

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

In the Matter of the Protest of:

KPAUTO, LLC, dba PUTNAM FORD OF SAN MATEO,

Protestant

v.

FORD MOTOR COMPANY, Respondent.

Protest No. PR-2759-21

OAH Case No. 2023050701

PROPOSED DECISION

Wim van Rooyen, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on September 18-21 and 25-28, 2023, by videoconference from Sacramento, California.

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

Steven M. Kelso, Elayna M. Fiene, and April C. Connally, Attorneys at Law, Greenberg Traurig, LLP, represented respondent Ford Motor Company (respondent).

Evidence was received and the record left open for submission of post-hearing briefs. After multiple briefing schedule extensions, briefing was completed, the record closed, and the matter submitted for decision on May 2, 2024.

GENERAL BACKGROUND

Pursuant to contract, authorized new motor vehicle dealerships (franchisees) must perform repairs to vehicles covered by the manufacturer's (franchisor's) warranty at no charge to the customer. In return, the franchisor must reimburse the franchisee for such warranty repairs, including the labor involved. Labor is reimbursed at a specified hourly warranty labor rate. California law generally requires that the warranty labor rate be equal to the franchisee's retail labor rate, the rate the franchisee charges its retail customers for repairs not covered by warranty.

Vehicle Code section 3065.2¹ provides a detailed mechanism for the franchisee to establish or modify its retail labor rate for purposes of determining the warranty labor rate. Summarized in broad terms, the franchisee submits to the franchisor a sequence of repair orders specified by statute and notifies the franchisor of the franchisee's requested retail labor rate calculated based on that submission. The franchisee calculates its retail labor rate by dividing the total labor charges from the "qualified repair orders" submitted by the "total number of hours that generated those charges."

¹ All further statutory references are to the California Vehicle Code, unless otherwise specified.

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. The statute excludes labor charges pertaining to specific types of repairs, including routine maintenance.

The next step is for the franchisor to evaluate the franchisee's requested retail labor rate using the franchisee's submission. If the franchisee's requested retail labor rate is substantially higher than the franchisee's current warranty labor rate, the franchisor has 30 days from receipt of the franchisee's initial notice and submission to request a supplemental set of repair orders. Specifically, the franchisor may request all repair orders closed within the period of 30 days immediately preceding, or 30 days immediately following, the set of repair orders initially submitted by the franchisee.

After the franchisor's evaluation, it may contest the franchisee's requested retail labor rate on the grounds that it is materially inaccurate or fraudulent. The franchisor must notify the franchisee of the contest within 30 days after receiving the initial notice and submission from the franchisee, or if the franchisor requested a supplemental set of repair orders, within 30 days after receiving the supplemental set of repair orders. As part of the franchisor's notification of the contest, the franchisor must provide a full explanation of all reasons for the allegation of material inaccuracy and/or fraud, evidence substantiating the franchisor's position, a copy of all calculations used by the franchisor in determining the franchisor's position, and a proposed adjusted retail labor rate.

If a franchisor fails to comply with section 3065.2's requirements, or if a franchisee disputes the franchisor's proposed adjusted retail labor rate, section 3065.4

authorizes the franchisee to file a protest with the New Motor Vehicle Board (Board) for a declaration of the appropriate retail labor rate. Until the Board renders a decision, the franchisor must pay the franchisee at the franchisor's proposed adjusted retail labor rate starting the 30th day after the franchisor's receipt of the franchisee's initial notice and submission.

STATEMENT OF THE CASE

This case involves a protest, Protest No. PR-2759-21 (Protest) under section 3065.4 by protestant, the franchisee, against respondent, the franchisor. The Protest was timely filed with the Board on December 30, 2021. Protestant challenges respondent's denial of protestant's request to increase its hourly warranty labor rate from \$177 to \$436.76 and respondent's proposed alternative rate of \$220.

PROCEDURAL BACKGROUND

The Parties

Protestant has been a Ford new motor vehicle dealership since January 27, 2021. It is presently located at 885 N. San Mateo Drive, San Mateo, California 94401. Protestant is an authorized Ford franchisee within the meaning of sections 331.1, 3065.2, and 3065.4. Kent Thomas Putnam is the majority owner of protestant through his company KBP Holdings, Inc. and also protestant's president. Alvaro A. Vasquez is a minority owner and general manager of protestant. Mr. Putnam owns several other new motor vehicle franchises in the San Francisco Bay Area. Together with protestant, those franchises comprise the Putnam Automotive Group.

Respondent is a manufacturer and distributor of Ford vehicles, with its headquarters located at 1 American Road, Dearborn, Michigan 48126. Respondent is a franchisor within the meaning of sections 331.2, 3065.2, and 3065.4.

Prehearing Motions

The case initially proceeded before the Board and its hearing officers for purposes of all discovery and law and motion matters. On May 18, 2023, the Board transferred the matter to the OAH to conduct a hearing on the merits, with the representation that discovery was completed and closed.

On August 11, 2023, the undersigned conducted a prehearing conference and heard oral argument on three briefed prehearing motions: (1) respondent's unopposed motion in limine regarding technology procedures during the virtual hearing to prevent any witness tampering (Technology Procedures Motion); (2) respondent's opposed motion in limine regarding evidence and argument that respondent engaged in adverse conduct towards protestant for filing its warranty labor rate increase request (Adverse Conduct Motion); and (3) respondent's opposed motion to compel protestant to produce documents responsive to respondent's request for production of documents no. 40, along with an accompanying request for sanctions (Discovery/Sanctions Motion). On August 15, 2023, the undersigned issued a written order resolving the motions. The ruling on each motion is briefly summarized below.

TECHNOLOGY PROCEDURES MOTION

Respondent's unopposed motion was granted.

ADVERSE CONDUCT MOTION

Respondent's opposed motion was granted on the basis that the Protest, even liberally construed, did not raise the issue of retaliatory adverse conduct. Thus, evidence of such conduct would have been irrelevant and potentially prejudicial. Additionally, it would have unduly consumed hearing time. Moreover, protestant had already filed a separate protest concerning respondent's alleged retaliatory adverse conduct. Consequently, protestant was precluded from offering any evidence or presenting argument at hearing that respondent engaged in retaliatory adverse conduct.

DISCOVERY/SANCTIONS MOTION

Respondent's opposed motion was denied on the basis that discovery was closed. The denial was without prejudice to any party's ability to object at hearing to evidence or argument concerning matters that should have been previously disclosed or produced in discovery.

Hearing Witnesses

At hearing, protestant offered the following witnesses: (1) Mr. Putnam; (2) Andrey Kamenetsky, the chief financial officer (CFO) and group operations manager for Putnam Automotive Group; (3) Jeffrey Korenak, director of implementation at FrogData, LLC (FrogData), the company that assisted protestant in preparing its warranty labor rate increase request; and (4) Edward "Ted" Stockton, an expert witness.

At hearing, respondent offered the following witnesses employed by respondent: John Michael Becic, a field operations analyst; Megan Murphy-Austin, a U.S. field operations manager; Allen Dale Kanouse, a repair process specialist; Maher

“Mike” Sweis, a repair improvement specialist; and LaShawne Swann, the San Francisco regional manager. Respondent also offered the testimony and declaration of David Alan Martinez, protestant’s former service manager, and the testimony of Suzanne Engel Heinemann, an expert witness. Additionally, respondent offered declarations by Yesse Cruz and David Rebuelta Lopez, technicians formerly employed by protestant.

Sanctions Issued at Hearing

At hearing, respondent moved for issue and evidentiary sanctions against protestant based on protestant’s failure to produce certain documents in discovery. After considering testimony, documentary evidence, and oral argument, the undersigned granted respondent’s motion for issue and evidentiary sanctions. Specifically, the undersigned entered a 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. Additionally, protestant was precluded from arguing or speculating as to the location where any repair reflected in any specific repair order in the submission was performed.²

² As discussed below, the location of repairs played no role in the resolution of this Protest. Thus, the sanctions imposed were inconsequential to the ultimate decision.

Post-Hearing Briefs

On January 18, 2024, respondent filed its post-hearing brief as well as proposed findings of fact and conclusions of law. These were respectively marked as Exhibits OO and PP, and admitted as argument.

On April 4, 2024, protestant filed its post-hearing brief as well as proposed findings of fact and conclusions of law. These were marked respectively as Exhibits 41 and 42, and admitted as argument.

On May 2, 2024, respondent filed its reply brief. It was marked as Exhibit QQ and admitted as argument.

