54:9.) Both pages of Exhibit P-147 were considered at the same time and were part of the same
23 document. (Exh. P-158.047, 54:10-23.)

24 69. On June 12, 2023, Respondent issued its Audit closing letter proposing to chargeback
25 approximately half a million dollars (\$502,821.56). (Exh. R-317.002-.003.)

26 70. On June 16, 2023, four days after the Audit closing letter, Respondent first responded to
27 the request for Putnam to use the Barn for non-customer facing offsite overflow service operations.
28 Respondent denied the request. (Exh. P-133.) Mr. Kamenetsky testified the June 16, 2023, letter was

1 the first response Putnam Ford received from Ford denying the request to utilize the Barn location for
2 non-customer facing service capacity. (RT Vol. IV, 275:2-5.) Putnam never received a specific response
3 to the October 2022 requests and December 2022 requests; Ford's June 16, 2023, letter responded to the
4 April 19, 2023, letter. (RT Vol. IV, 275:2-12.)

5 71. Respondent's response was approximately eight months after Putnam first requested to
6 use the Barn for non-customer facing offsite overflow service operations. (*Compare* Exh. P-104 (request
7 on October 25, 2022) *with* Exh. P-133 (response on June 16, 2023).) If Respondent had approved the
8 request, it would have undermined the reason Respondent proposed to chargeback Putnam half a million
9 dollars and would have undermined a central argument Respondent advanced in the Labor Rate
10 litigation. Ms. Swann never advised Ford's audit department of Putnam Ford's request to utilize the
11 Nissan location for service in October of 2022. (Exh. P-157.024, 33:13-23.)

12 72. Ms. Karnes helped draft the response to Putnam's April 19, 2023, letter. (Exh. P-158.022-
13 023, 28:16-29:15; *see also* Exh. P-158.029-.030, 36:8-37:3.) Ms. Karnes was unable to articulate any
14 potential issues with the proposed co-location of the service operations with the Nissan franchise without
15 revealing discussions with counsel; she did not articulate any reasons for why the proposed co-location
16 created an issue with the proposal. (Exh. P-158.035, 42:6-14.)

17 73. On July 6, 2023, Putnam requested Ford consider and approve the still pending request
18 to conduct non-customer facing offsite overflow service operations at 925 Bayswater. (Exh. P-134.)

19 74. Respondent denied the request to conduct non-customer facing offsite overflow service
20 operations at 925 Bayswater by letter dated July 27, 2023. (Exh. P-138.) Respondent denied the request
21 approximately seven (7) months after Putnam first made the request. (*Compare* Exh. P-106 (request on
22 December 13, 2022) *with* P-138 (response on July 27, 2023).) Ford's reasons for denying the service
23 capacity is due to the 925 Bayswater location currently being under protest by at least two dealers. (Exh.
24 P-138; RT Vol. V, 25:16-27:8.)

25 75. On October 13, 2023, Protestant again requested approval to conduct non-customer
26 facing offsite overflow service operations at 925 Bayswater explaining the satellite service location
27 would not be protestable. (Exh. P-139; *see also* RT Vol. V, 28:20-29:10.) Putnam Ford did not proceed
28 with a permanent facility at 925 Bayswater because the building would have required filling and

1 remodeling to make it serviceable which would have taken time, it also lacked a showroom requiring at
2 least three-years; in comparison 101 California Drive was already a fully functional dealership. (RT
3 Vol. V, 44:21-45:20.)

4 76. Within days and on October 19, 2023, Respondent considered and denied Putnam's
5 renewed request to utilize 925 Bayswater for satellite service operations. (Exh. P-140.)

6 77. On May 17, 2024, Protestant again requested approval to conduct non-customer facing
7 offsite overflow service operations at the former Putnam Nissan facility. (Exh. P-141.) Protestant
8 supported the request with the additional information that it had terminated Nissan operations at 101
9 California Drive. (*Id.*)

10 78. Within days and on May 22, 2024, Respondent considered and denied Putnam's request
11 to utilize the former Putnam Nissan facility for satellite service operations. (Exh. P-142.)

12 79. Respondent's denials of the October 13, 2023, request within six (6) days (*compare* Exh.
13 P-139 *with* Exh. P-140) and May 17, 2024, request within five (5) days (*compare* Exh. P-141 *with* P-
14 142) show the six- and seven-months Respondent delayed in responding to Putnam's initial requests
15 were unreasonable (*Compare* Exh. P-104 (request on October 25, 2022) *with* Exh. P-133 (response on
16 June 16, 2023); *compare* Exh. P-106 (request on December 13, 2022) *with* P-138 (response on July 27,
17 2023)).⁸ Respondent delayed its responses to the initial requests to better position itself in the Labor
18 Rate Litigation and Audit.⁹ Respondent first denial of the satellite service requests followed the Audit
19 closing letter and was issued the same week as the Audit closing letter (Exh. R-317.002-.003 (Audit
20 closing letter dated Monday, June 12, 2023); Exh. P-133 (earliest response in the record dated Friday,
21 June 16, 2023).)

22
23 ⁸ Additionally, for purposes of comparison, other facility requests Mr. Kamenetsky made to add
24 capacity for Volkswagen for two different offsite properties, one offsite property for Honda, and three
25 properties for Toyota. They were each approved in a timely manner. (RT Vol. IV, 243:5-244:16.)

26 ⁹ Mr. Kamenetsky further testified to his opinion the audit was in retaliation for Putnam's retail labor
27 rate request because the labor rate litigation was ongoing while witnesses were being deposed as the
28 audit was taking place. Moreover, the audit was nonrandom and originated from somewhere within
Ford. (RT Vol. V, 58:20-59:8.) When Ford conducted the Audit, it was during labor rate litigation
with Putnam Ford when Putnam Ford was under statutory protections from retaliatory audits, followed
Putnam's official request to recognize the Barn facility as an authorized facility in October 2022,
involved a chargeback that was issued prior to Ford denying Putnam's request in June of 2023, and
continued to withhold approval thereafter. (RT Vol. V, 58:20-62:23.)

1 80. Ordinarily Ford seeks to have dealers expand service capacity. For example, Ford
2 provides a program called the Enhanced Service Capacity Facility Program to provide dealers monetary
3 payments to expand service and parts operations. (RT Vol. IV, 158:12-160:4; Exh. P-146.)

4 81. Ms. Murphy-Austin “often” had conversation about expanding service capacity for San
5 Francisco dealers in her role as the San Francisco Regional Manager. (Exh. P-154.014-.015, 43:17-
6 44:4.) Ms. Murphy-Austin was involved in at least one instance where Ford approved an off-site service
7 when Ms. Murphy-Austin was the San Francisco Regional Manager. (Exh. P-154.016, 45:13-19; Exh.
8 P-156.021-.022, 29:25-30:4.)

9 82. Ms. Hughes agreed Ford is generally actively looking to increase service capacity for its
10 dealer network. (RT Vol. VI, 175:13-15.) Generally, “[t]here is a lot of opportunities still within parts
11 and service for both Ford’s dealers and Ford Motor Company, as well as for customer satisfaction that
12 results from increasing capacity.” (RT Vol. VI, 175:23-176:4.) Ms. Hughes agreed Putnam Ford needs
13 additional service capacity. (RT Vol. VI, 176:5-7.)

14 VI. RESPONDENT’S REPRESENTATIVES PLAN TO AND TAKE STEPS TO FIND
15 EVIDENCE RESPONDENT COULD USE TO AUDIT PROTESTANT IN ANTICIPATION
16 OF A SITE VISIT FOR A PROPOSED RELOCATION REQUESTED BY PUTNAM.

17 A. Ms. Hughes’s testimony shows the visit Ms. Swann and Ms. Hughes made to Putnam
18 Ford to access its proposed relocation was designed to find evidence Putnam was
performing warranty repairs at the Barn for purposes of initiating an audit.

19 83. Ms. Hughes’s first visit to Putnam Ford in her role as a network development manager
20 was regarding a proposed relocation of Putnam Ford to the Putnam Nissan facility in early 2023. (RT
21 Vol. VI, 134:22-135:15.) She visited the dealership with LaShawn Swann—the Regional Manager of
22 the San Francisco Region and Ms. Hughes’s supervisor. (RT Vol. VI, 135:16-136:1.)

23 84. Ms. Hughes testified she spoke with Ms. Swann in advance of the visit to Putnam Ford.
24 (RT Vol. VI, 136:9-21.) Prior to the visit and before Ms. Hughes had ever been to the Putnam dealership,
25 Ms. Swann said she was concerned that Putnam might be doing Ford service work at an unauthorized
26 facility called the Barn at Putnam Nissan.¹⁰ (RT Vol. VI, 136:22-137:16.)

27
28 ¹⁰ Of course, Ms. Swann knew there were repairs occurring at the Barn at this time because Mr.
Putnam had toured the Nissan facility, including the Barn, with Ms. Swann in October 2022 and Mr.

1 85. In preparation for the visit, Ms. Hughes admitted she was designated to be the photo taker
2 during the visit. (RT Vol. VI, 137:17-22.) Ms. Hughes took photos of both the Nissan facility and the
3 Barn. (RT Vol. VI, 138:6-9.)

4 86. Ms. Hughes and Ms. Swann had talked about that if Ms. Hughes saw Ford vehicles during
5 the visit, she would try to get pictures of them. (RT Vol. VI, 138:10-139:3.) The purpose of the photos
6 was based on the concern Putnam Ford was doing service in an unauthorized location and concerned
7 both customer pay and warranty repairs but especially warranty repairs. (RT Vol. VI, 139:5-14.)

8 87. Also, before Ms. Hughes first visit to Putnam Ford, Ms. Swann—Ms. Hughes
9 supervisor—told her “that Mr. Putnam and others potentially in the organization had lied about what had
10 been said in previous conversation.” (RT Vol. VI, 141:6-13.)

11 88. During the visit, Ms. Swann and Ms. Hughes saw Ford vehicles being serviced. Mr.
12 Putnam indicated the repairs were all customer pay or that all the repairs were retail repairs. (RT Vol.
13 VI, 142:3-25.) She did not recall Mr. Putnam saying anything more including not saying the repairs
14 were for Ford customer that brought their vehicles to the Nissan dealership to have their Ford vehicles
15 worked on. (RT Vol. VI, 143:1-9.)

16 89. During the visit, Ms. Hughes took pictures of the Ford vehicles she saw. (RT Vol. VI,
17 143:10-13.) The photos she took are contained in Exhibit P-107. (RT Vol. VI, 144:18-19.) She was
18 trying to capture the vehicles’ licenses plates in the pictures in order to identify if they were being
19 serviced by Putnam Ford and submitted as warranty claims. (RT Vol. VI, 146:19-147:5.)

20 90. Ms. Hughes only provided the photos to Ms. Swann; she only later provided them to
21 another person (Mr. Owens) upon that person’s request. (RT Vol. VI, 147:13-24.)

22
23
24
25
26

Putnam told Ms. Swann Putnam Ford was utilizing the service capacity at the Barn. (RT Vol. VII,
27 95:23-96:12 and 97:10-14.) Moreover, there was a pending request from Mr. Putnam to use the Barn
28 for off-site non-customer facing service operations dated October 25, 2022. (Exh. P-104.) Ms.
Hughes testified she was unaware of Ms. Swann’s prior visit or Ms. Swann’s conversations with Mr.
Putnam. (RT Vol. VI, 140:5-23.)

1 **B. Ms. Swann’s telling of the same preparation and visit described by Ms. Hughes**
2 **shows Ms. Swann attempted to conceal important aspects of the visit that show a**
3 **concrete and pre-prepared plan to establish evidence warranty repairs were**
4 **occurring at an unauthorized facility.**

5 91. Ms. Swann admits she visited the Putnam Nissan dealership for a second time on January
6 19, 2023, in response to Putnam Ford’s December 13, 2022, request. (RT Vol. VII, 118:8-14.)

7 92. Ms. Swann denied knowing Putnam Ford was still doing service work at the Barn. (RT
8 Vol. VII, 118:15-19.)

9 93. Ms. Swann denied telling Ms. Hughes prior to the visit to take pictures of any Ford service
10 work she saw on the Putnam Nissan property. She suggested she started off taking pictures and then
11 turned the picture taking over to Ms. Hughes. (RT Vol. VII, 118:20-119:9; *see also* RT Vol. VII, 119:20-
12 120:1 (denying there was a plan for Ms. Hughes to take the photos and suggesting “we were just taking
13 pictures of the facility”).)

14 94. During the tour Ms. Swann testified she told Mr. Putnam she had previously told him he
15 could not service Ford vehicles at the Putnam Nissan facility. She suggested he said the vehicles were
16 for Nissan customers. (RT Vol. VII, 119:10-15.)

17 95. Ms. Swann also denied telling Ms. Hughes before the visit that “the Putnam people could
18 not be trusted and that they had lied about previous things that were said” or anything along those lines.
19 (RT Vol. VII, 120:2-14.)

20 **C. Other record evidence shows the warranty audit was in retaliation for Putnam’s**
21 **retail labor rate submission and to gain an advantage in litigation.**

22 96. Ms. Murphy-Austin, in her role as the San Francisco Regional Manager immediately
23 prior to Ms. Swann, expressed shock at Putnam’s requested labor rate at issue in the labor rate protest.¹¹
24 (Exh. P-154.019, 57:14-23.) She referred to Putnam’s requested rate as “outrageously high.” (*Id.*)

25 97. In her email from September 1, 2021, Ms. Murphy-Austin wrote, “If they continue to
26 pursue this twice the market average type rate, they won’t see a lick of support from me moving
27 forward.” In her words, she meant, she would deny Putnam “above-and-beyond-type favors that I would

28 ¹¹ Ms. Murphy-Austin was in communication with Ms. Swann concerning her adjustment to the San
Francisco Region including Ms. Swann’s relocation. (Exh. P-156.024-.025, 35:12-36:4.)

do for dealers that are good partners to Ford Motor Company.” (Exh. P-154.020, 59:18-25; *see also* Exh. P-155.019-.020, 208:18-209:17.)

98. Ms. Murphy-Austin did not recall withholding any such support in her role as the San Francisco Regional Manager (Exh. P-154.021, 60:7-13), however, Ford undoubtedly applied this sentiment when it refused to timely consider and ultimately rejected Putnam’s request to establish non-customer facing satellite service operations.

99. Ms. Murphy-Austin further wrote, “Product, facility money ... Nothing.” She meant, “if [Putnam] wanted to make a proposal for something and asked for Ford’s participation and it was something that wasn’t required of us, I wasn’t going to go out of my way to provide funding for a dealer that hasn’t been a good partner to us or to our customers.” (Exh. P-154.021-.022, 60:19-61:9; *see also* Exh. P-155.019-.020, 208:18-209:17.) This was Ms. Murphy-Austin’s direct response to Putnam’s labor rate submission. (Exh. P-154.022, 61:10-12.)

100. Mr. Gogolewski was involved in the Putnam labor rate submission. (RT Vol. VI, 23:3-13.) Ms. Swann learned about the labor rate litigation through Mr. Gogolewski.

VII. EACH STEP OF RESPONDENT’S AUDIT PROCESS RELATES BACK TO THE DECISION TO OBTAIN EVIDENCE AGAINST PUTNAM TO USE IN THE LABOR RATE LITIGATION AND AUDIT.

101. Ford’s audit department conducts three types of audits: (1) Phase 3 audits, (2) required follow-up audits, and (3) allegation audits. (RT Vol. I, 75:14-20.) Ford does not conduct random audits. (RT Vol. I, 75:21-22.)

102. Ford conducts a Phase 3 audit after performing Phase 1 and 2. Phase 1 concerns repair categories on the dealer dashboard resulting in a warranty score. A warranty score of 60 or less results in Phase 1 consulting being provided to the dealer. The warranty score considers information such as repair categories, repeat repair, a dealer’s warranty and administration, if a dealer is submitting claims in a timely manner, if a dealer’s claims are accurate when they submit them and if the dealer’s claims are rejected and have to be submitted a second time. (RT Vol. I, 76:22-78:23.) If a dealer remains below a warranty score of 60 or less after the Phase 1 consulting meeting, Ford continues with Phase 2. Phase 2 involves Ford reviewing repair orders with the dealer at a further meeting. (RT Vol. I, 80:2-19.) If a

1 dealer continues to be below a warranty score of 60, Ford conducts a Phase 3 warranty audit. (RT Vol.
2 I, 80:20-81:6.)

3 103. Ford conducts a follow-up audit if a prior audit found false practices. (RT Vol. I, 76:9-
4 21.)

5 104. Ford conducts an allegation audit following Ford's receipt of an allegation concerning an
6 improper warranty practice at a dealership. (RT Vol. I, 81:19-83:4.)

7 105. Allegation audits begin with the allegation information being added to a tracker. The
8 audit supervisor, here Sharita Crawford, will assign the allegation for investigation to one of the auditors
9 to attempt to substantiate the allegation. (RT Vol. I, 83:24-84:15.) If the allegation is substantiated,
10 Ford proceeds to a warranty study. (RT Vol. I, 84:16-20.) A Ford warranty study then reviews repair
11 orders from the dealership which Ford has identified as including potentially false claims. (RT Vol. I,
12 85:13-21.) The warranty study "confirm[s] the information which [Ford] believe[s] to be correct...."
13 (RT Vol. I, 85:22-86:7.) During the warranty study, Ford makes a determination from the repair orders
14 if the claims are in fact false claims or not. (*Id.*) If the warranty study finds what Ford determines to be
15 false claims, Ford upgrades the warranty study to an audit. (RT Vol. I, 86:12-17.)

16 106. Here, Ford conducted an allegation audit of Putnam Ford. (RT Vol. I, 87:13-15.) The
17 audit did not proceed through Phases 1, 2, and 3 based on Putnam's warranty score. (RT Vol. I, 87:16-
18 19 (the audit was not a Phase 3 or follow-up audit).) Ford's selection of Putnam for the allegation audit
19 process was not random. (RT Vol. II, 136:25-137:4.) The allegation led Ford to initiate the allegation
20 audit against Putnam Ford. (Exh. P-157.008, 11:20-24.)

21 107. Mr. Owens testified the source of the allegation was the region. (RT Vol. I, 92:3-4.) Ms.
22 Crawford received an email containing the allegation. (Exh. P-157.013, 16:7-13.) Ms. Crawford
23 testified she did not know who the email was from.¹² (Exh. P-157.013, 16:10-16.)

24 108. Sharita Crawford assigned Mr. Owens to the allegation on March 27, 2023. (RT Vol. I,
25

26 ¹² Ms. Crawford later attempted to contradict this, suggesting the allegation was from the region. (Exh.
27 P-157.042, 64:6-18.) However, she did not know if she received an email from Ms. Swann containing
28 the allegation. (Exh. P-157.044, 66:2-4.) Similarly, she did not know if she received an email from
Ms. Hughes containing the allegation. (Exh. P-157.044, 66:5-7.) At the end of her deposition, Ms.
Crawford affirmed again that she still did not know who sent her the allegation. (Exh. P-157.047,
77:9-23.)

87:20-88:1; RT Vol. II, 28:12-17.) The allegation Mr. Owens was assigned to investigate concerned Putnam Ford performing repairs at an unauthorized facility. (RT Vol. I, 88:13-15.)

