

VIA EMAIL

New Motor Vehicle Board

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New Motor Vehicle Board

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ATTORNEYS FOR PROTESTANT

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

10 In the Matter of the Protest of:

11
12 KM3G INC., d/b/a PUTNAM KIA OF
13 BURLINGAME,

14 Protestant,

15 v.

16 KIA AMERICA INC.,

17 Respondent.
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PROTEST NO: PR-2803-22

**PROTESTANT'S POST-HEARING
OPENING BRIEF**

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1 Pursuant to the Board’s Order Establishing Post-Hearing Briefing Schedule, Protestant, KM3G Inc.,
2 d/b/a Putnam Kia of Burlingame (“Putnam”), hereby submits its Post-Hearing Opening Brief.

3 **INTRODUCTION**

4 The central issue to be determined in this Protest concerns the Board’s first interpretation of
5 Vehicle Code section 3065.2. The Board must decide how the plain language of Section 3065.2 should
6 be interpreted in regard to the phrase “the hours generating those charges.” Putnam uses the Kia factory
7 guide hours (“Labor Time Standards” or “LTS”) in pricing customer pay repairs. However, Respondent,
8 Kia America, Inc. (“Kia” or “Respondent”), argues actual technician hours should be considered to be
9 “the hours generating those charges.” Kia’s suggestion actual technician hours should be used in the
10 calculation mandated by Section 3065.2 is contrary to long-standing industry practice and the language
11 of the statute. Moreover, Business and Professions Code section 9884.9 requires dealers provide upfront
12 pricing to the customer before any repair is completed—it is impossible to legally use actual hours to
13 generate customer charges to service customers.

14 There are few factual disputes pertaining to the evidence introduced at hearing. The parties
15 would likely not be in litigation but for the legal question of how Section 3065.2 should be interpreted.
16 Specifically, in regard to Section 3065.2, subdivision (a)(2), which provides “[t]he franchisee shall
17 calculate its retail labor rate by determining the total charges for labor from the qualified repair orders
18 submitted and dividing that amount by the total number of hours that generated those charges.”

19 In this protest, it is Kia’s burden to demonstrate Putnam’s March 22, 2022, letter, requesting an
20 increase to its warranty labor reimbursement rate (“Submission”) to be materially inaccurate or
21 fraudulent. [Cal. Veh. Code, § 3065.4, subd. (a).] In attempting to satisfy this burden, Kia is limited to
22 the stated reasons set forth in its May 26, 2022, denial letter (“Denial”). [Cal. Veh. Code, § 3065.2,
23 subd. (d)(1).] The Denial sets forth three discrete reasons for Kia’s denial of the requested Submission
24 rate.

25 First, Kia claimed the Submission was calculated using “book times that are, in aggregate, far
26 less than the actual hours that generated the charges on the repair orders.” [Exh. J-6.001-.002.] There
27 is little to no factual dispute concerning the sold hours used by Putnam and the actual technician hours
28 documented on each qualified repair order (“RO”). The resolution of Kia’s first reason for denial is

1 dependent upon the Board’s interpretation of what the Legislature intended “those hours generating the
2 charges” to mean. Putnam presented evidence of the longstanding industry practice, as well as legal
3 obligation, of pricing customer pay repairs upfront based upon the use of hourly time guides. Kia failed
4 to present any compelling evidence that would justify finding the Legislature intended actual technician
5 hours to be those generating the charges for the purposes of Section 3065.2.

6 Second, Kia claimed the Submission failed to include repairs that should be considered to be
7 qualified repairs under Section 3065.2. [Exh. J-6.002.] Kia attached a spreadsheet to the Denial that
8 included a number of brake pad replacements and bulb replacements it alleged should have been included
9 in the Submission calculation as “qualified repairs.” However, Kia appears to have abandoned this
10 claim, conceding at hearing that brake pads and bulbs are consumable items that should properly be
11 considered to be routine maintenance repairs and excluded from the calculation required by Section
12 3065.2.

13 Third, Kia pointed to a RO that did not include a qualified repair and charged \$250 for 0.1 of an
14 hour. [Exh. J-6.002.] Kia argued this RO should have been excluded from the Submission calculation.
15 Putnam agrees and advised Kia of such, prior to the commencement of this Protest. [Exh. J-7.009.]
16 While the removal of this RO has minimal effect to the Submission calculation, Putnam agrees this RO
17 should not be a part of the properly calculated labor rate.

18 Finally, Kia alleged the Submission “is potentially fraudulent.” [Exh. J-6.002.] Kia failed to
19 present evidence of fraud. Instead, Kia attempted to introduce evidence of other Kia dealer’s labor rates
20 in comparison to Putnam’s calculated rate as evidence of an inference of fraud. There is no basis to
21 conclude any aspect of the Submission was fraudulent. The evidence shows Putnam’s use of Kia’s Labor
22 Time Standards (“LTS”) and the application of an hourly labor rate of \$440.

23 Section 3065.4 provides several options for how the Board might decide this Protest. The Board
24 must first determine whether Kia satisfied its burden of demonstrating it complied with the requirements
25 of Section 3065.2 and that the calculation in Putnam’s Submission was materially inaccurate or
26 fraudulent. [Cal. Veh. Code, § 3065.4, subd. (a).] However, the Board is not required to determine a
27 precise retail labor rate. A Board decision finding Kia failed to meet its burden to show the Submission
28 to be materially inaccurate or fraudulent would be sufficient to allow the parties to resolve all remaining

1 Putnam’s initial submission. [Exh. J-4; Joint Stipulation of Facts at ¶¶ 13-14; RT Vol. IV, 577:5-19; *see*
2 *also* RT Vol. IX, 77:21-78:4.] Putnam provided the supplemental repair orders on or about April 27,
3 2022. [Exh. J-5; Joint Stipulation of Facts at ¶¶ 15-17; RT Vol. IV, 579:4-13; RT Vol. VII, 132:21-24;
4 RT Vol. VIII, 62:4-8 and 63:2-5; RT Vol. VIII, 63:21-64:20 (Mr. Korenak testifying the 30 days of
5 additional ROs were from February 1, 2022 through March 2, 2022) and RT Vol. VIII, 72:11-19
6 (describing the remaining ROs on January 31, 2022 would also have been submitted through March 2,
7 2022); RT Vol. IX, 78:3-79:4.]

8 The repair orders provided with the original Putnam submission covered the time period of
9 November 3, 2021, through January 31, 2022 (the “90-Day Period”). [Exh. J-3.001.] The supplemental
10 repair orders cover the time period of February 1, 2022, through March 2, 2022.² [RT Vol. VIII, 63:21-
11 64:20.]

12 By letter dated May 26, 2022, Respondent advised Protestant it was denying Putnam’s requested
13 retail labor rate (“Denial”). [Exh. J-6; Joint Stipulation of Facts at ¶¶ 18-23; RT Vol. II, 171:12-14; RT
14 Vol. IX, 80:7-13.] In the Denial, Kia alleged Putnam’s requested retail labor rate was either materially
15 inaccurate or fraudulent. [Exh. J-6.001.] The Denial failed to allege whether the requested retail labor
16 rate was one or the other. [*See Id.*] Kia calculated a proposed adjusted retail labor rate of \$268.89. [Exh.
17 J-6.003; Joint Stipulation of Facts at ¶ 18.]

18 Respondent set forth three reasons for its decision in the Denial. First, Kia alleged Putnam’s
19 calculation should have been based upon actual technician hours instead of the Kia factory guide hours.
20 [Exh. J-6.001-.002; *see also* RT Vol. IV, 588:13-24 and 591:11-592:6 (Kia’s reference to “book times”
21 in the final paragraph of Exh. J-6 refers to the dealership’s listed sold hours).] Second, Kia alleged
22 certain routine maintenance items, such as brake repairs, bulb replacements, and battery replacements,
23 should have been included in Putnam’s calculated rate. [Exh. J-6.002.] Third, Kia identified a *single*
24 repair order that incorrectly listed sold hours.³ [Exh. J-6.002.] Kia’s Denial separately alleged Putnam’s
25 submission was potentially fraudulent because it was significantly higher than other Kia dealers’ rates.

26 _____
27 ² Also including the remaining ROs on January 31, 2022. [RT Vol. VIII, 72:11-19.]

28 ³ RO 10298 concerned a downpayment for diagnostic with parts on back order and further references
RO 10280 (Exh. R-210). [Exh. R-211.001.] Ultimately, the customer called to cancel the parts and
repair. [*Id.*]

1 [Exh. J-6.002; *see also* RT Vol. IV, 759:6-21 (The single RO, RO 10298 referenced above, also
2 constituted the same issue raised as Kia’s third reason Putnam’s Submission was potentially fraudulent).]

3 In response to Kia’s Denial, Putnam provided a detailed response explaining its position.⁴ [Exh.
4 J-7; Joint Stipulation of Facts at ¶¶ 24-25; RT Vol. VIII, 71:17-24; RT Vol. IX, 91:2-8.] First, Putnam
5 explained all labor rate submissions performed by its vendor, FrogData, LLC, rely on sold hours and not
6 actual hours. [Exh. J-7.003-.004.] Any RO may have a higher or lower actual hour entry compared to
7 sold hours depending on the speed or relative slowness of the individual technician and specific repair
8 factors, however, the retail customer does not participate financially in the actual time required for the
9 repair. [*Id.*] Repairs are quoted to the customer before work is actually performed and the dealership is
10 required to provide the customer a final price before any work is performed. [*Id.*] The cost of labor is
11 not generated by the actual time a technician requires to complete the repair. [*Id.*]

12 Second, Putnam objected to Kia’s inclusion of nine brake pad and rotor repairs or replacements
13 and brake fluid service that are routine maintenance and required to be excluded from the calculation of
14 Putnam’s retail labor rate. [Exh. J-7.006-.008.] Kia further included a light bulb replacement excluded
15 from the calculation of Putnam’s retail labor rate. [*Id.*] Kia also included three additional ROs in its
16 calculation of a proposed adjusted retail labor rate that should have been excluded under Section 3065.2,
17 including a refilling of transmission fluid and two battery replacements. [*Id.*]

18 Finally, Putnam agreed RO #10298 should have been excluded from the calculation of Putnam’s
19 retail labor rate because the RO concerned a prepayment for diagnostics where the repair was
20 subsequently cancelled. [Exh. J-7.009-.010.] Putnam proposed the removal of ROs 10298 and 10638
21 from the calculation as well as the removal of repair lines for replacements of bulbs, 12-volt batteries,
22 brake pads and rotors, and fluids from the calculation of Putnam’s retail labor rate. [Exh. J-7.012.] With
23 the proposed removals, Putnam’s retail labor rate would be \$436.51. [*Id.*]

24 **QUALIFIED REPAIR ORDERS IN DISPUTE**

25 Pursuant to the Board’s Order Establishing Post-Hearing Briefing Schedule, Paragraph (1)(b),
26 Putnam attaches hereto as Exhibit 1 a chart identifying the repair orders in dispute by RO number, a brief

27 _____
28 ⁴ Putnam also provided Kia a letter dated July 28, 2022, seeking a response to the June 15, 2022, letter
prior to filing a Section 3065.4 Protest with the Board. [Exh. P-109.001.]

1 description of each repair at issue, and a statement of why each repair order should or should not be
2 considered a “qualified repair order” as defined in subdivision (j) of Vehicle Code section 3065.2.

3 **RELEVANT LAW**

4 The statutory language of Sections 3065.2 and 3065.4 is clear and unambiguous. Section 3065.4
5 places the burden of proof with Respondent to demonstrate it complied with the requirements of Section
6 3065.2 and show Putnam’s Submission is fraudulent or materially inaccurate. [Cal. Veh. Code, § 3065.4,
7 subd. (a).]

8 The language from Section 3065.2, subdivision (h) plainly states the franchisor’s obligation to
9 calculate rates as set forth therein: “When a franchisee submits for the establishment or modification of
10 a retail labor rate, retail parts rate, or both, pursuant to this section, a franchisee’s retail labor rate or retail
11 parts rate *shall be calculated only using the method prescribed in this section*. When a franchisee submits
12 for the establishment or modification of a retail labor rate, retail parts rate, or both, pursuant to this
13 section, a *franchisor shall not use, or require a franchisee to use, any other method*, including, but not
14 limited to, any of the following[.]” [Cal. Veh. Code, § 3065.2, subd. (h) (emphasis added).] Section
15 3065.2, subdivision (a)(2) plainly sets forth the requirement to calculate a “retail labor rate by
16 determining the total charges for labor from the qualified repair orders submitted and dividing that
17 amount by the total number of hours that generated those charges.” [Cal. Veh. Code, § 3065.2, subd.
18 (a)(2).]

19 The Business and Professions Code section 9884.9(a) provides an “automotive repair dealer shall
20 give to the customer a written estimated price for labor and parts necessary for a specific job, except as
21 provided in subdivision (e). No work shall be done and no charges shall accrue before authorization to
22 proceed is obtained from the customer.” [Cal. Bus. & Prof. Code, § 9884.9, subd. (a).]

23 **ARGUMENT**

24 I. KIA FAILED TO COMPLY WITH THE REQUIREMENTS OF SECTION 3065.2.

25 Kia asserted three reasons it believed Putnam Kia’s requested labor rate was materially
26 inaccurate: (1) Putnam used book times (i.e., sold hours)⁵ which were “far less” than the actual hours in
27 _____

28 ⁵ Kia’s reference to “book times” in the final paragraph of Exh. J-6 refers to the dealership’s listed sold
hours. [RT Vol. IV, 588:13-24 and 591:11-592:6.]

1 the ROs; (2) Putnam’s calculation failed to include certain repair orders Kia believed to be “qualified
2 repair orders”; and (3) Kia contended RO 10298 should not have been included in the calculation. [Exh.
3 J-6.001-.002.] Kia also asserted three reasons it believed Putnam Kia’s requested labor rate was
4 “potentially fraudulent” because “(1) it is more than \$200 per hour higher than the highest rate paid by
5 KUS to any other Kia dealer in California; (2) it is approximately \$200 per hour higher than the hourly
6 retail rates charged by luxury dealerships in the Dealership’s own market; and (3) it is difficult to believe
7 that the Dealership charged a customer, and that the customer actually paid, \$250 simply for ordering a
8 part on service that was not performed.” [Exh. J-6.002.]

9 Each of Kia’s reasons set forth in the Denial fail for the reasons discussed below. [*See, infra*,
10 Part I.A-B (discussing Kia’s first reason for alleged material inaccuracy); Part I.C (discussing Kia’s
11 second reason for alleged material inaccuracy); Part II (discussing Kia’s third reason for alleged material
12 inaccuracy and Kia’s third reason for the Submission being potentially fraudulent [RO 10298]); Part III
13 (discussing Kia’s first and second reasons for the Submission being potentially fraudulent).] The record
14 evidence shows Kia failed to comply with Section 3065.2 when issuing the Denial.

15 **A. Kia incorrectly interprets Section 3065.2 to require the use of actual technician**
16 **hours in place of the sold hours historically used in the industry.**

17 There is no support for the proposition the Legislature intended “those hours generating the
18 charges” to refer to actual technician hours when enacting Section 3065.2. Well before the enactment
19 of Section 3065.2, the Legislature required all dealers to determine customer repair charges upfront—
20 before any work is performed. The automotive industry does not use actual hours to determine charges
21 to customers. It is unlawful in California to determine customer charges after the completion of a repair.
22 The customer must agree to the price, prior to any work being completed as required by California
23 Business and Professions Code section 9884.9 (a):

24 (a) The automotive repair dealer shall give to the customer a written estimated price for
25 labor and parts necessary for a specific job, except as provided in subdivision (e). No work
26 shall be done and no charges shall accrue before authorization to proceed is obtained from
27 the customer. No charge shall be made for work done or parts supplied in excess of the
28 estimated price, or the posted price specified in subdivision (e), without the oral or written
consent of the customer that shall be obtained at some time after it is determined that the
estimated or posted price is insufficient and before the work not estimated or posted is done
or the parts not estimated or posted are supplied. Written consent or authorization for an

1 increase in the original estimated or posted price may be provided by electronic mail or
2 facsimile transmission from the customer. The bureau may specify in regulation the
3 procedures to be followed by an automotive repair dealer if an authorization or consent for
4 an increase in the original estimated price is provided by electronic mail or facsimile
5 transmission. If that consent is oral, the dealer shall make a notation on the work order of
the date, time, name of person authorizing the additional repairs, and telephone number
called, if any, together with a specification of the additional parts and labor and the total
additional cost, and shall do either of the following:

6 [Cal. Bus. & Prof. Code, § 9884.9, subd. (a).]

7 It necessarily follows a labor time guide must be used to prospectively price customer pay repairs.
8 It is industry custom to use guide hours when pricing customer-pay repairs. [RT Vol. II, 338:4-7.] Kia
9 does not exercise any control over what Kia dealers charge for retail or customer-pay repairs. [RT Vol.
10 I, 81:16-20; RT Vol. III, 387:6-22.] Mr. Nardini further testified there are no restrictions on what time
11 guide Kia dealers use to price customer pay repairs. [RT Vol. I 81:16-24; RT Vol. II, 337:8-13; RT Vol.
12 III 387:20-388:3 (Dealers are free to use Kia's LTS times if they choose).] Moreover, Kia does not
13 require a dealer use the same guide hours for all the times it submits in support of a labor rate request.
14 [RT Vol. III, 457:14-18.] Putnam uses Kia's LTS times to price customer pay repairs. [RT Vol. V,
15 943:15-944:6; *see also* RT Vol. VI, 17:10-21.] Mr. Nardini confirmed Kia's LTS times are reasonable.
16 [Vol. II 336:1-7 and 337:14-17.]