ISSUES PRESENTED

- (a) Is protestant's determination of its retail labor rate materially inaccurate or fraudulent?
- (b) Did respondent otherwise comply with section 3065.2's requirements?
- (c) If the answer to the foregoing questions is yes, should an appropriate retail labor rate under section 3065.2 be declared?

BURDEN AND STANDARD OF PROOF

In a protest under section 3065.4, the franchisor bears the burden of proving that the franchisee's determination of the retail labor rate is materially inaccurate or fraudulent and that the franchisor complied with section 3065.2. (§§ 3065.4, subd. (a), & 3066, subd. (e).) Because neither section 3065.4 nor section 3066 articulates a

different standard of proof, proof must be by a preponderance of the evidence. (Evid. Code, § 115 [“Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.”].) A preponderance of the evidence means “evidence that has more convincing force than that opposed to it.” (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

FACTUAL FINDINGS

Over eight days, the parties presented voluminous documentary evidence and the testimony of numerous witnesses. Although all the evidence and the parties’ arguments were carefully reviewed and considered in accordance with applicable law, these factual findings are limited to those necessary to explain resolution of the Protest. All factual findings were established by a preponderance of the evidence.

Factual findings are organized under topic headings for readability only and not to indicate an exclusive relationship to an issue or topic denoted by the topic heading. Citations and references to the record are not exhaustive and instead intended to be examples of evidence relied upon to reach a factual finding. The absence of a citation generally means that the finding is foundational or uncontested, or an ultimate finding based upon other factual findings and reasonable inferences drawn from them.

Background Regarding Repair Orders

1. A repair order generally documents the work performed on a vehicle at a franchisee’s dealership. It contains the repair order number (RO No.), the customer’s name and contact information, the franchisee’s name and contact information, the service advisor’s name, the particular vehicle’s information, the date the repair order was opened (the date the franchisee accepted the vehicle from the customer for

diagnosis and/or repairs), and the date the repair order closed (the date that repairs were completed and the vehicle was ready for the customer to pick up). (Reporter's Transcript [RT] Vol. I, 52:7-53:10; see generally Ex. Joint-7.)

2. A repair order may contain multiple repair lines, each designated alphabetically (A, B, C, etc.). Each repair line corresponds to a particular customer concern and related diagnostics and/or repairs performed by the franchisee's technician(s). For each repair line, the repair order documents the customer concern, the diagnostics and/or repairs performed, whether they were warranty or customer-paid repairs, the associated labor charges billed to the customer, the associated parts charges billed to the customer, and the technician's individual assigned code. A repair order does not contain the labor rate used for work performed. (RT Vol. I, 53:11-57:17; see generally Ex. Joint-7.)

3. The accounting copy of a repair order contains additional information that does not appear on the customer copy of the repair order. (RT Vol. V, 948:15-949:19.) Specifically, for each repair line, the accounting copy lists the "A/HRS" or "actual hours," the time that the technician actually worked on the particular repair based on the technician's time records, and the "S/HRS" or "sold hours," the time that was billed to the customer on the particular repair. (RT Vol. I, 55:16-56:5.)

The Parties' Notices, Submissions, and Communications Preceding the Protest

PROTESTANT'S NOTICE OF WARRANTY LABOR RATE INCREASE REQUEST

4. In 2021, protestant's hourly warranty labor rate was \$177 per hour. (RT Vol. I, 45:1-3.) On July 15, 2021, protestant hired FrogData to assist protestant with preparing a warranty labor rate increase request to respondent. (Ex. 2; RT Vol. VII,

1473:3-1474:6.) FrogData is a “warranty uplift” vendor. As permitted by statute, it pulls data from the franchisee’s database and selects a set of repair orders most favorable to the franchisee to submit in support of a warranty labor rate increase request. (RT Vol. VII, 1353:1-1354:6, 1356:6-13, 1362:1-22.)

5. FrogData relies on the franchisee’s repair orders as source documents. (RT Vol. VII, 1370:14-1371:8.) It verifies that repair lines relate to qualified repairs and ensures that the data in the warranty labor rate increase request matches the repair order data. (RT Vol. VII, 1421:17-1422:1, 1431:11-1433:6.) It does not question the accuracy of the repair order data or how the franchisee determined the actual hours or sold hours reflected on repair orders. (RT Vol. VII, 1432:1-1433:6.)

6. In a letter dated July 28, 2021, and submitted electronically on August 24, 2021, protestant notified respondent of protestant’s request to increase its hourly warranty labor rate to \$436.76. (Exs. Joint-2 & Joint-4; RT Vol. I, 42:2-44:25.) The request was accompanied by accounting copies of 250 repair orders opened in the 90-day period from March 10 to June 7, 2021, containing 1,006 total repair lines (“Initial Submission”). (Ex. MM at B1265-B1268; RT Vol. I, 45:4-18.) From the Initial Submission, protestant identified 41 repair lines across 25 repair orders as involving qualified repairs. (Ex. Joint-3; Ex. MM at B1267-B1268.) Protestant computed that the total sold hours associated with those qualified repairs were 46.8, and the total labor charges associated with those qualified repairs were \$20,440.55. It then divided the total labor charges by the sold hours, which resulted in an average retail labor rate of \$436.76. (Ex. Joint-3; RT Vol. I, 65:24-66:15.)

RESPONDENT'S INITIAL COMMUNICATIONS WITH PROTESTANT REGARDING WARRANTY LABOR RATE INCREASE REQUEST

7. Ms. Murphy-Austin, then respondent's San Francisco Regional Manager, was notified of protestant's warranty labor rate increase request. (RT Vol. I, 174:9-20, 206:20-207:3.) She described her reaction as follows:

I felt that the request that was submitted was outrageous. To me, this rate was excessively high. It was almost double the next highest dealer in the nation and all of the surrounding dealers in the area. And I was very concerned that it was bad for customers, bad for Putnam Ford's reputation, bad for the surrounding Ford dealers' reputations, bad for Ford Motor Company's reputation. You know, I felt that it really just – this perception that car dealers price gouge, I just felt like it really reinforced that. This perception is out there.

(RT Vol. I, 189:5-17.) Additionally, she was "concerned that it was not a competitive rate in the market and that customers would be paying, you know, quite a bit more for a comparable repair at Putnam Ford versus other locations." (RT Vol. I, 189:18-23.)

8. Ms. Murphy-Austin spoke with Mr. Putnam and Mr. Vasquez, protestant's general manager, about her concerns. (RT Vol. I, 189:24-190:16, 219:9-16.) They assured her that "the price point that the customer would be paying would be comparable to the neighboring dealers despite the fact that they had a higher labor rate." (RT Vol. I, 190:2-16.) They explained that "the labor times would be lower which would then offset the higher labor rate and create a competitive price point in the

market. So, in fact, the labor and the sold labor hours don't reflect reality." (RT Vol. I, 191:22-192:16.) Based on that conversation, Ms. Murphy-Austin believed that protestant was "manipulating the hours to keep the [customer labor] charges competitive with the market" while ostensibly using a high retail labor rate. (RT Vol. I, 197:16-198:2.)

RESPONDENT'S REQUEST FOR AND RECEIPT OF SUPPLEMENTAL REPAIR ORDERS

9. On September 20, 2021, respondent requested a supplemental set of repair orders from protestant. (Ex. Joint-5; RT Vol. I, 46:14-47:9.) Respondent noted that protestant's "submission for retail labor rate . . . is substantially higher than its current warranty rate." (Ex. Joint-5.) As such, respondent requested "accounting copies of all repair orders closed within the period of 30 days immediately following the set of repair orders submitted" by protestant. (Ex. Joint-5.)

10. On September 27, 2021, protestant submitted the requested supplemental set of repair orders. (RT Vol. I, 47:12-16.) The supplemental set consisted of 168 repair orders opened in the 30-day period from June 8 to July 7, 2021, containing 667 total repair lines ("Supplemental Submission") (collectively with the Initial Submission, the "Submission"). (Ex. MM at B1265-B1268.) From the Supplemental Submission, 31 repair lines across 19 repair orders involved qualified repairs. (Ex. MM at B1267-B1268.)

RESPONDENT'S NOTICE OF CONTEST OF PROTESTANT'S REQUESTED WARRANTY LABOR RATE INCREASE

11. On October 26, 2021, respondent notified protestant that respondent contested the requested warranty labor rate increase. (Ex. Joint-6; RT Vol. I, 70:23-71:6.) The letter stated:

This letter is in response to your submission for a labor rate increase requesting additional reimbursement for labor rates at your dealership.