109. Ms. Crawford indicated she wanted Mr. Owens to upload the allegation into the allegation tracker. Once he did so, she would assign him to the allegation audit. Ms. Crawford indicated they had “an urgent request to proceed.” (Exh. P-111.001.) Mr. Owens uploaded the requested information to the allegation tracker and proceeded with reviewing the allegation. (RT Vol. II, 29:4-15.) Mr. Owens requested Arunothayam Devendiran add Putnam Ford to the WCP system to proceed with the allegation assignment; in his email Mr. Owens described the allegation to be “a TOP Priority Warranty Allegation to conduct next week.”¹³ (RT Vol. II, 47:4-24; Exh. P-113.001.)

110. Ford’s allegation tracker entry for the Putnam Ford allegation audit is contained in Exhibit P-110. It reads:

On January 19, 2023, LaShawn Swann, the Regional Manager of the San Francisco Region visited a facility that Putnam was proposing as a facility to which its dealership could relocate. The facility is referred to in the Putnam organization as “the barn,” and is probably part of the same dealer group’s Nissan facility.

LaShann [sic] snapped a few pictures of Ford vehicles that were being serviced in this non-approved facility.

At the time, Mr. Putnam waived away any concern and said all the vehicles were customer pay. Is there a way from the pictures you can tell if Putnam submitted any warranty claims associated with these vehicles for repairs that were being one [sic] around the time of LaShann’s [sic] visit?

(Exh. P-110; *see also* RT Vol. II, 49:12-52:6.) The source of the allegation is listed as “Greenberg Traurig, LLP,” the same law firm representing Respondent in the Labor Rate litigation.¹⁴ (*Id.*) Ms. Crawford received the allegation on March 3, 2023. (Exh. P-157.022, 31:16-22; *see also* Exh. P-110 (Date Received column); Exh. P-161.018, 23:8-19.) The source column on the allegation tracker means

¹³ Mr. Owens testified all allegations are top priority, however, he capitalized “top” in this request to Mr. Devendiran and noted it needed to be conducted next week. (RT Vol. II, 47:4-24; Exh. P-113.001.) Mr. Owens use of the phrase “TOP” Priority Warranty Allegation would be redundant if Ford did not place special emphasis in having Putnam’s allegation audit conducted.

¹⁴ Mr. Owens suggested it was a mistake to list Greenberg Traurig, LLP as the source of the allegation. (RT Vol. II, 52:2-6.) This is not credible because Mr. Owens suggests the source should instead say the region, however, he did not have any other discussion with Ms. Swann or Ms. Hughes about the photos that were taken beyond the discussion contained in the email chain in Exhibit P-112. (RT Vol. II, 40:3-8.)

1 where the audit department received the information from. (Exh. P-157.022-023, 31:23-32:1.)

2 111. Mr. Owens looked at information contained in the allegation including pictures of Ford
3 vehicles being repaired. (RT Vol. I, 88:14-18; Exh. R-322.) Mr. Owens used the pictures to determine
4 license plate numbers, entered those numbers into Carfax to obtain VINs, and searched Ford's warranty
5 claims for any warranty claims on the VINs. (RT Vol. I, 94:14-23.) Mr. Owens determined three of the
6 four vehicles had warranty claims submitted around the time the pictures were taken. (RT Vol. I, 95:22-
7 96:11.)

8 112. Mr. Owens originally believed the pictures were taken by Ms. Swann, however, Ms.
9 Swann clarified the photos that supported the allegation were taken by Ms. Hughes. (RT Vol. II, 31:10-
10 19; Exh. P-112.001.) Mr. Owens did not have any other discussion with Ms. Swann about the photos
11 that were taken beyond the discussion contained in the email chain in Exhibit P-112. (RT Vol. II, 40:3-
12 5.) Mr. Owens did not have any discussion with Ms. Hughes about the photos. (RT Vol. II, 40:6-8.)

13 113. After confirming warranty claims had been submitted for the three vehicles in the pictures
14 taken by the region, Mr. Owens recommended Ford proceed with a warranty study. (RT Vol. I, 97:10-
15 22.) Mr. Owens would not have evaluated the allegation nor proceeded with the warranty study if the
16 allegation had not been made. (RT Vol. II, 136:15-24.) Upon receiving Mr. Owens' recommendation
17 to proceed with a warranty study, Sharita Crawford instantaneously assigned Mr. Owens to conduct the
18 warranty study. (RT Vol. I, 98:14-23.)

19 114. Mr. Owens prepared a letter announcing the warranty study to Putnam Ford. (RT Vol. I,
20 101:18-102:3; Exh. R-309.) The letter announcing the warranty study specifically indicated the warranty
21 study could lead to Ford upgrading the warranty study to an audit. (RT Vol. I, 102:23-103:5; Exh. R-
22 309.)

23 115. Mr. Hughes at the opening meeting did not affect Mr. Owens' opening meeting agenda
24 and he did not do anything different due to Mr. Hughes's attendance at the opening meeting. (RT Vol.
25 I, 116:5-15.)

26 116. Putnam Ford and its representatives fully cooperated with Mr. Owens during the course
27 of the audit. (RT Vol. II, 143:24-144:6.)
28

1 117. During the warranty study, Mr. Owens provided Putnam Ford a list of repair orders he
2 wished to review for the warranty study. (RT Vol. I, 116:16-21.) He requested and obtained permission
3 to interview various dealership employees, including Ford technicians. Mr. Owens spoke to three Ford
4 technicians working from the Barn and Ford technicians working out of the Nissan dealership's service
5 department. (RT Vol. I, 117:8-118:3.) Mr. Owens observed three Ford technicians working from the
6 Barn and three working from the Nissan service department. (RT Vol. I, 118:16-119:1.)

7 118. Mr. Owens requested all repair orders for the six technicians he identified who worked in
8 the Barn and Nissan service department from June of 2022 through February 2023. (RT Vol. I, 119:19-
9 120:10; *see also* Exh. R-312.)

10 119. Mr. Owens and Ms. Crawford upgraded the warranty study to a warranty audit. Ms.
11 Crawford agreed with Mr. Owens' recommendation to upgrade the warranty study to a warranty audit
12 "immediately" and "almost instantaneously." (RT Vol. I, 126:25-128:18.)

13 120. All the claims Mr. Owens identified as false claims were repairs that were performed at
14 an unauthorized facility (i.e., the Barn or the Nissan service facility).¹⁵ (RT Vol. I, 128:19-129:11.) All
15 the claims at issue were not fictional—repairs actually occurred concerning the claims at issue in this
16 Protest. (RT Vol. II, 70:21-25.) Mr. Owens did not consider the statement of address in the ROs as a
17 reason for charging back the claims at issue. (RT Vol. II, 105:24-106:8.)

18 121. Ford claims Mr. Owens' warranty audit was conducted as a result of his warranty study.
19 (*See, e.g.*, RT Vol. I, 131:17-22.) However, as shown above, Mr. Owens selected Putnam for the
20 warranty study based on confirming the allegation Ford received. Mr. Owens was assigned to the
21 allegation due to Ford representatives in the region making an allegation against Putnam and providing
22 it to Ford's audit department. The audit directly flowed from the allegation stemming from Ms. Hughes
23 and Ms. Swann's planned visit to Putnam Ford where Ms. Hughes and Ms. Swann agreed Ms. Hughes
24 would take pictures in an effort to show Putnam was performing warranty work at an unauthorized
25 facility. (*See, supra*, Part VI.) The pictures were taken with the intent to use them and the ensuing audit
26 as leverage against Putnam in the labor rate litigation. (*Id.*)

27
28

¹⁵ With the exception of one mileage misstatement. (RT Vol. I, 129:12-17.)

1 122. Mr. Owens issued a letter upgrading his warranty study to a warranty audit on May 8,
2 2023. (RT Vol. I, 132:17-21; Exh. R-313.) Mr. Owens asked for “a lot of repair orders” with a focus
3 on the repairs performed by the six technicians who Mr. Owens identified as working in an unauthorized
4 facility. (RT Vol. I, 136:2-21.) At one point during the Audit, Mr. Owens sorted and filtered claims
5 from the six technicians Mr. Owens identified; his “interest went toward the warranty claims that were
6 identified with those six technicians.” (RT Vol. II, 139:7-16.) Mr. Owens shadowed Putnam technicians
7 at the Barn for at least a day watching them doing repairs.¹⁶ (RT Vol. IV, 205:10-206:2.) Mr. Owens
8 asked Mr. DeFrees which stalls the Putnam Ford employees worked in location wise and he was
9 interested in who worked at the Barn and who worked at the main shop. (RT Vol. IV, 223:18-224:6.)

10 123. Mr. Owens used a list of technician IDs to determine claims performed by technicians
11 who worked at the Barn or the Nissan service facility. (RT Vol. I, 139:7-142:3; Exh. R-321.) The list
12 showed six technicians who worked at either the Barn or the Nissan service facility. (*Id.*)

13 124. Mr. Owens prepared Exhibit J-4 showing the claims subject to chargeback in his Audit.
14 (RT Vol. I, 143:25-144:13; Exh. J-4.) Page 583 of Exhibit J-4 is the disallowance summary showing
15 Ford’s proposed chargeback of \$502,821.56. (Exh. J-4.583.) Ford proposed to chargeback Putnam
16 \$502,821.56 as a result of the Audit. (Exh. R-317.002.)

17 125. Claims associated with reason code D61.07 stating “Service supervision: Repair not
18 performed” do not mean the repairs were not performed but that the repairs were performed at a location
19 other than Putnam’s authorized Ford facility. (RT Vol. I, 148:1-19; *see also* Exh. P-157.032-.033, 48:23-
20 49:3.) Mr. Owens selected the reason code D61.07 as a “generalized bucket” because of a “system
21 limitation”; i.e., Ford does not have a chargeback reason code associated with repairs done at an
22 unauthorized facility. (*See* RT Vol. II, 75:17-76:1; *see also* Exh. P-157.033-.034, 49:23-50:11.) All of
23 the parts in the Audit claims at issue were installed on the customer’s vehicle. (RT Vol. II, 78:16-25.)

24 126. Mr. Owens conducted a claims review meeting on or about May 24, 2023, to review the
25 audit findings and proposed chargeback with Putnam Ford. (RT Vol. I, 214:18-216:11; Exh. R-318.)
26 Putnam Ford declined to review claims where the sole reason for the chargeback concerned the repair
27

28 ¹⁶ Mr. Owens felt the technicians in the Barn were doing adequately in the way they handled the
repairs. (RT Vol. IV, 206:3-14.)

1 being performed at an unauthorized repair facility. (RT Vol. I, 216:12-217:21; RT Vol. R-318.) 550 of
2 the 552 claims subject to chargeback were based, in whole or in part, on D61.07 “Service Supervision:
3 Repair not performed.” (Exh. P-126; *see also* Exh. J-4.583 and Exh. P-127.) Mr. Owens chose to list
4 D61.07 as the primary reason for the chargeback on each of the 550 claims at issue in the Audit. (RT
5 Vol. II, 75:8-16.)

6 127. When Mr. Owens conducted the audit, the sole basis for the location being a basis for a
7 proposed chargeback was based on Section 5(c) of the dealer agreement. (RT Vol. II, 81:14-82:3.) Mr.
8 Owens used Section 5(c) based on the Village Ford of Pine Bush audit example Mr. Owen’s received
9 from Mr. Walsh; he did not review Putnam’s dealer agreement specifically. (RT Vol. II, 103:23-105:1.)

10 128. Mr. Owens, Ford’s auditor, learned of the labor rate litigation at the same time he received
11 the Putnam allegation assignment. (RT Vol. I, 229:1-7.) Mr. Owens discussed the subject of the labor
12 rate litigation with Bill Walsh.¹⁷ (RT Vol. I, 229:9-24.) Mr. Walsh was Ms. Crawford’s predecessor
13 and previously the supervisor of the warranty auditors for Ford. (RT Vol. I, 237:7-12.) Mr. Walsh
14 previously been asked his opinion about Putnam Ford’s retail labor rate request and was involved in the
15 request. (Exh. P-159.008-.009, 14:22-15:3.)

16 129. In conversation between Mr. Owens and Mr. Walsh, Mr. Walsh “asked what dealer it
17 was, and when [Mr. Owens] told him, he asked if that was related to a lawsuit, and [Mr. Owens] said,
18 yes, it was.” (RT Vol. I, 247:5-11; *see also* RT Vol. II, 181:10-12 and 16 (“Q. Okay. And when Mr.
19 Walsh made his inquiry about the relation of the labor rate litigation to your investigation, you told him
20 yes, it was; right? A. Yes”).)

21 130. Mr. Owens was further involved in a conversation with Allen Kanouse concerning a
22 potential audit of Putnam Ford.¹⁸ (Exh. P-150.002, 79:2-4.) During the conversation, Mr. Owens
23 shared the potential audit was of Putnam Ford. (Exh. P-150.002, 79:5-13.) Mr. Kanouse directed Mr.
24

25 ¹⁷ In his April 27, 2023, deposition, Mr. Walsh denied speaking with Mr. Owens concerning his audit.
26 (Exh. P-159.016, 61:1-8.) However, Mr. Walsh sent Mr. Owens “the key documents from the Village
27 Ford of Pine Bush” audit on April 4, 2023. (Exh. P-118; Exh. P-160.005, 8:11-25.) Mr. Walsh denied
28 recalling a discussion with Mr. Owens at or around the time of his email to him. (Exh. P-160.008,
11:11-17.)

¹⁸ The conversation occurred on or about Tuesday, April 4, 2023—while the Audit was ongoing. (*See*
Exh. P-150.003, 80:13-25 (the deposition was taken on Thursday, April 6, 2023).)

Owens to speak to Mr. Walsh. (Exh. P-150.003, 80:8-12.)

131. Mr. Owens also discussed the labor rate litigation with Connie Airington, Tom Shire, and Sharita Crawford, all Ford representatives. (RT Vol. I, 230:2-13.) Mr. Owens discussed the labor rate litigation with Ms. Crawford several times but less than ten times. (RT Vol. I, 230;14-16.)

132. During her April 26, 2023, deposition, Ms. Swann testified she did not know Jonathan Owens. (RT Vol. VII, 84:8-18.) However, at the hearing, she admitted at the time of her deposition she had actually had at least two prior communications with Mr. Owens in scheduling visits to Putnam Ford. (RT Vol. VII, 84:19-24; *see also* Exh. P-112 (showing Ms. Swann communicated with Mr. Owens in March 2023); Exh. P-115 (showing Mr. Owens sent Ms. Swann the email concerning the Warranty Study at Putnam Ford on March 29, 2023).)

VIII. PUTNAM FORD COULD NOT ADEQUATELY SERVE FORD CUSTOMER’S WITHOUT USE OF THE BARN; FORD FAILED TO PROVIDE PUTNAM THE OPPORTUNITY TO CURE ANY MATERIAL NON-COMPLIANCE WITH DOCUMENTATION OR ADMINISTRATIVE CLAIMS SUBMISSION REQUIREMENTS RELATED TO THE USE OF THE BARN.

133. Mr. Owens asserted the Audit claims at issue were false because the work was done or performed not at an authorized Ford facility. (RT Vol. II, 105:2-8.) “Because of that reason, they -- and the requirements of warranty and policy, by submitting the claim they agreed that they were complying with all warranty and policy manual requirements, which was not done; so they were misstating material facts.” (RT Vol. II, 105:2-14.) The Board finds this would transform any potential reason for denial from “material noncompliance with reasonable and nondiscriminatory documentation and administrative claims submission requirements” to the claim being “false or fraudulent.” This contradicts the legislative intent to provide documentation and administrative claims submission requirements the opportunity to be cured and is rejected. (*See* Cal. Veh. Code, § 3065, subd. (e)(2).) The reasons for rejection at issue in this Protest are properly considered alleged material noncompliance with reasonable and nondiscriminatory documentation and administrative claims submission requirements. (*See Id.*)

1 134. There are situations where Ford warranty repairs can be completed at a location other
2 than an authorized Ford or Lincoln dealership, including sublet repairs.¹⁹ (RT Vol. II, 83:15-25; *see also*
3 Exh. J-3.158.) Ford dealers are permitted to perform field service action work at offsite repairs even if
4 not part of the Ford mobile service program. (RT Vol. II, 94:20-96:2; Exh. J-3.012.) Similarly, Ford
5 permits repairs to take place outside a dealer's authorized service facility for mobile service using an
6 authorized mobile service van. (Exh. P-154.017-.018, 51:23-52:3.) Mr. Owens never discussed or
7 considered opportunities of Putnam Ford to cure any of the proposed chargeback, for example, by
8 marking certain repairs field service action repairs. (RT Vol. II, 96:4-100:13.)

9 135. Under the right circumstance, a dealership can sublet a repair to be performed at a facility
10 other than the one at which the dealership is authorized to operate in. (RT Vol. II, 112:4-19.)

11 136. All the technicians who performed the Audit repairs at issue were current on their
12 technician certifications. (RT Vol II, 124:23-25.) There was no issue of shop competency concerning
13 the Audit repairs at issue. (RT Vol. II, 125:1-17.)

14 137. During the audit closing meeting, Mr. Vasquez was part of a discussion with Ford
15 representatives including Mr. Owens and Ms. Swann about the capacity shortfalls that would result from
16 Putnam Ford not using the Barn location for service repairs. (RT Vol. III, 93:1-94:24.) Mr. Owens, Ms.
17 Swann, and the head of Ford's audit department (Ms. Crawford) acknowledged the need for more service
18 capacity. (RT Vol. III, 98:5-19.) The Ford representatives proposed using an "A" and "B" RO code
19 system to designate those repairs performed at the Barn compared to 885 North San Mateo Drive. (RT
20 Vol. III, 98:10-24; *see also* RT Vol. IV, 144:23-145:20 (describing Mr. Owens' suggestion of a Location
21 A and B solution to identifying the location where repairs took place); RT Vol. IV, 268:7-268:15 (Mr.
22 Kamenetsky describing Mr. Owens and Mr. Crawford asking Mr. Davis and Mr. Freschet to come up
23 with a plan to separate work done at Location A and Location B such that warranty repairs could only
24 take place in the main facility).)

27 ¹⁹ For example, Putnam Ford does not have an alignment rack and so would need to sublet out
28 alignments. (Exh. P-151.011-.012, 61:16-62:16.) Dealer can also sublet to a location they do not own
for body shop work or glass repairs. (Exh. P-157.034-.035, 50:20-51:2 and 51:6-9.)

1 138. Mr. Davis moved the highly certified technicians to the main 885 location to perform the
2 warranty work consistent with Mr. Owen’s idea to implement a Location A and Location B where work
3 was being performed. (RT Vol. IV, 142:3-143:8.) Ms. Swann participated in the conversation indicating
4 she did not care whether the customer pay repairs occurred as long as warranty work is being done at
5 885 North San Mateo Drive. (RT Vol. IV, 143:17-144:14.)

6 139. Ms. Crawford does not recall all the alternative being discussed, but does recall “I made
7 it very clear that all repair *for warranty* have to be performed at an authorized facility. And I kept
8 bringing them back to that..... I do remember bring them back to that’s what needs to happen. *Nothing*
9 *other than that.*” (Exh. P-157.037-.038, 59:20-60:8 (emphasis added).) “So when I left the claims
10 review or the claims review meeting as well as the closing meeting, it was clear that me and my team
11 said no warranty repairs other than the authorized facility.” (Exh. P-157.039-.040, 61:19-62:7.) When
12 a Putnam Ford representative instructed work to stop at the Barn during the audit closing meeting, Ms.
13 Crawford understood the instruction to only concern warranty work. (Exh. P-157.045-.046, 71:14-
14 72:11.)