17 In addition, Mr. Nardini testified he believes there are some Kia dealers who rely on the Kia LTS
18 for pricing customer-pay repairs besides Putnam. [RT Vol. II, 336:23-337:7.] Mr. Nardini further
19 admitted dealers are permitted to use LTS hours to price customer-pay repairs. [RT Vol. III, 388:1-3.]
20 For these reasons, Kia permits Putnam to price customer-pay repairs using the Kia LTS as the applicable
21 guide hours.

22 Putnam uses the factory guide hours to create uniformity across all the Putnam lines for pricing
23 repairs. [RT Vol. VI, 74:19-23.] Putnam sought to use factory time guides to price customer pay repairs
24 to achieve uniform pricing. [RT Vol. VII, 135:14-20.] Putnam could not achieve uniform pricing with
25 a third-party time guide because the manufacturer requires the dealership use the manufacturer's time
26 guide for warranty repair orders. [RT Vol. VII, 135:21-24.]

27 Putnam does not use actual hours to generate charges to retail customers and did not rely on
28 actual hours in its Submission. Jeffrey Korenak testified he has never relied on actual hours when

1 calculating a labor rate submission and factories have not requested actual hours be used in his
2 calculations. [RT Vol. VIII, 35:10-23 (Mr. Korenak testifying other than in a rebuttal, it is always sold
3 hours and labor charges).]

4 None of Kent Putnam’s franchises charge customers for customer pay repairs based on actual
5 hours. [RT Vol. VII 134:21-135:9 (Mr. Putnam explaining it is not possible to charge service customers
6 based on actual hours).] Putnam Kia does not use actual hours to charge a customer for a service repair—
7 the charge is based on the sold hours. [RT Vol. VI, 17:22-24.] Putnam’s service advisor would not
8 know the actual hours at the time of pricing the repair to the customer; the service advisor only becomes
9 aware of the actual hours after the repair is complete . [RT Vol. VI, 18:7-21; RT Vol. VI, 21:15-22:6;
10 *see also* RT Vol. VII, 134:21-135:9; RT Vol. IX, 82:14-83:10 (Mr. Kamenetsky testified Putnam does
11 not use actual time to generate charges because Putnam could not know the actual hours when quoting
12 a price to a customer and customers do not participate in the repair taking more or less time in terms of
13 the final cost of the repair).]

14 Vehicle Code section 3065.2 does not state the total charges for labor from the qualified repair
15 orders submitted be divided by the total number of actual hours or the total number of hours completing
16 the repair. [*See* Cal. Veh. Code, § 3065.2, subd. (a)(2).] Instead, the legislature indicated the calculation
17 should be performed using “the total number of hours that *generated* those charges.” [Cal. Veh. Code,
18 § 3065.2, subd. (a)(2) (emphasis added).]

19 The actual hours in Putnam’s ROs do not generate charges—Putnam’s sold hours generate the
20 charges. [RT Vol. V, 950:21-951:5 (Mr. Reyes testifying the training and efficiency of the assigned
21 technician does not impact the price of a repair to Putnam Kia’s customers); *see also* RT Vol. V, 946:18-
22 949:7 and 950:15-20 (Mr. Reyes describing the different levels of training for Kia technicians and
23 confirming not all technicians are equally capable and not all technicians could complete the same job
24 in the same amount of time).]

25 Moreover, dividing the amounts charged by Putnam by the actual hours in repairs yields vastly
26 different labor rates between ROs. Using the actual hours for the division for Count 1/RO 10158 in
27 Kia’s spreadsheet would generate a labor rate of \$75.99/hr [Exh. J-6.004 (Count 1) (\$250.00 divided by
28 3.29 actual hours)]; in contrast, for Count 18/RO 10426 in Kia’s spreadsheet, dividing \$220.00 by 0.1

1 actual hours calculates a labor rate of \$2,200.00/hr [Exh. J-6.004 (Count 18)]. [See also RT Vol. IV,
2 616:19-617:17.] Applying actual hours to calculate Putnam’s labor rate is inconsistent with how Putnam
3 generates charges to its customers.

4 Kia presented no evidence to support the use of actual technician hours when calculating a rate
5 pursuant to section 3065.2. If the Legislature intended the use of actual hours, it would have said so.
6 This is especially true in consideration of the preexisting legal obligation to provide upfront pricing and
7 the standard industry practice of using time guide hours to price customer pay repairs.

8 **B. Kia does not use actual hours to calculate retail labor rates.**

9 Kia’s response to the Putnam Submission is the only instance where Kia has attempted to use
10 actual hours to determine a dealer’s retail labor rate. [RT Vol. III, 412:25-413:17 and RT Vol. IV,
11 782:16-19 (Mr. Nardini is not aware of Kia using actual hours to calculate any other labor rate
12 submission.)] Mr. Korenak testified he has worked on approximately 120 to 125 labor rate submissions
13 to Kia with between 20 to 30 of those having been done on behalf of Kia dealers located in California—
14 none of these submissions were performed using actual technician hours. [RT Vol. VIII, 33:22-34:8.]
15 Moreover, Mr. Korenak has never seen another manufacturer calculate a retail labor rate using actual
16 hours as a matter of course. [RT Vol. VIII 35:10-23 (Mr. Korenak testifying other than in a rebuttal, it
17 is always sold hours and labor charges.)]

18 Kia was unable to offer evidence of any other California labor rate request made pursuant to
19 Section 3065.2, whereby Kia used actual technician hours to determine a retail labor rate. [RT Vol. III,
20 412:25-413:17 and RT Vol. IV, 782:16-19.]

21 **C. Kia failed to comply with the requirements of Section 3065.2 when it improperly**
22 **included routine maintenance repairs specifically excluded by the plain language of**
23 **the statute.**

24 Kia was aware routine maintenance repairs are to be excluded from the calculation required by
25 Section 3065.2. When reviewing the submission for Stevens Creek Kia in June 15, 2020, Kia’s warranty
26 operations manager, Rachelle Nelson, (in a similar position to Oscar Rodriguez who signed Kia’s denial
27 letter to Putnam) stated Kia agreed to exclude bulbs and batteries from a labor rate calculation. [Exh. P-
28 111.001; RT Vol. III, 406:18-407:24.] Kia agreed bulbs and batteries were maintenance items which
should be excluded from the calculation of a dealer’s retail labor rate. [Exh. P-111.001.] Vehicle Code

1 section 3065.2, subdivision (c)(3) expressly excludes bulbs and batteries from the calculation of a retail
2 labor rate as routine maintenance items. [Cal. Veh. Code, § 3065.2, subd. (c)(3) (unless they are provided
3 in the course of and related to a repair).] Nevertheless, Kia included these repairs when responding to
4 the Submission with its calculated alternative rate. [Exh. J-6.004-.005 (Counts 5, 36, and 37); *see also*
5 RT Vol. IV, 663:18-25 (Mr. Nardini agreeing the bulb replacement in Line C of RO 10181 was not a
6 warrantable repair at the mileage of the vehicle); Exh. R-216.001 and RT Vol. IV, 676:9-16 (showing
7 the only repair in RO 10646, Line A related to the replacement of a battery); Exh. R-217.003; RT Vol.
8 IV, 679:18-22 (the cause of the battery failure in RO 10655, Line D was due to wear and tear).]

9 Mr. Nardini testified it is Kia’s position brakes may be covered under its warranties depending
10 on what the customer reports and what the technician finds. [RT Vol. II, 176:3-14.] Mr. Nardini
11 admitted wear over time is not covered under Kia’s warranty, however, suggested if something else was
12 reported, the repair could be covered under warranty. [*Id.*]

13 In Kia’s denial letter, Kia listed as a second reason for denial that certain qualified repair orders
14 should have been included but were not included in the original submission. [Exh. J-6.002; RT Vol. IV,
15 596:3-21.] The repairs Kia contends in its Denial should have been included appear in red in the attached
16 spreadsheet. [Exh. J-6.004-.005; RT Vol. IV, 596:16-21.]

17 As noted above, bulbs and batteries are expressly excluded from a labor rate calculation as routine
18 maintenance repairs in Section 3065.2, subdivision (c). [Cal. Veh. Code, § 3065.2, subd. (c)(3)
19 (excluding from the calculation “[r]outine maintenance, including, but not limited to, the replacement of
20 *bulbs*, fluids, filters, *batteries*, and belts that are not provided in the course of, and related to, a repair”)
21 (emphasis added).] As discussed further below, the repairs at issue here concerning bulbs and batteries
22 did not involve the replacement of bulbs or batteries *in the course of and related to another warranty-*
23 *like repair.*

24 Brakes are a routine maintenance item as well, as described in Kia’s warranty manual. Brake
25 linings “are designed to wear out as part of the process of stopping your vehicle safely and consistently
26 while providing reasonable levels of noise and vibration during normal use.” [Exh. R-230.008.] “The
27 more wear factors which are present, the more rapid the wear. Resulting repairs and replacements of
28 linings *are not covered* by your warranty.” [*Id.* (emphasis added).]

1 Brakes are intended to wear out eventually. [RT Vol. III, 356:20-357:3.] Brakes stop a vehicle
 2 with friction. [RT Vol. III, 357:4-15.] Brake pads start at a thickness of 10 millimeters and can wear
 3 down to zero millimeters. [RT Vol. III, 358:10-16.] Brake pads are routinely replaced when they get to
 4 4, 3, or 2 millimeters. [RT Vol. III, 358:17-359:8.] Brake pads and shoes are identified in Kia's warranty
 5 manual as wear items. [Exh. R-230.011; RT Vol. III, 365:16-366:8.]

6 The following chart lists the bulb, battery, and brake repairs included in Kia's Exhibit J-6
 7 spreadsheet which should have been excluded from the calculation of Putnam's retail labor rate by
 8 Section 3065.2(c)(3) and the reasons they should have been excluded:

<u>Count</u> <u>in</u> <u>Exh.</u> <u>J-</u> <u>6.004-</u> <u>.005</u>	<u>RO</u> <u>Number</u>	<u>Corresponding</u> <u>RO Exhibit (if</u> <u>applicable)</u> <u>and type of</u> <u>repair</u>	<u>Reason Repair is Routine Maintenance</u>
3	10168	Exh. R-206 (Line A); Brake Repair	RO 10168, Line A indicates the technician confirmed the noise was coming from the right front brakes at 1 millimeter. [Exh. R-206.001-.002; RT Vol. IV, 635:9-22.] The repair replacing the brakes occurs on Line C of the RO. [RT Vol. IV, 635:24-636:7.] No amount of adjustment, polishing, or resurfacing would restore the brake pads described in RO 10168 from 1 millimeter all the way back to 10 millimeters. [RT Vol. IV, 639:2-640:9.] The repair in RO 10168, Line A concerned the replacement of brake pads and resurfacing of rotors due to ordinary wear and tear not covered by Kia's warranty. [RT Vol. IV, 640:10-16.]
5	10181	Exh. R-207.002-.003 (Line C); Bulb Repair	Line C of RO 10181 includes the bulb replacement with the actual hours for the labor involved in the replacement of 0.06 hours, sold hours of 0.06, and a charge of \$20.00. [Exh. R-207.002; <i>see also</i> Exh. J-6.004 (listing the same figures for the RO).] Line C of RO 10181 does not describe it is an HID bulb replacement. [RT Vol. IV, 652:25-653:12.] Bulbs wear away and burn out eventually. [RT Vol. IV, 653:22-654:2.] For this repair, the bulb was approximately two years old, and the vehicle had traveled 78,000 miles. [Exh. R-207.002-.003; RT Vol. IV, 654:8-21.] Kia's warranties exclude normal maintenance items, including but not limited to spark plugs, engine belts, filters, wiper blades and <i>bulbs</i> , except HID bulbs. [Exh. R-230.011; RT Vol. IV, 661:2-8.] Mr. Nardini agreed the bulb replacement in Line C of RO 10181 was not a warrantable repair at the mileage of the vehicle. [RT Vol. IV, 663:18-25.]

8	10263	Exh. R-209.001-.002 (Line B); Brake Repair	The repair in Line B of RO 10263 included resurfacing the rotors and replacing the front brake pads which were at 2 millimeters. ⁶ [Exh. R-209.001-.002; RT Vol. II, 190:10-19.] The RO states the cause for the customer concern was “wear and tear.” [Exh. R-209.001; RT Vol. IV, 642:3-8.] The brake pads had worn down from 10 millimeters down to 2 millimeters as the result of ordinary wear and tear. [RT Vol. IV, 643:11-20.] Mr. Nardini conceded the wear part—i.e., the brake pad replacement—would not be covered by warranty and the cause of the squeaks he identified in the RO were coming from the brakes. [RT Vol. IV, 644:2-14; <i>see also</i> RT Vol. IV, 644:25-645:4 (Mr. Nardini agreeing the outcome was the replacement of the pads and rotors).] Mr. Nardini agreed the brake pad replacement would not be covered by Kia’s adjustment warranty because no amount of polishing, resurfacing, or adjustment could bring a 2-millimeter brake pad back up to 10 millimeters. [RT Vol. IV, 644:15-24.]
9	10271	Brake Repair	During the hearing, Kia stipulated the repair associated with RO 10271 included in Exhibit J-6.004 should not have been included and stipulated to removing it from the calculation. [RT Vol. II, 192:3-19.] The repair description shows the repair concerned brake pad replacement and rotor resurfacing. [Exh. J-6.004.]
13	10334	Brake Repair	During the hearing, Kia stipulated the repair associated with RO 10334 included in Exhibit J-6.004 should not have been included as a qualified repair order and stipulated to removing it from the calculation. [RT Vol. II, 214:20-25.] The repair description shows the repair concerned brake pad replacement and rotor resurfacing. [Exh. J-6.004.]
20	10468	Exh. R-213.001 (Line A); Brake Repair	Line A of RO 10468 concerns a brake repair; the customer described a squeal sound when the brakes were applied and the brakes sinking further than normal. [Exh. R-213.001; RT Vol. II, 193:20-194:1.] The cause for the repair noted in the RO is “due to wear and tear.” [Exh. R-213.001; <i>see also</i> RT Vol. IV, 648:12-14.] The front brake pads for this vehicle had worn down from 10 millimeters to 4 millimeters prior to the repair described in the RO. [Exh. R-213.001; RT Vol. IV, 649:3-12.] The repair in Line A of RO 10468 is a removal and replacement of the front brake pads and resurfacing of both front rotors. ⁷ [Exh. R-213.001; RT Vol. IV, 649:13-23.] The resurfacing of rotors and the replacement of brake pads is an ordinary maintenance item, and no amount of polishing or

⁶ The repair also included lubrication involving fluids that are not generally covered by warranty. [RT Vol. IV, 642:23-643:5.]

⁷ The repair also involved a brake fluid service, however, fluid replacement is not covered as a warranty item. [RT Vol. IV, 649:20-650:6.]

1			adjusting would have taken 4-millimeter brake pads to 10 millimeters. [RT Vol. IV, 650:7-14.] Mr. Nardini agreed the repair in Line A of RO 10468 was not a qualified repair. [RT Vol. IV, 650:15-17.]
2			
3	21	10474	Brake Repair
4			During the hearing, Kia stipulated to withdraw consideration of RO 10474 from its labor rate calculation. [RT Vol. II, 195:9-19.] Kia’s spreadsheet included 0.5 actual hours for the labor on the repair, 1.5 sold hours, and a net labor charge of \$285.28. [Exh. J-6.004 (listed in Court 21).] The repair description shows the repair concerned a brake pad replacement. [Exh. J-6.004.]
5			
6	23	10527	Brake Repair
7			During the hearing, Kia stipulated to withdraw consideration of RO 10527 from its labor rate calculation; Kia stipulated it was not a qualified repair. [RT Vol. II, 196:6-7 and 196:15-16.] The repair description shows the repair concerned brake pad replacement and resurfacing of both rotors. [Exh. J-6.004.]
8			
9	30	10590	(Second entry in spreadsheet) Exh. R-265.005 (Line G); Brake Repair
10			During the hearing, Kia stipulated the second repair it had included for RO 10590 was not a qualified repair. [RT Vol. II, 196:19-197:4.] The brake repair in RO 10590 is Line G contained in Exhibit R-265. [Exh. J-6.005; Exh. R-265.005.] The repair included the resurfacing of both front rotors and replacement of the front brake pads which had worn down to 4 millimeters. [Exh. R-265.005; RT Vol. IV, 623:4-19.] Mr. Nardini agreed the repair in Line G of RO 10590 concerned brake wear because the cause was normal wear and tear. [RT Vol. IV, 622:22-3.] Mr. Nardini agreed the repair described in Line G of RO 10590 was not a qualified repair. [RT Vol. IV, 623:20-22.]
11			
12	32	10592	Brake Repair
13			During the hearing, Kia stipulated to withdraw consideration of RO 10592 from its labor rate calculation; Kia stipulated it was not a qualified repair. [RT Vol. II, 197:21-23.] The repair description shows the repair concerned front brake pad replacements. [Exh. J-6.005.]
14			
15	35	10638	Exh. R-215.001 (Line A); Fluid Refill
16			Ultimately, as described in Line A of RO 10638, the technician describes, “Upon further inspection, checked transmission fluid level. Found that it was low and that the fluid was dark and had a burnt smell. At this time, would recommend to performed [sic] transmission service, and recheck vehicle. Test-drove at highway speeds. Vehicle did not stall and HEV light did not turn on. Recheck for DTC. Not DTC at this time. Vehicle operating as designed.” The transmission fluid was low and had to be filled back up. [R-215.001-.002; RT Vol. IV, 666:8-667:5.] Oil and fluid changes are not warrantable repairs under Kia’s warranty. [Exh. R-230.011; RT Vol. IV, 668:23-669:14.] Transmission fluid is a fluid and filling up the transmission fluid in this repair is not a warrantable repair. [RT Vol. IV, 669:15-670:1;
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			<i>see also</i> Cal. Veh. Code, § 3065.2, subd. (c)(3) (specifically listing fluids as a routine maintenance item).]
36	10646	Exh. R-216.001 (Line A); Battery Replacement	Line A of the RO concerns a diagnosis and battery replacement with actual hours, sold hours, and customer charges matching the information listed in Kia’s spreadsheet. [Exh. R-216.001; Exh. J-6.005; RT Vol. II, 205:5-25.] Batteries, similar to bulbs, wear out over time. Batteries charge while the vehicle is running and lose charge when the vehicle is not running generating wear and tear on the battery. [RT Vol. IV, 671:3-15.] In the ordinary operation of a vehicle, batteries will eventually wear out. [RT Vol. IV, 671:22-25.] The only repair performed in Line A of RO 10646 was to replace a battery. There is no repair related to the battery replacement in Line A of RO 10646. [Exh. R-216.001; RT Vol. IV, 676:9-16.]
37	10655	(First entry in spreadsheet) Exh. R-217.003 (Line D); Battery Replacement	Line D of RO 10655 concerns a battery replacement with actual hours, sold hours, and customer charges mostly ⁸ matching the information listed in Kia’s spreadsheet. [Exh. J-6.005; Exh. R-217.003; RT Vol. II, 208:19-209:2.] Batteries, similar to bulbs, wear out over time. Batteries charge while the vehicle is running and lose charge when the vehicle is not running generating wear and tear on the battery. [RT Vol. IV, 671:3-15.] In the ordinary operation of a vehicle, batteries will eventually wear out. [RT Vol. IV, 671:22-25.] The only repair performed in Line D of RO 10655 is a battery replacement. There are no other repairs related to the battery replacement in Line D of RO 10655. [RT Vol. IV, 679:11-17.] The cause of the battery failure is described as due to wear and tear. [Exh. R-217.003; RT Vol. IV, 679:18-22.]