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

As an example of this, please refer to RO# 10239. This RO has two applicable repairs on it, an oil leak diagnosis for \$220.00 (Repair A – technician hours 0.23, customer hours

0.50) which was diagnosed as an engine rear main seal leak. The repair for this customer concern was to replace the rear main seal which involves removing and installing (R&I) the transmission and engine flywheel to replace the seal. The customer was charged \$1,442.50 for this representing 10.70 technician clocked hours, but a customer hour charge of just 3.2 hours. The Ford published service labor time for R&I of the transmission alone is 3.7 hours, so it is not clear what the 3.2 hours shown on this repair represents. At \$1,662.50 for 3.7 total hours, this customer repair would seem to show an effective labor rate of \$449.32 per hour. With the technician showing a total of 10.93 hours spent on the repair there is a considerable disconnect between the amount of work this repair required and what is being reported on the repair order copy.

Another example of this is RO# 10305 which shows a customer charge of \$1,062.68 for what appears to be an extensive diagnosis and repair with a reported 2.40 hours customer time, but the technician time for this was 12.74 hours. Based on this the effective rate on this repair would seem to be \$442.78.

If we review some of the repairs that are excludable under the California statutory procedure, we see the effective rates are more market-appropriate, example is RO# 10238 fuel filter replace \$148.01 (Repair A – technician hours 0.30,

customer hours 1.00 - \$148.01 effective rate). Reviewing RO# 10287 which was included in the group of RO copies from 30 days after the period of your original request, this RO shows two repairs the customer paid at \$87.50 and \$52.50 which show customer quoted times of 0.80 and 0.20 hours for a total of \$140.00 for an effective rate of \$140.00 per hour.

Additionally, some repairs simply seem intended to maximize the charge to a customer who is not knowledgeable of the automotive repair being performed. An example of this is RO# 10048 where the customer needed a battery and starter motor replaced. On this repair the customer was charged \$440.00 to diagnose the battery and starter motor issues (Repair A – technician hours 0.00, customer hours 0.00). The repair order then shows the battery replaced for \$104.21 (Repair D – technician hours 1.33, customer hours 0.50). And then finally the starter motor is replaced for \$336.50 (Repair E – technician hours 0.03, customer hours 0.70). Taken together, the customer was charged \$792.63 in labor (after a 10% discount) based on a quoted time of 1.2 hours (1.36 hours of technician time) for an effective labor rate to this customer of \$660.53 per hour (after discount).

If we review RO# 10251 a similar issue exists. The customer complained of a coolant leak and the repair is to replace a

thermostat and housing assembly. There is 5.42 hours of technician time shown on Repair B to diagnose the issue, but there is no charge to the customer. On Repair F where the issue is fixed, there is no technician time, but it shows 1.00 hours to the customer for \$641.06. This customer apparently paid a \$641.06 per hour labor rate. In other repair orders we are being told that the customer hours and customer labor charge prove a \$440 per hour rate, but the technician hours shown are often twice or more than the customer hours. This issue is present on a number of ROs such as: 10206, 10248, 10216, 10204, 10319, 10362, and others.

As documented on your repair order copies and noted above, many of the customer paid labor hours do not align with the work performed and the technician clocked hours often indicate a repair much different than the customer paid hours you are reporting. The examples above are just examples; the evidence substantiating Ford Motor Company's position contesting your request is all the documentation you submitted as part of your request, including the additional repair orders.

In sum, the requested rate seems not to be based on customer quoted hours, or technician recorded time, but rather on a desire to attempt to demonstrate an inordinately high labor rate of approximately \$440.00 per

hour, which is generally around double the rate being charged in the market by other dealers of any other brand. These disconnects aggravate a concern that many of the ROs you submitted are listed as duplicates, which may not be the final version. As described in this letter, given the inconsistency in rates being charged and the hours being shown, we have no alternative but to contest your calculation because the rate you calculated is materially inaccurate or fraudulent.

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

(Ex. Joint-6.) Thereafter, this Protest ensued.

The Submission's Data

RESPONDENT'S EVIDENCE

12. At hearing, respondent offered evidence of multiple inconsistencies, discrepancies, and irregularities in protestant's Submission. Respondent primarily

relied on the data in protestant's own repair orders as supplemented by the testimony of respondent's witnesses Messrs. Becic, Kanouse, and Sweis.

Mr. Becic has worked for respondent for 18 years and is currently a field operations manager. (RT Vol. I, 33:2-8.) His responsibilities include managing a team of analysts that process and analyze franchisee warranty labor rate increase requests in compliance with various states' laws. He has extensive experience in reviewing repair orders and addressing complex issues that may arise in validating rates requested by franchisees. (RT Vol. I, 37:19-39:10.)

Mr. Kanouse has worked for respondent since 2010 and is currently a repair process specialist. (RT Vol. II, 244:1-5, 259:9-261:15.) In previous roles, he was a consultant on warranty-related issues and a warranty auditor. (RT Vol. II, 259:9-261:15.) Before starting to work for respondent, he was a service manager at various dealerships for approximately 20 years. (RT Vol. II, 248:19-259:8, 273:15-20.) For a majority of his professional career, he has reviewed and analyzed repair orders on an almost daily basis. (RT Vol. II, 271:16-273:14.)

Mr. Sweis has worked for respondent since 2021 and is currently a repair improvement specialist. (RT Vol. III, 509:7-12, 516:7-19.) He has worked in the automotive industry for approximately 30 years: as a repair technician, repair shop owner, college instructor on automotive technology, technical repair specialist, and field service engineer assisting dealerships with difficult diagnoses and repairs. (RT Vol. III, 510:18-516:9.) He is a master-certified automotive technician. (RT Vol. III, 515:23-516:3.)

13. The specific inconsistencies, discrepancies, and irregularities identified by respondent include the following: (1) dividing protestant's customer labor charges by

the sold hours creates impossible hourly rates; (2) the large discrepancies between actual hours and sold hours; (3) customer labor charges associated with zero sold hours; (4) customer labor charges associated with zero actual hours; and (5) the presence of flat rate charges.³ Each is discussed separately below.

(1) Dividing Customer Labor Charges by the Sold Hours for Repairs Creates Impossible Hourly Rates

14. For numerous qualified repair lines in the Submission, dividing the associated customer labor charge by the number of sold hours results in an hourly rate extending past dollars and cents, often with infinitely repeating decimals. Examples include:

- RO No. 10049, Line A: The sold hours are 10.60 and the customer labor charge is \$4,654.89, resulting in an hourly rate of \$439.140566037735849 repeating. (Ex. Joint-7, at B1792.)
- RO No. 10206, Line E: The sold hours are 3.4 and the customer labor charge is \$1,503.52, resulting in an hourly rate of \$442.21176470588235294 repeating. (Ex. Joint-7, at B1468-B1469.)
- RO No. 10239, Line D: The sold hours are 3.2 and the customer labor charge is \$1,442.50, resulting in an hourly rate of \$450.78125. (Ex. Joint-7, at B1399-B1400.)

³ Any other inconsistencies, discrepancies, and irregularities identified by respondent were not established by a preponderance of the evidence.

- RO No. 10305, Line D: The sold hours are 2.4 and the customer labor charge is \$1,062.68, resulting in an hourly rate of \$442.783 repeating. (Ex. Joint-7, at B1868.)
- RO No. 10362, Line F: The sold hours are 3.5 and the customer labor charge is \$1,549.63, resulting in an hourly rate of \$442.751428571 repeating (Ex. Joint-7, at B1978-B1980.)
- RO No. 10362, Line I: The sold hours are 1.5 and the customer labor charge is \$650, resulting in an hourly rate of \$433.3333333333333. (Ex. Joint-7, at B1980-B1981.)

15. Mr. Kanouse explained protestant's computer software system that generates repair orders is pre-programmed to calculate a customer labor charge from the sold hours and hourly rate protestant enters for the particular repair line. (RT Vol. II, 343:25-344:16, 465:14-17, 470:1-16.) Messrs. Becic and Kanouse both agreed that it is impossible to enter an hourly rate that has fractions of a cent into that computer software system. Thus, the sold hours in the above repair line examples could not have generated the associated customer labor charges. (RT Vol. I, 81:25-86:5, 90:16-92:6, 93:15-94:10, & Vol. II, 321:2-9, 343:25-344:16, 349:4-351:11.)