15 140. Ms. Swann clarified during the audit closing meeting that the location restriction was
16 specific to warranty repair work and did not impact customer pay repairs which could continue at the
17 Barn. (RT Vol. IV, 269:15-270:11; *see also* RT Vol. V, 21:8-22:5.)

18 141. During the audit closing meeting, Mr. Owens separated the claims at issue into two stacks.
19 (RT Vol. IV, 138:25-139:2.) Mr. Owens separated the stacks so those that only pertained to the facility
20 being used were in one stack. (RT Vol. IV, 140:2-8.) Mr. Davis testified, the smaller stack concerning
21 violations beyond the facility being used for the repair were reviewed and he took notes of the alleged
22 violations. (RT Vol. IV, 140:9-141:13; *see also* RT Vol. IV, 264:23-265:5 (Mr. Kamenetsky describing
23 the separation of the stacks of chargebacks into two piles with the larger one being those for repairs done
24 in the unauthorized location).)

25 142. Putnam Ford currently performs all warranty repairs at its authorized facility. (RT Vol.
26 IV, 72:19-22.) After the May 24, 2023, closing meeting, Putnam Ford ceased using the Barn for warranty
27 repairs. (RT Vol. IV, 142:3-10.)

1 143. The inability of Putnam Ford to use the Barn to perform warranty repairs has created
2 stress for Putnam Ford’s technicians. (RT Vol. III, 99:15-100:7.) “It has been an incredible stressful
3 situation for Putnam Ford and all of its service employees, managers, writers, technicians, service
4 director, having to hire people at very high wages and to keep them even though they have to share stalls
5 and have to maneuver.” (RT Vol. III, 104:10-24.) Protestant has added two more stalls at 885 North
6 San Mateo Drive to accommodate more warranty work. (RT Vol. III, 104:25-105:2.)

7 144. The working conditions for Putnam’s technicians are worse after Ford required Putnam
8 cease use of the Barn for warranty repairs. (RT Vol. IV, 168:23-169:2; RT Vol. IV, 217:3-9.)

9 145. Protestant cannot refuse to perform the warranty work that is brought in by Ford
10 customers. (RT Vol. III, 105:16-19.) Protestant’s dealer agreement requires it to “provide warranty
11 service to owners with vehicles under warranty, regardless of whether or not they are the selling dealer.”
12 (RT Vol. II, 106:15-23; Exh. J-3.054.)

13 146. Ford requires Putnam Ford to prioritize warranty work over customer pay work. (RT
14 Vol. IV, 157:6-9; *see also* RT Vol. IV, 193:22-194:14 and Exh. J-1.019 (section of the franchise
15 agreement stating “dealer...shall give precedence to all such work [warranty, policy, and campaign
16 work] over other service work if the use of the vehicle is impaired”).)

17 147. Putnam Ford currently has nine technicians. (RT Vol. IV, 116:13-15.) Putnam Ford has
18 enough service business to employ more than nine technicians. (RT Vol. IV, 116:16-18.) Putnam does
19 not have the spots, stalls, or other property to employ more technicians. (RT Vol. IV, 121:20-122:1.)

20 148. Six technicians work at the 885 North San Mateo Drive location. (RT Vol. IV, 206:17-
21 20.) There are five service stalls available at 885 North San Mateo Drive. (RT Vol. IV, 206:21-22.)

22 149. Putnam Ford is not able to timely complete all warranty work at the 885 North San Mateo
23 Drive location. (RT Vol. IV, 147:8-16; *see also* RT Vol. IV, 166:8-167:10 (Mr. Davis describing Ford
24 customers are unable to receive complete warranty repair work in as timely a manner as when Putnam
25 Ford utilized the Barn); RT Vol. IV, 216:2-217:1 (Mr. DeFrees indicating customers are receiving the
26 same quality repairs but the speed of those repairs has been impacted).) The space limitations at 885
27 North San Mateo Drive prevent technicians from working on two vehicles at once and creates time
28 efficiency issues in Putnam’s ongoing service operations. (RT Vol. IV, 147:23-150:1.) Putnam Ford

1 cannot perform heavy duty work involving transmissions or engine pulls or work on F-550s at the 885
2 North San Mateo Drive location. (RT Vol. IV, 151:7-14; *see also* RT Vol. IV, 202:12-203:25 (Mr.
3 DeFrees testifying there are issues with the roof height at 885 North San Mateo Drive on some repairs
4 for full-size transits, the bigger Ford vans, ambulances, and trucks that have aftermarket roof racks
5 installed or contractor trucks).) Putnam previously performed such repairs at the Barn. (RT Vol. IV,
6 151:15-152:11; *see also* RT Vol. IV, 204:19-205:5 (Mr. DeFrees testifying there were not any repairs
7 that could not be performed at the Barn location).)

8 150. All warranty repairs can be completed 885 North San Mateo Drive with inconveniences.
9 For example, some vehicles can be lifted up but not to a comfortable working height. Technicians
10 complete repairs on the ground if the repair can be completed on the ground due to the space limitations.
11 (RT Vol. IV, 206:23-208:18.)

12 151. Putnam Ford has lost a handful of technicians since ceasing use of the Barn. (RT Vol.
13 IV, 152:12-21.) Three heavy duty technicians left specifically because of the facility space limitations.
14 (RT Vol. IV, 152:23-153:24; *accord* RT Vol. IV, 209:11-212:6 (Mr. DeFrees describing reasons two
15 technicians stopped working for Putnam based on tight spaces and working on the floor).)

16 152. Mr. Sweis agreed the 885 North San Mateo Drive location is not sufficient to fulfill
17 Putnam Ford's service obligation on its own. (Exh. P-143.04, 611:20-612:1; Exh. P-151.008, 53:15-18.)
18 Mr. Sweis described the 885 North San Mateo Drive service facility as "very small." "I believe, two or
19 three bays. It's a drive-through kind of a system. It's not open, wide width-wise where you could bring
20 in three separate cars. It was a pass-through type of a system." (Exh. P-151.004, 33:1-10.)

21 153. Ms. Murphy-Austin agreed the 885 North San Mateo Drive location did not have
22 adequate service capacity. (Exh. P-155.015, 204:17-24; Exh. P-156.020, 27:4-10.)

23 ANALYSIS

24 154. Respondent bears the burden to demonstrate it complied with the requirements of Vehicle
25 Code section 3065(e). Section 3065 (e)(1) provides in part "A franchisor shall not select a franchisee
26 for an audit, or perform an audit, in a punitive retaliatory, or unfairly discriminatory manner."

27 155. The evidence shows Ford targeted Putnam for audit in direct response to Putnam's 2021
28 Labor rate request and the ongoing Section 3065.4 Protest concerning the same. Ford was aware Putnam

1 was using the non-customer-facing service location known as the “Barn” *more than a full year before*
2 Ford initiated the allegation audit process for Putnam on or about March 3, 2023. Putnam’s use of the
3 Barn was never an issue until Ford determined this could be used to penalize Putnam for seeking a labor
4 rate and to gain a tactical advantage in litigation concerning Putnam’s requested labor rate increase.

5 156. As shown in the timeline presented above, Ford’s efforts to conduct the Audit overlapped
6 discovery in the labor rate protest. The timeline of the Protests is interrelated. Ford chose to send an
7 auditor into a franchisee’s dealership while litigation was pending and discovery was ongoing in the
8 labor rate litigation because Ford had the power to do so pursuant to its franchise agreement with Putnam.

9 157. Ford failed to provide evidence showing it selected Putnam on a reasonable basis. Ford
10 failed to produce evidence the Audit arose through Ford’s normal processes. Ford failed to provide
11 evidence of internal communications regarding the allegation that was the purported basis for the Audit.
12 Ford refused to provide testimony from the Ford employees purportedly responsible for approving the
13 initiation of the allegation audit process in regard to Putnam Ford. Instead, the evidence shows the
14 allegation audit process was initiated by LaShawn Swann and Ford’s outside counsel while they were
15 actively preparing for the hearing in the Section 3065.4 protest.

16 158. The testimony presented by Ms. Swann concerning her visit to Putnam on January 19,
17 2023, is not credible. The testimony of Ms. Hughes is instead accepted as showing Ms. Swann came to
18 the January 19, 2023, with a plan in mind to have an allegation audit performed against Putnam. Ms.
19 Swann pre-prepared who would take the photos, advised Ms. Hughes Putnam was not to be trusted, and
20 misrepresented Mr. Putnam’s representations concerning the Ford vehicles being repaired.

21 159. It was the allegation that stemmed from Ms. Swann’s visit to Putnam Ford on January 19,
22 2023, which caused Putnam to be selected for the allegation audit. The selection was punitive,
23 retaliatory, and unfairly discriminatory. Ford failed to show its selection of Putnam for the Audit was
24 not punitive, retaliatory, or unfairly discriminatory. (*See* Cal. Veh. Code, § 3065, subd. (e)(1).)

25 **DETERMINATION OF ISSUES**

26 160. Respondent failed to sustain its burden of proof to show it complied with Section 3065.

27 161. Respondent selected Protestant for the Audit in a punitive, retaliatory, and unfairly
28 discriminatory manner.

162. Respondent is precluded as a matter of law from proceeding with its proposed \$502,821.56 chargeback.

PROPOSED DECISION

Based on the evidence presented and the findings herein, IT IS HEREBY ORDERED THAT Protest No. PR-2826-23 is sustained. Respondent failed to establish its burden of proof under Vehicle Code section 3065(e)(6) that it complied with Section 3065. Respondent may not proceed with its proposed \$502,821.56 chargeback identified by the Audit.

Dated: April 2, 2025

LAW OFFICES OF
GAVIN M. HUGHES

By Robert Mayville Jr
Gavin M. Hughes
Robert A. Mayville, Jr.
Attorneys for Protestant

1 **DECLARATION OF SERVICE BY ELECTRONIC MAIL**

2 I, Robert A. Mayville, Jr., declare that I am employed in the County of Sacramento, State of
3 California, that I am over 18 years of age, and that I am not a party to the proceedings identified herein.
4 My business address is 4360 Arden Way, Suite 1, Sacramento, California 95864.

5 I declare that on April 2, 2025, I caused to be served a true and complete copy of:

6
7 ***PROTESTANT'S POST-HEARING BRIEF***

8 *and*

9 ***PROTESTANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW***

10
11 ***KPAuto, LLC, dba Putnam Ford of San Mateo***

12
13 *v.*

14 ***Ford Motor Company***

15 ***Protest No.: PR-2826-23***

16
17 By Electronic Mail:

18 Steven M. Kelso, Esq.
19 April Connally, Esq.
20 H. Camille Papini-Chapla, Esq.
21 Greenberg Traurig, LLP
22 1144 15th Street, Suite 3300
23 Denver, Colorado 80202
kelsos@gtlaw.com
april.connally@gtlaw.com
papinichapla@gtlaw.com

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

25 Executed April 2, 2025, in Sacramento, California.

26
27 

28 Robert A. Mayville, Jr.

VIA EMAIL

Steven M. Kelso (Colorado Bar No. 29099)
H. Camille Papini-Chapla (California Bar No. 282893)
Greenberg Traurig, LLP
1144 15th Street, Suite 3300
Denver, CO 80202
Telephone: 303.572.6500
Facsimile: 303.572.6540
Email: kelsos@gtlaw.com
papinichapla@gtlaw.com

Attorneys for Respondent
FORD MOTOR COMPANY

New Motor Vehicle Board

Received
5-19-25

FILED

New Motor Vehicle Board

Date: 5-19-25

By: am

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-2826-23

FORD MOTOR COMPANY'S POST-
HEARING CLOSING BRIEF

TABLE OF CONTENTS

1		
2	Table of Authorities	iii
3	Introduction.....	1
4	Relevant Law	2
5	Argument	2
6	I. Ford Complied with Section 3065(e).....	2
7	A. Ford Properly Charged Back False Warranty Claims for Repairs	
8	Performed at an Unauthorized Location	3
9	i. Falsely Certifying that Warranty Repairs Were Performed at an	
10	Authorized Location is Not a Curable Paperwork Error	3
11	ii. Putnam Ford Does Not Address Legal Irrelevance of Its	
12	Justification Argument.....	6
13	iii. Putnam Ford’s Invented Justification is Not Supported by the	
14	Evidence.....	6
15	iv. The “Justification” Has Limited Value Even if Correct	13
16	B. Ford Satisfied all Procedural and Administrative Requirements of	
17	Section 3065(e)(3)	13
18	C. The Audit was Not Retaliatory	13
19	i. Putnam Ford Skips Over the Substance of Mr. Owens’	
20	Testimony Regarding His Decision to Initiate the Audit	
21	Following the Warranty Study.....	13
22	ii. The Swan Character Assassination.....	15
23	iii. Megan Murphy-Austin’s Email is not Evidence of a Ford Plan	
24	for Retaliation	18
25	iv. The Timing of the Audit Was Not a Settlement Tool or	
26	“Leverage”	20
27	v. Putnam Ford’s Brief Repeatedly Inaccurately Describes the	
28	Evidence.....	20

1	D.	Impermissible Invasion of the Attorney Client Privilege	21
2	II.	Putnam Ford’s Belated Section 3065.2 Claim for Bad Faith Is not Properly	
3		Before the Board, Clearly Articulated, or Factually Supported.....	22
4	A.	Putnam Ford Ignores Jurisdictional Limitations and Insists that its	
5		Vague and Insufficient Complaint Was Enough	22
6	B.	Any Section 3065.2 Claim is Precluded	22
7	C.	Putnam Ford Still Has Not Articulated a Fully Formed Bad Faith	
8		Claim.....	23
9	D.	Putnam Ford Ignores the Evidence to Create an Incomplete Picture of	
10		the Relocation Issue	23
11	i.	Ms. Murphy-Austin’s Honest Response to an Outrageous Rate	
12		is Weaponized to Excuse Putnam Ford’s Fraud	25
13	ii.	Imagined Delays That Did Not Exist.....	25
14	iii.	Putnam Ford’s Underlying Theme of Entitlement.....	26
15		Conclusion	27

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Howitson v. Evans Hotels, LLC</i> , (2022) 81 Cal.App.5th 475 [297 Cal.Rptr.3d 181]	22
<i>Storek & Storek, Inc. v. Citicorp Real Estate, Inc.</i> , (2002) 100 Cal. App. 4th 44 [122 Cal.Rptr.2d 267]	26
<i>Voices of the Wetlands v. State Water Resources Control Bd.</i> , (2011) 52 Cal.4th 499 [128 Cal.Rptr.3d 658]	5
<i>Webb v. Serabian</i> , (1949) 93 Cal.App.2d 642 [209 P.2d 436]	21

Statutes

Cal. Evid. Code § 913	21
Cal. Gov. Code § 11513.....	21
Cal. Veh. Code § 3065	2, 3, 5, 14, 22, 27
Cal. Veh. Code § 3065(e)	1, 2, 4, 23
Cal. Veh. Code § 3065(e)(2).....	4, 5
Cal. Veh. Code § 3065(e)(3).....	5, 13
Cal. Veh. Code § 3065(e)(6).....	6
Cal. Veh. Code § 3065.2.....	2, 22, 23, 26

INTRODUCTION

Putnam Ford flouted its contractual obligations with Ford, lied, got caught, and tried to invent a post hoc rationale to shift the blame onto Ford. Putnam Ford's Post-Hearing Response Brief reinforces the weaknesses of its case. It relies on an imagined, incomplete, and incorrect version of the facts and ignorance of the relevant law. In so doing, it avoids engaging with Ford's arguments and legal analysis in its Post-Hearing Opening Brief, leaving many of Ford's points unrebutted and unrefuted

Ford's Post Hearing Opening Brief began by setting forth the elements of a California Vehicle Code Section 3065(e) ("Section 3065(e)") claim and demonstrating that its auditor properly charged back false claims consistent with California law. Putnam Ford does not address Ford's analysis of false claims, instead dismissing its hundreds of false certifications on warranty claims as mere "documentation and submission requirements." A false warranty claim is not tantamount to a paperwork error, and it cannot be cured.

As predicted, Putnam Ford relies on a justification defense argument. It makes no attempt to acknowledge, let alone rebut, Ford's argument that an excuse or justification is irrelevant. Nor can it. Section 3065(e) does not prevent a manufacturer from charging back an otherwise false claim because the dealer was somehow justified in submitting it. Even if a justification argument was legally relevant, Putnam Ford has no justification.

Ford also clearly set forth its standard procedures for an audit and explained how they were followed here. Citing to the testimony of Jonathan Owens, who decided to audit Putnam Ford with the concurrence of his supervisor, Ford refuted the notion that the audit was retaliatory and persuasively explained his decision-making process, which did not include any aspect of the labor rate case. Putnam Ford's full-throated attempt to cast the audit as retaliatory is confusing. In addition to being based on speculation and heavily relying on overly simplistic sense of timing, Putnam Ford engages in a false and curious character assassination of a person that was not involved in any of the warranty labor rate decision making and was not involved in the audit or its decision making—LaShawn Swann. The decision to engage in such a spurious attack on her credibility and cast her as the villain reveals the weakness of their case—Putnam Ford cannot address the relevant facts, so it must invent new ones.

1 And, of course, just as it did throughout the evidentiary hearing, Putnam Ford defaults to urging the
2 Board to impermissibly draw inferences based on the exercise of attorney-client-privilege.

3 Moving to the new California Vehicle Code Section 3065.2 (“Section 3065.2”) bad faith claim,
4 Ford explained that the Board does not have jurisdiction to hear Putnam Ford’s belated—and
5 haphazardly-raised—Section 3065.2 claim of bad faith. Putnam Ford disregards the jurisdictional
6 arguments altogether and proceeds to create a strawman narrative that the issue of jurisdiction is a ruse
7 to have the Board ignore the issue of a retaliatory audit. Not so. Ford clearly explained that the Section
8 3065.2 claim for retaliation was functionally one and the same as the Section 3065(e) claim, and that
9 the substance of the claim was already being evaluated under Section 3065. Among the manufactured
10 outrage, Putnam Ford still fails to address jurisdiction, articulate a legal standard for bad faith, identify
11 the precise actions that constituted bad faith, or state the nature of its damages and the remedy it seeks.
12 Moreover, the hodge-podge of bad faith allegations is a combination of arguments from counsel (not
13 facts), speculation, and an incomplete look at the record. None of it stands up.

14 Ford has met its burden to show that the charge backs complied with California law and the
15 audit was not in retaliation for the warranty labor rate request. Ford has demonstrated why a Section
16 3065.2 claim is not before the Board (whatever that claim might be), and it has detailed the wealth of
17 evidence showing that Putnam Ford is a bad actor, intent on deceiving Ford and creating a distraction
18 to avoid the consequences of its own fraud.

19 The Board should overrule Putnam Ford’s Protest.

20 **RELEVANT LAW**

21 Putnam Ford briefly addresses the burden of proof, but it does not quote or otherwise set forth
22 the legal standards for a Section 3065(e) or Section 3065.2 claim. (Putnam Br. 20:14-22.) Ford’s
23 statement of the relevant law has gone un rebutted. (*See generally* Ford Br. 23-24.)