II. KIA’S ISOLATED EXAMPLE OF A CANCELLED REPAIR IN RO NUMBER 10298 DOES NOT RENDER PUTNAM’S SUBMISSION MATERIALLY INACCURATE.

Even prior to the filing of this protest, Putnam conceded there was an error in the creation of RO number 10298 and agreed to remove this RO from its calculation. [Exh. J-7.009.] This RO showed sold hours of 0.1 of an hour and total charges of \$250. [Exh. R-211.001.] This would result in an ELR of \$2,500—this is obviously not reflective of what Putnam is actually charging customers. Nevertheless, this error was easily redressed because the statute permits Kia to do its own calculation. [See Cal. Veh. Code, § 3065.2, subd. (d)(5).]

⁸ The RO lists 87.05 for the net labor charge while the spreadsheet lists 87.50. The difference appears to be a typographical error in the spreadsheet.

1 Kia requested an additional 30 days of ROs and was permitted to perform its own calculation so
2 long as it was done in compliance with the requirements of 3065.2. [Exh. J-4; Cal. Veh. Code, § 3065.2,
3 subd. (d)(4)-(5).] The supplemental ROs provide Kia the opportunity to select its own 90-day range of
4 repairs from within the 120 days of consecutive ROs provided. [Cal. Veh. Code, § 3065.2, subd. (d)(5).]
5 This provided Kia the opportunity to provide a more favorable range of ROs. It also provided Kia the
6 opportunity to include or exclude repairs as appropriate. However, Kia’s calculation did not comply
7 with the requirements of Section 3065.2 because it included routine maintenance items specifically
8 prohibited from inclusion in the calculation such as basic brake repairs. [See Cal. Veh. Code, § 3065.2,
9 subd. (c)(3); see also, *supra*, Part I.C.]

10 The Legislature specifically excluded routine maintenance items because these types of repairs
11 can be completed without specialized training or equipment by thousands of low-overhead independent
12 shops and commercial chains such as Jiffy Lube and Pep Boys. Dealers are required to price routine
13 maintenance items at steeply discounted rates to attract customers for these repairs. Putnam employs set
14 price menu pricing for routine maintenance repairs and does not apply an hourly customer pay rate to
15 any set of guide hours for routine maintenance repairs. [RT Vol. VII, 152:21-153:7 (Kent Putnam
16 describing routine maintenance is a competitive market and does not require highly trained technicians);
17 RT Vol. VI 104:23-105:16. (Rad Reyes describing maintenance repairs are typically sold as a package).]
18 The only time Putnam would consider a brake repair to be a qualified customer pay repair would be in
19 instances where the brake repair was required as part of a nonroutine maintenance repair or the repair
20 required something more than pads and rotors. For example, Putnam included RO 10631 as a qualified
21 repair because it required replacement of a brake caliper—a repair also covered by the manufacturers
22 standard warranty. [Exh. R-214.003-.004 (RO 10631, Line F describing a caliper replacement and brake
23 fluid service); RT Vol. III, 518:6-519:13; RT Vol. VI, 115:20-116:23.]

24 RO 10298 constituted the third reason for Kia’s denial of Putnam’s requested labor rate in Kia’s
25 denial letter. [Exh. J-6.002.] Kia’s proposed response to the inclusion of RO 10298 in the labor rate
26 calculation was to remove the RO from the calculation. [*Id.*] The RO also constituted the same issue
27 raised as Kia’s third reason Putnam’s submission was potentially fraudulent. [RT Vol. IV, 759:6-21.]

28 ///

1 RO 10280 in Exhibit R-210 concerns the same vehicle and circumstances as RO 10298. [See
2 Exh. R-210.001-.002.] The vehicle in RO 10280 and 10298 was towed in for service. [Exh. R-210.002;
3 RT Vol. IV, 724:23-725:14.] The vehicle was towed in due to vandalism; the vehicle was broken into
4 and the ignition was damaged. [RT Vol. V, 990:14-21.] The battery on the vehicle was so drained the
5 vehicle could not be jumped. [RT Vol. VI, 125:3-8.]

6 In response to Kia’s third reason for the denial, Putnam agreed in its June 15, 2022, letter that
7 RO 10298 should have been excluded from the labor rate calculation. [Exh. J-7.009; RT Vol. IV, 692:21-
8 693:10 and 724:3-11.] Putnam explained the \$250.00 was prepayment for diagnostic but that the repair
9 was subsequently cancelled and the RO should not have been included in the calculation. [Exh. J-7.009-
10 .010.; RT Vol. IV, 693:11-23.]

11 RO 10298 concerned a downpayment for diagnostic with parts on back order and further
12 references RO 10280 (Exh. R-210). [Exh. R-211.001.] Ultimately, the customer called to cancel the
13 parts and repair. [Id.] No repair was performed on the vehicle associated with RO 10298 and Putnam
14 agrees the RO should not be used in calculating a warranty labor rate pursuant to Section 3065.2. [RT
15 Vol. IX, 87:7-20.]

16 The effect of the single entry for RO 10298 in Putnam’s spreadsheet contained in Exhibit J-3 is
17 not material to the overall requested labor rate. RO 10298 added 0.10 sold hours and \$250.00 to the
18 totals under the Labor Sale Hours (Qual) and Net Labor Charge columns. [Exh. J-3.002 (Count 10 for
19 RO 10298).] Subtracting 0.10 from the 21.4 total for the Labor Sale Hours (Qual) column and \$250.00
20 from the \$9,577.01 total for the Net Labor Charge column equals 21.3 hours for the Labor Sale Hours
21 (Qual) column and \$9,327.01 for the Net Labor Charge column. [Exh. J-3.003.] Dividing \$9,327.01 by
22 the 21.3 hours would calculate a labor rate of \$437.89/hour instead of the \$447.52 in Exhibit J-3—less
23 than a \$10 difference or a difference of approximately 2% less than Putnam’s requested labor rate.

24 The inclusion of RO 10298 in Putnam’s Submission does not render the Submission materially
25 inaccurate or fraudulent. Putnam agrees RO 10298 should be excluded. The removal of RO 10298 does
26 not affect the material accuracy of the Submission.

27 ///

28 ///

1 III. KIA INCORRECTLY ARGUES PUTNAM’S SECTION 3065.2 RETAIL LABOR RATE
2 MUST BE COMPARABLE TO OTHER KIA DEALERS.

3 In its Denial, Kia argues as both its first and second reasons Putnam’s Submission was potentially
4 fraudulent based on the rates of other dealers compared to Putnam’s request. [Exh. J-6.002.] However,
5 the rates of other dealers are not part of the determination of a retail labor rate pursuant to Section 3065.2.
6 [See Cal. Veh. Code, § 3065.2, subd. (a)(2) (calculating a retail labor rate “by determining the total
7 charges for labor from the qualified repair orders submitted and dividing that amount by the total number
8 of hours that generated those charges”; there is no consideration of neighboring dealer’s warranty rates
9 in the determination).]

10 In addition to the statutory procedure, a Kia dealer may also submit a labor rate survey to increase
11 its labor rate for warranty labor reimbursement. [RT Vol. I, 92:3-15; see also RT Vol. III, 401:3-7.] At
12 the start of Putnam’s franchise, Putnam submitted a labor rate survey to establish its initial labor rate.
13 [Exh. J-2.001 (establishing an average of warranty rates of \$225.27/hour).] The rates of the franchises
14 listed in Exhibit J-2 are no longer accurate and the warranty rates of the franchises are now significantly
15 higher. [RT Vol. IX, 31:17-32:11.] Moreover, Putnam declined to follow a survey procedure to establish
16 its labor rate by way of considering the warranty labor reimbursement rate for neighboring dealers;
17 Putnam’s Submission was based on the formula in Vehicle Code section 3065.2. [See Exh. J-3.001.]

18 To the extent the Board determines there is any ambiguity in whether to consider the rates of
19 other dealers in establishing a retail labor rate as requested pursuant to Vehicle Code section 3065.2, the
20 Board should look “to a variety of extrinsic aids, including the ostensible objects to be achieved, the
21 evils to be remedied, the legislative history, public policy, contemporaneous administrative construction,
22 and the statutory scheme of which the statute is a part.” [Cal. Disability Servs. Ass’n v. Bargmann
23 (2020) 52 Cal. App. 5th 911, 916 (emphasis added) (quoting Lincoln Unified School Dist. v. Superior
24 Court (2020) 45 Cal.App.5th 1079, 1090; see also Coal. of Concerned Cmty., Inc. v. City of L.A. (2004)
25 34 Cal.4th 733, 737 (requiring the same interpretive procedure).]

26 We must give the statutory provisions at issue a reasonable and common sense
27 interpretation, consistent with the apparent purpose and intention of the Legislature. If
28 possible, we will give significance to the plain meaning of every word, phrase, and
sentence of a statute in pursuance of the legislative purpose, harmonizing the various
parts of an enactment by considering each particular clause or section in the context of

1 the statutory framework as a whole. In this process, we must take into account the context,
2 object, and history of the legislation, as well as public policy and contemporaneous
3 construction in our attempt to arrive at a construction that is practical rather than technical
in nature.

4 [*In re Rochelle B.* (1996) 49 Cal.App.4th 1212, 1216 (emphasis added).]

5 While Vehicle Code section 3065.2 references “a reasonable warranty reimbursement schedule,”
6 the statute is defining how to calculate a reasonable warranty reimbursement schedule pursuant to the
7 formula expressly provided in subdivisions (a)(2) and (a)(3). Other parts of the statute expressly limit a
8 franchisor to determining a proposed adjusted retail labor rate using the same requirements and formula
9 applicable to the franchisee pursuant to subdivision (a). [Cal. Veh. Code, § 3065.2, subd. (d)(5).]
10 Moreover, the franchisor is precluded by law from “Unilaterally calculating a retail labor rate or retail
11 parts rate for a franchisee, except as provided in subdivision (d).” [Cal. Veh. Code, § 3065.2, subd.
12 (h)(3).]

13 Moreover, the legislative history shows an intent by the legislature to depart from the prior
14 determination of labor rate based on reasonableness in favor of a determination based on the formula
15 established in Section 3065.2. The Assembly Committee on Transportation comment on AB 179 recites
16 AB 179 “...reverses the existing power dynamic between dealers and manufacturers by allowing dealers
17 to set the labor and parts rate through an established formula outlined in this bill instead of having those
18 rates dictated by the manufacturers and judged on a ‘reasonableness’ standard by NMVB.” [2019 Cal.
19 Assemb. Bill No. 179, Cal. 2019-2020 Reg. Sess., Assemb. Comm. on Trans. – April 18, 2019, at p. 7⁹.]

20 In further support, in enacting AB 179, the legislature removed the following provision from
21 Section 3065:

22 (b) In determining the adequacy and fairness of the compensation, the franchisee’s
23 effective labor rate charged to its various retail customers may be considered together
24 with other relevant criteria. If in a protest permitted by this section filed by any franchisee
25 the board determines that the warranty reimbursement schedule or formula fails to
26 provide adequate and fair compensation or fails to conform with the other requirements
27 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.

28 ⁹ A copy of the Assembly Committee on Transportation’s analysis is attached hereto as Exhibit 2 for
ease of reference. The hearing date associated with the report is April 22, 2019.

1 [Cal. Veh. Code, § 3065, subd. (b) (Prior version effective January 1, 2017, to December 31, 2019).]

2 Similarly, subdivision (a) provided “The reasonableness of the warranty reimbursement schedule
3 or formula shall be determined by the board if a franchisee files a protest with the board.” [Cal. Veh.
4 Code, § 3065, subd. (a) (Prior version effective January 1, 2017, to December 31, 2019).]

5 The current version of Section 3065 removed the protest right from section 3065, subdivision (a)
6 based on the reasonableness of the warranty reimbursement schedule or formula and instead provided in
7 subdivision (b):

8 In determining what constitutes a reasonable warranty reimbursement schedule under this
9 section, a franchisor shall compensate each of its franchisees for parts and labor at rates
10 equal to the franchisee’s retail labor rate and retail parts rate, as established pursuant to
11 Section 3065.2.

11 [Cal. Veh. Code, § 3065, subd. (a) and (b) (Version effective January 1, 2020).]

12 The statutory history shows the legislature intended to and did replace a reasonableness
13 framework for warranty reimbursement with the formula set forth in Section 3065.2. This was intended
14 to reverse the “existing power dynamic” where a manufacturer would argue a dealer’s requested labor
15 rate was unreasonable in light of the warranty labor rates of surrounding dealers.

16 In addition, the evidence Kia relies on to show Putnam’s requested labor rate is not consistent
17 with other dealer’s warranty or retail labor rates fails to consider the circumstances underlying the other
18 rates. Kia did not compare the guide used by other Kia dealers to Putnam. [RT Vol. IV, 757:9-13.] Kia
19 did not consider how the other dealers compensate technicians or the structure of the technicians’ pay
20 plans. [RT Vol. IV, 757:19-25.] Kia did not differentiate whether the dealership is being paid based on
21 a Section 3065.2 submission or a warranty labor rate based on a survey of other dealership’s warranty
22 rates. [RT Vol. IV, 758:1-6.] Kia also did not compare the number of ROs other dealerships process
23 compared to warranty ROs or any other way to quantify the number of ROs those dealerships open. [RT
24 Vol. IV, 758:7-11.] These deficiencies in Kia’s comparison applied to each of the individual dealers Kia
25 sought to discuss during the hearing. [See RT Vol. IV, 764:9-773:8.]

26 Concerning the luxury retail rates referenced in Kia’s Denial letter, the information was based
27 on information from an Audi and Porsche dealership in Burlingame. [RT Vol. V, 877:8-11.] Comparing
28 Putnam to two luxury dealerships without providing other important information, including the labor

1 time guides used by the Audi and Porsche dealerships for customer pay repairs, fails to show Putnam’s
2 requested labor rate is potentially fraudulent.

3 IV. KIA FAILED TO SHOW THE SUBMISSION TO BE MATERIALLY INACCURATE OR
4 FRAUDULENT.

5 During the hearing and in its Pre-Hearing Brief, Kia raised additional arguments beyond those
6 set forth in the Denial. As well as being precluded from being relied upon without justification [Cal.
7 Veh. Code, § 3065.2, subd. (d)(1) (“After submitting the notification, the franchisor shall not add to,
8 expand, supplement, or otherwise modify any element of that notification, including, but not limited to,
9 its grounds for contesting the retail labor rate, retail parts rate, or both, without justification.”)], the
10 arguments also fail to show Putnam’s Submission was materially inaccurate or fraudulent.

11 **A. Kia’s argument based on its XTT time warranty bulletin should be rejected.**

12 During the hearing, Mr. Nardini suggested a dealer could claim additional time for diagnosis
13 (XTT time) if the particular repair was difficult. [RT Vol. II, 155:7-156:2 (as an example, Mr. Nardini
14 suggesting the 3.29 Actual Hours might qualify for XTT time on RO 10158, Line A).] Mr. Nardini
15 suggested the repair in RO 10158, Line A was an electrical-type repair which is one of the types of
16 repairs which would qualify for XTT time. [RT Vol. II, 156:4-12.]