16. Mr. Kanouse further clarified that the impossible hourly rates discussed above could not have resulted from a customer discount on the labor charge associated with a repair line. That is because the full amount of labor would still be billed on the repair line, with any discounted portion documented separately on the repair order. (RT Vol. II, 364:2-365:16, 494:12-14.)

(2) The Large Discrepancies Between Actual Hours and Sold Hours

17. For numerous qualified repair lines in the Submission, there are large discrepancies between actual hours and sold hours. Examples include:

- RO No. 10071, Line A: The actual hours are 3.2 and the sold hours are 0.5 (600%+ difference). (Ex. Joint-7 at B1748.)
- RO No. 10206, Line E: The actual hours are 7.38 and the sold hours are 3.4 (217% difference). (Ex. Joint-7 at B1468-B1469.)
- RO No. 10239, Line D: The actual hours are 10.7 and the sold hours are 3.2 (334% difference). (Ex. Joint-7 at B1399-B1400.)
- RO No. 10248, Line D: The actual hours are 3.8 and the sold hours are 0.5 (760% difference). (Ex. Joint-7 at B1380.)
- RO No. 10287, Line B: The actual hours are 0.77 and the sold hours are 0.2 (385% difference). (Ex. Joint-7 at B1831.)
- RO No. 10305, Line D: The actual hours are 7.69 and the sold hours are 2.4 (320% difference). (Ex. Joint-7 at B1868.)
- RO No. 10362, Line A: The actual hours are 3.62 and the sold hours are 1.0 (362% difference). (Ex. Joint-7 at B1977.)
- RO No. 10362, Line G: The actual hours are 6.6 and the sold hours are 0.6 (1,100% difference). (Ex. Joint-7 at B1980.)

- RO No. 10362, Line H: The actual hours are 11.37 and the sold hours are 0.6 (1,895% difference). (Ex. Joint-7 at B1980.)

18. Messrs. Becic and Kanouse observed that in the automotive service industry, the sold hours and actual hours are usually "close together." (RT Vol. I, 71:25-72:10 & Vol. II, 319:9-320:16.) Mr. Kanouse explained that for customer-pay work, a dealership usually aims for actual hours to be lower than sold hours:

When we are looking at technicians, we are really looking for them to try to be at least 100 percent efficient, if not overly efficient. Where they would be maybe 110, up to 120 percent efficient, that means they are beating that sold time in their actual repairs.

(RT Vol. II, 319:9-19.) Unexpected or unusual issues could arise during a repair. However, before performing the additional work, the dealership typically obtains the customer's approval for increased labor charges (which would involve corresponding increased sold hours) beyond the initial customer estimate. (RT Vol. II, 319:19-320:1.)

19. Thus, Messrs. Becic, Kanouse, and Sweis found the large discrepancies between actual hours and sold hours "absolutely not normal" and "very unusual." (RT Vol. I, 76:25-77:19, 78:18-79:8, 86:6-87:12, 92:7-93:14, 102:25-103:6, 106:7-19, Vol. II, 319:5-320:16, & Vol. III, 571:14-22, 575:1-23, 579:5-580:6.) Based on Mr. Becic's review of a sample set of the repair orders, the sold hours also did not match respondent's factory time guide for warranty repairs (factory time guide). (RT Vol. I, 109:18-110:12.) In his view, the "sold hours don't reflect reality at all" but in many instances appeared designed to produce an effective hourly labor rate of approximately \$440. As such, he

did not believe that the sold hours generated the associated customer labor charges. (RT Vol. I, 71:7-73:3, 85:8-94:10.)

(3) Customer Labor Charges Associated with Zero Sold Hours

20. For some qualified repair lines in the Submission, there are customer labor charges associated with zero sold hours. For example:

- RO No. 10071, Line A: Two technicians worked on this repair. Technician No. 2030 had actual hours of 1.18 and sold hours of 0, with an associated customer labor charge of \$81.12. Technician No. 2018 had actual hours of 2.02 and sold hours of 0.50, with an associated customer labor charge of \$138.88. (Ex. Joint-7 at B1748.)
- RO No. 10248, Line D: Two technicians worked on this repair. Technician No. 2035 had actual hours of 0.80 and sold hours of 0, with an associated customer labor charge of \$46.31. Technician No. 2036 had actual hours of 3.00 and sold hours of 0.50, with an associated customer labor charge of \$173.69. (Ex. Joint-7 at B1380.)

21. Mr. Becic noted that, at least as to Technician No. 2030 in RO No. 10071, Line A, and Technician No. 2035 in RO No. 10248, Line D, the sold hours could not mathematically have generated the associated customer labor charges. Zero multiplied by any number would be zero. Moreover, Mr. Becic observed that when one combines both technicians' sold hours and associated labor charges for each repair line

identified above, it curiously results in an effective hourly labor rate of \$440.⁴ Mr. Becic believed that this was not a coincidence, but instead an attempt by protestant to engineer an effective hourly rate of \$440. (See Ex. Joint-7 at B1380 & B1748; RT Vol. I, 99:25-106:6.)

(4) Customer Labor Charges Associated with Zero Actual Hours

22. For some qualified repair lines in the Submission, there are customer labor charges associated with zero actual hours. For example:

- RO No. 10036, Line E: The sold hours are 0.2, the actual hours are 0, and the associated customer labor charge is \$100.36. (Ex. Joint-7 at B1829.)
- RO No. 10036, Line F: The sold hours are 0.1, the actual hours are 0, and the associated customer labor charge is \$75.65. (Ex. Joint-7 at B1829-B1830.)
- RO No. 10049, Line A: The sold hours are 10.6, the actual hours are 0, and the associated customer labor charge is \$4,654.89. (Ex. Joint-7 at B1792-B1793.)
- RO No. 10277, Line A: The sold hours are 0.2, the actual hours are 0, and the associated customer labor charge is \$132. (Ex. Joint-7 at B1325.)

⁴ For RO No. 10071, (\$81.12 plus \$138.88 labor charges) divided by (0 plus 0.5 sold hours) equals \$440 per hour. (Ex. Joint-7 at B1748.) For RO No. 10248, (\$46.31 plus \$173.69 labor charges) divided by (0 plus 0.5 sold hours) equals \$440 per hour. (Ex. Joint-7 at B1380.)

- RO No. 10251, Line F: The sold hours are 1.0, the actual hours are 0, and the associated customer labor charge is \$641.06. (Ex. Joint-7 at B1372.)

Messrs. Becic and Kanouse noted that the zero actual hours listed for these qualified repair lines cannot be accurate because the technician must have spent at least some time to perform these billed repairs. (RT Vol. I, 61:25-63:2, Vol. II, 309:8-24.)

(5) The Presence of Flat Rate Charges

23. For some of the qualified repair lines in the Submission, protestant charged customers a flat fee of \$440 to diagnose a complaint. Instead of documenting the charge as a flat fee, protestant typically documented one sold hour corresponding to the diagnosis regardless of the actual time spent diagnosing the issue. (RT Vol. VII, 1468:21-1469:3.) Examples include:

- RO No. 10259, Line A: 1.13 actual hours, 1.00 sold hours, \$440 associated customer labor charge. (Ex. Joint-7 at B1352.)
- RO No. 10206, Line A: 1.46 actual hours, 1.00 sold hours, \$440 associated customer labor charge. (Ex. Joint-7 at B1467.)
- RO No. 10148, Line A: 1.96 actual hours, 1.00 sold hours, \$440 associated customer labor charge. (Ex. Joint-7 at B1583.)
- RO No. 10118, Line A: 0 actual hours, 1.00 sold hours, \$440 associated customer labor charge. (Ex. Joint-7 at B1647.)
- RO No. 10106, Line C: 1.97 actual hours, 1.00 sold hours, \$440 associated customer labor charge. (Ex. Joint-7 at B1674.)

- RO No. 10094, Line A: 0.25 actual hours, 1.00 sold hours, \$440 associated customer labor charge (Ex. Joint-7 at B1700.)
- RO No. 10091, Line A: 1.87 actual hours, 1.00 sold hours, \$440 associated customer labor charge (Ex. Joint-7 at B1705.)
- RO No. 10036, Line B: 0.85 actual hours, 1.00 sold hours, \$440 associated customer labor charge (Ex. Joint-7 at B1828.)