24 **ARGUMENT**

25 **I. FORD COMPLIED WITH SECTION 3065(e)**

26 Ford satisfied all elements of Section 3065(e). (*See* Ford Br. 24:19-42:7.) Putnam Ford does
27 not challenge this, but instead reargues its unsubstantiated retaliation theory.
28

1 First, Putnam Ford sidesteps Ford's proper disallowance of Putnam Ford's false claims
2 following a warranty audit (*see* Ford Br. 26:18-30:5), and instead makes a conclusory and flimsy
3 argument that their false certifications were simply "documentation and submission requirements." It
4 does not explain how false certifications are tantamount to a documentation or submission
5 requirement, let alone how it could have retroactively corrected their false certifications. It certainly
6 is not possible to go back in time and perform the repairs at their authorized location or go back in
7 time to properly authorize a facility under the Sales and Service Agreement.

8 Second, Putnam Ford claims it was justified in submitting false claims because it had limited
9 service capacity. (Putnam Br. 35:1-40:11.) But Putnam Ford does not address that Section 3065
10 contains no exception preventing a manufacturer from charging back a claim where there is an
11 "excuse" or "justification" for the falsity. (*Compare* Putnam Br. with Ford Br. 30:7-19 (statutory
12 analysis).) Nor could it; California law contains no such exception. (Ford Br. 30:7-19.) Thus, the Board
13 may not find that Ford violated Section 3065 under some theory that Putnam Ford's false claims were
14 justified. And even if such a justification exception was present in the statute, the facts would not
15 support its application.

16 Third, Putnam Ford does not challenge that Ford met all procedural requirements of Section
17 3065.

18 Fourth, Putnam Ford tries to support its claim of retaliation with a version of the record that
19 substitutes facts with the argument of counsel and wild speculation. (Putnam Br. 21:2-34:5.)
20 Importantly, Putnam Ford avoids addressing the bulk of Mr. Owens' testimony regarding the bases
21 and methodology for the audit, likely because his testimony was un rebutted and his credibility
22 unimpeachable. (Ford Br. 7:1-23:11, 35:11-38:7.) The audit was proper, not retaliatory.

23 **A. Ford Properly Charged Back False Warranty Claims for Repairs Performed at**
24 **an Unauthorized Location**

25 i. Falsely Certifying that Warranty Repairs Were Performed at an Authorized
26 Location is Not a Curable Paperwork Error

27 A warranty claim in which the work was performed at an unauthorized location is false because
28 every time a dealer submits a warranty claim to Ford, it certifies "this repair . . . is compliant with Ford

1 Warranty & Policy.” (Ford Br. 26:18-30:5 (citing Ex. J-03, 006 (certification statement), and 007
2 (submission of a warranty claims confirms that repair conforms with statement)); *accord* Owens:
3 8/6/24, 161:21-162:4 (testimony that submission of warrant claim is a certification that the claim is
4 compliant with Warranty Manual).) Putnam Ford glosses over this with the unsupported conclusion
5 that because the repair itself was performed, there is no falsity. In so doing, Putnam Ford conflates the
6 “repair” with the “claim.” The claim was charged back because the claim was false, not because the
7 repair was not “properly made.” Veh Code, § 3065(e)(2) (“Previously approved **claims** shall not be
8 disapproved or charged back to the franchisee unless **the claim is false or fraudulent**, [or] repairs
9 were not properly made” (emphasis added)). Putnam Ford does not argue that submitting a
10 certification that the repair was performed consistent with all requirements in the Warranty and Policy
11 Manual when, in fact, it had not been performed pursuant to these requirements is not a “false claim.”

12 Instead, Putnam Ford insists that the location of the repair is a “documentation and submission
13 requirement.” (Putnam Br. 40:12-43:7.) As a threshold matter, Putnam Ford does not discuss the
14 relevant subsection, nor offer any analysis as to how or why the location of a repair is a “documentation
15 or submission requirement.” It just introduces the phrase without any analysis. Even the most cursory
16 investigation of this point reveals it is meritless.

17 Under Section 3065(e),

18 (2) Previously approved claims shall not be disapproved or charged back to the
19 franchisee **unless the claim is false or fraudulent**, repairs were not properly made,
20 repairs were inappropriate to correct a nonconformity with the written warranty due
21 to an improper act or omission of the franchisee, **or for material noncompliance**
with reasonable and nondiscriminatory documentation and administrative
claims submission requirements. . . .

22 (3) If the franchisor disapproves of a previously approved claim following an audit,
23 the franchisor shall provide to the franchisee, within 30 days after the audit, a
24 written disapproval notice stating the specific grounds upon which the claim is
25 disapproved. The franchisor shall provide a reasonable appeal process allowing the
26 franchisee a reasonable period of not less than 30 days after receipt of the written
27 disapproval notice **to respond to any disapproval with additional supporting**
documentation or information rebutting the disapproval and to cure
noncompliance, with the period to be commensurate with the volume of claims
28 under consideration. If the franchisee rebuts any disapproval and cures any material
noncompliance relating to a claim before the applicable deadline, the franchisor
shall not chargeback the franchisee for that claim.

1
2 Veh. Code, § 3065(e)(2) & (3).

3 Section 3065 does not define “documentation and administrative claims submission
4 requirements.” In the absence of a statutory definition, the Board should “begin with the plain,
5 commonsense meaning of the language used by the Legislature. If the language is unambiguous, the
6 plain meaning controls.” *Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52
7 Cal.4th 499, 519, [128 Cal.Rptr.3d 658]. “Documentation” and “submission” refers not to the
8 substance of a claim, but how the claim is submitted and the information submitted with the claim.
9 Indeed, the legislative history Putnam Ford quotes refers to “technical reasons, such as disapproving
10 a claim based on an improper signature” or the inclusion of a “technical mistake.” (Putnam Br. 42:2-
11 7 (quoting Aug. 13, 2013, California Bill Analysis, Assembly Committee, 2013-2014 Regular Session,
12 Senate Bill 155, CA B. An., S.B. 155 Assem., 8/13/2013 at p. 4).) These are paperwork requirements—
13 was the paperwork legible? Was it signed? Did it contain all necessary supporting information?
14 Section 3065(e)(3) contemplates allowing a dealer who submitted a true warranty claim for a proper,
15 appropriate repair to correct the paperwork associated with that specific claim. Putnam Ford’s false
16 certifications are not merely documentation or submission errors—there is no additional supporting
17 documentation that changes the location of the repair to another facility—especially a facility for a
18 competitor of Ford. Putnam Ford cannot cure this noncompliance because the repair cannot be redone
19 at an authorized facility. Rather, Putnam Ford made an affirmatively false statement on every single
20 claim, and it explicitly stipulated that the repairs were performed at an unauthorized location.

21 Equally weak is Putnam Ford’s insistence that it attempted to take a corrective action to fix
22 this “documentation and submission” error by obtaining off-site service capacity. While this off-site
23 argument suffers from factual and substantive flaws, which will be discussed *infra*, it also requires the
24 suspension of time. Putnam Ford cannot correct this issue as to any specific warranty repair that it has
25 performed and submitted. Nothing Putnam Ford could have done would have remedied the prior false
26 warranty claims that Ford charged back pursuant to the warranty audit. Putnam Ford cannot erase the
27 fact that it already submitted a false certification let alone performed the same repair again at the
28 authorized location.

1 The claims were false.

2 ii. Putnam Ford Does Not Address Legal Irrelevance of Its Justification Argument

3 The board may provide a “determination of whether the franchisor complied with this
4 subdivision [(e)].” Veh. Code, § 3065 (e)(6). The Board’s determination is limited to whether the claim
5 is “false,” with no modification, and no qualifications added by the Legislature. (Ford Br. 30:14-16.)
6 The statute does not make exceptions for dealers where the falsity is excused, accidental, or the product
7 of necessity (real or invented). Putnam Ford elides this argument entirely; Ford’s argument carries on
8 this issue.

9 iii. Putnam Ford’s Invented Justification is Not Supported by the Evidence

10 As predicted, Putnam Ford blames Ford for its false activity, arguing its false claims were
11 justified because Ford allegedly knew (1) the Barn was being used for non-customer facing service
12 operation, and (2) the location didn’t have adequate capacity. (Putnam Br. 21:4-25:8.) Apparently,
13 under these circumstances Putnam Ford believes a dealer may ignore the terms of the Warranty and
14 Policy Manual and submit false certifications to Ford. But Putnam Ford’s logic is lacking; it conflates
15 Ford’s general knowledge that the Barn existed, and that Putnam Ford’s temporary location had
16 inadequate service capacity with actual knowledge and approval of the Barn and the main Nissan
17 Facility to perform warranty repairs.

18 a) *Ford did not Have Actual Knowledge of Putnam Ford’s Unauthorized Use*
19 *of the Barn Until October 2022.*

20 Putnam Ford contends Ford knew it was “performing Ford repairs at” the Barn for some
21 unspecified period of time, but “Ford did not take any action in response to Putnam Ford’s use of the
22 noncustomer facing service location, prior to it being identified as a litigation tool[.]” (Putnam Br.
23 23:22-24.) Putnam Ford argues a least four Ford employees knew Putnam Ford was using the Barn to
24 do Ford repairs, implying that Ford somehow informally approved the use of the Barn and is estopped
25 from relying on Putnam Ford’s use of the Barn for the chargebacks. Not only does this fail to address
26 Putnam Ford’s use of the main Nissan Facility, and directly contradicts Putnam Ford’s stipulation that
27 the repairs were performed at an unauthorized facility, the evidence says otherwise.
28

1 **Maier “Mike” Sweis**

2 Mr. Sweis was a repair improvement specialist at Ford as of September 20, 2023. (Ex. R-336,
3 009-10, 022). He did not testify at the Hearing, but the parties designated portions of his deposition
4 and a summary of his testimony is available in Ford’s Post-Hearing Brief in Warranty Labor Rate
5 Matter (R-337,-016, 019-020, 023, 026-027, 034, 048-049, 073, 075, 077) and the Board’s decision
6 overruling Putnam Ford’s protest in the Warranty Labor Rate Litigation (Ex. R-336, -022 to 026).
7 Putnam Ford argues that:

- 8 • Mr. Sweis first visited the Barn in September 2021 with his predecessor. (Putnam Br.
9 22:24-26.)
- 10 • Mr. Sweis was told by his predecessor that Putnam Ford had an off-site facility. (Putnam
11 Br. 22:27.)
- 12 • “Mr. Sweis visited the Putnam Ford dealership approximately nine or ten times. Almost all
13 of Mr. Sweis’s visits to Putnam Ford were to the Barn; he only visited the main facility
14 once or twice.” (Putnam Br. 23:3-5.)

15 Putnam Ford concludes that Ford, through a repair improvement specialist, was aware of
16 Putnam Ford’s use of the Barn and the Nissan Facility for warranty repair work. (Putnam Br. 21:17-
17 24.) Yet, Mr. Sweis testified that he had no idea that the Barn was not an authorized location. (Ex. R-
18 335, 003:15-19.) As a technician, he did not know what was in any specific dealer agreement. (*Id.*,
19 003:20-25.) Mr. Sweis certainly did not have the authority to approve the use of an unapproved
20 location. (*Id.*, 004:14-19.) And there is no evidence that Mr. Sweis alerted anyone at the Regional
21 Office of Putnam Ford’s use of the Barn.

22 **Mike Gogolewski**

23 Mr. Gogolewski was a Ford Market Representation Manager in San Francisco from 2021
24 through August 2022. (Gogolewski: 8/15/24, 94:5-13.) Putnam Ford argues Mr. Gogolewski knew of,
25 and allowed Putnam Ford to use the Barn and Nissan Facility for warranty repair work because:

- 26 • Mr. Gogolewski visited the Barn with Putnam GM, Al Vasquez, in April 2022. (Putnam
27 Br. 22:14-15.)

- “Mr. Gogolewski admitted he had visited the former Putnam Nissan dealership and the Barn one to two times.” (Putnam Br. 22:19-20.)
- “Even though Mr. Gogolewski suggested he only saw an old Econoline in the Barn, Mr. Gogolewski’s deposition testimony showed the Econoline was on a lift and being worked on and he saw a Ford vehicle or two in the Barn.” (Putnam Br. 22:20-23 (citing RT Vol. VI, 82:12-83:9 and 84:12-85:14).)

This visit is grossly misrepresented. Mr. Gogolewski saw the Barn once, but he certainly did not “tour” it. (Gogolewski: 8/15/24, 101:16-21.) “We just looked, and I remember we left from there.” (*Id.* 101:22-102:19; *accord* Vasquez: 8/12/24, 58:3-9 (testifying they walked by the Barn, up to the rolling gate, walking inside the entry, and left; they did not talk to any technicians while there).) Mr. Vasquez, the General Manager, admitted he did not disclose that Putnam Ford was performing warranty work at the Barn during that visit. (Vasquez: 8/12/24, 56:14-57:23.) Mr. Vasquez also could not testify that Mr. Gogolewski affirmatively knew the Barn was an unapproved location being used for repairs. (*Id.*, 57:8-58:18.) Instead, Mr. Gogolewski testified that relocating to a permanent facility was Ford’s methodology for resolving the shortfall in service capacity “from day one” (Gogolewski: 8/15/24, 118:17-21), not allowing off-site service work at the Barn. Ford detailed Mr. Gogolewski’s efforts to help Putnam Ford relocate in its brief. (Ford Br. 50:8-51:15.)

Meghan Murphy-Austin

- “When Ms. Murphy-Austin was the San Francisco Regional Manager, Putnam Ford took her on a tour of the area around Putnam Ford including the Buick GMC facility, the Nissan facility, and the facility Putnam was operating out of for Ford.” (Putnam Br. 23:7-9.)
- “In reviewing the December 13, 2022, letter to LaShawn Swann Ms. Murphy-Austin indicated ‘the building that I think is being described is Nissan, and it was one of the many alternatives Kent suggested and one of the ones that we would have been okay with.’” (Putnam Br. 23:9-12.) (internal citations omitted.)

As with Mr. Gogolewski, Putnam Ford tries to turn Ms. Murphy-Austin’s prior visits for the purpose of considering a relocation of Putnam Ford into a disclosure that Putnam Ford was using the Barn and Nissan Facility for warranty work. Ms. Murphy-Austin toured these buildings as part of the

1 extensive work that Ford did to help Putnam Ford relocate its entire dealership. (Ex. R-349, 028: 11-
2 16.) She testified that the Nissan building (Nissan main building and the Barn) was a potential
3 alternative facility for Putnam Ford that Ford would have approved. (*Id.*, 027:22-028:4.) She did not
4 testify that she knew the Barn was being used for unauthorized warranty repairs, nor did she say that
5 the Barn would have been approved as a service-only location. (Ex. R-350, 004:8-22, 007:19-008:10;
6 Ex. R-351, 006:5-10.)

7 **LaShawn Swann**

- 8 • “During an October 2022 visit to Putnam Ford, Mr. Putnam told Ms. Swann Putnam Ford
9 was performing service work at the Barn. Ms. Swann advised Mr. Putnam he needed to
10 submit a written request to formally add the Barn location to the dealer agreement.”
11 (Putnam Br. 23:13-16) (internal citations omitted.)

12 On its face, Ms. Swann’s response is the opposite of approval. She testified she was not
13 previously aware Putnam Ford had been using the Barn or the Nissan Facility, Ford had not approved
14 the use of either, and she told Mr. Putnam to cease performing warranty repairs at those locations.
15 (Ford Br. 52:1-12 (summarizing and citing testimony).) If Putnam Ford’s defense is that it believed
16 Ford approved the use of the Barn and Nissan Facility, then it should have ceased using those building
17 no later than October 2022 when Ms. Swann unequivocally told Mr. Putnam to stop. But the audit
18 revealed that Putnam Ford persisted on using the unauthorized locations for warranty work into 2023.

19 Putnam Ford attempts to cast itself as a helpless, innocent dealer, who “was not hiding its use
20 of the Barn from Ford—going so far as to drive Ford representatives to the Barn and Kent Putnam
21 telling Ms. Swann about the ongoing use of the Barn.” (Putnam Br. 23:19-20.) This argument is
22 undermined by the fact that Putnam Ford actively tried to conceal the Barn’s use throughout 2022 and
23 early 2023. Ex. R-337, 023 to 025 (detailing Putnam Ford’s attempt to hide its use of the Barn in
24 discovery of the Labor Rate Litigation). In reality, Putnam Ford was far from forthcoming and ended
25 up with a sanction in the labor rate litigation for failure to produce documents concerning the location
26 of repairs during discovery. (Ex. R-336-010 (Board decision recounting sanctioning Putnam Ford for
27 withholding documents).)

b) *Putnam Ford's Capacity Is a Post-Hoc Excuse*

Putnam Ford reasons that because Ford knew the Authorized Location had capacity limitations, Putnam Ford had no choice but to make false claims. (Putnam Br. 22:3-24:8, 35:4-23.) Putnam Ford points generally to Ford's promotion of "expanding service capacity for San Francisco dealers" (*id.* at 22:6-8), and Ford employees' acknowledgement that the Authorized Location had issues with service capacity (*id.* at 23:26-27, 35:14-23), as evidence that it was entirely appropriate to use the Barn and Nissan Facility without approval. This is a disingenuous way to repackage the truth of this story, which was that Ford made a concerted effort to help Putnam Ford relocate the entire dealership, but Putnam Ford repeatedly delayed. Capacity limitations were never a concern for Putnam Ford until after it was caught using the Barn and faced consequences.