17 However, Kia will only pay for actual time for labor beyond Kia’s LTS (referred to as XTT time)
18 in extraordinary conditions or extraordinary diagnostics. [Exh. R-232.001; RT Vol. III, 372:4-7 and
19 540:16-23.] XTT time does not apply to a routine instance of exceeding LTS hours and does not apply
20 to every repair. [RT Vol. III, 372:16-22.]

21 To receive payment based on XTT time, Kia’s bulletin includes requirements a dealer must meet.
22 [Exh. R-232.001.] The technician must know he or she is dealing with an extraordinary diagnosis before
23 he or she starts the diagnosis. [RT Vol. III, 375:9-376:6.] Wait time for the technician between
24 submitting information to Kia’s Techline and receiving a response is not included in the time Kia will
25 pay for XTT time. [RT Vol. III, 376:15-377:12.] To receive XTT time, a technician must also follow
26 Kia’s repair processes and procedures. [RT Vol. III, 378:6-379:4.] Moreover, a dealership cannot
27 exceed 0.9 hours of XTT time unless a dealership complies with a Techline assistance case and a prior
28 warranty approval. [Exh. R-232.002; RT Vol. III, 383:19-384:14.] XTT time also has listed exclusions.

1 [Exh. R-232.002; RT Vol. III, 384:15-385:24.]

2 Kia has the option to deny claims for XTT time based on examining the documentation submitted
3 by the dealer and determining, for example, the repair should only be subject to a certain amount of
4 additional time or to deny the claim based on a failure to follow Kia's repair procedures. [RT Vol. IV,
5 740:23-741:11.] Mr. Reyes, Putnam's service manager, could not recall a single instance of seeking
6 additional diagnostic time on a warranty repair at Putnam Kia. [RT Vol. V, 957:20-958:4.]

7 To the extent Kia continues to argue the potential availability of XTT supports its position that
8 actual hours should be used instead of sold hours in determining Putnam's retail labor rate, these
9 arguments should be rejected for the foregoing reasons. XTT time only applies to extraordinary
10 conditions or extraordinary diagnostics, comes with specific and expansive conditions, and even if
11 claimed, claims for XTT time can ultimately be denied by Kia. Kia will not pay actual time on each
12 warranty repair submitted by Putnam and Kia's XTT time bulletin does not provide justification to
13 calculate Putnam's labor rate using actual hours.

14 **B. Comparing the RO sold hours to matching Kia's LTS printouts show the sold hours**
15 **are in aggregate higher than Kia's LTS; strictly applying Kia's LTS for each RO**
16 **would have resulted in a higher retail rate than Putnam requested.**

17 During the hearing, the evidence showed eight (8) of the repairs in Exhibit J-3.002-.003 match
18 Kia's LTS printouts exactly including ROs 10183, 10191, 10291, 10300, 10529 (Line A), 10534, 10585,
19 and 10590. The following summarizes the ROs matching Kia's LTS:

RO Number	Sold Hours and Repair with citation	LTS and Description with citation
10183	The accounting copy of the repair order associated with RO 10183, Line A is contained in Exhibit R-208. [See Exh. J-3.002 and Exh. R-208.001.] RO 10183, Line A concerns the installation of a fuel door switch. [Exh. R-208.001; RT Vol. VI, 30:24-31:4.] The RO shows sold hours of 0.3 hours and a corresponding \$176.00 charge for labor on Line A. [Id.; RT Vol. VI, 31:5-7]	Kia's LTS for the replacement of a fuel filler door is 0.3 hours. [Exh. P-120.004; see also Exh. P-121.002; RT Vol. VI, 31:8-24.] The sold hours on RO 10183, Line A match the corresponding Kia LTS time for the repair.
10191	The accounting copy of the repair order associated with RO 10191, Line C is contained in Exhibit R-251. [See Exh. J-3.002 and Exh. R-251.006-.007.] RO 10191, Line C concerns the installation of	Kia's LTS for the replacement of a starter motor assembly is 0.6 hours. [Exh. P-120.005; see also Exh. P-121.002; RT Vol. VI, 35:3-10 and 36:6-37:13.] The sold hours on RO 10191, Line C match

1		a new starter motor. [Exh. R-251.006; RT Vol. VI, 35:22-36:2.] The RO shows sold hours of 0.6 hours and a corresponding \$264.00 charge for labor on Line C. [<i>Id.</i> ; RT Vol. VI, 36:3-5.]	the corresponding Kia LTS time for the repair.
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4	10291	The accounting copy of the repair order associated with RO 10291, Line F is contained in Exhibit R-252. [See Exh. J-3.002 and Exh. R-252.004.] RO 10291, Line F concerns the replacement of the rear side valve cover gasket (the part listed for the repair is the gasket-rocker cover). [Exh. R-252.004; RT Vol. VI, 42:5-10.] The RO shows sold hours of 0.6 hours and a corresponding \$264.00 charge for labor on Line F. [<i>Id.</i> ; RT Vol. VI, 42:11-13.]	Kia's LTS for the replacement of the Rocker Cover /or Gasket is 0.6 hours. [Exh. P-120.006; see also Exh. P-121.002; RT Vol. VI, 43:18-44:17.] The sold hours on RO 10291, Line F match the corresponding Kia LTS time for the repair.
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10	10300	The accounting copy of the repair order associated with RO 10300, Line A is contained in Exhibit R-253. [See Exh. J-3.002 and Exh. R-253.001.] RO 10300, Line A concerns a BCM replacement based on the car being stuck in park due to the shift lock not functioning properly. [Exh. R-253.001; RT Vol. VI, 207:15-24.] The RO shows sold hours of 1.0 hours and a corresponding \$440.00 charge for labor on Line A. [<i>Id.</i>]	During the hearing, Mr. Reyes searched for a BCM replacement for the vehicle in RO 10300, Line A in Kia's LTS and Putnam provided it as Exhibit P-123. [RT Vol. VII, 62:9-63:22.] The LTS for RO 10300, Line A is 0.8 hours for the repair and 0.2 hours for the diagnostic tool operation for a total of 1.0 hour. [Exh. P-123; RT Vol. VII, 64:6-15.] The sold hours on RO 10300, Line A match the corresponding Kia LTS time for the repair.
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17	10529 (Line A)	The accounting copy of the repair order associated with RO 10529, Lines A and B are contained in Exhibit R-260. [See Exh. J-3.002 and Exh. R-260.001-.003.] RO 10529, Line A concerns a differential pinion oil seal repair and replacement. [Exh. R-260.001-.002; RT Vol. III, 493:17-23; RT Vol. VI, 88:88:1-6.] The RO shows sold hours of 1.0 hours and a corresponding \$440.00 charge for labor on Line A. [<i>Id.</i> ; RT Vol. VI, 88:18-21.]	Kia's LTS for the replacement of a differential pinion oil seal is 1.0 hours. [Exh. P-120.013; see also Exh. P-121.002; RT Vol. III, 496:20-23; RT Vol. VI, 88:10-24.] The sold hours on RO 10529, Line A match the corresponding Kia LTS time for the repair. [See also RT Vol. III, 493:24-494:3 (Mr. Nardini agreeing the LTS and sold hours match).]
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24	10534	The accounting copy of the repair order associated with RO 10534, Line B is contained in Exhibit R-261. [See Exh. J-3.002 and Exh. R-261.001-.002.] RO 10534, Line B concerns a replacement of the windshield washer fluid pump. [Exh. R-261.001-.002; RT Vol. VI, 92:22-93:11.] The RO shows sold hours of 0.5 hours and a corresponding \$220.00 charge for labor	Kia's LTS for the replacement of a Washer Motor & Pump is 0.5 hours. [Exh. P-120.015; see also Exh. P-121.002; RT Vol. VI, 94:25-96:11.] The sold hours on RO 10534, Line B match the corresponding Kia LTS time for the repair.
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	on Line B. [<i>Id.</i> ; RT Vol. VI, 94:21-24.]	
10585	The accounting copy of the repair order associated with RO 10585, Line A is contained in Exhibit R-264. [<i>See</i> Exh. J-3.002 and Exh. R-264.001.] RO 10585, Line A concerns a replacement of a rear trunk latch assembly. [Exh. R-264.001; RT Vol. VI, 108:7-20.] The RO shows sold hours of 0.3 hours and a corresponding \$132.00 charge for labor on Line A. [<i>Id.</i> ; RT Vol. VI, 108:21-23]	Kia's LTS for the replacement of a Tailgate Latch Assembly is 0.3 hours. [Exh. P-120.018; <i>see also</i> RT Vol. III, 510:20-511:9; RT Vol. VI, 109:1-18.] The sold hours on RO 10585, Line A match the corresponding Kia LTS time for the repair. [<i>See also</i> RT Vol. III, 511:7-512:9 (Mr. Nardini agreeing the sold hours and Kia's LTS for the repair match).]
10590	The accounting copy of the repair order associated with RO 10590, Line E is contained in Exhibit R-265. [<i>See</i> Exh. J-3.003 and Exh. R-265.004.] RO 10590, Line E concerns a reseal of the oil pan. [Exh. R-265.004; RT Vol. VI, 110:12-17.] The RO shows sold hours of 1.0 hours and a corresponding \$431.52 charge for labor on Line E. [<i>Id.</i> ; RT Vol. VI, 111:8-10.]	Kia's LTS for the replacement of a Lower Oil Pan /or Gasket is 1.0 hours. [Exh. P-120.019; <i>see also</i> Exh. P-121.002; RT Vol. VI, 110:18-111:7.] The sold hours on RO 10590, Line E match the corresponding Kia LTS time for the repair.

Eight (8) of the entries in Exhibit J-3.002-.003 concerning ROs in Putnam's original submission show they were for diagnostics only with no corresponding LTS time. [Exh. P-121.002; RT Vol. III, 416:9-417:17 (ROs 10148, 10153, 10158, 10298, 10454, and 10617); *see also* Exh. R-262.001 and Exh. P-121.002 (showing a diagnosis related to the truck latch assembly with 0.5 hours and a corresponding \$250.00 charge for labor in RO 10553); Exh. R-212.001 (concerning a diagnosis corresponding to sold hours of 1.5 hours and a corresponding charge of \$660.00 for RO 10346)¹⁰.]

In the context of a warranty repair, after a diagnosis is performed, the customer does not have to pay for the work to be done. [RT Vol. III, 418:10-14; *see also* RT Vol. III, 421:17-19 (as a practical matter, there is no diagnosis without a repair in the warranty context).] However, for a customer-pay repair, the customer may decline to have the work performed after diagnosis. [RT Vol. III, 418:15-419:7; RT Vol. III, 421:20-24.] The diagnostic fee is necessary to secure some compensation in the event the customer declines to have the repair completed at the dealership.

¹⁰ To the extent Kia claims there was any repair in RO 10346, Line A, it concerns adjusting the plug locking mechanism. [*See* RT Vol. IV, 572:14-573:23; RT Vol. VII, 17:25-18:14.] Kia did not provide evidence of the LTS time for adjusting the plug locking mechanism and there is no evidence the LTS for the adjustment exceeds 1.5 hours.

1 There are no individualized diagnosis times in Kia’s labor time standards because the diagnosis
 2 is generally considered part of the associated repair (unless the LTS specifies differently). [RT Vol. III,
 3 421:6-16.] As a result, Putnam could not directly apply Kia’s LTS for diagnosis only repairs. In
 4 addition, the charge for the diagnosis precedes a determination of the required repair because the
 5 technician must diagnose a vehicle before knowing how to repair it. Putnam’s pricing of diagnostic
 6 repairs does not show inconsistency with Kia’s LTS for customer-pay repairs.

7 Mr. Reyes’s spreadsheet suggested the first entry for RO 10180 associated with Line A was
 8 diagnostic only. [See Exh. P-121.002.] However, during the hearing, Mr. Reyes clarified RO 10180,
 9 Line A concerned the replacement of the driver side clock spring. [Exh. R-250.001; RT Vol. VI, 180:1-
 10 12 and 185:6-20.] Kia did not provide reliable evidence the sold hours for RO 10180, Line A of 0.2
 11 hours were less than the Kia LTS for a drive side clock spring replacement for the VIN in RO 10180.

12 The remaining repairs¹¹ with corresponding LTS printouts in the record show the following
 13 differences:

RO Number	Sold Hours and Repair with citation	LTS and Description with citation	Difference¹²
RO 10133	The accounting copy of the repair order associated with RO 10133, Line A is contained in Exhibit R-247. [See Exh. J-3.002 and Exh. R-247.001; RT Vol. III, 429:20-431:5.] RO 10133, Line A concerns the replacement of a knock sensor. [Exh. R-247.001; RT Vol. III, 432:2-5, 434:6-18, 436:5-9, and 438:22-439:8; RT Vol. V, 1003:18-20.] The RO shows sold hours of 1.4 hours and a corresponding \$646.00 charge for labor. [<i>Id.</i> ; see also RT Vol. VI, 13:20-25.]	Kia’s LTS for a knock sensor repair and replacement is a total of 1.1 hours (0.90 for the repair and 0.2 for associated diagnostic). [Exh. P-120.001; see also Exh. P-121.002; RT Vol. V, 1003:25-1005:3; RT Vol. VI, 16:15-21.] The sold hours on RO 10133, Line A are 0.3 hours higher than the corresponding Kia LTS time for the repair. [See also RT Vol. VI, 20:19-23.]	+0.3

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 24 ¹¹ There are a total of 31 entries in Exhibit J-3.002-.003. Eight (8) of the entries match the LTS times as noted above; eight (8) concern diagnostic only repairs without corresponding LTS times as noted above (including RO 10298 which Putnam agrees should not be included in the calculation); one (1) of the entries is RO 10180, Line A discussed above, and the remaining 14 repairs with corresponding LTS times are discussed below.

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 28 ¹² Putnam includes a “+” in this column when the sold hours exceed the LTS hours and a “-” in this column when the sold hours are less than the LTS hours. A positive total of the differences shows the sold hours are greater than the aggregate LTS hours.

1	RO 10165	The accounting copy of the repair order associated with RO 10165, Line B is contained in Exhibit R-249. [See Exh. J-3.002 and Exh. R-249.001.] RO 10165, Line B concerns the replacement of a front window regulator and switch. [Exh. R-249.001-.002; RT Vol. III, 526:6-527:19; RT Vol. VI, 25:10-19.] The RO shows sold hours of 0.4 hours and a corresponding \$176.00 charge for labor. [Id.]	Kia's LTS for replacing the power window switch is 0.3 hours and for replacing the regulator is 0.3 hour totaling 0.6 hours. [Exh. P-120.002; RT Vol. VI, 20-26:12.] The sold hours on RO 10165, Line B are 0.2 hours lower than the corresponding Kia LTS time for the repair.	-0.2
2	RO 10180	The accounting copy of the repair order associated with RO 10180, Lines A and B is contained in Exhibit R-250. [See Exh. J-3.002 and Exh. R-250.001.] RO 10180, Line B concerns the replacement of both the front window switch and front passenger side regulator's motor. [Exh. R-250.001; RT Vol. III, 464:18-466:1 and 531:14-532:11; RT Vol. VI, 27:17-29:9.] The RO shows sold hours of 0.2 hours and a corresponding \$88.00 charge for labor on Line A and 1.1 hours and a corresponding \$484.00 charge for labor on Line B. [Id.]	Kia's LTS for the replacement of both the front power window switches and the replacement of a front window regulator motor is a total of 0.7 hours (0.40 for the switches and 0.3 for the regulator). [Exh. P-120.003; see also RT Vol. III, 532:12-19 (Mr. Nardini agreeing with the 0.7 hour total from the LTS hours and a 0.4 hour difference); RT Vol. VI, 195:1-19.] The sold hours on RO 10180, Line B are 0.4 hours higher than the corresponding Kia LTS time for the repair.	+0.4
3	RO 10320	The accounting copy of the repair order associated with RO 10320, Line A is contained in Exhibit R-243. [See Exh. J-3.002 and Exh. R-243.001.] RO 10320, Line A concerns the installation of a driver's side outside door handle. [Exh. R-243.001; RT Vol. VI, 46:14-47:1.] The RO shows sold hours of 0.3 hours and a corresponding \$125.00 charge for labor on Line A. [Id.; RT Vol. VI, 47:2-3.]	Kia's LTS for the replacement of an outside door handle is 0.4 hours. [Exh. P-120.007; see also RT Vol. VI, 52:3-15.] The sold hours on RO 10320, Line A are 0.1 hours lower than the corresponding Kia LTS time for the repair.	-0.1
4	RO 10352	The accounting copy of the repair order associated with RO 10352, Line A is contained in Exhibit R-254. [See Exh. J-3.002 and Exh. R-254.001-.002.] RO 10352,	Kia's LTS for the replacement of a Purge Control Solenoid Valve is 0.3 hours. [Exh. P-120.008; see also Exh. P-121.002; RT Vol. III, 487:25-488:20; RT Vol. VI, 55:13-	+0.8