PROTESTANT'S EVIDENCE

24. At hearing, both Mr. Putnam, protestant's majority owner and president, and Mr. Kamenetsky, the CFO for Putnam Automotive Group, testified regarding the Submission's data. Each witness's pertinent testimony is summarized below. Protestant did not offer testimony from any of its service advisors, service managers, or technicians.

Mr. Putnam's Testimony

25. Mr. Putnam explained that protestant does not charge customers for customer-pay repairs based on actual hours of labor. (RT Vol. V, 1041:20-25.) That is because protestant must provide the customer with an estimate, which the customer must agree to pay before repair work is performed. (RT Vol. V, 1042:10-17.)

26. Mr. Putnam testified that he instructed protestant's service manager and service advisors to implement the following policy for customer-pay repair pricing: the service advisor first looks up the hours for the particular repair suggested by respondent's factory time guide and enters those hours as the sold hours for the repair line. The sold hours are then multiplied by an hourly rate of \$440 to generate the associated customer labor charge. (RT Vol. V, 1042:18-1043:13.) According to Mr.

Putnam, the policy was designed to ensure pricing uniformity by using the factory time guide for both warranty and customer-pay repairs. (RT Vol. V, 1045:24-1047:4.)

27. However, Mr. Putnam acknowledged that the sold hours in the Submission did not always match respondent's factory time guide. (RT Vol. V, 1124:3-24.) He admitted that service advisors had discretion to change the sold hours for repairs, although he "would expect that 440-an-hour labor rate to hold." (RT Vol. V, 1124:22-1125:4.)

28. Mr. Putnam could not explain the impossible hourly rates extending beyond dollars and cents, nor the customer labor charges associated with zero sold hours or zero actual hours in the Submission. (RT Vol. V, 1130:7-1147:10.) At the end of his testimony he was asked:

Sir, isn't it true that your instructions, your plan, that your service advisors and your service manager at Putman Ford use the Ford time guide for [sold] hours and apply a rate of 440 to it – turns out that didn't actually happen, true?

Mr. Putnam answered: "True." (RT Vol. V, 1147:11-16.)

Mr. Kamenetsky's Testimony

29. Mr. Kamenetsky also initially testified that protestant priced labor on customer-pay repairs by multiplying the sold hours based on respondent's factory time guide by an hourly rate of \$440. (RT Vol. VII, 1467:20-1468:1.) However, he later testified that service advisors were not required to use respondent's factory time guide: "The closest thing that they use is they'll refer to the factory time if they're not

sure on a repair, but they are not required to use that on customer pay.” (RT Vol. VII, 1544:10-1545:12.)

30. Mr. Kamenetsky also posited that some of the impossible labor rates in the Submission could have resulted from discounts protestant provided and manually entered on the labor charge for a particular repair. Such discounts may have been given to compensate for increased parts costs, thereby allowing protestant to adhere to the total customer estimate for labor and parts. (RT Vol. VII, 1598:2-1601:8.) However, Mr. Kamenetsky acknowledged that his theory was “speculation” and that he was perhaps “not the best person to testify to this.” (RT Vol. VII, 1599:13-17, 1600:11-16.) He never worked as a technician, service advisor, or service manager. (RT Vol. VII, 1502:22-1503:2.) He did not have knowledge of how the repair order system “actually works from an input side.” (RT Vol. VII, 1509:16-1510:18.)

Expert Opinions

RESPONDENT’S EXPERT - SUZANNE ENGEL HEINEMANN

31. Ms. Heinemann obtained her bachelor’s degree in business administration with a concentration in finance from the College of William and Mary in 1994. (Ex. MM at B1291.) She has nearly 30 years of experience as a forensic accountant and economic consultant across a variety of industries. (RT Vol. V, 875:10-20, 882:22-891:22, 893:23-897:11; Ex. MM at B1291.) As a forensic accountant, she analyzes business records such as repair orders and financial statements to find trends and reach conclusions. (RT Vol. V, 882:1-21, 904:4-905:12.) She is a Certified Public Accountant (CPA) in California and accredited in business valuation through the American Institute of Certified Public Accountants. (RT Vol. V, 876:12-877:16, 881:5-25; Ex. MM at B1291.)

32. Ms. Heinemann has worked extensively on cases involving the automotive industry for over 15 years, mostly analyzing dealership operations in various dealer/manufacturer disputes. (RT Vol. V, 891:23-892:22.) She has testified in about 15 cases in state and federal courts, and has been deposed in about 30 cases as an expert witness. (RT Vol. V, 898:15-23, 899:12-900:4; Ex. MM at B1292-B1301.)

33. Respondent retained Ms. Heinemann to provide expert analysis regarding protestant's warranty labor rate increase request and Submission within the statutory framework of section 3065.2. Additionally, she was asked to calculate an appropriate retail labor rate based on the Submission. (RT Vol. V, 875:21-876:8; Ex. MM at B1255.) As part of Ms. Heinemann's analysis, she reviewed extensive documents, including section 3065.2, the Submission, communications between protestant and respondent regarding the warranty labor rate increase request, protestant's financial statements, and transcripts from depositions taken in this matter. (RT Vol. V, 901:23-903:7.) Additionally, she spoke with several of respondent's employees, including Messrs. Becic and Sweis. (RT Vol. V, 903:8-904:3.)

34. Ms. Heinemann prepared an expert report dated February 10, 2023, and also testified as to her analysis and opinions at hearing. (Ex. MM.) In both her report and testimony, Ms. Heinemann identified serious concerns with the Submission's data from a forensic accounting perspective.

35. As an initial matter, she observed that protestant provided repair orders *opened* in the 90-day period from March 10 to June 7, 2021 for the Initial Submission, and repair orders *opened* in the 30-day period from June 8 to July 7, 2021 for the Supplemental Submission. However, based on her review of section 3065.2, Ms. Heinemann believes protestant was required to submit repair orders *completed or closed* within those respective time periods. Because some repair orders were closed

but not opened within those time periods, the Submission is missing those repair orders. Due to the missing data, Ms. Heinemann could not determine the impact the missing repair orders had on the overall Submission and calculation of the retail labor rate. (See RT Vol. V, 922:15-932:2; Ex. MM at B1265-B1266.)

36. Additionally, Ms. Heinemann articulated several reasons why she believed the Submission's sold hours were not an accurate measure of the hours that generated the labor charges for qualified repairs. (RT Vol. V, 933:6-934:21, 940:17-21.)

First, for numerous qualified repair lines in the Submission, dividing the customer labor charges by the sold hours for repairs creates impossible hourly rates. (RT Vol. V, 935:1-24.) Ms. Heinemann observed:

So if you think about the mechanics of a repair order, it is nearly impossible to imagine that the total charges are sort of mathematically derived from an application of the sale hour times a rate that is, you know, something repeating out to the seventh decimal place . . . It is a clear indication that the – that the sale hour is really an after-the-fact metric. It is a hypothetical that is in the repair order that is independent of the total charges.

(RT Vol. V, 935:15-936:8.) Consequently, Ms. Heinemann concluded that the sold hours did not generate the customer labor charges. Instead, she believed they were likely entered after the fact to derive an hourly retail labor rate as close to \$440 as possible. (RT Vol. V, 933:6-22, 935:1-938:3, 940:17-21; Ex. MM at B1276-B1277.)

Second, for some qualified repair lines in the Submission, there are customer labor charges associated with zero sold hours. (RT Vol. V, 933:6-22, 937:7-19; Ex. MM at B1276-B1277.) Ms. Heinemann noted:

So what I indicated in my report was that, you know, there are instances where sale hours are zero, yet there are total charges, right? So that is a clear indication that sale hours in the [repair order] system are independent of total charges, right? You mathematically cannot have zero hours and still get total charges if those two are related to each other.

(RT Vol. V, 937:13-19.) Thus, the presence of customer labor charges associated with zero sold hours reinforced her conclusion that the Submission's sold hours did not generate the customer labor charges. (RT Vol. V, 937:20-938:3, 940:17-21.)

Third, for numerous qualified repair lines in the Submission, there are large discrepancies between actual hours and sold hours. (RT Vol. V, 933:23-934:2; Ex. MM at B1274-B1277.) Based on her discussions with Messrs. Becic and Sweis, Ms. Heinemann understood that such large discrepancies are unusual. (RT Vol. V, 941:1-10.) She explained:

So when there is such a vast difference with sale hours, it really causes that concern that, like, well, then what are sale hours? Are they a hypothetical benchmark for what it should take? Is it something to effectuate a 440 rate? I mean, . . . it is this underpinning of something is wrong. There is not a lot of credibility to sale hours if they don't

relate to or are even close to on balance the amount of actual time the dealership is spending to repair vehicles.