Putnam Ford confuses the actual timeline of its various relocation requests (*see* Putnam Br. 36-40), but the timing of its requests and Ford's provisional approvals is clear:

Date	Action	Citation
March 8, 2021	Putnam Ford agrees to present a permanent facility solution by May 2, 2022;	Ex. P-102.001
Spring 2021 – Spring 2022	Ford Suggests Putnam Ford move into Putnam GMC location to address limited capacity Ford begins working on plans for potential relocation, but does not receive a written request Putnam Ford put the move to GMC on hold to work on other potential sites. Mr. Gogolewski worked with Putnam Ford "extensively" to relocate to Nissan. Ms. Murphy-Austin visited the Buick GMC facility and the Nissan Facility.	Vasquez: 8/12/24, 59:12-60:18 Vasquez: 8/12/24, 60:24-61:2 Gogolewski: 8/15/24, 95:20-24 Ex. P-154, 010: 4-21
May 2, 2022	Deadline for identifying relocation site passes	Ex. P-102.001
June 2022	Beginning of Disallowance Period for Audit	Ford Br. 31, n. 17
October 2022	Kent Putnam informs Ms. Swann for the first time that it is using the bar to service Ford cars. Ms. Swann advised Mr. Putnam that Putnam Ford could not service Ford vehicles at the unauthorized location and explained Putnam Ford needed to submit a written request.	Ford Br. 51:18-52:12; Swann: 8/16/24, 96:19-20 Swann: 8/16/24, 98:7-11; 210:8-14

October 25, 2022	First written request: Putnam Ford submits a written request to use the Barn.	Ex. P-104; Ford Br. 52:23-24
December 13, 2022	Second written request ¹ : Putnam Ford submitted a new written request to (1) relocate its entire operations to the Nissan Facility, and (2) for use of 925 Bayswater for additional stalls.	Ex. P-106; Ford Br. 53:13-15
January 19, 2023	Ms. Swann and Ms. Hughes visit Nissan Facility.	Hughes: 8/15/24, 135:1-18; Swann: 8/16/24, 118:24-119:2
January 2023	Putnam Ford verbally asks Ford to remove the Nissan Facility from the request, and only consider use of the 925 Baywater stalls.	Swann: 8/16/24, 112:10-14; 126:20-23; Ford Br. 53:20-54:4.
February 2023	End of Audit Period	Ford Br. 31, n. 17
Spring 2023	Mr. Putnam attempts to circumvent the process and have Ford administrative staff add the Barn as an authorized location, but Ms. Swann catches him and the Barn is not surreptitiously added.	Swann: 8/15/24, 214:8-15; Ford Br. 54:8-14
April 3, 2023	Mr. Owens conducts warranty study	Putnam Br. 15:3-4
April 19, 2023	Fourth Request: Putnam Ford submits request to relocate to 925 Bayswater and renews request to use the Barn.	Ex. P-119
June 27, 2023	Ford approved Putnam Ford's request to relocate the entire facility at 925 Bayswater, subject to clearance of the market, but denied the included request to use the Barn for temporary service work.	Swann: 8/16/24, 212:1-4; Kamenetsky: 8/13/24, 114:12-18; Ex. R-339; Hughes: 8/15/24, 232:18-22.
June 29, 2023	Ford issues Notice of Putnam Ford's Proposal to Relocate Dealership Operations to Serramonte Ford, Towne Ford, and James Ford	Ex. R-340; Ex. R-341; Ex. R-342
Summer 2023	Serramonte Ford and Towne Ford each filed a protest	Kamenetsky: 8/13/24, 133:16-21.
September 25, 2023	Mr. Putnam admits that Nissan requires that all of its authorized facilities, including the Barn, be used exclusively for Nissan operations.	Ex. R-327, 012: 14-013:3

¹ Putnam Ford claims "The December 13, 2022, request to use 925 Bayswater for additional non-customer facing service maintenance and repair capacity did not replace the request to use the Barn...." (Putnam Br. 38, n 14.) But Putnam Ford's written request makes no mention that it wanted Ford to continue to consider both the October and December requests. Ford's understanding at the time was certainly that each request was a new request, not cumulative. (Swann: 8/16/24, 112:10-14; 126:20-23 ("[] the October request became the December request that became the January request that became other requests down the road; so each—essentially we – we would receive new requests."). As a practical matter, the December request was for the use of the *entire* Nissan Facility (which included the Barn), which inherently replaces the October 2022 request for use of the Barn only. Even if this was Putnam Ford's intent, which is doubtful, it certainly was not Ford's understanding. A good-faith belief that the October request was no longer in effect cannot be used to support claims of retaliation and bad faith, which necessarily require intent.

December 6, 2023	Fifth Request: Putnam Ford submits written request to relocate operations to the Nissan Facility.	Kamenetsky: 8/13/24, 136:15-22, 137:14-138:4; Ex. R-343
February 20, 2024	Ford provides conditional approval of Putnam Ford's relocation request to the Nissan Facility.	Kamenetsky: 8/13/24, 138:14-17, 139:7-16; Ex. R-344; Hughes: 8/15/24, 232:23-25
February 29, 2024	Ford noticed the market on behalf of Putnam Ford. Ford of Serramonte filed a protest. That protest was still pending at the time of the Hearing.	Kamenetsky: 8/13/24, 142:15-21.; 144:15-24; R-345

Putnam Ford's allegation that Ford "unreasonably refused multiple Putnam Ford requests to formally add more non-customer off-site service capacity" is nonsense. (Putnam Br. 36:11-12.) Putnam Ford confused and complicated its own efforts by submitting, revising, and re-submitting various requests. At no point did Ford ignore or intentionally stall Putnam Ford's various relocation or satellite requests, and Putnam Ford produced no evidence to support such a claim.² Putnam Ford had its own idea of how long approval should take without having any insight or understanding of Ford's procedures and timeframe for analyzing such requests. (Kamenetsky: 8/13/24, 103:2-21 (Mr. Kamenetsky had "no idea" of Ford's process for approving a facility).) Putnam Ford also seems to believe that Ford should have capitulated to its after-the-fact request for offsite service capacity, even though it likely meant that Putnam Ford would continue to refuse to fulfill its promise to permanently relocate to sufficient facilities. (Swann: 8/16/24, 228:17-22 (testifying she was "concerned with approving or requesting and supporting a secondary location" because "it doesn't guarantee that [Putnam Ford is] wanting to move forward with the [permanent] facility itself.")) Putnam Ford's flawed understanding of Ford's processes and procedures cannot be imputed on Ford as malicious or evidence of wrongdoing.

Moreover, capacity limitations and location requests are irrelevant to the basis for the audit. Putnam Ford performed claims at an unauthorized location and falsely certified claims, Ford discovered these facts, and Mr. Owens conducted an allegation investigation, warranty study, and audit confirming these false claims. Capacity had nothing to do with Putnam Ford's warranty fraud.

² Ex. R-353, 003:23-005:1 (G. Karnes designated testimony); Swann: 8/16/24, 165:19-22, 171:10-12; Hughes: 8/15/24, 233:5-13; Ex. R-351, 002:8-15; Ex. R-349, 028:11-16.

1 This is especially true considering the audit reviewed warranty repairs done as early as four months
2 before Putnam Ford’s first written request for additional capacity. (*See* Ex. J-04.) Putnam Ford
3 interjects its capacity limitations as a last-ditch effort to justify its fraudulent behavior. It is not relevant
4 or persuasive.

5 iv. The Justification Has Limited Value Even if Correct

6 551 of 552 disallowed warranty claims “were found to be false claims pursuant to the Warranty
7 Manual as performance at an unauthorized location.” (Ford Br. 18:4-5) (internal citations omitted). Of
8 the 551 denied warranty claims, 74 claims identified reasons additional to the fact that the repairs were
9 performed at an unauthorized location. (Ford Br. 18:7-9.) That said, Ford made one mistake—the
10 actual value of the repairs disallowed for reasons other than location is \$111,709.18. (*See Attachment*
11 **2.**) Therefore, even if the Board finds that falsely certifying that a claim was performed in accordance
12 with the terms of the Warranty and Policy Manual does not render a claim false, the Protest should not
13 be sustained with respect to \$111,709.18 of the charge backs.

14 **B. Ford Satisfied all Procedural and Administrative Requirements of Section**
15 **3065(e)(3)**

16 Putnam Ford has functionally conceded that Ford satisfied all Procedural and Administrative
17 Requirements of Section 3065(e)(3). Putnam Ford did not argue to the contrary in its Response brief,
18 nor did it present any evidence during the hearing to rebut Ford’s evidence showing it satisfied these
19 procedural elements.

20 **C. The Audit was Not Retaliatory**

21 i. Putnam Ford Skips Over the Substance of Mr. Owens’ Testimony Regarding
22 His Decision to Initiate the Audit Following the Warranty Study

23 Putnam Ford concedes “the warranty study and Mr. Owens’s recommendation to escalate the
24 study to an audit [] led to the Audit. It was when Ms. Crawford agreed with Mr. Owens’
25 recommendation to upgrade the warranty study to a warranty audit ‘immediately’ and ‘almost
26 instantaneously’ which led to the actual Audit being conducted.” (Putnam Br. 45:11-14.) Putnam Ford
27 does not refute the audit process, or even Mr. Owens’ credibility. It tacitly discusses Mr. Owens
28

1 enough to create the impression that Ford employees outside of the margins—Ms. Swann and Ms.
2 Murphy-Austin—nefariously masterminded the audit with the help of undersigned counsel.

3 Ford detailed Mr. Owens’ testimony at length. (Ford Br. 7:8-23:11, 36:11-37:10.) Putnam Ford
4 does not launch any assault on Mr. Owens—the single most important witness in this case. Instead,
5 Putnam Ford makes baseless statements like “Ford failed to meet its burden to show its selection of
6 [Putnam Ford] for audit was done in compliance with the requirements of Section 3065(e).” (Putnam
7 Br. 6:6-8; *accord id.* 21:7-17.) Whether Putnam Ford agrees with the evidence’s veracity is one thing,
8 but it is absurd to claim that Ford did not present any evidence that the audit complied with Section
9 3065. Ford unequivocally presented robust testimony that Mr. Owens made the decision to audit
10 Putnam Ford and his decision was based on evidence of numerous false claims. (Ford Br. 36:11-37:10
11 (discussing Mr. Owens’ reasons for auditing Putnam Ford).) Mr. Owens, whose job is unconnected
12 with facility requests or labor rate requests, explicitly and persuasively denied he selected Putnam
13 Ford for an audit in punitive, retaliatory, or unfairly discriminatory manner. (Owens: 8/6/24; 73:12-
14 74:5; 129:24-132:6.)

15 To the extent Putnam Ford discusses Mr. Owens’ testimony at all, its focus is on Mr. Owens’
16 investigation into the location of repairs. (*See, e.g.*, Putnam Br. 33:14-20.) The thrust of the discussion
17 is that Mr. Owens’ early fixation on the location of the repairs is evidence that the audit was designed
18 to target the location issue and, therefore, was retaliatory. Focus on the location issue during the
19 allegation stage and warranty study stage is expected, though, as that was the basis for the allegation.
20 Mr. Owens had to investigate the location of warranty repairs because it is his job to independently
21 verify or deny the allegation. (Ford Br. 7:9-8:17 (discussing the Ford audit process), 9:16-10:21
22 (investigation of the allegation), 10:23-13:20 (performing the warranty study), 36:11-37:10 (reasons
23 Mr. Owens selected Putnam Ford for an audit).) Moreover, he independently determined that
24 performing repairs at an unauthorized location constituted a false claim. (Owens: 8/6/24, 129:5-11
25 (testifying “repairs that are being performed in an unauthorized facility[, which] is not allowed by
26 warranty and policy or the Sales and Service Agreement. So, by submitting those claims to Ford Motor
27 Company, the dealer is agreeing or confirming that those repairs complied with all Warranty and
28

1 Policy Manual requirements.”.) Mr. Owens was obligated to verify the facts before auditing Putnam
2 Ford. This is not retaliation; it is sound business practice.

3 ii. The Swan Character Assassination

4 Every story of punitive or retaliatory allegations needs a villain. Here, Putnam Ford bypassed
5 the usual suspects (the auditor, the audit team, etc.), and targeted Ms. Swann, Ford’s Regional
6 Manager, who played no role in denying Putnam Ford’s labor rate request or Mr. Owens’
7 recommendations leading to the warranty study and warranty audit. (Swann: 8/16/24; 83:25-84:6;
8 204:20-205:10). Still, Putnam Ford dedicates two sections to the attempted character assassination of
9 Ms. Swann claiming (1) she is a central figure in both the Labor Rate Litigation and the Audit
10 Litigation; (2) Ms. Swann provided false testimony regarding knowledge of the audit and Mr. Owens,
11 and (3) Ms. Swann attempted to conceal her true intentions during a visit with Putnam Ford and then
12 misrepresented Mr. Putnam’s statements. (Putnam Br. 25:11-28:7.) These are gross
13 mischaracterizations.

14 First, Putnam Ford strives to give Ms. Swann significance, by casting her as a “critical Ford
15 witness in the labor rate litigation.” (*Id.* 25:22-23.) Perhaps the theory is that if Putnam Ford can
16 somehow link her to the audit case and the Labor Rate Litigation, the Board will infer some retaliation.
17 Unfortunately, Ms. Swann, while a valued employee, was utterly irrelevant to the issues in both cases.
18 Ms. Swann was not involved in reviewing or denying Putnam Ford’s materially inaccurate labor rate
19 submission. (Swann: 8/16/24, 205:20-24.) She was not a witness in Ford’s case-in-chief in the Labor
20 Rate Protest; she was a rebuttal witness called to address the false testimony Mr. Putnam gave
21 regarding whether any of the customer pay repairs involved in that litigation were performed at the
22 Barn. (Ex. R-337, 025 n. 9 (footnote in brief summarizing Ms. Swann’s testimony rebutting Mr.
23 Putnam’s testimony).) And the Board referred to Ms. Swann precisely once in its Decision, only to
24 note that she had testified. (Ex. R-336, 010.) This is not a critical witness. Nor is she “critical” here.
25 She sent the allegation (Owens: 8/6/24, 92:3-4; Owens: 8/7/24, 163:4-8 (testifying the allegation was
26 from “the region”)), but **she was not involved in the decision to conduct a warranty study or audit**
27 (*see* Ford Br. 10:4-21, 13:8-20 (detailing Mr. Owens’ testimony regarding his decision to upgrade the
28 allegation investigation to a warranty study, and then upgrade the study to an audit)).

1 Second, in a desperate attempt to find a “gotcha” moment, Putnam Ford purports to reveal that
2 Ms. Swann “knew” Mr. Owens and tried to conceal it. (Putnam Br. 25:17.) In her April 2023
3 deposition in the Warranty Labor Rate litigation, she testified she did not know Mr. Owens. (Putnam
4 Br. 25:11; Swann: 8/16/24, 94:8-95:3.) But alas, a year and a half later at the hearing in this matter,
5 she admitted she had two inconsequential email communicates with him. The alleged “false
6 testimony” and “concealed knowledge” Putnam Ford cites to is two non-memorable emails strings—
7 one of which Ms. Swann was only carbon copied on. (Ex. P-115, 002.) In the other email, Ms. Swann
8 simply clarified who took the January 19, 2023 Nissan visit photos. (Ex. P-112; Owens: 8/7/24, 39:5-
9 7; 40:3-5 (Mr. Owens confirmed Ex. P-112 is the only communication he had with Ms. Swann
10 concerning the Nissan photos).) This dénouement is underwhelming. Receiving an email from a fellow
11 employee of a vast company is not the same as knowing a person. And it is hardly surprising that a
12 busy regional manager could not recall two emails with an auditor that, as of the time of her first
13 deposition, she had never met. Her memory at the time of her first deposition fairly represents how
14 uninvolved she had been in the audit in April 2023—she did not even remember receiving those
15 communications.

16 The truth is less scintillating. Ms. Swann and Mr. Owens met in person once, and that was with
17 Putnam Ford employees during the audit closing meeting. (Swann: 8/16/24, 204:8-14.) While Mr.
18 Owens prepared a letter with Ms. Swann’s signature notifying Putnam Ford of the date for the warranty
19 study, Ms. Swann did not write, or contribute to, the letter. (Owens: 8/6/24, 101:18-102:3; Putnam Br.
20 15:3-4.) Putnam Ford agrees that: Mr. Owens, not Ms. Swann “recommended Ford proceed with a
21 warranty study of Putnam Ford” (Putnam Br. 14:20); Mr. Owens, not Ms. Swann, met with and
22 observed Putnam Ford technicians (Putnam Br. 15:13-15, 33:12-13); and Mr. Owens, not Ms. Swann,
23 identified claims as false (Putnam Br. 17:13). Ms. Swann was not involved in the audit. (Swann:
24 8/16/24, 204:20-25.) Whether she remembered receiving an email from Mr. Owens is inconsequential

25 Third, Putnam Ford seeks to villainize and discredit Ms. Swann because she and Ms. Hughes
26 caught its service department performing repairs at an unauthorized location. Ford detailed the events
27 in January 2023 when Ms. Swann and Ms. Hughes visited the Nissan Facility as part of Putnam Ford’s
28 latest relocation request. (Ford Br. 52:14-54:22.) Putnam Ford now contends Ms. Swann “attempted

1 to distance herself from the premeditated nature of the January 19, 2023 visit to Putnam Ford with Ms.
2 Hughes.” (Putnam Br. 26:5-6.). It claims that “Ms. Swann’s testimony was directly contradicted by
3 the testimony of Ms. Hughes.” (Putnam Br. 26:8-9) (internal citations omitted.) The “contradictions”
4 are either irrelevant or based on Putnam Ford’s argument of the case, not actual testimony. The
5 following are a few examples:

6 **Alleged Contraction 1 (internal citations omitted)**

7 Prior to the visit and before Ms. Hughes had ever been to the Putnam dealership,
8 Ms. Swann told Ms. Hughes she was concerned Putnam might be doing Ford
service work at an unauthorized facility called the Barn, at Putnam Nissan....

9 (Putnam Br. 26:19-21.) In fact, Ms. Swann denied knowing Putnam Ford was still doing service work
10 at the Barn. Ms. Hughes saying Ms. Swann was concerned Putnam Ford was doing Ford service work
11 at the Barn does not contradict Ms. Swann’s testimony that she did not know whether Putnam Ford
12 was **still** doing service work at the Barn—especially since Ms. Swann told Mr. Putnam to stop doing
13 work in the Barn three months prior.

14 **Alleged Contraction 2 (internal citations omitted)**

15 In preparation for the visit, Ms. Hughes testified Ms. Swann designated her to be
16 the photo taker during the visit. Ms. Hughes, in fact, took the photos of both the
Nissan facility and the Barn.

17 ...Ms. Swann denied telling Ms. Hughes prior to the visit to take pictures of any
18 Ford service work she saw on the Putnam Nissan property. Ms. Swann suggested
19 she started off taking pictures and then turned the picture taking over to Ms.
Hughes.

20 (Putnam Br. 26:22-27:2.) Whether Ms. Swann designated Ms. Hughes to take the photos, or whether
21 she later turned the picture taking over to Ms. Hughes, is irrelevant. This is yet another red herring.
22 What matters is that Mr. Owens received an allegation that included pictures of Putnam Ford servicing
23 Ford vehicles at the Barn.³

24
25
26
27
28 ³ The January 19, 2023, visit was in response to Putnam Ford’s location request. Putnam Ford invited
Ford to the property for the inspection and tour. (Swann: 8/16/24, 131:5-15).

Alleged Contradiction 3 (internal citations omitted)

...[B]efore Ms. Swann and Ms. Hughes ever arrived at the dealership, Ms. Hughes testified Ms. Swann told her ‘that Mr. Putnam and others potentially in the organization had lied about what had been said in previous conversation.’

Ms. Swann denied telling Ms. Hughes before the visit that ‘the Putnam people could not be trusted and that they had lied about previous things that were said’ or anything along those lines.

(Putnam Br. 27:5-11.) Two coworkers can participate in a routine conversation and later both truthfully testify differently about what was said during the conversation. It is unreasonable to expect people to memorize every conversation they have. In addition, whether Ms. Swann liked or trusted Mr. Putnam is irrelevant. She was not involved in the audit (or the labor rate request) and her personal opinion of Mr. Putnam does not matter.

iii. Megan Murphy-Austin’s Email is not Evidence of a Ford Plan for Retaliation

Putnam Ford contends “Ms. Murphy-Austin’s [September 1, 2021,] email is evidence of Ford’s intent to retaliate against Putnam for the labor rate submission, in direct violation of Section 30365.2, subdivision (i)(2)(G).” (Putnam Br. 29:4-6.) Because Ms. Murphy-Austin no longer worked in the San Francisco Region at the time of the Labor Rate Litigation or the audit, Putnam Ford asserts “it is plain to see Ford, through Ms. Swann, applied [Ms. Murphy-Austin’s] sentiment when it refused to timely consider, and ultimately rejected, Putnam’s request to formally acknowledge the use of its non-customer facing satellite service operations.” (Putnam Br. 29:2-4.) The email is not salacious, and Putnam Ford’s argument is threadbare.