1		Line A concerns the diagnosis and replacement of a valve-purge control. [Exh. R-254.001-.002; RT Vol. III, 487:1-15; RT Vol. VI, 54:6-19.] The RO shows sold hours of 1.3 hours and a corresponding \$382.00 charge for labor on Line A. [<i>Id.</i> ; RT Vol. VI, 54:20-25]	56:8.] During the hearing, Kia identified its LTS included 0.2 additional hours for diagnostic time associated with a Purge Control Solenoid Valve repair increasing the total Kia LTS for this repair to 0.5 hours. [Exh. R-269; RT Vol. V, 837:24-3840:20.] The sold hours on RO 10183, Line A are 0.8 hours higher than the corresponding Kia LTS time for the repair. [<i>Id.</i> ; see also RT Vol. V, 871:6-25 (Mr. Nardini confirming the sold hours are 0.8 hours higher than the corresponding Kia LTS for the repair).]	
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10	RO 10404	The accounting copy of the repair order associated with RO 10404, Line A is contained in Exhibit R-255. [See Exh. J-3.002 and Exh. R-255.001-.002.] RO 10404, Line A concerns a reseal of an oil pan assembly. [Exh. R-255.001-.002; RT Vol. III, 489:25-490:8 and 534:7-14; RT Vol. VI, 56:19-24.] The RO shows sold hours of 0.8 hours and a corresponding \$401.19 charge for labor on Line A. [<i>Id.</i> ; RT Vol. VI, 56:2-57:2.]	Kia's LTS for the replacement of an oil pan assembly is 0.9 hours. [Exh. P-120.009; see also Exh. P-121.002; RT Vol. III, 534:15-21 (Mr. Nardini agreeing the LTS hours for the repair are 0.9 hours and the sold hours are 0.1 hour less than the LTS hours); RT Vol. VI, 57:3-12.] The sold hours on RO 10404, Line A are 0.1 hours lower than the corresponding Kia LTS time for the repair.	-0.1
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18	RO 10415	The accounting copy of the repair order associated with RO 10415, Line A is contained in Exhibit R-256. [See Exh. J-3.002 and Exh. R-256.001-.003.] RO 10415, Line A concerns the diagnosis and replacement of the vehicle's PCM (including an electronic control unit and PCB clock). [Exh. R-256.001-.003; RT Vol. III, 472:6-18; RT Vol. VI, 60:10-18.] The RO shows sold hours of 1.0 hours and a corresponding \$440.00 charge for labor on Line A. [<i>Id.</i> ; RT Vol. VI, 60:19-25.] The customer received a discount on the labor for the repair of \$44.01. [<i>Id.</i>]	Kia's LTS for the replacement of the metal core PCB block assembly is 0.2 hours. [Exh. P-120.010; see also Exh. P-121.002; RT Vol. VI, 61:1-15.] Kia introduced a further LTS printout during the hearing that showed the LTS time for a replacement of the engine control module has a time of 0.4 hours with an additional 0.2 hours for the diagnostic tool for a total of 0.6 hours. [Exh. R-268; RT Vol. V, 831:3-15 and 835:17-836:12.] Combining the 0.6 hours for the engine control module and 0.2 hours for the metal core PCB block assembly show the applicable LTS hours for RO 10415, Line A is 0.8 hours. In total, the sold hours on	+0.2
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1			RO 10415, Line A are 0.2 hours higher than the corresponding Kia LTS time for the repair. [<i>Id.</i> ; <i>see also</i> RT Vol. V, 866:7-867:4 (Mr. Nardini confirming Line A's sold hours are 0.2 hours higher than the corresponding Kia LTS time).]	
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5	RO 10426	The accounting copy of the repair order associated with RO 10426, Line D is contained in Exhibit R-257. [<i>See</i> Exh. J-3.002 and Exh. R-257.003.] RO 10426, Line D concerns the replacement of a clock spring. [Exh. R-257.003; RT Vol. III, 478:10-481:14 and 548:2-12; RT Vol. VI, 71:15-72:24.] The RO shows sold hours of 0.4 hours and a corresponding \$220.00 charge for labor on Line D. [<i>Id.</i> ; RT Vol. VI, 73:3-5.]	Kia's LTS for the replacement of a clock spring assembly is 0.6 hours. [Exh. P-120.011; <i>see also</i> Exh. P-121.002; RT Vol. III, 548:13-20 (Mr. Nardini agreeing the LTS time for the clock spring assembly repair and replacement is 0.6 hours; 0.2 hours less than the sold hours in Line D); RT Vol. VI, 73:6-20.] The sold hours on RO 10426, Line D are 0.2 hours lower than the corresponding Kia LTS time for the repair.	-0.2
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13	RO 10486	The accounting copy of the repair order associated with RO 10486, Line A is contained in Exhibit R-259. [<i>See</i> Exh. J-3.002 and Exh. R-259.001-.002.] RO 10486, Line A concerns a diagnosis and replacement of a fuel sending unit. [Exh. R-259.001-.002; RT Vol. III, 551:19-22; RT Vol. VI, 84:14-22.] The RO shows sold hours of 1.5 hours and a corresponding \$660.00 charge for labor on Line A. [<i>Id.</i> ; RT Vol. VI, 84:23-25.]	Kia's LTS for the replacement of a fuel sender assembly is 0.5 hours with an additional 0.2 hours for the diagnosis. [Exh. P-120.012; <i>see also</i> Exh. P-121.002; RT Vol. III, 551:23-552:10 (Mr. Nardini agreeing the LTS hours for the repair include 0.5 hours for the repair and 0.2 hours for the diagnosis totaling 0.7 hours); RT Vol. VI, 85:1-19.] The sold hours on RO 10486, Line A are 0.8 hours higher than the corresponding Kia LTS time for the repair.	+0.8
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21	RO 10529 (second entry)	The accounting copy of the repair order associated with RO 10529, Lines A and B are contained in Exhibit R-260. [<i>See</i> Exh. J-3.002 and Exh. R-260.001-.003.] RO 10529, Line B concerns the repair and replacement of a windshield washer fluid pump. [Exh. R-260.002-.003; RT Vol. III, 494:4-9; RT Vol. VI, 89:2-12.] The RO shows sold hours of 0.4 hours and a corresponding \$200.00 charge for labor on Line B. [<i>Id.</i> ; RT Vol. VI, 90:4-7.]	Kia's LTS for the replacement of a Washer Motor & Pump is 0.5 hours. [Exh. P-120.014; <i>see also</i> Exh. P-121.002; RT Vol. III, 496:24-497:3; RT Vol. VI, 90:10-24.] The sold hours on RO 10529, Line B are 0.1 hours lower than the corresponding Kia LTS time for the repair.	-0.1
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1	RO 10571	The accounting copy of the repair order associated with RO 10571, Line A is contained in Exhibit R-244. [See Exh. J-3.002 and Exh. R-244.001-.002.] RO 10571, Line A concerns the replacement of a sunroof motor. [Exh. R-244.001-.002; see also RT Vol. II, 254:18-256:3 and RT Vol. III, 498:3-13; RT Vol. VI, 99:5-100:4.] The RO shows sold hours of 1.3 hours and a corresponding \$608.31 charge for labor on Line A. [Id.; RT Vol. VI, 100:5-7.]	Kia's LTS for the replacement of a Panorama Sunroof Motor Assembly is 2.4 hours. [Exh. P-120.016; RT Vol. II, 258:10-16; see also Exh. P-121.002; RT Vol. VI, 100:10-101:2.] The sold hours on RO 10571, Line A are 1.1 hours lower than the corresponding Kia LTS time for the repair.	-1.1 ¹³
9	RO 10581	The accounting copy of the repair order associated with RO 10581, Line A is contained in Exhibit R-263. [See Exh. J-3.002 and Exh. R-263.001.] RO 10581, Line A concerns a replacement of the downhill indicator light (bulb replacement). [Exh. R-263.001; RT Vol. III, 500:21-501:6; RT Vol. VI, 101:24-102:12.] The RO shows sold hours of 0.5 hours and a corresponding \$125.00 charge for labor on Line A. [Id.]	Kia's LTS for the replacement of a Bulb is 0.2 hours. [Exh. P-120.017; see also Exh. P-121.002; RT Vol. VI, 102:13-103:2.] The sold hours on RO 10581, Line A are 0.3 hours higher than the corresponding Kia LTS time for the repair.	+0.3
17	RO 10591	The accounting copy of the repair order associated with RO 10591, Line A is contained in Exhibit R-266. [See Exh. J-3.003 and Exh. R-266.001-.002.] RO 10591, Line A concerns a replacement of the VCMA (variable charge motion actuator). [Exh. R-266.001-.002; see also RT Vol. II, 251:17-253:5; RT Vol. VI, 112:24-113:12.] The RO shows sold hours of 0.6 hours and a	Kia's LTS for the replacement of a VCM Motor Assembly is 0.6 hours. [Exh. P-120.020; see also Exh. P-121.002; RT Vol. VI, 114:1-7.] During the hearing, Kia introduced an LTS printout which showed the repair for a VCM Motor Assembly included an additional 0.2 hours for diagnostic time for a total of 0.8 hours for the LTS time for the repair in RO 10591, Line A. [Exh. R-270; RT Vol. V, 841:15-844:11.]	-0.2

¹³ As discussed during the hearing, RO 10571 concerned an extended warranty repair that should have been excluded from the calculation. The repair in RO 10571, Line A concerns a Claim Number 2688461, Protective Asset Extended Warranty. [Exh. P-118.013; RT Vol. IX, 60:11-16.] Protective Life VSC provided authorization for payment for an extended warranty claim on RO 10571, Line A. [Exh. P-125; RT Vol. IX, 70:15-23.] Repairs for service contract providers or insurance carriers are excluded from the calculation of a retail labor rate under Section 3065.2. [Cal. Veh. Code, § 3065.2, subd. (c)(8) and (11).] Excluding RO 10571 from the calculation of the difference in this section of Putnam's Post-Hearing Brief would increase the total difference by 1.1 hours.

	corresponding \$264.00 charge for labor on Line A. [<i>Id.</i> ; RT Vol. VI, 113:24-25.]	The sold hours on RO 10591, Line A are 0.2 lower than the corresponding Kia LTS time for the repair (including the additional 0.2 hours of diagnostic time). [<i>Id.</i> ; see also RT Vol. V, 886:14-887:16 (confirming the sold hours on RO 10591, Line A are 0.2 hours (or 12 minutes) lower than the corresponding LTS time for the repair and diagnosis).]	
RO 10631	The accounting copy of the repair order associated with RO 10631, Line F is contained in Exhibit R-214. [See Exh. J-3.003 and Exh. R-214.003-.004.] RO 10631, Line F concerns a replacement of the front passenger side caliper assembly as well as a brake fluid service. [Exh. R-214.003-.004; RT Vol. III, 518:6-519:13; RT Vol. VI, 115:20-116:23.] The RO shows sold hours of 1.3 hours and a corresponding \$572.00 charge for labor on Line F. [<i>Id.</i>]	Kia's LTS for the replacement of a Brake Caliper Assembly is 0.5 hours. [Exh. P-120.019; see also Exh. P-121.002; RT Vol. III, 519:14-520:1; RT Vol. VI, 117:13-24.] The sold hours on RO 10631, Line F are 0.8 hours higher than the corresponding Kia LTS time for the repair. [See also RT Vol. VI, 118:6-25.]	+0.8

The total difference between the sold hours and LTS hours in the above ROs sums to +1.6 hours. The sold hours in the ROs are in aggregate 1.6 hours greater than Kia's LTS. Because the difference between the sold hours in the RO and the LTS hours shows the sold hours Putnam used were in aggregate higher, the difference between the values benefits Kia in the calculation of Putnam's retail labor rate. The lower time values from the precise application of Kia's LTS would result in a higher retail labor rate.

If all the ROs had instead been equal to Kia's LTS and the charges to the customers had remained unchanged, the total number of hours generating the charges in Exhibit J-3.002-.003 would have been 1.6 hours less or 19.8 hours (21.4 hours minus 1.6 hours). This would have supported a request for a \$483.69 per hour labor rate (\$9,577.01 – the total in the Net Labor Charge column – divided by 19.8

1 hours).¹⁴

2 To the extent Kia relies on the differences between Putnam’s sold hours and Kia’s LTS hours,
3 the differences do not constitute a material inaccuracy. If Putnam’s sold hours had conformed to Kia’s
4 LTS hours exactly, the retail labor rate supported by Putnam’s ROs would have been greater not less. In
5 addition, most of the differences are no more than 0.3 hours different.

6 **C. Kia’s argument based on the language requiring application of the franchisor’s time**
7 **allowances in prior versions of Section 3065.2(a)(2) should be rejected.**

8 In its Pre-Hearing Brief, Kia relied on the language from the initial proposed version of 3065.2
9 from AB 179 to argue the Legislature intended to prohibit the use of Kia’s LTS. [See Respondent’s Pre-
10 Hearing Brief at 17:14-23.] To the extent Kia continues to rely on this argument, it should be rejected
11 because the legislative history does not preclude Putnam from pricing repairs based on Kia’s LTS hours
12 to generate charges.

13 As introduced, AB 179 included the language “total number of hours allowed pursuant to the
14 franchisor’s time allowances that would be used to compensate the franchisee for the same work had it
15 been performed under warranty” when dividing the total charges from the franchisee’s repair orders.
16 The language was replaced in the May 20, 2019, version of the bill with “total number of hours that
17 generated those charges.” [Amended Assembly AB 179 – May 20, 2019, Proposed language 3065.2,
18 subd. (a)(2).]¹⁵

19 The legislative history does not explain the intent of the language “total number of hours that
20 generated those charges” replacing “total number of hours allowed pursuant to the franchisor’s time
21 allowances that would be used to compensate the franchisee for the same work had it been performed
22 under warranty” except to say it was less controversial.¹⁶ However, neither version of the language

23 _____
24 ¹⁴ If RO 10571 concerning the sunroof motor replacement under an extended warranty plan is excluded
25 and the difference increased to +2.7 hours, the calculation would be \$512.14 (\$9,577.01 divided by
26 18.7 hours).

27 ¹⁵ A copy of the May 20, 2019, version of AB 179 containing the amendments to section (a)(2) from
28 the California Legislative Information website accessed on May 14, 2024, is attached hereto as Exhibit
3 for ease of reference.

¹⁶ “The basis for this bill [AB 179] is a similar bill by the same author last year (AB 2107), which was
approved by this committee but vetoed. Most of the provisions of this bill are similar or identical to
those contained in AB 2107. The biggest difference between the bills is the calculation of the

1 describes dividing total charges for labor from qualified repair orders by actual technician time incurred
2 in performing the repair. Nothing in the legislative history for either AB 2107 or AB 179 supports using
3 actual hours for any of the described calculations.

4 The Board should interpret the change to the statutory language as an expansion of a dealer’s
5 choice when selecting a time guide—not a limitation. Under the previous version of the statute, “total
6 number of hours allowed pursuant to the franchisor’s time allowances that would be used to compensate
7 the franchisee for the same work had it been performed under warranty” meant a franchisee could price
8 its customer pay labor using a multiplied time guide but would calculate its warranty labor
9 reimbursement rate under Section 3065.2 using the hours from the franchisor’s time guide. Under the
10 language as enacted, “total number of hours that generated those charges” means the franchisee can
11 choose what set of guide hours it uses to price customer pay repairs, however, whatever hours the
12 franchisee uses to generate the charges will be used to calculate the warranty labor reimbursement rate.

13 The plain meaning of Section 3065.2, subdivision (a)(2) allows a franchisee the freedom to use
14 a franchisor’s factory guide hours or a third-party guide as the source of the hours generating the charges
15 to retail customers. Kia does not restrict what time guides a dealer may use for pricing customer-pay
16 repairs. [RT Vol. I, 81:21-24; RT Vol. II, 337:8-13; RT Vol. III, 387:23-25.] Mr. Nardini admitted he
17 believes there are some Kia dealers who rely on the Kia LTS for pricing customer-pay repairs besides
18 Putnam. [RT Vol. II, 336:23-337:7.] Mr. Nardini further admitted dealers are permitted to use LTS
19 hours to price customer-pay repairs. [RT Vol. III, 388:1-3.] Kia’s LTS hours are a reasonable number
20 of hours to allocate to a repair. [RT Vol. II, 336: 1-7 and 337:14-17.] Putnam may rely on Kia’s LTS
21 to price customer pay repairs and generate charges.

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26 reimbursement rates charged to manufacturers for the warranty work performed by dealers. This
27 provision was fought over last year and was the basis of its veto. The reimbursement rate calculation
28 contained in this bill is less controversial.” [2019 Cal. S. Bill No. 179, Cal. 2019-2020 Reg. Sess., S.
Comm. on Trans. – August 15, 2019, at pp. 3-4.] A copy of the Senate Committee on Transportation
analysis is attached hereto as Exhibit 4 for ease of reference.

1 **D. Kia’s argument based on the veto by Governor Brown does not assist the**
2 **determination of what the phrase “total number of hours that generate those**
3 **charges” means.**

4 In its Pre-Hearing Brief, Kia argued Governor Brown’s veto of Assembly Bill 2107 caused the
5 Legislature to remove any reference to time allowances. [See Respondent’s Pre-Hearing Brief at 17:14-
6 18:10.] To the extent Kia continues to rely on the argument, it should be rejected as inconsistent with
7 the legislative history and Governor Brown’s veto message.

8 Governor Brown’s message accompanying his veto of AB 2107 stated “This bill modifies the
9 statutory framework governing the relationship between new car dealers and manufacturers, including
10 establishing a complex formula to determine the rate manufacturers will reimburse dealers for warranty
11 and recall repairs. Under current law, manufacturers are required to reimburse dealers for warranty and
12 recall repairs at a ‘reasonable’ rate negotiated between the two parties. This framework appears to be
13 working reasonably well and I see no reason to adopt the rather complicated formula authorized in this
14 bill--with perhaps unintended consequences.” [2019 Cal. S. Bill No. 179, Cal. 2019-2020 Reg. Sess., S.
15 Comm. on Trans. – August 15, 2019, at p. 5.]