(RT Vol. V, 941:11-20.) When asked to explain what a sold hour is, Ms. Heinemann stated:

I don't know what an S hour is. I know it is a sold hour. I think – I think of it as a hypothetical. It could be a hypothetical benchmark of potentially what the dealership would like to accomplish it for. Frankly it is just one of two inputs – algebraic inputs to total charges, right? So total charges are whatever sale hours are times whatever rate. And it seems to me that – I have concerns about the manipulability of sale hours as well [as] the manipulability of the rate if, at the end of the day, the only information that we know to be totally accurate is the amount the customer paid and, where it is logged, the technician hours on the vehicle.

(RT Vol. V, 941:21-942:9.) Ms. Heinemann further observed that, unlike actual hours and the customer labor charges, the sold hours do not “flow into” the financial data on the bottom of the accounting copies of the repair orders or into protestant's financial statements. Thus, she could not discern any internal controls with respect to the sold hours from an accounting perspective. (RT Vol. V, 934:8-17, 944:20-949:19.) Finally, she dismissed the possibility that the large discrepancies between actual and sold hours could be explained by protestant applying respondent's factory time guide hours as the sold hours in the Submission:

[A]pproximately 50 percent of the qualified lines, if you take the sale hours and you divide it into the labor charges, you get a rate that is not consistent with a whole dollar rate or a 440 rate. And so even if it were the guide hours that were being reflected in the sale hours in some cases then it would leave 50 percent of the cases where that really reasonably can't be true.

(RT Vol. V, 1001:15-1002:4.)

Fourth, for some of the qualified repair lines in the Submission, protestant charged customers a flat rate of \$440 to diagnose a complaint. Although there is nothing inappropriate about a flat rate itself, protestant typically documented one sold hour corresponding to the diagnosis regardless of the actual time spent diagnosing the issue. Ms. Heinemann found the inclusion of flat rate charges problematic because they are fixed fees that inherently have no relationship to the time spent on the work. Thus, for the flat rate repair lines, the sold hours cannot be said to generate the customer labor charges. (See RT Vol. V, 934:3-7; 943:8-944:24; Ex. MM at B1275-B1277.)

In sum, Ms. Heinemann believed that protestant's sold hours were either "arbitrary" or "otherwise unrelated to the actual work undertaken." In any event, they were independent of the customer labor charges. Accordingly, they were not an accurate reflection of the hours that generated the customer labor charges for qualified repairs. (Ex. MM at B1277.)

37. Ms. Heinemann also noted that the above concerns about the Submission's data were exacerbated by the small sample size of qualified repair lines

(72 qualified repair lines out of 1,673 total repair lines in the Submission, for approximately 4.3 percent of the population). (Ex. MM at B1268.) Although protestant cannot be faulted for a sample size specified by statute, a small sample size is more sensitive to errors and anomalies than a larger sample size, resulting in greater impact on calculations. (RT Vol. V, 910:10-912:3.)

38. Based on the foregoing, Ms. Heinemann opined that protestant's Submission and determination of its retail labor rate are materially inaccurate, primarily because the Submission's sold hours are not an accurate measure of the hours that generated the customer labor charges for qualified repairs. (RT Vol. V, 960:4-18.) She believed the inaccuracy was material because, from an accounting perspective, it would "really change the decision of users of the financial data." (RT Vol. V, 1002:10-1003:4.)

39. Notwithstanding her opinion concerning the Submission's material inaccuracy, Ms. Heinemann used her best efforts to calculate appropriate hourly retail labor rates for protestant based on various scenarios and assumptions. (RT Vol. V, 960:10-961:19; Ex. MM at B1285-B1286.) However, she acknowledged the underlying data's deficiencies and imperfections, including the lack of actual hours on several repair orders. Thus, even as a forensic accountant, Ms. Heinemann found it difficult to be "pinned down" to an exact appropriate rate. (RT Vol. V, 949:20-950:21, 971:5-975:7.) She does not fault respondent for proposing an adjusted retail labor rate without a calculation using data from the Submission:

I am accustomed to working with imperfect data, and I am just more comfortable with thinking about alternatives for when there are data anomalies, and, frankly, having to throw data out and seeing how sensitive a model is to that.

So does it make sense that they maybe threw their hands up? It makes sense to me because I am just in a position where I am always faced with imperfect data. That's just the way my work goes. And I work around that. So to the extent somebody doesn't have that level of confidence, that doesn't surprise me . . . I mean, I think that -- my sense is they take data and they calculate. And I think here there is a lot of reasons why I am here doing a broader forensic look to try to get to an answer that makes sense.

(RT Vol. V, 975:8-977:9.)

PROTESTANT'S EXPERT - EDWARD "TED" STOCKTON

40. Mr. Stockton obtained his bachelor's degree in economics from Western Michigan University in 1998 and his master's degree in agriculture and resource economics (with an emphasis in applied econometrics) from the University of Arizona in 2010. (Ex. 40 at A807; RT Vol. VI, 1160:1-1161:5, 1266:9-23.) He is not a forensic accountant and does not hold any professional certifications relevant to this matter. (RT Vol. VI, 1266:24-1267:15.)

41. Since 1998, Mr. Stockton has worked for The Fontana Group, Inc., an economic and quantitative consulting company: as an analyst from 1998-1999, a senior analyst from 2000-2005, a case manager from 2005-2011, director of economics services from 2011-2012, and vice president of economics services from 2012 to the present. (Ex. 40 at A807; RT Vol. VI, 1159:14-25, 1161:6-1167:22.) In his current role, he studies complex economic problems across multiple industries, including the automobile industry. He also consults on matters involving conceptual foundations and calculation

of economic harm. (Ex. 40 at A807.) He has testified as an expert in numerous state and federal cases involving the automobile industry. (Ex. 40 at A808-A826.)

42. Protestant retained Mr. Stockton to “review Ms. Heinemann’s report and, where appropriate, conduct analysis and set forth any opinions drawn from that analysis.” (Ex. 40 at A796.) Mr. Stockton indicated that, as part of his analysis, he reviewed Ms. Heinemann’s report, documents from two other cases, the Submission’s repair orders, and a data file of the Submission’s repair orders created by protestant. (Ex. 40 at A841.) Mr. Stockton prepared an expert report dated March 10, 2023, and also testified at hearing as to his analysis and opinions. (Ex. 40.)

43. During his testimony, Mr. Stockton appeared generally unfamiliar with the repair orders’ contents and data. It took him a long time to locate data on the repair orders and respond to related questions. (See, e.g., RT Vol. VI, 1282:24-1284:9; 1287:3-1288:10, 1291:23-1292:9, 1297:5-1298:16.) Mr. Stockton explained that he “mainly” relied on the data file prepared by protestant. Whenever the data file conflicted with the Submission’s repair orders, he generally deferred to the “downstream” file because it had the “[m]ost up-to-date information.” (RT Vol. VI, 1294:7-1299:1.)

44. Mr. Stockton criticized the emphasis Ms. Heinemann placed on the differences between actual and sold hours in the Submission:

Ms. Heinemann characterizes differences between [sold hours] and [actual hours] as “discrepancies” and as evidence of inaccuracy of [protestant’s] Submission. In consulting for many dozens of dealerships, I have never encountered a dealership whose management expected [sold hours] and [actual hours] to be the same . . . my overwhelming

experience is that dealership service operations provide estimates in advance of providing services and honor pre-communicated prices unless unforeseen circumstances arise during the repair. Differences between [sold hours] and [actual hours] are not discrepancies; they are differences.

(Ex. 40 at A799.) He further explained that:

So there is a dollar amount up front. There is going to be some variability once you get started. In general, with small variability, the dealer will stick with the [estimate's] dollar amount although the work provided might change. Big dollar, I would expect most dealers to call up and communicate with the customer about that.

(RT Vol VI, 1206:15-1208:20.) However, Mr. Stockton was unable to explain why the differences between actual and sold hours were so large for numerous qualified repair lines in the Submission. He never asked protestant what happened "on the ground" with those repairs. (RT Vol. VI, 1284:10-1294:6.)

45. Mr. Stockton disclaimed forming any opinion regarding whether protestant's Submission complied with section 3065.2 or whether the Submission was materially inaccurate. Nor did he offer an opinion regarding what an appropriate retail labor rate for protestant should be. (Ex. 40 at A796, A800-A802; RT Vol. VI, 1262:16-1264:9.)