The 2021 email captured Ms. Murphy-Austin’s honest shock and dismay in response to Putnam Ford’s labor rate request of an outrageously high \$436 per hour. (Ex. P 154, 019:14-23.) Ms. Murphy-Austin replied to that jaw-dropping amount by stating, “If [Putnam] continue[s] to pursue the twice the market average type rate, they won’t see a lick of support from me moving forward....Product, facility money....nothing.” (Putnam Br. 28:11-17.) For Ms. Murphy-Austin, that meant treating Putnam Ford like any other dealer and foregoing “above-and-beyond type favors,” such as, for example, assistance (beyond what is contractually required) with product displays, or offering

1 discretionary monies for new facilities.⁴ (Ex. P 154, 020:18-25; Ex. R-350, 015:4-016:20.) She did
2 not suggest withholding allocation, or anything else “required by contract,” nor did any such thing
3 occur. (Ex. R-350, 016:1-4.) Indeed, up to this point Ford had bent over backward to assist Putnam
4 Ford.

5 Her surprise at the outrageous rate began and ended in that email. Ms. Murphy-Austin had no
6 role in this audit—or any other audit. (Ex. R-351, 004:25-005:16.) Like Ms. Swann, Ms. Murphy-
7 Austin had no role in the consideration of Putnam Ford’s labor rate request. (*Id.*, 004:22-24.) She did
8 not learn about Putnam Ford’s service work at the Nissan Facility and/or Barn until after she left the
9 role as regional manager. (*Id.*, 005:15-16; 006:18-22.) She has never initiated an audit, she does not
10 know what an allegation audit is, and in her role as regional manager (which she was not at the time
11 of the audit⁵), at most, she would receive notifications of when “they would happen, and sometimes
12 the regional manager would be invited to [attend] it to become aware of the findings” (*Id.*, 004:24-
13 005:16.)

14 The connection with Ms. Swann is non-existent. Ms. Swann knew nothing about the contents
15 of Ms. Murphy-Austin’s September 1, 2021 email. (Swann, 8/16/24, 103:4-8.) Ms. Murphy-Austin
16 never shared her opinions about Putnam Ford to Ms. Swann, and even during Ms. Swann’s transition
17 into the regional manager role, they did not discuss the Labor Rate Litigation. (*Id.*, 103:17-22.) At the
18 time of this hearing, Ms. Swann and Ms. Murphy-Austin only stayed in contact occasionally, and it
19 was usually by email. (*Id.*, 104:14-105:4.) It is obvious from the evidence—Ms. Murphy-Austin was
20 never in a position to initiate or influence an audit.

21 Because Ms. Murphy-Austin and Ms. Swann are not involved in audits, for Putnam Ford’s
22 theory to have any teeth, the Board would have to accept that Ms. Murphy-Austin directed Ms. Swann,
23 who then directed both Ms. Crawford and Mr. Owens to engage in the audit to seek revenge. By
24
25

26
27 ⁴ Ford’s financial support for a dealer proposing new facility concepts is considered discretionary
monies. (Ex. R-350, 016:10-20.)

28 ⁵ Ms. Murphy-Austin began a new position on April 1, 2022. (Ex. R-350, 025:1-6).

1 extension, the Board would have to find that, at minimum, Ms. Murphy-Austin, Ms. Swann, Ms.
2 Crawford, and Mr. Owens all repeatedly lied under oath.

3 Ms. Murphy-Austin's email was a shocked response to a rate of over \$436 per hour, not a
4 pronouncement of a vendetta to stall a relocation in order to set Putnam Ford up for a warranty audit.

5 iv. The Timing of the Audit Was Not a Settlement Tool or "Leverage"

6 Putnam Ford argues "Ford did not take any action against Putnam's use of the Barn until Ford
7 saw an opportunity to use the Barn service location as leverage in the labor rate litigation." (Putnam
8 Br. 23:21-22.) It further claims Ford purportedly used the audit to try and "leverage Putnam to settle
9 [the labor rate request] when faced with a significant proposed Audit chargeback." (Putnam Br. 25:7-
10 8.) Correlation is not causation (and this is not even correlation); that the audit coincidentally occurred
11 during the tail end of the Labor Rate Protest, is not proof of a nefarious connection. Because there is
12 no evidence that the audit was conducted in retaliation of the labor rate request, Putnam Ford is forced
13 to point to this overlap as if it is meaningful. But Mr. Owens was unequivocally clear that he was not
14 influenced by the Labor Rate Protest, which is direct evidence the audit was not in retaliation for the
15 labor rate request and dispels any possible inferences that can be drawn for timing. (Ford Br. 19-21.)

16 Mr. Owens' testimonial evidence is definitive and carries the issue. There is not a scrap of
17 evidence—not an email, a phone call, or testimony from a Putnam Ford or Ford witness—that Ford
18 ever insinuated, suggested, hinted, or offered implicitly or explicitly to make the audit end if Putnam
19 Ford settled the Labor Rate Protest. The audit was not some sort of leverage mechanism associated
20 with the Labor Rate Protest. If Ford had tried to leverage the audit, Putnam Ford would certainly have
21 those communications in their possession or would have been able to testify about any oral
22 communications. The absence of any such communication reveals the weakness of Putnam Ford's
23 theory.

24 v. Putnam Ford's Brief Repeatedly Inaccurately Describes the Evidence

25 The remainder of conspiracy-laden inaccuracies in Putnam Ford's Brief are too numerous to
26 detail. Ford's **Attachment 3**, provides various examples of Putnam Ford summary of testimony and/or
27 exhibits that are misleading. The take-away from **Attachment 3** is that the Board should not rely on
28

1 Putnam Ford’s summary or paraphrasing of the record and should instead look to the testimony and
2 exhibits.

3 **D. Impermissible Invasion of the Attorney Client Privilege**

4
5 Ford’s objections to Putnam Ford’s insistence that the Board draw impermissible inferences
6 from the exercise of attorney-client privilege communications has been well documented. (Ford Br.
7 38:23-42:7.) Putnam Ford does not address the legal analysis of the application of Section 913 of the
8 Evidence Code or Section 11513 of the Government Code. (*See generally* Putnam Br.) Faced with the
9 law, Putnam Ford backtracks and claims that it is not asking the Board to draw any inferences at all.
10 It then proceeds to point to redactions on an email and asks the Board to find this is evidence of
11 counsel’s role in retaliation because Ford has not provided proof that counsel’s involvement was not
12 retaliatory. (Putnam Br. 30:7-11.).⁶ Putnam Ford is asking the Board to make an inference from the
13 exercise of privilege; Ford cannot directly address counsel’s presence without breaking privilege. Ford
14 met its burden by producing extensive evidence, though Mr. Owens, to demonstrate that the audit was
15 initiated solely because Putnam Ford had been performing repairs at an unauthorized location. (Ford
16 Br. 7:9-15:17, 35:12-38:7.) Drawing any inference from the presence of a redaction or the invocation
17 of privilege at the hearing violates California law.
18
19
20
21
22

23
24 ⁶ Putnam Ford insists that because Ford could not produce an extensive paper trail and documentary
25 history for every aspect of its case, Ford has not met its evidentiary burden. (*See, e.g.* Putnam Br.
26 30:11-14.) Not only is Putnam trying to make the inconsequential significant (the details of the original
27 allegation are just background and not legally irrelevant; it is the actual selection and conduct of an
28 audit that is legally relevant), but witness testimony from individuals with personal knowledge is
evidence. *Webb v. Serabian* (1949) 93 Cal.App.2d 642, 645 [209 P.2d 436, 438] (holding argument
that certain facts regarding transactions could only be proven though documentary evidence is “clearly
without merit” because “[t]he law has long recognized the oral testimony of witnesses with personal
knowledge . . . [is] competent evidence[.]”).

1 **II. PUTNAM FORD’S BELATED SECTION 3065.2 CLAIM FOR BAD FAITH IS NOT**
2 **PROPERLY BEFORE THE BOARD, CLEARLY ARTICULATED, OR FACTUALLY**
3 **SUPPORTED**

4 **A. Putnam Ford Ignores Jurisdictional Limitations and Insists that its Vague and**
5 **Insufficient Complaint Was Enough**

6 Just as Putnam Ford failed to address some of the threshold legal issues relating to the Section
7 3065 claim, it avoids tackling the jurisdictional issue of the Section 3065.2 claim and does not set forth
8 a legal basis for why the Board may hear and decide a claim that was not presented to it, as required
9 by the California Legislature. (*Compare* Ford Br. 42:10-45:14, *with* Putnam Br.)

10 Putnam Ford suggests that a Section 3065.2 claim was presented to the Board because the
11 protest “placed at issue the facts underlying Ford’s bad faith.” (Putnam Br. 44:16.) There were no
12 allegations regarding bad faith relating to relocation requests in the protest. Although Putnam Ford
13 argues that Ford cannot claim “ignorance” (Putnam Br. 44:16-19), the protest speaks for itself.

14 As it relates to the audit, Putnam Ford misrepresents Ford’s position. Putnam Ford accuses
15 Ford of trying to “side-step” the issue of retaliation completely. But Ford stated, “[f]unctionally, [the
16 Section 3065.2(i)(2)(G) claim for retaliation] is the same as Putnam Ford’s allegation that Ford
17 selected it for an audit for a retaliatory purpose under Section 3065. Although the Board may not
18 consider a violation of Section 3065.2, it has considered the same underlying factual theory as part of
19 the Section 3065 claim.” (Ford Br. 42 n. 21.) To the extent Putnam Ford raises retaliation under Section
20 3065.2, it is duplicative because it is already addressed under Section 3065.

21 **B. Any Section 3065.2 Claim is Precluded**

22 Putnam Ford also dedicates a single footnote to claim preclusion but misunderstands the
23 doctrine. (Putnam Br. 44 n.8.) As explained in Ford’s Opening Brief, preclusion applies to any claim
24 that could have been brought. (Ford Br. 45:16-46:20 (citing *Howitson v. Evans Hotels, LLC* (2022) 81
25 Cal.App.5th 475, 486 [297 Cal.Rptr.3d 181, 190] (“Claim preclusion applies to matters which were
26 raised or could have been raised, on matters litigated or litigatable in the prior action.” (internal
27 quotation marks omitted)).) If the matter to be litigated is “within the scope of the [prior] action, related
28 to the subject-matter and relevant to the issues, so that it could have been raised, the judgment is
conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged.” *Howitson*,

1 81 Cal.App.5th at 486. Putnam Ford certainly could have pled a Section 3065.2 claim alleging that
2 Ford acted in bad faith regarding relocation as part of its Labor Rate Litigation, but it never did. The
3 fact that the Board excluded evidence of the audit did not impair its ability to allege bad faith in
4 connection with the location. Indeed, much of Putnam Ford’s argument before the Board relates to
5 events that occurred long before the September 2023 Hearing on the Labor Rate Litigation. There is a
6 final judgment on the merits on the Labor Rate Litigation, and that is preclusive.

7 **C. Putnam Ford Still Has Not Articulated a Fully Formed Bad Faith Claim**

8 Putnam Ford’s brief does not clearly articulate the bad faith claim it purports to bring at this
9 late hour. That is, it has not stated how Ford purportedly acted in bad faith **and** how that bad faith
10 allegedly caused them harm in the context of relocation. Putnam Ford certainly floats the concept of
11 acting in bad faith regarding approval of a new location. But this theory has a number of issues.
12 Although Putnam Ford spends a considerable amount of time addressing the relocation issue, it does
13 not specify what the damages are. If the damage is the resulting audit and charge backs, then the only
14 issues relevant to relocation are those that occurred prior to the audit. All of the allegations relating to
15 relocation after January 2023 are irrelevant. But if relocation denials after the audit are part of the
16 claim, what is the harm? Especially since Ford approved relocation twice.

17 These questions have no answers, nor do the answers matter. Putnam Ford did not plead a
18 Section 3065.2 claim, nor could it have pled such a claim for the reasons articulated in Ford’s Opening
19 Post-Hearing Brief. Their failure to articulate a precise bad faith claim, even now, after the close of
20 evidence is telling. The purpose of the narrative appears to be an excuse to expand the record and
21 distract the Board from the finite issue before it: whether Ford complied with Section 3065(e). Putnam
22 Ford’s multiple half-hearted attempts to relocate have no bearing on the relevant legal inquiry.

23 **D. Putnam Ford Ignores the Evidence to Create an Incomplete Picture of the**
24 **Relocation Issue**

25 Ford’s Opening Post-Hearing Brief details how “[t]he evidence overwhelmingly demonstrates
26 that Ford acted in good faith in responding to every one of Putnam Ford’s relocation requests.” (Ford
27
28

1 Br. 48:19-20.) Putnam Ford functionally concedes the following timeline because its brief does not
2 directly address any of these facts:

- 3 • For two years before Putnam Ford got caught using the Barn, Ford actively and diligently
4 supported all of Putnam Ford's relocations ideas.
 - 5 ○ "[t]he Authorized Location was never intended to be permanent.... In a March 2021
6 Conditional Letter of Approval conditionally approving a dealership at the Authorized
7 Location, Putnam Ford agreed it would secure a final, permanent location by May 2,
8 2022." (Ford Br. 49:15-19) (internal citation omitted.)
 - 9 ○ "Mr. Putnam readily admitted that the Barn is not an authorized location of Ford; it is
10 a Nissan facility. He also acknowledged that Nissan required its authorized facilities be
11 used exclusively for Nissan operations." (Ford Br. 51:18-20) (internal citation omitted.)
 - 12 ○ Originally, it was believed that Putnam Ford was going to relocate to the Buick GMC
13 facility. (Ex. R-349, 007:19-22.)
 - 14 ○ "Ford helped Putnam Ford with a potential relocation by working on design plans for
15 [the Buick GMC location]." This was not a formal location request, but Putnam Ford
16 showed intent to go to that location. (Gogolewski: 8/15/24, 94:25-95:19; Ford Br.
17 50:14-15) (internal citation omitted.)
 - 18 ○ Ford "worked with [Putnam] extensively" on the Nissan location, including facility and
19 design supplements, as well as cost assessments. (Gogolewski: 8/15/24; 95:20-96:4.)
 - 20 ○ Putnam Ford did not end up relocating to the GMC or Nissan facility because a pattern
21 of indecisiveness emerged. (Gogolewski: 8/15/24; 96:5-9; Ex. R-349, 007:23-008:2.)
 - 22 ○ "In Spring 2022, Mr. Gogolewski visited the Nissan Facility to try and get a
23 commitment to relocate from Putnam Ford because they had not submitted a formal
24 request for relocation." (Ford Br. 51:1-3) (internal citation omitted.)
 - 25 ○ "Mr. Gogolewski 'absolutely' would have supported a relocation to the GMC facility
26 and would have supported relocating to the Nissan Facility as an exclusive Ford
27 facility." (Ford Br. 51:8-10) (internal citation omitted.)

- As explained, *supra*, and *infra*, after October 2022, Putnam Ford continued this pattern of constantly changing its mind. This is evident from Putnam Ford’s **five** separate requests for the same few locations. (*See* Ford Br. 52:13-55:28.)

From October 2022, through late 2023, Putnam Ford made a total of five requests for relocation and/or satellite service at one, or a combination, of the following three locations: (1) the Barn, (2) the Nissan facility, and (3) 925 Bayswater. (*See* Ford Br. 52:13-55:28.) Despite Putnam Ford’s claim otherwise, Ms. Hughes “spent a lot of time on pushing through all of the requests that Putnam Ford has made.” (Ford Br. 52:19-20) (internal citation omitted.) Ultimately, Ford approved **two** of Putnam Ford’s relocation requests, including Putnam Ford’s relocation request to the Nissan Facility. (*Id.*, 52:13-55:28; Kamenetsky: 8/13/24, 114:12-18; 138:14-17, 139:7-16; Ex. R-339; Ex. R-344; Hughes: 8/15/24, 232:18-25.)

Rather than address these facts, Putnam Ford focuses on an email related to a different case and “gaps” in time based strictly on formal letters (and ignores numerous phone conversations). Moreover, underlying its mischaracterization of events is a deep sense of entitlement: Putnam Ford’s version of “good faith” is that a manufacturer should jump to do whatever a dealer desires, immediately, regardless of any other business, legal, or contractual considerations.

i. Ms. Murphy-Austin’s Honest Response to an Outrageous Rate is Weaponized to Excuse Putnam Ford’s Fraud

Based solely on Ms. Murphy-Austin’s September 1, 2021 email, Putnam Ford asserts “it is plain to see Ford, through Ms. Swann, applied [Ms. Murphy-Austin’s] sentiment when it refused to timely consider, and ultimately rejected, Putnam’s request to formally acknowledge the use of its non-customer facing satellite service operations.” (Putnam Br. 29:2-4.) The email is not that salacious, and Putnam Ford’s argument is threadbare. (*See* Part I.C.iii., *supra*.)

ii. Imagined Delays That Did Not Exist

Putnam Ford wastes three pages imagining delays that did not exist. (Putnam Br. 37:26-39:20.) By acknowledging the written relocation requests, and ignoring all the other forms of communication between Putnam Ford and various Ford employees, Putnam Ford conjures up a story that Ford ignored

1 requests and/or intentionally stalled its relocation process. This could not be further from the truth.
2 (*See Ford Br. 30:21-33:17, 48:19-56:19; Part I.A.iii.b., supra.*)

3 iii. Putnam Ford’s Underlying Theme of Entitlement

4 Absent from Putnam Ford’s good faith discussion is a legal analysis of what constitutes good
5 faith (or bad faith) and why Ford’s actions constitute bad faith. The assumption is that good faith
6 requires Ford to immediately capitulate to all of Putnam Ford’s requests. This is not the legal standard.

7 No court has analyzed what constitutes “good faith” for the purpose of Section 3065.2.
8 However, California law is no stranger to this concept in business dealings. Good faith is frequently
9 juxtaposed with reasonableness and differentiated as follows:

10 [R]easonableness and good faith are distinct concepts. A decision is unreasonable
11 when it is arbitrary, capricious, or lacking in evidentiary support. **A lack of good**
12 **faith, on the other hand, suggests a moral quality, such as dishonesty, deceit,**
13 **or unfaithfulness to duty.** When the promisor has the power to make a purely
subjective decision, that decision must be made in good faith, but the courts will
not examine its reasonableness.

14 *Storek & Storek, Inc. v. Citicorp Real Estate, Inc.* (2002) 100 Cal. App. 4th 44, 59 [122 Cal.Rptr.2d
15 267, 279] (emphasis added) (internal citations omitted). Good faith need not even be reasonable. Such
16 a legal standard certainly does not require that a business party satisfy every one of its partner’s
17 desires or even meet its needs. Rather, the good faith standard prohibits deceitful or dishonest
18 conduct.

19 Putnam Ford has not claimed, nor is there any evidence that Ford deceived Putnam Ford or
20 acted with dishonesty or unfaithfulness to a duty in considering its changing relocation requests.
21 There is no evidence that Ford made any representation or statement to Putnam Ford regarding
22 relocation that it later recanted or did not fulfill. Indeed, the record shows that Ford wanted—for
23 years—to get Putnam Ford into a new location and undertook considerable efforts to evaluate every
24 option Putnam Ford presented. It also took each request seriously and eventually granted **two** of
25 Putnam Ford’s requests for relocation. If Ford was acting dishonestly, it would not have urged Putnam
26 Ford to relocate and it certainly would not have granted its request and, upon Putnam Ford changing
27 its mind, granted its request again.
28

1 **CONCLUSION**

2 Ford complied with Sections 3065.⁷ Putnam Ford was selected for an audit because of its own
3 failure to adhere to Ford's standards, not because Ford was upset about the labor rate request and
4 protest, or for any other Putnam Ford-concocted reason. Every single claim that Ford charged back
5 was false. The Board should overrule the Protest, uphold the 552 disallowances and permit Ford to
6 charge back the full amount of the disallowances, or \$502,821.56.