16 Governor Brown’s veto of AB 2107 was not directed toward the “total number of hours allowed
17 pursuant to the franchisor’s time allowances that would be used to compensate the franchisee for the
18 same work had it been performed under warranty” but was instead directed at the bill more generally in
19 that it replaced a reasonableness determination in the first place. [2019 Cal. S. Bill No. 179, Cal. 2019-
20 2020 Reg. Sess., S. Comm. on Trans. – August 15, 2019, at p. 5.] Governor Brown’s veto message
21 would have applied equally to both AB 179 and AB 2107.

22 In addition, as introduced, AB 179 continued to include the “total number of hours allowed
23 pursuant to the franchisor’s time allowances that would be used to compensate the franchisee for the
24 same work had it been performed under warranty” language. The language was only replaced in the
25 May 20, 2019, version of the bill with “total number of hours that generated those charges.” [Amended
26 Assembly AB 179 – May 20, 2019, Proposed language 3065.2, subd. (a)(2).]

27 Governor Brown’s veto does not assist in the interpretation of the meaning of “the total number of
28 hours that generated those charges.” Any argument Kia continues to make in reliance on Governor
29 Brown’s veto should be rejected.

1 V. IF THE BOARD DECIDES TO DETERMINE A RETAIL LABOR RATE, THE RECORD
2 REFLECTS A PROPERLY CALCULATED RETAIL LABOR RATE BASED UPON KIA'S
3 SELECTION OF ROS TO BE \$ 436.51 PER HOUR.

4 Mr. Korenak prepared an analysis comparing the original Putnam Submission to Kia's responsive
5 calculation included with the Denial. Using the expanded universe of ROs Kia selected upon receipt of
6 the additional 30-days of ROs, Mr. Korenak calculated a retail labor rate pursuant to the requirements of
7 Section 3065.2. [Exh. P-108.010 (Tab 4); RT Vol. VIII, 83:5-85:20 and 95:7-97:17.] Mr. Korenak
8 determined the retail labor rate of \$436.51. [RT Vol. VIII, 98:18-21, 110:20-111:17 and 116:6-17.]

9 Kia's only challenge to this calculation rests upon the legal determination of whether actual hours
10 should be used instead of sold hours. As discussed throughout, Section 3065.2 should not be interpreted
11 to require the use of actual technician hours in place of the industry standard of sold hours.

12 **A. Putnam's original submission provides a calculated rate of \$447.52 per hour based**
13 **on the use of sold hours.**

14 Putnam's Submission provided an initial calculation of its retail labor rate of \$447.52 per hour.
15 [Exh. J-3.001-.003.] If the Board determines Kia failed to meet its burden of showing it complied with
16 the requirements of Section 3065.2 when responding to the Submission with its alternative rate of
17 \$268.89, the Board should adopt Putnam's rate as set forth in the Submission.

18 The only inaccuracy in the Submission was the inclusion of RO 10298. [Exh. R-211; *see also,*
19 *supra*, Part II.] Nevertheless, this error does not render the Submission materially inaccurate or
20 fraudulent. The exclusion of this RO results in a retail labor rate of \$437.89 per hour compared to the
21 calculated rate of \$447.52 per hour. A difference of \$9.63 per hour. This is roughly a 2 percent
22 difference in calculated rates and should not be considered material.

23 **B. Kia uses additional ROs from the set of supplemental ROs to calculate a rate of**
24 **\$268.89 per hour based on the use of actual technician hours.**

25 When Kia calculated the alternative rate of \$268.90, it relied on the inclusion of ROs that could
26 not be considered to be qualified repairs under the plain language of Section 3065.2. Kia improperly
27 included the following ROs:

- 28 • RO 10168 for brake service;
- RO 10181 for a brake light bulb;

- 1 • RO 10263 for a brake service;
- 2 • RO 10271 for brake service¹⁷;
- 3 • RO 10334 for brake service;
- 4 • RO 10468 for brake service;
- 5 • RO 10474 for brake service;
- 6 • RO 10527 for brake service;
- 7 • RO 10592 for brake service;
- 8 • RO 10638 for transmission fluid;
- 9 • RO 10546 for battery replacement; and
- 10 • RO 10655 for battery replacement.

11 Kia's inclusion of these routine maintenance repairs was a violation of Section 3065.2 because
12 routine maintenance items *including but not limited to* the replacement of bulbs, fluids, and batteries are
13 specifically excluded from the retail labor rate calculation. [Cal. Veh. Code, § 3065.2, subd. (c)(3).]
14 Although not specifically named, brake pad replacements must also be considered routine maintenance
15 repairs because they are consumable products intended to be replaced in response to wear. [RT Vol. IV,
16 637:24-640:16 (Mr. Nardini agreeing normal brake wear is not covered by warranty and is a maintenance
17 repair); *see also, supra*, Part I.C.] The Board should reject any consideration of Kia's retail labor rate
18 calculation because it includes routine maintenance repairs the Legislature specifically excluded from
19 the calculation.

20 Even if the Board were to accept Kia's selection of qualified repairs for its alterative calculation,
21 the Board should reject Kia's use of actual hours in place of sold hours. The price of a customer pay
22 repair is independent of the actual time it takes the technician to complete the repair.

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27 ¹⁷ The highlighted ROs are those Kia conceded at hearing were routine maintenance repairs that should
28 not be included in a Section 3065.2 calculation. Kia initially included these as qualified repairs when
responding to the Submission. [See Exh. J-6.004-.005.]

1 **CONCLUSION**

2 The plain language of Section 3065.2 should be given its intended effect. Kia's refusal to
3 calculate Putnam's Retail Labor Rate as set forth therein is irrebuttable. Kia's claim Putnam, and no
4 other Kia franchisee, should be required to calculate a retail labor rate using actual hours in place of the
5 industry standard of using sold hours is also in violation of Section 3065.2. Kia's argument Putnam's
6 use of Kia's own Factory Guide Hours to price customer repairs renders Putnam's Request materially
7 inaccurate or fraudulent would require Kia demonstrate its own guide to be materially inaccurate or
8 fraudulent. Kia's Denial included repairs in its calculation of a proposed alternative rate Kia now agrees
9 were included in violation of the express requirements of Section 3065.2.

10 Protestant respectfully requests the Board issue its decision finding Kia failed to comply with the
11 statutory mandate set forth in Section 3065.2; Kia failed to satisfy its burden to show Putnam's requested
12 rate of \$447.52 to be materially inaccurate or fraudulent; and Putnam's submission be deemed approved
13 retroactive to April 23, 2022.

14 In the alternative, if the Board seeks to determine a retail labor rate based upon the universe of
15 qualified repairs selected by Kia, Protestant requests the Board find the rate of \$436.51 to be the rate
16 properly calculated pursuant to Section 3065.2.

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19 By the signature below and pursuant to the Order Establishing Post-Hearing Briefing Schedule
20 paragraph 3(c), counsel for Protestant attests to the factual accuracy and legal sufficiency of the
21 foregoing brief.

22
23
24 Dated: May 14, 2024

LAW OFFICES OF
GAVIN M. HUGHES


25
26 By  _____
27 Gavin M. Hughes
28 Robert A. Mayville, Jr.
Attorneys for Protestant

EXHIBIT 1

Chart of Repair Orders in Dispute pursuant to Order Establishing Post-Hearing Briefing Schedule, Paragraph 1(b)

Repair Order No.	Description of Repair	Whether a “Qualified Repair Order” and why
RO 10133 (Line A)	Replacement of a knock sensor [Exh. R-247.001; RT Vol. III, 432:2-5, 434:6-18, 436:5-9, and 438:22-439:8; RT Vol. V, 1003:18-20; RT Vol. VI, 13:3-19.]	The parties do not dispute the RO is a Qualified Repair Order. In addition, Kia has an LTS for a knock sensor repair and replacement totaling 1.1 hours (0.90 for the repair and 0.2 for associated diagnostic). [Exh. P-120.001; <i>see also</i> Exh. P-121.002; RT Vol. V, 1003:25-1005:3; RT Vol. VI, 16:15-21.] However, the RO is not in the 90-day period selected in Kia’s Denial Letter.
RO 10148 (Line U)	Diagnostic associated with the airbag light [Exh. R-242.002.]	The repair is diagnosis only but concerns a repair which would be subject to warranty if the customer had agreed to proceed with the repair. However, the RO is not in the 90-day period selected in Kia’s Denial Letter.
RO 10153 (Line A)	Diagnostic related to rear driver side window not rolling up or down [Exh. R-248.001.]	The repair is diagnosis only but concerns a repair which would be subject to warranty if the customer had agreed to proceed with the repair. However, the RO is not in the 90-day period selected in Kia’s Denial Letter.
RO 10158 (Line A)	Diagnostic related to the vehicle’s shifting lock [Exh. R-205.001.]	The parties agree the repair is a qualified repair order. [See Exh. J-3.002-.003 and Exh. J-6.004-.005.]
RO 10165 (Line B)	Replacement of a front window regulator and switch [Exh. R-249.001-.002; RT Vol. III, 526:6-527:19; RT Vol. VI, 25:10-19.]	The parties agree the repair is a qualified repair order. [See Exh. J-3.002-.003 and Exh. J-6.004-.005.]
RO 10168 (Line A)	Brake service [Exh. R-206.002-.003; Exh. J-6.004; RT Vol. II, 183:15-17.]	The parties dispute whether RO 10168, Line A is a qualified repair order. RO 10168, Line A is not a qualified repair order. RO 10168, Line A indicates the technician confirmed the noise was coming from the right front brakes at 1 millimeter. [Exh. R-206.001-.002; RT Vol. IV, 635:9-22.] The repair replacing the brakes occurs on Line C of the RO. [RT Vol. IV, 635:24-636:7.] No amount of adjustment, polishing, or resurfacing would restore the brake pads described in RO 10168 from 1 millimeter all the way back to 10 millimeters. [RT Vol.

		IV, 639:2-640:9.] The repair in RO 10168, Line A concerned the replacement of brake pads and resurfacing of rotors due to ordinary wear and tear not covered by Kia's warranty. [RT Vol. IV, 640:10-16.]
RO 10180 (Lines A & B)	Replacement of the driver side clock spring [Exh. R-250.001; RT Vol. VI, 180:1-12 and 185:6-20] and replacement of both the front window switch and front passenger side regulator's motor [Exh. R-250.001; RT Vol. III, 464:18-466:1 and 531:14-532:11; RT Vol. VI, 27:17-29:9.]	The parties agree the repair is a qualified repair order. [See Exh. J-3.002-.003 and Exh. J-6.004-.005.]
RO 10181 (Line C)	Replacement of a bulb [Exh. R-207.002-.003; RT Vol. II, 185:19-186:1.]	The parties dispute whether RO 10181, Line C is a qualified repair order. RO 10181, Line C is not a qualified repair order. Line C of RO 10181 includes the bulb replacement with the actual hours for the labor involved in the replacement of 0.06 hours, sold hours of 0.06, and a charge of \$20.00. [Exh. R-207.002; <i>see also</i> Exh. J-6.004 (listing the same figures for the RO).] Line C of RO 10181 does not describe it is an HID bulb replacement. [RT Vol. IV, 652:25-653:12.] Bulbs wear away and burn out eventually. [RT Vol. IV, 653:22-654:2.] For this repair, the bulb was approximately two years old, and the vehicle had traveled 78,000 miles. [RT Vol. IV, 654:8-21; Exh. R-207.002-.003.] Kia's warranties exclude normal maintenance items, including but not limited to spark plugs, engine belts, filters, wiper blades and <i>bulbs</i> , except HID bulbs. Mr. Nardini agreed the bulb replacement in Line C of RO 10181 was not a warrantable repair at the mileage of the vehicle. [RT Vol. IV, 663:18-25.]
RO 10183 (Line A)	Installation of a fuel door switch [Exh. R-208.001; RT Vol. VI, 30:24-31:4.]	The parties agree the repair is a qualified repair order. [See Exh. J-3.002-.003 and Exh. J-6.004-.005.]
RO 10191 (Line C)	Installation of a new starter motor [Exh.	The parties agree the repair is a qualified repair order. [See Exh. J-3.002-.003 and Exh. J-6.004-.005.]

	R-251.006; RT Vol. VI, 35:22-36:2.]	
RO 10263 (Line B)	Replacement of brake pads and resurfacing of rotors [Exh. R-209.001-.002; RT Vol. II, 190:10-19.]	The parties dispute whether RO 10263, Line B is a qualified repair order. RO 10263, Line B is not a qualified repair order. The repair in Line B of RO 10263 included resurfacing the rotors and replacing the front brake pads which were at 2 millimeters. ¹ [Exh. R-209.001-.002; RT Vol. II, 190:10-19.] The RO states the cause for the customer concern was “wear and tear.” [Exh. R-209.001; RT Vol. IV, 642:3-8.] The brake pads had worn down from 10 millimeters down to 2 millimeters as the result of ordinary wear and tear. [RT Vol. IV, 643:11-20.] Mr. Nardini conceded the wear part—i.e., the brake pad replacement—would not be covered by warranty and the cause of the squeaks he identified in the RO were coming from the brakes. [RT Vol. IV, 644:2-14; <i>see also</i> RT Vol. IV, 644:25-645:4 (Mr. Nardini agreeing the outcome was the replacement of the pads and rotors).] Mr. Nardini agreed the brake pad replacement would not be covered by Kia’s adjustment warranty because no amount of polishing, resurfacing, or adjustment could bring a 2-millimeter brake pad back up to 10 millimeters. [RT Vol. IV, 644:15-24.]
RO 10271	Brake pad replacement and rotor resurfacing [Exh. J-6.004.]	The parties agree RO 10271 is not a qualified repair order. During the hearing, Kia stipulated the repair associated with RO 10271 included in its spreadsheet in Exhibit J-6.004 should not have been included and stipulated to removing it from the calculation. [RT Vol. II, 192:3-19.]
RO 10291 (Line F)	Replacement of the rear side valve cover gasket [Exh. R-252.004; RT Vol. VI, 42:5-10.]	The parties agree the repair is a qualified repair order. [See Exh. J-3.002-.003 and Exh. J-6.004-.005.]
RO 10298 (Line A)	Downpayment for diagnostic with parts on back order [Exh. R-211.001.]	The parties agree RO 10271 is not a qualified repair order. In response to Kia’s third reason for the denial, Putnam agreed in its June 15, 2022, letter that the RO should have been excluded from the labor rate calculation. [Exh. J-7.009; RT Vol. IV, 692:21-693:10 and 724:3-11; <i>see also</i> RT Vol. IX, 87:7-20.]
RO 10300 (Line A)	BCM replacement [Exh. R-253.001; RT Vol. VI, 207:15-24.]	The parties agree the repair is a qualified repair order. [See Exh. J-3.002-.003 and Exh. J-6.004-.005.]

¹ The repair also included lubrication involving fluids that are not generally covered by warranty. (RT Vol. IV, 642:23-643:5.)

RO 10320 (Line A)	Installation of a driver's side outside door handle [Exh. R-243.001; RT Vol. VI, 46:14-47:1.]	The parties agree the repair is a qualified repair order. [See Exh. J-3.002-.003 and Exh. J-6.004-.005.]
RO 10334	Brake pad replacement and rotor resurfacing [Exh. J-6.004.]	The parties agree RO 10271 is not a qualified repair order. During the hearing, Kia stipulated the repair associated with RO 10334 included in its spreadsheet in Exhibit J-6.004 should not have been included as a qualified repair order and stipulated to removing it from the calculation. [RT Vol. II, 214:20-25.]
RO 10346 (Line A)	A diagnosis related to a vehicle starting but shutting itself off in less than a minute [Exh. R-212.001.]	The parties agree the repair is a qualified repair order. [See Exh. J-3.002-.003 and Exh. J-6.004-.005.]
RO 10352 (Line A)	Diagnosis and replacement of a valve-purge control [Exh. R-254.001-.002; RT Vol. III, 487:1-15; RT Vol. VI, 54:6-19.]	The parties agree the repair is a qualified repair order. [See Exh. J-3.002-.003 and Exh. J-6.004-.005.]
RO 10404 (Line A)	reseal of an oil pan assembly [Exh. R-255.001-.002; RT Vol. III, 489:25-490:8 and 534:7-14; RT Vol. VI, 56:19-24.]	The parties agree the repair is a qualified repair order. [See Exh. J-3.002-.003 and Exh. J-6.004-.005.]
RO 10415 (Line A)	Diagnosis and replacement of the vehicle's PCM [Exh. R-256.001-.003; RT Vol. III, 472:6-18; RT Vol. VI, 60:10-18.]	The parties agree the repair is a qualified repair order. [See Exh. J-3.002-.003 and Exh. J-6.004-.005.]
RO 10426 (Line D)	Replacement of a clock spring [Exh. R-257.003; RT Vol. III, 478:10-481:14 and 548:2-12; RT Vol. VI, 71:15-72:24.]	The parties agree the repair is a qualified repair order. [See Exh. J-3.002-.003 and Exh. J-6.004-.005.]
RO 10454 (Line A)	Diagnosis related to a hybrid warning	The parties agree the repair is a qualified repair order. [See Exh. J-3.002-.003 and Exh. J-6.004-.005.]

	light or check engine light [Exh. R-258.001-.002; <i>see also</i> RT Vol. II, 236:4-16.]	
RO 10468 (Line A)	replacement of the front brake pads and resurfacing of both front rotors [Exh. R-213.001; RT Vol. IV, 649:13-23.]	The parties dispute whether RO 10468, Line A is a qualified repair order. RO 10468, Line A is not a qualified repair order. Line A of RO 10468 concerns a brake repair; the customer described a squeal sound when the brakes were applied and the brakes sinking further than normal. [Exh. R-213.001; RT Vol. II, 193:20-194:1.] The cause for the repair noted in the RO is “due to wear and tear.” [Exh. R-213.001; <i>see also</i> RT Vol. IV, 648:12-14.] The front brake pads for this vehicle had worn down from 10 millimeters to 4 millimeters prior to the repair described in the RO. [Exh. R-213.001; RT Vol. IV, 649:3-12.] The repair in Line A of RO 10468 is a removal and replacement of the front brake pads and resurfacing of both front rotors. ² [Exh. R-213.001; RT Vol. IV, 649:13-23.] The resurfacing of rotors and the replacement of brake pads is an ordinary maintenance item, and no amount of polishing or adjusting would have taken 4-millimeter brake pads to 10 millimeters. [RT Vol. IV, 650:7-14.] Mr. Nardini agreed the repair in Line A of RO 10468 was not a qualified repair. [RT Vol. IV, 650:15-17.]
RO 10474	Brake pad replacement [Exh. J-6.004.]	The parties agree RO 10474 is not a qualified repair order. During the hearing, Kia stipulated to withdraw consideration of RO 10474 from its labor rate calculation. [RT Vol. II, 195:9-19.]
RO 10486 (Line A)	Diagnosis and replacement of a fuel sending unit [Exh. R-259.001-.002; RT Vol. III, 551:19-22; RT Vol. VI, 84:14-22.]	The parties agree the repair is a qualified repair order. [See Exh. J-3.002-.003 and Exh. J-6.004-.005.]
RO 10527	Brake pad replacement and resurfacing of both rotors [Exh. J-6.004.]	The parties agree RO 10527 is not a qualified repair order. During the hearing, Kia stipulated to withdraw consideration of RO 10527 from its labor rate calculation; Kia stipulated it was not a qualified repair. [RT Vol. II, 196:6-7 and 196:15-16.]