LEGAL CONCLUSIONS

Applicable Law

SUBSTANTIVE LAW GOVERNING THE PROTEST

1. "In determining what constitutes a reasonable warranty reimbursement schedule . . . a franchisor shall compensate each of its franchisees for . . . labor at rates equal to the franchisee's retail labor rate . . . as established pursuant to Section 3065.2." (§ 3065, subd. (b).)

2. Under section 3065.2, a franchisee seeking to establish or modify its retail labor rate:

shall submit in writing to the franchisor whichever of the following is fewer in number:

(A) Any 100 consecutive qualified repair orders completed, including any nonqualified repair orders completed in the same period.

(B) All repair orders completed in any 90-consecutive-day period.

(§ 3065.2, subd. (a)(1).) 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).) Submitted qualified repair orders "shall

be from a period occurring not more than 180 days before the submission." (*Id.*, subd. (b).)

3. Along with its submission, the franchisee must notify the franchisor of its requested retail labor rate calculated based on the submission. (§ 3065.2, subd. (a)(4).) The franchisee calculates its retail labor rate by "determining the total charges for labor from the qualified repair orders submitted and dividing that amount by the total number of hours that generated those charges." (*Id.*, subd. (a)(2).) The statute excludes from the calculation labor charges pertaining to specific types of repairs, including routine maintenance. (See *id.*, subd. (c).)

4. If the franchisee's requested retail labor rate is substantially higher than its current warranty labor rate, the franchisor may request a supplemental set of repair orders within 30 days from receipt of the franchisee's initial notice and submission. (§ 3065.2, subd. (d)(4).) Specifically, the franchisor may request all repair orders closed within the period of 30 days immediately preceding, or 30 days immediately following, the set of repair orders submitted by the franchisee. (*Ibid.*)

5. The franchisor may then contest the franchisee's requested retail labor rate. The franchisor must notify the franchisee of the contest within 30 days after receiving the initial notice and submission from the franchisee, or if the franchisor requested a supplemental set of repair orders, within 30 days after receiving the supplemental set of repair orders. (§ 3065.2, subd. (d)(1).) Specifically:

[T]he franchisor shall submit no more than one notification to the franchisee. The notification shall be limited to an

assertion that the rate is materially inaccurate⁵ or fraudulent, and shall provide a full explanation of any and all reasons for the allegation, evidence substantiating the franchisor's position, a copy of all calculations used by the franchisor in determining the franchisor's position, and a proposed adjusted retail labor rate . . . After submitting the notification, the franchisor shall not add to, expand, supplement, or otherwise modify any element of that notification, including, but not limited to, its grounds for contesting the retail labor rate . . . without justification.

(*Ibid.*) If the franchisor requested supplemental repair orders, the franchisor may calculate a proposed adjusted retail labor rate based upon any set of the qualified repair orders submitted by the franchisee, provided that the franchisor generally complies with the same requirements applicable to the franchisee's initial submission. (See *id.*, subds. (d)(1) & (d)(5).)

⁵ Because section 3065.2 does not define "materially inaccurate," that term is given its "ordinary, everyday meaning." (*Halbert's Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 Cal.App.4th 1233, 1238.) "Accurate" is defined as "free from error," "conforming exactly to truth or to a standard," or "exact." (Merriam-Webster Dictionary, available at <https://www.merriam-webster.com/dictionary/accurate>, last visited May 16, 2024.) "The ordinary meaning of the adjective 'material' is '[o]f such a nature that knowledge of the item would affect a person's decision-making; significant; essential.'" (*County of Kern v. Alta Sierra Holistic Exchange Service* (2020) 46 Cal.App.5th 82, 101 [citation omitted].)

6. "If the franchisee agrees with the conclusions of the franchisor and any corresponding adjustment to the retail labor rate . . . no further action shall be required." (§ 3065.2, subd. (d)(2).) The new adjusted rate shall be deemed effective 30 days after the franchisor's receipt of the franchisee's initial notice and submission. (*Ibid.*)

7. "If a franchisor fails to comply with Section 3065.2, or if a franchisee disputes the franchisor's proposed adjusted retail labor rate . . . the franchisee may file a protest with the board for a declaration of the franchisee's retail labor rate . . ." (§ 3065.4, subd. (a).) Until the Board renders a decision, the franchisor must pay the franchisee at the franchisor's proposed adjusted retail labor rate starting the 30th day after the franchisor's receipt of the franchisee's initial notice and submission. (§ 3065.2, subd. (d)(3).)

8. "In any protest under [section 3065.4], the franchisor shall have the burden of proof that it complied with Section 3065.2 and that the franchisee's determination of the retail labor rate . . . is materially inaccurate or fraudulent." (§ 3065.4, subd. (a).) Additionally:

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

(§ 3065.4, subd. (b).)

CREDIBILITY EVALUATIONS

9. Under the Evidence Code, the trier of fact:

may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:

(a) His demeanor while testifying and the manner in which he testifies.

(b) The character of his testimony.

(c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies.

(d) The extent of his opportunity to perceive any matter about which he testifies.

(e) His character for honesty or veracity or their opposites.

(f) The existence or nonexistence of a bias, interest, or other motive.

(g) A statement previously made by him that is consistent with his testimony at the hearing.

(h) A statement made by him that is inconsistent with any part of his testimony at the hearing.

(i) The existence or nonexistence of any fact testified to by him.

(j) His attitude toward the action in which he testifies or toward the giving of testimony.

(k) His admission of untruthfulness.

(Evid. Code, § 780.)

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

Determination of the Issues Presented

(A) IS PROTESTANT'S DETERMINATION OF ITS RETAIL LABOR RATE MATERIALLY INACCURATE OR FRAUDULENT?

Materially Inaccuracy

11. Respondent has shown by a preponderance of the evidence that protestant's Submission and determination of its retail labor rate are materially inaccurate. Primarily relying on protestant's own repair orders, as supplemented by the detailed, thorough, and credible testimony of Messrs. Becic, Kanouse, and Sweis, respondent identified numerous inconsistencies, discrepancies, and irregularities in the Submission. Those include the impossible hourly rates that could not plausibly be entered into the repair order system; the large discrepancies between actual hours and sold hours; customer labor charges associated with zero sold or actual hours; and the presence of flat rate charges.

12. Ms. Heinemann, an experienced forensic accountant, persuasively explained why the above-mentioned inconsistencies, discrepancies, and irregularities are significant, would change the decision making of the data's users, and render the Submission materially inaccurate. She also credibly opined that the Submission's sold hours are therefore not an accurate measure of the hours that generated the customer labor charges for qualified repairs. By contrast, Mr. Stockton, who is not a forensic accountant, displayed at best limited familiarity with the Submission's repair orders. He primarily relied on and deferred to a data file prepared by protestant. He also disclaimed forming any opinion regarding whether the Submission was materially inaccurate.

13. Protestant contends that it used respondent's factory time guide to determine the sold hours for qualified repairs. However, Mr. Becic noted that the sold hours did not match respondent's factory time guide, at least for the sample set of the repair orders he reviewed. Additionally, Mr. Putnam acknowledged that the sold hours in the Submission did not always match respondent's factory time guide, and Mr. Kamenetsky testified that service advisors were not required to use respondent's factory time guide for customer-pay repairs. Moreover, even if protestant had used respondent's factory time guide to determine the sold hours, it does not explain the impossible hourly rates on numerous qualified repair lines.

14. Protestant posits that the impossible hourly rates could have resulted from discounts protestant provided and manually entered on the labor charges for particular repair lines. According to Mr. Kamenetsky, protestant may have offered such labor discounts to compensate for increased parts costs. However, Mr. Kamenetsky conceded that he was speculating and did not have knowledge of how the repair order system "actually works from an input side." Mr. Kanouse, who was a service manager at various dealerships for approximately 20 years and has extensive experience with repair orders, dismissed Mr. Kamenetsky's theory. Mr. Kanouse persuasively explained that, in the event of a labor discount, the full amount of labor would still be billed on the individual repair line, with any discounted portion documented separately on the repair order.

15. Protestant also argues that the differences between actual and sold hours in the Submission are normal and should be expected. However, Messrs. Becic and Kanouse explained that the sold hours and actual hours are usually "close together." Indeed, Mr. Kanouse observed that for customer-pay work, a dealership usually aims for actual hours to be lower than sold hours.