7
8
9 Dated: May 19, 2025

GREENBERG TRAURIG, LLP

10
11 By: /s/ Steven M. Kelso
12 Steven M. Kelso
13 H. Camille Papini-Chapla
14 Attorneys for Respondent
15 Ford Motor Company
16
17
18
19
20
21
22
23
24
25
26
27

28 ⁷ And 3065.2 should the Board decide to reach this issue.

PROOF OF SERVICE

CAPTION: KP AUTO, LLC, dba Putnam Ford of San Mateo v. FORD MOTOR COMPANY
BOARD: NEW MOTOR VEHICLE BOARD
PROTEST NOS.: **PR-2826-23**

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 19, 2025, I served the foregoing **FORD MOTOR COMPANY'S POST-HEARING CLOSING BRIEF** on each party in this action, as follows:

Gavin M. Hughes
Robert A. Mayville, Jr.
Law Offices of Gavin M. Hughes
3436 American River Dr., Ste. 10
Sacramento, CA 95864
Telephone: 916-900-8022
Email: gavin@hughesdealerlaw.com
mayville @hughsdealerlaw.com

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 19, 2025, at Denver, Colorado.

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

/s/ Steven M. Kelso
Steven M. Kelso

Comparison of Disallowance Exhibits to Post Hearing Briefs

R.O#	Ln#	Reason	Ex. J-04 cite	Bates	RO Bates	Ford's Amount	RO# - Line	Extent of Alternative Reason Chargeback	Ford Overstates the non-location based disallowance by this amount	Findings	Citation	
3	0000012559	A	Labor operation to remove and install the transmission assembly was not claimed	008-009	FORD0000014-15	FORD0030250-30300	\$4,751.67	12559 - A	As Mr. Owens testified, the note cited and relied on by Ford did not independently support any chargeback. Instead, "It's something the dealer was entitled to, but did not claim" (RT Vol. I, 174:19-175:5). The entire proposed chargeback for this claim relies on the location of the repair	\$4,751.67	Total Line A: \$3,048.07 for Parts & \$1,826.00 for Labor = \$4,874.07; Lists D61.07 & D65.02; "So, it's something the dealer was entitled to, but did not claim. Part of the reason I put that down in my disallowance is to show the dealership the proper way to do it and what they should have done one way or the other. So that shows that they should have been paid an extra 5.8 hours, because you have to take the transmission out in order to overhaul the transmission." (RT Vol. I, 174:23-175:5)	(RT Vol. 1, 174:23-175:5); J-04 - 008-009
5	0000012794	A	Transmission cooler replacement is not required or supported by the technician comments; no warrantable defect documented to justify transmission cooler replacement; duplicate labor is not reimbursable	014-016	FORD0000020-22	FORD0028531-28584	\$5,889.20	12794 - A	"Disallow \$105.27 for the cooler and 2.3 hours of labor." "Disallow 2.6 hours of duplicate labor time." Total \$105.27 parts; 4.9 hours labor (\$1,078.00)	\$4,705.93	It states that because the repair was performed at "The Barn" "disallow the entire repair." Then it goes into the fact that there is no warrantable defect documented to justify transmission cooler replacement - disallow \$105.27 for the cooler and 2.3 hours of labor. "The 2.6 hours of actual time claimed 'to inspect and determine all damage and correct repair with the available parts.' is duplicate labor time - duplicate labor is not reimbursable - disallow 2.6 hours of duplicate labor time.	J-04-014;
6	0000012804	E	TSB 22-2139 and labor operation 222139S do not apply to the repair since the main control was not overhauled - it was replaced	016-018	FORD0000022-24	FORD0028585-28620	\$2,164.24	12804 - E	"Disallow 3.0 hours of labor difference between TSB time and SLTS time." Total 3.0 hours labor (\$660.00)	\$1,504.24	There is also: "Note: Credit may be provided with supporting technician comments related to the diagnosis."	J-04-017;
7	0000012833	A	Several parts billed out are included in the 6079 Engine Overhaul Gasket Gt; in addition some of the "if needed" parts listed in TSB 21-2269 were replaced without technician comments to support replacement	018-020	FORD0000024-26	FORD0028621-28699	\$8,278.63	12833 - A	"Disallow the duplicate and unsupported parts total of \$311.87." Total \$311.87 parts	\$7,966.76	Correct.	
8	0000012851	B	Repair order does not include the required Cost Cap; duplicate labor time; torque converter and solenoid assembly replacement are not supported by the technician comments provided; no warrantable defect identified with either component; labor operations 7001D2 and 7000AZJ are not supported by the technician comments provided	020-022	FORD0000026-28	FORD0028700-28740	\$5,741.60	12851 - B	"Due to the missing Cost Cap, all repair costs about the \$1,500 threshold for automatic transmissions is disallowed." Total Cost Cap not subject to proposed chargeback (\$1,500.00)	\$1,500.00	Due to the missing Cost Cap, all repair costs above the \$1,500 threshold for automatic transmissions is disallowed. The 2.6 hours claimed for transmission tear down and inspect is duplicate labor time with the transmission overhaul; The MTINSPECT is only to be claimed if the assembly cannot be repaired. Since the technician overhauled the transmission in this instance, the 2.6 hours is not reimbursable. Disallow 2.6 hours of labor; Torque converter and solenoid assembly replacement are not supported by the technician comments provided. There is no warrantable defect identified with either component. Metal contamination is not justification to replace these components under warranty. The torque converter was not flushed as required. The solenoid assembly can be cleaned. Disallow \$718.94 for these parts. Labor operations 7001D2 and 7000AZJ are not supported by the technician comments provided. Disallow 0.5 hours of unsupported labor time. <i>It appears they think they would have been owed the \$1,500 - and all other "costs" above that would be disallowed.</i>	020-021

9	0000012917	A	The 4.0 hours for additional diagnosis and the 5.5 hours of actual time for the wiring harness is not supported by the technician comments provided; no additional diagnosis time was needed based on the information provided	022-024	FORD0000028-30	FORD0028741-28788	\$3,163.55	12917 - A	"Disallow 9.5 hours of unsupported labor time." Total 9.5 labor hours (\$2,090.00)	\$1,073.55	Correct - it states "disallow 9.5 hours of unsupported labor time" - \$220 x 9.5 hours = \$2,090.00	
13	0000013083	B	Additional 1.0 hour of diagnosis time is not required when the TCM has CTC P0606	043-044	FORD0000049-50	FORD0014661-14717	\$1,010.15	13083 - B	"Disallow 1.0 of additional diagnosis time." Total 1.0 labor hour (\$220.00)	\$790.15	The 1.0 hour of additional diagnosis time is not required when the TCM has DTC P0606. The 14M02 instructs the technician to replace the TCM. No additional diagnosis is required. Disallow 1.0 of additional diagnosis time.	
22	0000013277	A	Several parts billed out are also included in the 6079 Engine Overhaul Gasket Kit	099-101	FORD0000105-107	FORD0013826-13898	\$6,712.51	13277 - A	"Disallow \$295.46 of duplicate parts." Total \$295.46 parts	\$6,417.05	Correct	
23	0000013339	A	TSB 22-2015 was mentioned at the beginning of the technician comments does not apply to this vehicle; TSB 22-2015 applies to the 2022 F-Super Duty 10R140 Automatic Transmission	111-112	FORD0000117-118	FORD0029136-29246	\$2,860.23	13339 - A	The reason cited by Ford is a note included by Mr. Owens. There is no statement it independently supports any chargeback. (See RT Vol. I, 174:18-175:5 (Mr. Owens describing his use of a note did not independently support a proposed chargeback).)	\$2,860.23	Note: TSB 22-2015 that was mentioned at the beginning of the technician comments does not apply to this vehicle. TSB 22-2015 applies to the 2022 F-Super Duty 10R140 Automatic Transmission- Harsh/Delayed Engagement And/or Harsh/Delayed Shift - D64.02 Technician Responsibilities: Not Following latest service publicaitons or repair procedures - <i>I don't think that the testimony supports this - see the RO "Tech 2070 from previous repair order #13213 Following TSB 22-2015."</i>	RO = Exhibit J-05 Vol. 2 - 002788 (FORD0029160) [pdf p. 864]
24	0000013339	E	Transmission heat exchanger replacement is not supported by the comments provided; duplicate labor time; 3.5 hours of actual time claimed for tear down and inspection of the transmission was not necessary	113-116	FORD0000119-122	FORD0029136-29246	\$12,534.97	13339 - E	"Disallow \$219.31 in parts and 2.0 hours of labor related to the transmission heat exchanger portion of this repair." "Disallow 3.5 hours of labor." Total \$219.31 parts; 5.5 hours of labor (\$1,210.00)	\$11,105.66	Correct	
25	0000013401	B	Repair order does not include the required Cost Cap	126-128	FORD0000132-134	FORD0029548-29599	\$4,163.13	13401 - B	"Due to the missing Cost Cap, all repair costs about the \$2,500 threshold for automatic transmissions is disallowed." Total Cost Cap not subject to proposed chargeback (\$2,500.00)	\$2,500.00	Correct	
26	0000013471	A	The 4.0 hours for additional diagnosis time is not supported by the technician comments provided	139-141	FORD0000145-147	FORD0030568-30611	\$1,351.00	13471 - A	"Disalow [sic] 4.0 of unsupported labor." Total 4.0 labor hours (\$880.00)	\$471.00	Correct	
27	0000013507	B	Cost Cap is missing; since repair total is above the threshold, a Cost Cap is required	145-147	FORD0000151-153	FORD0031011-31142	\$5,791.39	13507 - B	"Disallow the repair cost about the threshold of \$1,500." Total Cost Cap not subject to proposed chargeback (\$1,500.00)	\$1,500.00	In addition to the Total Cost Cap it goes on to state that "The Technician flushed the transmission cooler and lines as required. Replacement of the transmission cooler and heater are not required by the WSM or supported by the technician documentation provided. The main control and solenoid assembly replacement is not required or supported by the technician comments provided. There is no warrantable defect documented to justify replacement of these parts. Disallow \$790.65 for the unsupported parts and 2.9 hours of labor for the cooler replacement. Labor operation 7000AZJ is not supported by the technician comments. Disallow 0.3 for the unsupported labor."	

30	0000013897	B	Repair order doesn't include the required Cost Cap; duplicate labor time with the transmission overhaul; MTINSPECT is only to be claimed if the assembly cannot be repaired; no warrantable defect identified with either component	217-219	FORD0000223-225	FORD0034025-34065	\$5,790.13	13897 - B	"Due to the missing Cost Cap, all repair costs about the \$1,500 threshold for automatic transmissions is disallowed." Total Cost Cap not subject to proposed chargeback (\$1,500.00)	\$1,500.00	In addition to the Total Cost Cap it goes on to state that "The 2.7 hours claimed for transmission tear down and inspect is duplicative labor time with the transmission overhaul. The MTINSPECT is only to be claimed if the assembly cannot be repaired. Since the technician overhauled the transmission in this instance, the 2.7 hours is not reimbursable. Disallow 2.7 hours of labor. Torque converter, main control, and solenoid assembly replacement are not supported by the technician comments provided. There is no warrantable defect identified with either component. Metal contamination is not justification to replace these components under warranty. The torque converter was not flushed as required (see EVC04934). The main control can be overhauled and the solenoids can be cleaned. Disallow \$902.02 for these parts."	
31	0000013987	A	Improper labor operations were claimed; technician comments support transmission removal/installation and transmission overhaul - neither of these labor operations were claimed	242-243	FORD0000248-249	FORD0034025-34065	\$2,971.60	13897 - A	The stated reason cited by Ford does not support a potential chargeback; instead, "The value of the missed labor operations is \$4,004.00." Putnam could have claimed an additional \$4,004.00 for the repair but did not.	\$2,971.60	Correct.	
33	0000014009	A	Duplicate labor; labor time is included in the transmission removal and installation labor operation 7000A	246-247	FORD0000252-253	FORD0032824-32915	\$5,925.61	14009 - A	"Disallow 0.5 of duplicate labor." Total 0.5 labor hours (\$110.00)	\$5,815.61	Correct	
34	0000014009	E	With a hole in the block it is not necessary to perform the engine tear down for inspection; labor operation 6007E1 is not required or supported by the technician comments provided	247-249	FORD0000253-255	FORD0032824-32915	\$7,941.79	14009 - E	"Disallow 2.8 hours of labor time." Total 2.8 labor hours (\$616.00)	\$7,325.79	Correct	
35	0000014026	A	Technician comments don't have a technician ID associated with them; unsupported actual time; labor operations are not supported by the technician comments provided; engine air filter replacement is not warrantable; actual time claimed for tear down and inspection of the engine was not necessary - was replaced under the Low Time In Service Policy (LTIS)	251-253	FORD0000257-259	FORD0033009-33060	\$9,444.49	14026 - A	"Disallow 0.3 hour of unsupported actual time claimed." "Disallow 3.0 hours of unsupported labor time." "Disallow 1.5 hours of labor." "Disallow \$25.12 for the air filter." Total \$25.12 parts; 4.8 labor hours (\$1,056.00)	\$8,363.37	Correct	
38	0000014123	C	Repair order documentation does not include the required Cost Cap; main control and solenoid assembly replacement is not supported by the technician comments provided; no warrantable defect documented	279-281	FORD0000285-287	FORD0034483-34538	\$4,920.56	14123 - C	"Due to the missing Cost Cap, all repair costs above the \$1,500 threshold for automatic transmissions is disallowed." Total Cost Cap not subject to proposed chargeback (\$1,500.00)	\$1,500.00	It also states: "Main control and solenoid assembly replacement is not supported by the technician comments provided. There was no warrantable defect documented and not details to explain why the main control or solenoid assembly needed to be replaced. Disallow \$556.85. Labor operation 7000AZJ is not supported by the technician comments. Disallow 0.3 hour of unsupported labor time."	
40	0000014205	A	3.0 hours of actual time claimed for tear down and inspection of the transmission was not necessary; transmission assembly was replaced under the Low Time In Service (LTIS) policy	290-292	FORD0000296-298	FORD0034738-34778	\$8,627.09	14205 - A	"Disallow 3.0 hours of labor." Total 3.0 labor hours (\$660.00)	\$7,967.09	Correct.	
41	0000014207	A	Actual time included contacting the TAC and FSE - this portion of the actual time is not reimbursable under warranty	294-295	FORD0000300-301	FORD0034810-34851	\$990.80	14207 - A	"Disallow 1.0 of unsupported time." Total 1.0 labor hours (\$220.00)	\$770.80	It states: "The 1.3 hours of actual time included contacting the TAC and FSE. This portion of the actual time is not reimbursable under warranty. Disallow 1.0 of unsupported time."	

42	0000014270	C	Time records for repair line "C" is 0.09 hours - maximum actual time that can be claimed is 0.1 hour	308-309	FORD0000314-315	FORD0035755-35792	\$110.00	14270 - C	"Disallow 0.4 of unsupported actual time." Total 0.4 labor hours (\$88.00)	\$22.00	It states: "The time records for repair line C is 0.09 hours. The minimum actual time that can be claimed is 0.1 hour. Disallow 0.4 of unsupported actual time."	
43	0000014270	E	Time records for repair line "E" is 0.07 hours - maximum actual time that can be claimed is 0.1 hour	309-311	FORD0000315-317	FORD0035755-35792	\$110.00	14270 - E	"Disallow 0.4 of unsupported actual time." Total 0.4 labor hours (\$88.00)	\$22.00	It states: "The time records for repair line E is 0.07 hours. The minimum actual time that can be claimed is 0.1 hour. Disallow 0.4 of unsupported actual time."	
45	0000014365	B	Brake rotor replacement is not required based on the brake rotor thickness measurements documents; no warrantable defect identified with the brake rotors	336-337	FORD0000342-343	FORD0035443-35478	\$417.27	14365 - B	"Disallow \$137.98 in parts and .3 in labor related to the brake rotor replacement." Total \$137.98 parts; 0.3 labor hours (\$66.00)	\$213.29	Correct.	
47	0000014452	F	Labor operation 7000A50 to flush the torque converter is not required or supported by the technician comments provided	361-362	FORD0000367-368	FORD0036423-36492	\$6,898.98	14452 - F	"Disallow 0.2 hour of labor for the difference." Total 0.2 labor hours (\$44.00)	\$6,854.98	Correct.	
48	0000014487	B	Labor operations 7000A50, 7001D1 and AD are not supported by the technician comments provided; no mention of monitoring PIDS and no explanation provided to support the additional diagnosis time	368-370	FORD0000374-376	FORD0036889-36970	\$6,806.98	14487 - B	"Disallow 2.3 hours of unsupported labor time." "Disallow \$1,312.02 for these 2 parts." Total \$1,312.02 parts; 2.3 labor hours (\$506.00)	\$4,988.96	Correct.	
51	0000014784	A	Main control replacement is not supported by the technician comments provided; no warrantable defect documented and no details explaining why the main control needs to be replaced; labor operations are not supported by the technician comments provided; actual time claimed for additional diagnosis is not supported by the technician comments	423-425	FORD0000429-431	FORD0025619-25705	\$5,630.46	14784 - A	"Disallow \$505.36." "Disallow 0.7 hour of unsupported labor time." "Disallow 1.5 hours of unsupported labor time." Total \$505.36 parts; 2.2 labor hours (\$484.00)	\$4,641.10	Correct - It also states "There was no warrantable defect document and no details to explain why the main control needed to be replaced... There was no diagnostic procedures/test results provided to justify the extra diagnosis time."	
53	0000014880	A	Duplicate labor; labor time is included in the 21M01D claimed on repair line "D"	439-440	FORD0000445-446	FORD0037216-37261	\$1,080.11	14880 - A	"Disallow 1.8 hours of duplicate labor." Total 1.8 labor hours (\$396.00)	\$684.11	Correct.	
59	0000015092	A	Labor operation 8005D was not necessary; coolant leak from the weep hole can be verified with a simple visual inspection; in addition the customer had already identified the source of the leak	473-474	FORD0000479-480	FORD0039964-39997	\$2,399.01	15092 - A	"Disallow 0.4 hour of labor time." Total 0.4 labor hours (\$88.00)	\$2,311.01	It also states: "Labor operation 8005D was not necessary. The coolant leak from the weep hole can be verified with a simple visual inspection. In addition, the customer had already identified the source of the leak."	
60	0000015164	A	The 1.0 hours of additional diagnosis time is not supported by the technician comments provided	479-481	FORD0000485-487	FORD0040116-40153	\$910.47	15164 - A	"Disallow 1.0 of unsupported time." Total 1.0 labor hours (\$220.00)	\$690.47	It also states: "the 1.0 hours of additional diagnosis time is not supported by the technician comments provided. The extent of the diagnosis was to plug in a known good camera."	
64	0000015371	A	Main control replacement is not supported by the technician comments provided; no warrantable defect documented and no details explaining why the main control needs to be replaced	511-513	FORD0000517-519	FORD0038646-38723	\$5,465.95	15371 - A	"Disallow \$587.36." Total \$587.36 parts	\$4,878.59	It also states: "Main control replacement is not supported by the technician comments provided. There was no warrantable defect documented and no details to explain why the main control needed to be replaced."	
65	0000015371	B	Labor operation 2001B3T to machine the rear brake rotors is not supported by the technician comments provided	513-514	FORD0000519-520	FORD0038646-38723	\$471.22	15371 - B	"Disallow 0.6 hour of unsupported labor." Total 0.6 labor hours (\$132.00)	\$339.22	Correct.	
67	0000015455	A	The oil filter is included with the engine long block assembly; replacement of the oil filter is not required or supported by the technician comments provided	528-530	FORD0000534-536	FORD0041018-41069	\$11,536.77	15455 - A	"Disallow \$8.58 in parts." Total \$8.58 parts.	\$11,528.19	Correct.	
68	0000015481	A	Replacement of the upper intake manifold and oil filter adaptor are not supported by the technician comments; no mention of why the oil filter adaptor was replaced	531-533	FORD0000537-539	FORD0041105-41125	\$11,998.01	15481 - A	"Disallow \$279.14 for the unsupported parts." Total \$279.14 parts.	\$11,718.87	Correct.	