² The repair also involved a brake fluid service, however, fluid replacement is not covered as a warranty item. (RT Vol. IV, 649:20-650:6.)

RO 10529 (Lines A & B)	Differential pinion oil seal repair and replacement [Exh. R-260.001-.002; RT Vol. III, 493:17-23; RT Vol. VI, 88:88:1-6.] and repair and replacement of a windshield washer fluid pump [Exh. R-260.002-.003; RT Vol. III, 494:4-9; RT Vol. VI, 89:2-12.]	The parties agree the repair is a qualified repair order. [See Exh. J-3.002-.003 and Exh. J-6.004-.005.]
RO 10534 (Line B)	Replacement of the windshield washer fluid pump [Exh. R-261.001-.002; RT Vol. VI, 92:22-93:11.]	The parties agree the repair is a qualified repair order. [See Exh. J-3.002-.003 and Exh. J-6.004-.005.]
RO 10553 (Line A)	Diagnosis related to the tailgate door handle not operating [Exh. R-262.001.]	The parties agree the repair is a qualified repair order. [See Exh. J-3.002-.003 and Exh. J-6.004-.005.]
RO 10571 (Line A)	Replacement of a sunroof motor [Exh. R-244.001-.002; <i>see also</i> RT Vol. II, 254:18-256:3 and RT Vol. III, 498:3-13; RT Vol. VI, 99:5-100:4.]	As discussed during the hearing, RO 10571 concerned an extended warranty repair that should have been excluded from the calculation. The repair in RO 10571, Line A concerns a Claim Number 2688461, Protective Asset Extended Warranty. [Exh. P-118.013; RT Vol. IX, 60:11-16.] Protective Life VSC provided authorization for payment for an extended warranty claim on RO 10571, Line A. [Exh. P-125; RT Vol. IX, 70:15-23.] Repairs for service contract providers or insurance carriers are excluded from the calculation of a retail labor rate under Section 3065.2. [Cal. Veh. Code, § 3065.2, subd. (c)(8) and (11).]
RO 10581 (Line A)	Replacement of the downhill indicator light (bulb replacement) [Exh. R-263.001; RT Vol. III, 500:21-501:6; RT Vol. VI, 101:24-102:12.]	The parties agree the repair is a qualified repair order. [See Exh. J-3.002-.003 and Exh. J-6.004-.005.]
RO 10585 (Line A)	Replacement of a rear trunk latch assembly [Exh. R-	The parties agree the repair is a qualified repair order. [See Exh. J-3.002-.003 and Exh. J-6.004-.005.]

	264.001; RT Vol. VI, 108:7-20.]	
RO 10590 (Lines E and G)	Reseal of the oil pan [Exh. R-265.004; RT Vol. VI, 110:12-17.] and resurfacing of both front rotors and replacement of the front brake pads [Exh. R-265.005; RT Vol. IV, 623:4-19.]	The parties agree the repair is a qualified repair order. [See Exh. J-3.002-.003 and Exh. J-6.004-.005.] The parties also agree Line G is excluded from the calculation of a retail labor rate by Section 3065.2, subdivision (c)(3). During the hearing, Kia stipulated the second repair it had included for RO 10590 was not a qualified repair. [RT Vol. II, 196:19-197:4.]
RO 10591 (Line A)	Replacement of the VCMA (variable charge motion actuator) [Exh. R-266.001-.002; <i>see also</i> RT Vol. II, 251:17-253:5; RT Vol. VI, 112:24-113:12.]	The parties agree the repair is a qualified repair order. [See Exh. J-3.002-.003 and Exh. J-6.004-.005.]
RO 10592	Front brake pad replacements [Exh. J-6.005.]	The parties agree RO 10527 is not a qualified repair order. During the hearing, Kia stipulated to withdraw consideration of RO 10592 from its labor rate calculation; Kia stipulated it was not a qualified repair. [RT Vol. II, 197:21-23.]
RO 10617 (Line A)	Diagnosis related to the vehicle's check engine light [Exh. R-267.001-.002; <i>see also</i> RT Vol. VII, 52:1-10.]	The parties agree the repair is a qualified repair order. [See Exh. J-3.002-.003 and Exh. J-6.004-.005.]
RO 10631 (Line F)	Replacement of the front passenger side caliper assembly as well as a brake fluid service [Exh. R-214.003-.004; RT Vol. III, 518:6-519:13; RT Vol. VI, 115:20-116:23.]	The parties agree the repair is a qualified repair order. [See Exh. J-3.002-.003 and Exh. J-6.004-.005.]
RO 10638 (Line A)	Transmission fluid refill [Exh. R-215.001-.002; RT Vol. IV, 666:8-667:5.]	The parties dispute whether RO 10638, Line A is a qualified repair order. RO 10638, Line A is not a qualified repair order. Ultimately, as described in Line A of RO 10638, the technician describes, "Upon further inspection, checked transmission fluid level. Found that it was low and that the fluid was dark and had a burnt smell.

		At this time, would recommend to performed [sic] transmission service, and recheck vehicle. Test-drove at highway speeds. Vehicle did not stall and HEV light did not turn on. Recheck for DTC. Not DTC at this time. Vehicle operating as designed.” The transmission fluid was low and had to be filled back up. [Exh. R-215.001-.002; RT Vol. IV, 666:8-667:5.] Oil and fluid changes are not warrantable repairs under Kia’s warranty. [Exh. R-230.011; RT Vol. IV, 668:23-669:14.] Transmission fluid is a fluid and filling up the transmission fluid in this repair is not a warrantable repair. [RT Vol. IV, 669:15-670:1; <i>see also</i> Cal. Veh. Code, § 3065.2, subd. (c)(3) (specifically listing fluids as a routine maintenance item).]
RO 10646 (Line A)	Diagnosis and battery replacement [RT Vol. II, 205:5-25; Exh. R-216.001; Exh. J-6.005.]	The parties dispute whether RO 10646, Line A is a qualified repair order. RO 10646, Line A is not a qualified repair order. Line A of the RO concerns a diagnosis and battery replacement with actual hours, sold hours, and customer charges matching the information listed in Kia’s spreadsheet. [RT Vol. II, 205:5-25; Exh. R-216.001; Exh. J-6.005.] Batteries, similar to bulbs, wear out over time. Batteries charge while the vehicle is running and lose charge when the vehicle is not running generating wear and tear on the battery. [RT Vol. IV, 671:3-15.] In the ordinary operation of a vehicle, batteries will eventually wear out. [RT Vol. IV, 671:22-25.] The only repair performed in Line A of RO 10646 was to replace a battery. There is no repair related to the battery replacement in Line A of RO 10646. [Exh. R-216.001; RT Vol. IV, 676:9-16.]
RO 10655 (Line D)	Battery replacement [Exh. J-6.005; Exh. R-217.003; RT Vol. II, 208:19-209:2.]	The parties dispute whether RO 10655, Line D is a qualified repair order. RO 10655, Line D is not a qualified repair order. Line D of RO 10655 concerns a battery replacement with actual hours, sold hours, and customer charges mostly ³ matching the information listed in Kia’s spreadsheet. [Exh. J-6.005; RT Vol. II, 208:19-209:2; Exh. R-217.003.] Batteries, similar to bulbs, wear out over time. Batteries charge while the vehicle is running and lose charge when the vehicle is not running generating wear and tear on the battery. [RT Vol. IV, 671:3-15.] In the ordinary operation of a vehicle, batteries will eventually wear out. [RT Vol. IV, 671:22-25.] The only repair performed in Line D of RO 10655 is a battery replacement. There are no other repairs related

³ The RO lists 87.05 for the net labor charge while the spreadsheet lists 87.50. The difference appears to be a typographical error in the spreadsheet.

		to the battery replacement in Line D of RO 10655. [RT Vol. IV, 679:11-17.] The cause of the battery failure is described as due to wear and tear. [Exh. R-217.003; RT Vol. IV, 679:18-22.]
RO 10679 (Line A)	Installation of lamp assembly [Exh. J-6.005 and P-108.010 (Tab 4).]	The parties agree the repair is a qualified repair order. [See Exh. J-6.004-.005.]
RO 10680 (Line A)	Replacement of the driveshaft and clean up of grease residue [Exh. J-6.005 and P-108.010 (Tab 4).]	The parties agree the repair is a qualified repair order. [See Exh. J-6.004-.005.]
RO 10712 (Line A)	Main driver side door switch repair [Exh. J-6.005 and P-108.010 (Tab 4).]	The parties agree the repair is a qualified repair order. [See Exh. J-6.004-.005.]

EXHIBIT 2

Date of Hearing: April 22, 2019

ASSEMBLY COMMITTEE ON TRANSPORTATION

Jim Frazier, Chair

ABPCA Bill Id:AB 179 (

Author:Reyes) – As Introduced Ver:January 9, 2019

SUBJECT: New Motor Vehicle Board

SUMMARY: Requires car manufacturers to reimburse franchised new car dealers for warranty repairs based on specified formula instead of using the existing practice of determining a reasonable rate and recasts other existing provisions on the relationship between manufacturers and dealerships. Specifically, **this bill:**

- 1) Establishes the following rules for manufacturers to compensate dealers for fulfilling warranty obligations:
 - a) Requires manufacturers to set the parts and labor rates by accepting a rate calculated by the dealers by determining the total charges from qualified repair orders submitted and dividing that amount by the dealer's total costs of the purchase of those parts;
 - b) Requires dealers to submit to manufacturers either one hundred sequential qualified repair orders, including any nonqualified repair orders completed in the same period, or all repair orders completed during any period of 90 consecutive days prior to the date of submission, whichever is fewer;
 - c) Defines a "qualified repair order" as 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 the warranty if the work had been required and performed during the period of the warranty.
 - d) Allows dealers to omit certain charges included in repair orders, including: manufacturer, manufacturer branch, distributor, or distributor branch special events, specials or promotional discounts for retail customer repairs; parts sold, or repairs performed, at wholesale, among other things.
 - e) Permits a manufacturer to contest the material accuracy of the dealer's retail labor rate or retail parts rate that was calculated by the dealer within 30 days after receiving notice from the dealer.

- f) Requires a manufacturer, if the dealer disagrees with the manufacturer's contested rate, to pay the dealer's rate until a decision is rendered by the New Motor Vehicle Board (NMVB), or a mutual resolution is made.
- g) Requires the retail labor rate and parts rate to take effect 30 days after the manufacturer receives the rate.
- h) Prohibits the manufacturer from taking any retaliatory or adverse actions because of the rates.
- i) Allows a dealer to petition NMVB for failing to accept the rates, and places the burden of proof on the manufacturer to show they did not violate the rate provisions.
- j) Allows NMVB to order the manufacturer to reimburse the franchisee for the difference between the amount the dealer actually received and the amount that the dealer would have received if the manufacturer compensated the dealer at the retail labor rate and retail parts.
- k) Defines "parts" to include, but not be limited to, engine, transmission and other part assemblies.
- l) Defines "warranty" to include certified preowned warranty, a technical service bulletin, a customer service campaign, and a federal recall.
- m) Places a 10% cap on the annual increase in the dealership's baseline warranty labor rate.
- n) Defines "baseline warranty labor rate" to mean the warranty labor rate that is in effect immediately prior to the dealer's most current submission to establish or

modify its warranty reimbursement schedule.

- 2) Places the following restrictions on manufacturers:
 - a) Clarifies that it is unlawful for a manufacturer to refuse or fail to deliver in reasonable quantities and within a reasonable time a new vehicle sold or distributed by the manufacturer, a new vehicle or parts or accessories to new vehicles that are of a model offered by the manufacturer or distributor to other franchisees in the state of the same line-make, if the vehicle, parts, or accessories are publicly advertised as being available for delivery or actually being delivered in this state.
 - b) Prohibits a manufacturer from requiring a dealer to perform service repair or warranty work on any vehicle model that is not currently or previously available to the franchisee for sale or lease as a new vehicle.
- 3) Defines “adverse action” as any activity that imposes, either expressly or implicitly, a burden, responsibility, or penalty on a dealer, including, but not limited to, any audits, withholding of incentives, or monetary chargebacks related to provisions protecting dealers from punitive measures taken to enforce a provision of existing law providing protections to dealers on exports; and removes the sunset clause for this provision.
- 4) Prohibits a manufacturer from requiring a facility alteration, expansion or addition if the facility has been modified within the last 10 years at a cost of \$250,000 or more and the modification was required, or was made, for the purposes of complying with a franchisor's brand image program.
- 5) Specifies that the \$250,000 cap on facility alterations does not apply for the following:
 - a) Facility alterations made involving the exercise of the franchisor’s trademark rights that is necessary to erect or maintain signs or to the use of any trade mark.

that is necessary to erect or maintain signs or to the use of any trade mark.

- b) Facility alterations made that are necessary for the sale or service of zero-emission or near-zero-emission vehicles.
 - c) Facility alterations made to comply with health or safety laws.
 - d) The installation of specialized equipment necessary to service a vehicle offered by a manufacturer and available for sale by the dealer.
- 6) Authorizes franchisees to file protests with NMVB related to performance standards, and places the burden of proof on the manufacturer to show they did not use prohibited performance standards, until January 1, 2025.
 - 7) Prohibits a manufacturer from preventing a dealer from selecting a digital service of a dealer's choice that is offered by a vendor of the dealer's choice, provided that the service offered by the vendor is approved by the manufacturer.
 - 8) Defines digital service to include internet web site and data management services, but to not include warranty repair processes for a vehicle.
 - 9) Reinstates a provision of law that sunset last year that prohibits a vehicle manufacturer, manufacturer branch, distributor, or distributor branch from taking an adverse action against a dealer relative to an export or sale-for-resale prohibition if the dealer causes the vehicle to be registered in a state and collects or causes to be collected any applicable sale or use tax due to the state until January 1, 2025.

EXISTING LAW:

- 1) Charges the California Department of Motor Vehicles (DMV) with licensing and regulating dealers, manufacturers, and distributors of motor vehicles who conduct business in California.
- 2) Establishes NMVB within DMV, and requires it to hear and decide certain protests presented by a motor vehicle franchisee.
- 3) Prescribes procedures to be followed by franchisors, franchisees, and NMVB regarding claims for warranty reimbursement or incentive compensation. Requires every manufacturer to fulfill every warranty agreement and adequately and fairly compensate each franchisee dealer for labor and parts used to fulfill the warranty. A copy of the

warranty reimbursement schedule or formula must be filed with NMVB, and the schedule or formula is required to be reasonable with respect to the time and compensation.

Requires all claims made by franchisees to be either approved or disapproved within 30 days after receipt by the franchiser. When any claim is disapproved, the franchisee who submits it shall be notified in writing, and, each notice shall state the specific grounds upon which the disapproval is based.

- 4) Makes it unlawful for a manufacturer or distributor to 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. In any proceeding in which a required facility alteration, expansion, or addition is an issue, the manufacturer or distributor would have the burden of proving the reasonableness of the requirement.
- 5) Prohibits a manufacturer from competing with a dealer in the same line-make operating under an agreement or franchise from a manufacturer or distributor in the relevant market area.
- 6) Establishes that manufacturers have a right of first refusal for the sale of a dealership if certain conditions are met.
- 7) Prohibits a manufacturer from establishing or maintaining a performance standard, sales objective or program for measuring a dealer's sales, service or customer service performance that may materially affect the dealer, unless the manufacturer has laid out a standard that is reasonable in light of the market characteristics, availability and allocation of vehicles and parts inventory, economic circumstances, and historical sales.