To be sure, Mr. Stockton testified that sold hours and actual hours are not expected to be exactly the same. That makes sense given that a franchisee is required to provide the customer with an upfront estimate. As Mr. Stockton explained, once the technician starts the repair, there might be some variability in the work and actual hours ultimately required. If that difference is relatively small, the franchisee will adhere to the original customer estimate. In this scenario, the actual hours may be a little more than, but still relatively close to, the sold hours.

However, if the difference in work and actual hours is anticipated to be large, Mr. Stockton would expect the franchisee to contact the customer to obtain approval for the anticipated increased labor charges. Mr. Kanouse also confirmed that this would be the appropriate procedure before additional work is performed. But in this scenario, the increased labor charges would naturally correspond to increased sold hours on the accounting copy of the repair order. Thus, one would still expect the actual hours to be relatively close to the sold hours after the customer's approval.⁶ Yet, Mr. Stockton was unable to explain why the differences between actual and sold hours were so large for numerous qualified repair lines in the Submission.

To the extent protestant's counsel contends that such large discrepancies, as opposed to minor differences, are normal in the industry, there is no credible record evidence to support that contention. "Argument by counsel is not evidence." (*Villacorta v. Cemex Cement, Inc.* (2013) 221 Cal.App.4th 1425, 1433.) Notably, protestant failed to present testimony by the very individuals that would likely be in

⁶ The customer sees neither actual nor sold hours on the customer copy of the repair order; only the total labor charge for a particular repair line.

the best position to explain the Submission's data – its technicians, service advisors, and/or service managers.

16. Respondent also presented extensive evidence and argument that protestant's Submission and determination of its retail labor rate are materially inaccurate because: (i) protestant performed some of the repairs in the Submission at an unauthorized location; and (ii) protestant's requested retail labor rate is unreasonable and wholly inconsistent with the market. However, given the conclusion that the Submission is materially inaccurate based on the numerous inconsistencies, discrepancies, and irregularities in the Submission's data itself, it is unnecessary to reach those alternative arguments.

17. Finally, the parties urge decision of a broader issue of statutory construction. Section 3065.2 refers to "hours that generated those charges" but does not define that phrase. It thus raises the question of whether the statute requires the use of actual or sold hours in its calculation. Respondent contends that actual hours are the hours that reflect the work done and thus generate the customer labor charges. Protestant contends that using sold hours is more appropriate because they are routinely used in the industry to price customer-pay repairs.

Interesting as that question may be, it is unnecessary to answer it to decide this Protest. "A simple yet fundamental principle of judicial restraint" can be stated as follows: "If it is not necessary to decide more to dispose of a case, then it is necessary *not* to decide more." (*Dobbs v. Jackson Women's Health Organization* (2022) 597 U.S. 215, 348 (conc. opn. of Roberts, C.J.) (emphasis in original).) Even assuming, without deciding, that sold hours are appropriate to use in a calculation under section 3065.2, the sold hours in the Submission here are materially inaccurate. Thus, the Protest can and should be resolved on that narrow ground alone.

Fraud

18. Respondent also contends that protestant's Submission and determination of its retail labor rate are fraudulent. According to respondent, the evidence shows that protestant intentionally manipulated the sold hours in the Submission to demonstrate an effective hourly retail labor rate of around \$440. Although that is one possible inference that could be drawn from the evidence, drawing it is not necessary to decide this Protest. Section 3065.2 requires respondent to demonstrate either material inaccuracy or fraud. Having decided that protestant's Submission and determination of its retail labor rate are materially inaccurate, it is unnecessary to reach the issue of fraud.

(B) DID RESPONDENT OTHERWISE COMPLY WITH SECTION 3065.2'S REQUIREMENTS?

19. Beyond showing material inaccuracy, respondent also demonstrated by a preponderance of the evidence that it otherwise complied with section 3065.2's requirements. Respondent timely filed its contest. It notified protestant of respondent's concerns about the Submission's underlying data, including that many of the sold hours did not seem appropriate for the associated repairs and were highly inconsistent with the actual hours clocked by the technicians. Respondent also noted that, rather than reflect reality, the sold hours appeared designed to demonstrate a high hourly effective labor rate. Respondent provided several examples from specific repair orders in the Submission.

20. To the extent that respondent later supplemented its contest with additional rationale and evidence, respondent had adequate justification. Respondent had a relatively short period of time to manually review and respond to 1,673 total

repair lines in protestant's Submission. As discussed above, the Submission contains numerous inconsistencies, discrepancies, and irregularities that require time and thorough analysis to detect. In any event, the supplemental rationale and evidence all derive from *protestant's own repair orders* and merely bolster the core issue raised in respondent's contest letter: the unreliability of the Submission's sold hours. Section 3065.2's requirements to contest a franchisee's requested retail labor rate are designed to ensure that a franchisee has fair notice of the basis of a franchisor's contest. It does not require a franchisor to offer a contest letter as detailed and thorough as the post-hearing briefing in this case. Indeed, such a requirement would render discovery and hearings in protests meaningless.⁷

21. Protestant broadly argues that its due process rights are violated by allowing respondent to supplement its initial contest letter. That argument rings hollow because the statute explicitly permits supplementation with justification. Moreover, protestant had the opportunity to conduct discovery and participate in a full evidentiary hearing to contest respondent's evidence and arguments. Stripped of bluster, protestant's due process argument is wholly devoid of substance.

22. Protestant also faults respondent for not providing a calculation in support of its proposed adjusted retail labor rate of \$220. However, Ms. Heinemann

⁷ The only exception is respondent's argument that protestant inappropriately provided repairs orders opened, as opposed to completed or closed, within the applicable time periods. That is an issue that should have been readily apparent from the face of the Submission, and there is inadequate justification for not timely raising it in the contest letter. Consequently, that issue was not considered in resolving this Protest.

persuasively explained that it was reasonable and understandable for respondent to decline to calculate a rate based on the materially inaccurate Submission. Even as a forensic accountant accustomed to dealing with imperfect data, she found it difficult to be “pinned down” to an exact appropriate rate. Thus, respondent ultimately proposed an adjusted retail labor rate that it believed was reasonable.

23. In sum, respondent demonstrated by a preponderance of the evidence that protestant’s Submission and determination of its retail labor rate are materially inaccurate and that respondent otherwise complied with section 3065.2. Thus, the only remaining question is whether an appropriate retail labor rate under section 3065.2 should be declared.

(C) SHOULD AN APPROPRIATE RETAIL LABOR RATE UNDER SECTION 3065.2 BE DECLARED?

24. Section 3065.4 confers discretion on the Board to calculate and declare an appropriate retail labor rate under section 3065.2. Here, given the material inaccuracy of the Submission’s data, that discretion is more reasonably exercised by declining to calculate and declare a rate. Although Ms. Heinemann used her best efforts to calculate an appropriate retail labor rate, she acknowledged the underlying data’s deficiencies and imperfections. Even as a forensic accountant, she professed difficulty and discomfort with confidently selecting an appropriate rate. Thus, the prudent course of action is to overrule the Protest and allow protestant to file a new warranty labor rate increase request that is not materially inaccurate.

25. Respondent requests that, upon overruling the Protest, the Board declare that protestant’s original hourly warranty labor rate of \$177 is still in effect and order protestant to reimburse respondent for all warranty labor hours paid in excess of \$177

per hour. That request is denied. Section 3065.4 only authorizes an award of the difference between what the franchisee has actually received and what the franchisee would have received if the franchisor had compensated the franchisee at the retail labor rate determined under section 3065.2. Because the Board declines to independently calculate an appropriate retail labor rate under section 3065.2, there is presently no difference to award under the statute. Additionally, under section 3065.2, subdivision (d)(2), if protestant had not filed the Protest, respondent's proposed adjusted retail labor rate of \$220 would have become effective. That is the rate that respondent has presumably been paying through the present. Thus, respondent has not shown by a preponderance of the evidence that it is entitled to the requested declaratory relief and/or reimbursement.

ORDER

Protest No. PR-2759-21 filed by protestant KPAuto, LLC, dba Putnam Ford of San Mateo, against respondent Ford Motor Company is OVERRULED.

I hereby submit the foregoing which constitutes my Proposed Decision in the above-entitled matter, as the result of a hearing before me, and I recommend this Proposed Decision be adopted as the decision of the New Motor Vehicle Board.

DATE: May 30, 2024

Wim vanRooyen

WIM VAN ROOYEN

Administrative Law Judge

Office of Administrative Hearings