70	0000015794	A	The 1.0 hour of actual time claimed is not supported by the time records provided; total clock time for repair line "A" is 0.73 hour	565-566	FORD0000571-572	FORD0040288-40310	\$220.00	15794 - A	"Disallow 0.3 of unsupported actual time." Total 0.3 labor hours (\$66.00)	\$154.00	Correct.	
----	------------	---	--	---------	-----------------	-------------------	----------	-----------	---	----------	----------	--

Total \$244,116.47
\$111,709.18

Total \$132,407.29

Attachment 3

Putnam Ford Quote or Referenced Exhibit	Full Quote or Context	Why it is Misleading/Additional Context
<p>Mr. Vasquez discussed the shortfall in service capacity with Ms. Murphy and Mr. Gogolewski. However, Ford representatives never discussed with nor offered Putnam a Facility Supplement even though Putnam Ford claims this is a required component of all Ford franchise agreements. (Putnam Br. 10.)</p>	<p>Vasquez testified: Q. Okay. Did Mr. Gogolewski -- well, let me back up. Were there actually Fords being worked on at the time you brought Mr. Gogolewski to -- to the barn location? A. Yes, sir. Q. And did he advise you that you would need to request to add that location to your Ford franchise agreement? A. It was never brought up to me. The conversation was mainly about the necessity to move the Ford franchise to our current GMC showroom, which is where Ford wanted us to go to. And that -- that's -- that was the main topic of all of our conversations at that time. (Vasquez: 8/8/24, 88:3-17)</p> <p>Gogolewski further testified: Q. Was relocation -- relocating to a permanent facility, as promised by Putnam Ford, the methodology for resolving the shortfall in service capacity? A. Yes. From day one. (Gogolewski: 8/15/24, 118:17-21)</p> <p>Swann further testified: A. We initially met at the dealership, and then we took a walk touring several difference facilities. (Swann: 8/16/24, 96:2-3)</p>	<p>This is not a required component of an agreement. Putnam Ford never asked for or indicated it wanted a supplement to its existing location; the focus was, at all times, find an entirely new, larger, and better-suited facility. A short fall in service capacity was not the only reason Ford wanted Putnam to be in a different location, so a new complete facility was necessary for Putnam Ford to meet a number of outstanding obligations to Ford.</p>

<p>Mr. Owens and Ms. Crawford upgraded the warranty study to a warranty audit. Ms. Crawford agreed with Mr. Owens' recommendation to upgrade the warranty study to a warranty audit "immediately" and "almost instantaneously." (Putnam Br. 16.)</p>	<p>Owens testified: Q. Can you explain to the Judge the decision to do a warranty audit at Putnam, please? A. Sure. Due to the extensive amount and quantity of false claims that I felt were false, those claims were reviewed with management and confirmed to be false, f-a-l-s-e, claims. My recommendation from the warranty study, due to my findings, was to upgrade the warranty study to a warranty audit. Q. Was that decision made in a conversation between you and your supervisor? A. Yes. Q. Your supervisor being - - A. Sharita Crawford. Q. If you could describe that conversation for the Judge please. A. Fairly straightforward. Once we had false claims confirmed and a warranty study, we review those. Due to the false classification, I made the recommendation to upgrade the warranty study to a warranty audit. She immediately agreed. (Owens: 8/6/24, 127:9-128:4)</p>	<p>Putnam Ford argues that the decision to audit was not based on facts or information of a false claim, but based on pressure from Ms. Swann. It takes Mr. Owens's testimony out of context to suggest the rapidity in which he decides to conduct the audit is an indication of bad faith. But the full testimony shows that the decision to audit was made after careful investigation and a warranty study. Based on the facts learned though those efforts, Mr. Owens quickly decided to audit Putnam Ford because the evidence overwhelmingly showed an egregious practice of submitting false claims.</p>
--	---	--

<p>The parties' January 27, 2021, Letter of Understanding specifically instructed Putnam Ford to "take the necessary actions to increase service capacity in order to meet the sales and service growth targets An increase in service capacity may include, but is not limited to, installation of additional service stalls/bays onsite or offsite[.]" (Putnam Br. 21.)</p>	<p>The Letter states:</p> <p>"Dealer agrees to take the necessary actions to increase service capacity in order to meet the sales and service growth targets.... An increase in service capacity may include, but is not limited to, installation of additional service stalls/bays onsite or offsite, increasing service hours of operation or modification of service."</p>	<p>Putnam Ford points to the language of the Letter of Understanding to justify breaching its Sales and Service Agreement and falsely certifying claims. The fact that Putnam Ford needed to increase its service site capabilities did not give it the ability to unilaterally breach the Dealer Agreement, the Warranty and Policy manual, and make false certifications. Nor does the letter allow as much. Putnam Ford did have the obligation to increase stalls, but within the terms of its contract. Putnam Ford had to make a relocation request, which it never did.</p>
---	---	--

<p>At the time of her deposition, Ms. Karnes could not recall a single instance of when Ford declined to approve a non-customer facing service addition. (Putnam Br. 21-22.)</p>	<p>Karnes testified: Q. Ms. Karnes, can you give me any examples of reasons where Ford declined to approve a non-customer-facing service addition? A. Again, I just -- I believe that's not something I can speak to broadly. Every situation is case by case. Q. I understand that. But can you give me any examples that you recall? ... A. I can't think of like a specific instance right now. (P-158.049-050, 58:20-59:9) Q. Okay. And if a dealer request for non-customer-facing service is ultimately approved, who is -- who or what is making that final decision? A. The assistant secretaries of the company. Q. And have you ever provided a recommendation on whether or not a non-customer-facing service facility should be approved? A. That's not really my role. (R-353.013, 27:17-25.) Swann testified: Q. It -- it seems like you may have a preference that Putnam relocate to a permanent facility to resolve any capacity issues rather than a piecemeal solution, like temporary offsite service. How come? A. That is -- that is correct. Well, primarily because a little bit of the history -- like, we have, kind, of gone from place to place. I think that getting them to identify and make the plans and arrangements to move in a long-term facility is the best option for us. But I also have a concern that if we approve something, there is -- quite frankly, it could just stop there. We would never really, you know, get to the point of having the full facility. And -- and that is a concern of mine. (Swann; 8/16/24, 218:4-23)</p>	<p>Putnam Ford tries to suggest that Ford's refusal to approve a satellite service location was unusual and, therefore, done in bad faith. In truth, Karnes states that the question is "not something I can speak to broadly. Every situation is case by case." She "can't think of a specific instance right now." Part of the context here is that Putnam Ford specifically needed to relocate its entire dealership and had promised to do so, but had delayed for years. There was real concern that Putnam would not fulfill its contractual obligations if Ford allowed for these half-measures.</p>
--	---	---

<p>Mr. Gogolewski did not advise Mr. Vasquez Putnam Ford would need to add the Barn location to its franchise agreement. (Putnam Br. 22.)</p>	<p>Vasquez testified: Q. And did he advise you that you would need to request to add that location to your Ford franchise agreement? A. It was never brought up to me. The conversation was mainly about the necessity to move the Ford franchise to our current GMC showroom, which is where Ford wanted us to go to. And that -- that's -- that was the main topic of all of our conversations at that time. (Vasquez: 8/8/24, 88:9-17)</p> <p>Gogolewski testified: Q. Okay. And in the case of Putnam Ford, wouldn't you have responsibility for doing some sort of review of the proposed 885 location? A. Some. Q. And wouldn't you offer an opinion on whether or not Ford should approve the relocation to this location? A. No. (Gogolewski: 8/15/24, 53:17-54:2)</p> <p>Gogolewski further testified: Q. All right. That wasn't the only Ford vehicle that you observed inside the barn on -- on one of your visits; right? A. That was the only vehicle that I -- that I saw. (Gogolewski: 8/15/24, 83:10-14)</p>	<p>Of course he did not advise him as such. Mr. Gogolewski did not know that Putnam Ford was using the Barn and Nissan Facility to do Ford warranty work. (Ford Br. 51.)</p>
<p>For Ford, the Audit became “a TOP Priority Warranty Allegation” with “an urgent request to proceed” . (Putnam Br. 25.)</p>	<p>Owens testified: Q. Mr. Owens, I asked you why you characterized this as a top priority warranty allegation in your e-mail. A. Yes. Q. Why did you? A. Because it is an allegation. Q. Okay. But why was this one a top priority? A. All allegations are top priority. Being how the warranty study was going to be the following week, I needed the entry entered so I could have a proper tracking number for the warranty study. (Owens: 8/7/24, 47:4-14) (emphasis added)</p>	<p>The testimony shows that All allegations are top priorities not just this one. Putnam Ford overlooks these facts to falsely give the impression that Mr. Owens was somehow instructed or pressured to pursue Putnam Ford because of the Warranty Labor Rate Litigation.</p>

<p>Putnam Ford argues that Ms. Swann's testimony is untrustworthy and that she played a key role in planning and executing the alleged retaliation against Putnam Ford. In support of this argument, Putnam Ford points to a portion of Ms. Hughes's testimony in which she allegedly testified that, "[p]rior to the [January] visit, and before Ms. Hughes had ever been to the Putnam Ford dealership, Ms. Swann told Ms. Hughes she was concerned Putnam might be doing Ford service work at an unauthorized facility called the Barn, at Putnam Nissan." (Putnam Br. 26.)</p>	<p>Swann testified: Q. Prior to your visit, Ms. Swann said she was concerned that Putnam might be doing Ford service work at a building called the barn? A. There was generally concern that they might be doing -- service work at an unauthorized facility, that unauthorized facility being the barn at Putnam Nissan. Q. And when you say there was a concern, that was Ms. Swann's concern; right? A. I don't remember where the concern arose, but it was a concern that we discussed mutually. (Swann: 8/15/24, 136:22-137:7)</p>	<p>Ms. Hughes testifies the concern was not just Ms. Swann's, it was mutual. The fact that both individuals found this concerning indicates that the location of warranty repair work is a serious concern across Ford, and location was not just some pretext.</p>
--	---	---

<p>Ms. Karnes was unable to articulate any potential issues with the proposed co-location of the service operations with the Nissan franchise without revealing discussions with counsel; she did not articulate any reason why the proposed co-location might be a problem with the proposal. (Putnam Br. 38.)</p>	<p>Karnes testified:</p> <p>Q. So Ms. Karnes, you aren't able to speak to the potential issues regarding being co-located with the Nissan franchise without revealing discussions with counsel; is that accurate?</p> <p>A. Yes, it is.</p> <p>Q. And prior to those communications, you had no basis to having any concern about Ford service being dualled at the Nissan location?</p> <p>A. All dual facilities have to be approved. (Ex. P-158.035, 42:6-14.)</p>	<p>Ms. Karnes is franchising coordinator and could not speak to potential issues because it is not her role. (P-158.021 21, 27:21-28:4) She has never given a recommendation, she just communicates between the two parties, so she would not know in the routine course of business why there would be issues with a dual location. Putnam Ford is also urging the court to impermissibly draw an inference based on the invocation of privilege. (See Ford Br. 38, 40-41; Ford Closing Br. 21.)</p>
---	--	--

Putnam Ford cites to Ex. 142 for the premise that "[w]ithin days, on May 22, 2024, Respondent considered and denied Putnam's [May 17, 2024] request to utilize the former Putnam Nissan facility for satellite service operations. (Ex. P-142.) (Putnam Br. 39.)	The Letter states: "Additionally, there continues to be concern about Putnam Ford completing service work at a unauthorized location as I detailed in my previous letter from April 1st, 2024. Within this letter, we requested your confirmation that you took immediate corrective actions. No response has been provided beyond confirmation of receipt of the letter from yourself." (Ex. P-142)	Ex. P 142 does not suggest Ford considered and denied Putnam Ford's May 17, 2024 request to utilize the former Putnam Nissan facility for satellite service operations. Ford actually provided conditional approval of Putnam Ford's relocation request to the Putnam Nissan Facility. Ford simply asked for confirmation that work was not being done at a current unauthorized location. (See Ford Closing Br. 12; P-142.)
--	--	--

VIA EMAIL

LAW OFFICES OF GAVIN M. HUGHES
GAVIN M. HUGHES State Bar #242119
ROBERT A. MAYVILLE, JR. State Bar #311069
4360 Arden Way, Suite 1
Sacramento, CA 95864
Telephone: (916) 900-8022
E-mail: gavin@hughesdealerlaw.com

ATTORNEYS FOR PROTESTANT

New Motor Vehicle Board

Received
5-25-23

FILED

New Motor Vehicle Board

Date: 5-25-23

By: am

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-2826-23

PROTEST
[Vehicle Code Section 3065]

Protestant, KPAuto, LLC, dba Putnam Ford of San Mateo, a California limited liability company, qualified to do business in California, through its attorneys, files this protest under the provisions of California Vehicle Code Section 3065¹ 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 ("FMC"), distributes Ford products and is the franchisor of Protestant.

¹ All additional references to "Section" shall refer to the California Vehicle Code.

1 3. Protestant is represented in this matter by Law Offices of Gavin M. Hughes, whose
2 address and telephone number are 4360 Arden Way, Suite 1, Sacramento, California 95864; (916) 900-
3 8022.

4 4. By letter dated March 28, 2023, FMC advised Putnam it would conduct a Warranty Study
5 of Putnam Ford beginning on April 3, 2023. FMC subsequently advised by letter dated May 8, 2023, it
6 would conduct an audit of Protestant's warranty and parts operations (the "Audit").

7 5. During a meeting at Putnam Ford on May 24, 2023, FMC advised Protestant of the results
8 the Audit. The Audit purports to have examined 562 of a possible 2,153 repair orders for the time period
9 of June 2022 through February 2023. The Audit determined 552 claims to be subject to chargeback in
10 the amount of \$502,821.56.

11 6. The Audit was conducted in violation of Section 3065 (e)(1) because it was conducted in
12 a punitive and retaliatory manner in response to Putnam's Ford's 2021 Retail Labor Rate and Retail Parts
13 Rate requests made pursuant to Section 3065.2 as well as Putnam Ford's subsequent Section 3065.4
14 protest: PR-2759-21.

15 7. The Audit was also conducted in violation of Section 3065.2 (i)(2)(G), which makes it
16 unlawful for a franchisor to conduct a nonrandom audit in response to a franchisee seeking compensation
17 or exercising a right pursuant to Section 3065.2.

18 8. The majority of the proposed chargebacks are based upon the completion of warranty
19 repairs at an additional Putnam Ford service location not formally recognized by FMC. However, FMC
20 was aware of Putnam Ford's use of the additional Putnam Ford service location since at least March
21 2022. Moreover, Putnam Ford formally requested approval of the additional service location in October
22 2022—FMC ignored this request.

23 9. Putnam Ford filed a protest pursuant to Section 3065.4 on or about December 30, 2021.
24 The Hearing was tentatively scheduled to commence on April 12, 2023. However, at the time of the
25 March 8, 2023, Hearing Readiness Conference, the Board advised the protest would be assigned to the
26 Office of Administrative Hearings for the merits hearing. A tentative hearing date of September 18,
27 2023, is now on calendar.

28 ///

1 10. FMC used the delay of the merits hearing to conduct the Audit in an attempt to gain
2 leverage to be used to force Putnam Ford to either dismiss its Section 3065.4 protest or settle for an
3 amount lower than what is required by Section 3065.2.

4 11. Protestant alleges the claims identified in the Audit and proposed to be charged back are
5 neither false nor fraudulent.

6 12. Protestant alleges FMC both selected Protestant and conducted the Audit in an
7 unreasonable, punitive, and unfairly discriminatory manner.

8 13. Protestant alleges all repairs concerning the Audit claims were properly performed and
9 done in accordance with FMC's written warranty relevant to each claim. The warranty reimbursement
10 received was for work performed by Protestant in fulfilling FMC's warranty obligations to Ford vehicle
11 owners. The warranty reimbursement amounts paid by FMC to Protestant permit Protestant to train and
12 compensate its service staff, enabling Protestant to continue providing Ford warranty service to the
13 public.

14 Protestant and its attorneys desire to appear before the Board and/or its designated hearing officer
15 for the purpose of presenting oral and documentary evidence concerning the matters herein alleged.
16 Protestant estimates the hearing in this matter will take ten (10) days to complete.

17 WHEREFORE, Protestant prays as follows:

18 1. That the Board sustain this Protest and determine FMC failed to comply with the
19 requirements of Vehicle Code section 3065.

20 2. That the Board advise Respondent it may not offset or otherwise undertake to collect the
21 proposed chargeback until the Board issues a final order on the protest as provided for in
22 Section 3065(e)(5).

23 3. That a pre-hearing conference be set and the parties notified thereof.

24 4. That a mandatory settlement conference be set and the parties notified thereof.

25 ///

26 ///

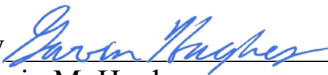
27 ///

28 ///

1 5. That Protestant be awarded such other and further relief as the Board deems just and
2 proper.

3
4 Dated: May 25, 2023

LAW OFFICES OF
GAVIN M. HUGHES

6 By 
7 Gavin M. Hughes
8 Robert A. Mayville, Jr.
9 Attorneys for Protestant
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **DECLARATION OF SERVICE BY ELECTRONIC MAIL**

2 I, Gavin M. Hughes, declare that I am employed in the County of Sacramento, State of
3 California, that I am over 18 years of age, and that I am not a party to the proceedings identified herein.
4 My business address is 4360 Arden Way, Suite 1, Sacramento, California 95864.

5 I declare that on May 25, 2023, I caused to be served a true and complete copy of:

6
7 ***Protest [3065]***

8
9 ***KPAuto, LLC, dba Putnam Ford of San Mateo***

10 ***v.***

11 ***Ford Motor Company***
12
13
14

15 By Electronic Mail:

16 Steven M. Kelso, Esq.
17 Gwen J. Young, Esq.
18 H. Camille Papini-Chapla, Esq.
19 Elayna Fiene, Esq.
20 April Connally, Esq.
21 Greenberg Traurig, LLP
22 1144 15th Street, Suite 3300
23 Denver, Colorado 80202
kelsos@gtlaw.com
youngg@gtlaw.com
papinichapla@gtlaw.com
elayna.fiene@gtlaw.com
april.connally@gtlaw.com

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

25 Executed this 25 May 2023 Sacramento, California.
26

27 
28 Gavin M. Hughes

PROOF OF SERVICE