FISCAL EFFECT: Unknown

COMMENTS: NMVB is a board within DMV with oversight provided by the California State Transportation Agency. It was created in 1967 as the New Car Dealers Policy and Appeals Board, with functions limited to hearing appeals from final decisions which were adverse to the occupational license of a new motor vehicle dealer, manufacturer, distributor or representative. After the passage of the Automobile Franchise Act in 1973, NMVB was given its current name and given quasi-judicial capacity to resolve disputes between franchised dealers and manufacturers of new motor vehicles. The board consists of 9 members, four of which are required to be dealers.

Primary Goals: Right now the board has jurisdiction over franchise terminations, new dealership locations, vehicle allocations, warranty reimbursements and incentive

reimbursements. This bill recasts franchise agreements between dealers and manufacturers in several different ways, including requiring warranty reimbursement rates to be based on a formula.

The other changes in this bill are aimed toward protecting car dealerships from what they believe are unnecessary costs, including requirements to upgrade their facilities beyond \$250,000 in a 10-year time period, or restricting a dealer from selecting a digital service of a dealer's choice.

Others restore provisions of law that sunset last year that would have been extended had Governor Brown signed AB 2107 (Reyes, 2018), including a provision to prevent retaliation against a dealer if someone purchased a vehicle at their dealership and then exported the vehicle.

Finally, several provisions of this bill are meant to clarify or expedite areas of existing law, including definitions of what an adverse action taken against a dealer is, while allowing dealers to protest already prohibited performance standards.

Last year, some manufacturers expressed an interest to continue to work with the dealers to address various issues in this bill, and have been able to work out many of these issues in other state's franchise laws. Other manufacturers had expressed to the committee an unwillingness to negotiate, and that AB 2107 was far more expansive than any other franchise-related bill in recent memory and undoes previous negotiations. This is the sixth bill since 2009 addressing the Automotive Franchise Law, and previous efforts have all generally ended with compromise with the exception of last year.

Multiple amendments were made to AB 2107 last year in an effort of good faith from the sponsors to address the opponents concerns. This bill reflects the final product of those amendments. The bill was ultimately vetoed by the Governor, for reasons to be discussed below.

Both parties have indicated a willingness to continue negotiations this year and to continue to make additional changes to the bill to address the manufacturers' concerns regarding warranty reimbursement rates established in this bill. As of the writing of this analysis, those discussions are ongoing.

A Reasonable Proposition: Much of the debate on the retail reimbursement rate for warranty work hinges on one word: reasonable. Currently, parts and labor rates for warranty reimbursements are generally set by manufacturers, and are required by law to be reasonable. A dealer can file a protest with the NMVB if they believe the rate offered by the manufacturers are unreasonable.

To date, NMVB has never made a determination that a rate provided to a dealer was

unreasonable.

This bill reverses the existing power dynamic between dealers and manufacturers by allowing dealers to set the labor and parts rates through an established formula outlined in this bill instead of having those rates dictated by the manufacturers and judged on a “reasonableness” standard by NMVB. Rates would be calculated by looking at either 100 sequential repair orders, or all repair orders completed during any period of 90 consecutive days prior to the date of submission. Dealers are granted permission to omit certain charges that they believe would artificially lower the retail labor and parts reimbursement because manufacturers would include non-warranty repairs in the calculation.

The dealers are concerned that by having a “reasonableness” standard, every retail rate can and will be challenged at NMVB. The sponsors contend that having a mathematical formula to establish the rates will result in a more accurate reflection of the costs to dealerships to provide warranty repairs. The dealers contend that inserting the word “reasonable” into this bill, even with the formula described above, would eliminate the purpose of this bill, which is to create a standardized formula for reimbursement rates.

Governor Brown vetoed AB 2107 (Reyes, 2018), which was identical to this bill, because of this provision in the bill. In his veto message, Governor Brown argued that “Under current law, manufacturers are required to reimburse dealers for warranty and recall repairs at a “reasonable” rate negotiated between the two parties. This framework appears to be working reasonably well and I see no reason to adopt the rather complicated formula authorized in this bill – with perhaps unintended consequences.”

The Alliance for Automobile Manufacturers, who are opposing this bill, argue that “The language of the bill clearly encourages car dealers to increase consumer retail repair rates and prices as a method to inflate compensation on warranty work from automobile manufacturers. In addition, the proposed prohibition on cost recovery surcharges would ensure that individual dealers cannot be held accountable for their independent pricing decisions, resulting in reduced competition and higher prices for all consumers.”

As part of the negotiations last year, the author took amendments to cap any increase in retail reimbursement rates at 10% per year. They also took amendments to require both qualified and unqualified repair orders to be sent to manufacturers in order to ensure the dealers were not selectively choosing repair orders that may reduce their reimbursement rate. Both sides have discussed with this committee ways to address how this formula should be calculated, and have indicated to the committee that they will continue to discuss these terms.

The Global Automakers contend that some of the provisions of this bill may lead to an artificial increase in costs. For example, they contend that, “The bill would allow a dealer to

be compensated for a parts markup for parts used in performing warranty work even if the manufacturer provided the parts to the dealer at no cost. These types of parts are typically provided to address recall or similar issues and allow customers to have their vehicles repaired more quickly and efficiently than traditional warranty repairs without injecting unnecessary costs into the distribution system.” The Global Automakers also contend that the formula in this bill allows dealers to charge them for the costs of a part at its highest price, not the current market rate for that part.

Manufacturers are concerned that they will be left with little recourse to contest the rates set by this bill. Manufacturers are only allowed to contest that the rate is materially inaccurate or fraudulent. They are required to pay the rate sent to them by the dealers until NMVB reverses the rate or the two parties come to an agreement to change the rate. Auto manufacturers are prohibited from amending their notification to dealerships, so if new information arises that the rate was fraudulent, the manufacturers will have no recourse to amend their complaint. The Global Automakers contend that “Manufacturers should be able to challenge a submission on any ground, including general economic conditions and if the submission is unreasonable. Moreover, a manufacturer should only have the burden of proof to demonstrate that it complied with this subsection.” Further, there is no provision for NMVB to award damages to a manufacturer even if such a rate is determined to be fraudulent. Manufacturers may be forced to pay artificially inflated rates for months with no recourse for reimbursement without filing a separate civil lawsuit after NMVB determination.

The Genesis of This Proposition: Several of the provisions of this bill stem from a dispute between dealers and a new line of car, Genesis, formerly Hyundai Genesis. Hyundai, seeking to break into the luxury car market, decided to spin off its Genesis car into a new brand of automobiles. Manufacturers have told dealers that sold Hyundai Genesis cars that they can no longer service the cars they sold for warranty reimbursements. Manufacturers are also preventing dealers that sold Hyundai Genesis cars from selling the new Genesis brand. Other dealerships are being told that even though they cannot sell the Genesis, they are required to service them for warranty reimbursements.

In response, this bill makes it unlawful for a manufacturer to refuse to deliver any new vehicles that are of a make or model offered by the manufacturer to other dealers in the state of the same line make. Further, a manufacturer would be prohibited from requiring a dealer to provide service repairs on a vehicle model that is currently not available to the dealer to sell. As a result of a provision in last year’s bill that was later removed, the car dealers were able to successfully negotiate a deal to make sure dealers that sold the vehicle can still service them.

Build it, and They Will Come: Another requirement dealers have found unfair include requirements to update their facilities for brand imaging. For example, manufacturers may

come in and require hardwood floors for certain cars to highlight how luxurious they are. This bill seeks to limit these requirements by deeming facility alterations, expansions, or additions as unreasonable if the facility has been modified in the last 10 years and the modifications were required or made for the purposes of complying with a manufacturer's brand image program.

Last year, amendments were made that are reflected in this bill to place a \$250,000 cap on how much money a manufacturer can require a dealer to spend to comply with their brand image program over the course of a decade.

Further amendments were made to clarify that the \$250,000 cap did not include payments made for the installation of zero-emission and near zero-emission vehicles, repairs made to comply with health and safety requirements, or upgrades made for the installation of specialized equipment necessary to service a vehicle offered by a manufacturer and available for sale by the dealer.

Up To Standard: Dealers are contending that manufacturer's current performance and incentive programs are unfair. Existing law makes it a violation for a manufacturer to establish or maintain a performance standard, sales objective or program for measuring a dealer's sales, or service or customer service performance standard that may materially affect the dealer, unless the manufacturer has laid out a standard that is reasonable in light of the market characteristics, availability and allocation of vehicles and parts inventory, economic circumstances, and historical sales. However, dealers cannot protest these performance standards to the NMVB unless they are either bringing a protest as a result of a termination. This bill allows for these protests to be made at any time, not just when the failure to meet a prohibited performance standard costs them their business. Last year's negotiations resulted in a sunset clause being inserted for this provision.

Off Into The Sunset: In 2015, the Legislature passed and Governor Brown signed AB 1178 (Achadjian), Chapter 526, Statutes of 2015, which prevented manufacturers from taking adverse actions against a dealer relative to an export or sale for resale prohibition if the dealer registers the vehicle in the state and collects or causes to be collected any applicable sale or use tax due the state. The legislature passed AB 1178 because of actions being taken against dealers who were being punished by manufacturers for individuals buying their cars and then trying to sell them on the international market. These provisions sunset in 2019, but would have been extended had AB 2107 been signed into law. This bill restores the previous law and sunsets the provision by January 1, 2025, and based on some interpretation issues with the NMVB, more clearly defines what should be considered an adverse action.

Committee concerns: Last year when this bill passed out of this committee there was a belief that further negotiations would continue around how the retail reimbursement rate

were calculated. While that bill was amended later in the Senate to place a 10% annual cap on retail reimbursement rates and to require dealer's to provide both qualified and unqualified repair orders, no changes were made to the way the reimbursement rate was calculated.

While 34 other states provide a formula for reimbursement rates, this bill uses a model for calculating reimbursement rates only used by one state: Wisconsin. The opponents of the bill have contended that the Wisconsin rate calculation provides a perverse incentive for dealerships to increase their non-warranty repair work in order to increase their warranty reimbursement rates.

This bill may result in car dealerships receiving more adequate reimbursements for the work they have to do as a result of a manufacturing error and are required to provide because of a warranty agreement between the manufacturer and the customer. However, it could also result in dealerships manipulating the system by increasing the costs of non-warranty repair work in order to increase their warranty reimbursement rates.

Previous Legislation: AB 2107 (Reyes, 2018) was nearly identical to this bill. That bill was vetoed by the Governor.

AB 1178 (Achadjian), Chapter 526, Statutes of 2015, provided that a vehicle manufacturer, manufacturer branch, distributor, or distributor branch cannot take any adverse action against a dealer relative to an export or sale-for-resale prohibition if the dealer causes the vehicle to be registered in a state and collects or causes to be collected any applicable sale or use tax due to the state, as specified.

SB 155 (Padilla), Chapter 512, Statutes of 2013, modified the relationship between motor vehicle dealers and manufacturers by, among other things, making changes regarding the use of flat-rate time schedules for warranty reimbursement, warranty and incentive claims, audits, protest rights, export policies, performance standards, and facility improvements.

SB 642 (Padilla), Chapter 342, Statutes of 2011, modified and expanded the existing statutory framework regulating the relationship between vehicle manufacturers and their franchised dealers.

SB 424 (Padilla), Chapter 12, Statutes of 2009, regulates actions that vehicle manufacturers may take with regard to their franchised dealers, and allows 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.

REGISTERED SUPPORT / OPPOSITION:

Support

California New Car Dealers Association (Sponsor)

California Conference of Machinists

California Motorcycle Dealers Association

Oppose

Alliance of Automobile Manufacturers

Association of Global Automakers

Civil Justice Association of California

Honda North America, Inc.

Analysis Prepared by: David Sforza / TRANS. / (916) 319-2093

EXHIBIT 3



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AB-179 New Motor Vehicle Board. (2019-2020)

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AMENDED IN ASSEMBLY MAY 20, 2019

CALIFORNIA LEGISLATURE— 2019–2020 REGULAR SESSION

ASSEMBLY BILL

NO. 179

Introduced by Assembly Member Reyes

January 09, 2019

An act to amend Sections 3010, 3050.5, 3065, ~~3066~~, 11713.3, 11713.13, and 11726 of, ~~to amend, repeal, and add Section 3066 of, to add Sections 3065.2 and 3065.25~~ ~~to add Sections 3065.2, 3065.25, 3065.3, and 3065.4~~ to, to add and repeal Sections 3050, 3050.1, ~~3050.7, 3065.3, and~~ ~~and 3050.7 of, to add and repeal~~ Article 6 (commencing with Section 3085) of Chapter 6 of Division 2 of, and to repeal Article 3 (commencing with Section 3052) of Chapter 6 of Division 2 of, the Vehicle Code, relating to new motor vehicles.

LEGISLATIVE COUNSEL'S DIGEST

AB 179, as amended, Reyes. New Motor Vehicle Board.

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 in regard to a dispute with the vehicle manufacturer. Prior law, until January 1, 2019, authorized the board to hear protests by an association challenging the legality of an export or sale-for-resale prohibition policy of a manufacturer, manufacturer branch, distributor, or distributor branch and established procedures for hearing those protests, as specified.

This bill would again authorize the board to hear these protests and establish the hearing procedures until January 1, ~~2025.~~ ~~2030.~~

Existing law, until January 1, 2019, required the board to hear an appeal filed by a new motor vehicle dealer, manufacturer, manufacturer branch, distributor, or distributor branch licensee or applicant of a decision by the department.

This bill would remove this requirement for the board to hear those appeals, and would repeal applicable provisions.

Prior law, until January 1, 2019, authorized the board, under specified circumstances, to mediate, arbitrate, or otherwise resolve certain disputes between a member of the public and a new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch, or representative.

This bill would authorize the board to hear those disputes only if they are brought by the member of the public or the member of the public consents to the jurisdiction of the board.

Existing law requires a franchisor to fairly compensate for labor and parts used to fulfill warranty obligations.

This bill would instead require a franchisor to reimburse a franchisee according to a retail labor rate and retail parts rate established by each franchisee. The bill would prescribe the method by which a franchisee may establish or alter those reimbursement rates and would require the board to resolve any disputes regarding the calculation of those rates. The bill would prohibit specified actions by a franchisor related to the establishment of those reimbursement rates.

Existing law prohibits a licensed manufacturer, manufacturer branch, distributor, distributor branch, or affiliate from engaging in specified proscribed business practices. A violation of these provisions is a misdemeanor.

This bill would prohibit additional acts, including making it unlawful for these entities to restrict dealers from selecting certain vendors of their choice, as specified. Because a violation of these new provisions would be punishable as a crime, the bill would impose a state-mandated local program.

The bill includes legislative findings and declarations and would make other conforming changes.

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.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: yes

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 California vitally affects 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 a clear procedure to determine whether a reimbursement is reasonable. Unlike many states that have addressed this issue, California does not require franchisees to be reimbursed for warranty work at a retail rate.
- (d) California prohibits manufacturers from imposing chargebacks and other adverse actions on dealers when the dealer did not have knowledge of, or reason to know of, an intended exportation or resale of a vehicle. To combat these violations, California authorized associations to file protests with the New Motor Vehicle Board to enforce California law on export policies. This authority expired on January 1, 2019.
- (e) Franchisors sometimes establish facility models that require dealers to update their facilities every few years. The Legislature intends to establish necessary parameters on facility upgrades.
- (f) Additional authority is needed at the New Motor Vehicle Board to ensure a fair and equitable motor vehicle franchise system.
- (g) Some manufacturers require dealers to indemnify manufacturers when implementing manufacturer policies.
- (h) The New Motor Vehicle Board provides an effective means to resolve disputes between manufacturers and dealers because it provides staff and judges with subject matter expertise and a successful alternative dispute

resolution program, which reduces a significant burden on the superior courts. Additional authority is needed at the New Motor Vehicle Board to address issues of performance standards.

(i) 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 franchisors, that manufacturers are discouraged from adopting and enforcing policies contrary to California law and regulation, that dealers are adequately protected from excessive facility upgrade requirements, and that dealers can seek to address illegal manufacturer acts by filing protests at the New Motor Vehicle Board.

SEC. 2. Section 3010 of the Vehicle Code is amended to read:

3010. Five members of the board shall constitute a quorum for the transaction of business, for the performance of any duty or the exercise of any power or authority of the board, except that three members of the board, who are not new motor vehicle dealers, shall constitute a quorum for the purposes of Article 4 (commencing with Section 3060) and the consideration of a petition pursuant to subdivision (b) of Section 3050 that involves a dispute between a franchisee and franchisor.

SEC. 3. Section 3050 is added to the Vehicle Code, to read:

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) 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) (A) 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.

(B) The board shall not have any jurisdiction over a dispute pursuant to this paragraph involving any member of the public, including a consumer or other person that is not 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, unless that person has filed the dispute with the board or consents to jurisdiction by the board.

(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.

(c) 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, 3065.2, 3065.3, **3065.4**, 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.

(d) Hear and decide, within the limitations and in accordance with the procedure provided, a protest presented by an association challenging a policy of a manufacturer, manufacturer branch, ~~distributor~~ **distributor**, or distributor branch pursuant to Section 3085. 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 6 (commencing with Section 3085), unless all participants to the protest stipulate otherwise.

(e) Notwithstanding subdivisions (b), (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.

(f) This section shall remain in effect only until January 1, ~~2025~~, 2030, and as of that date is repealed.

SEC. 4. Section 3050 is added to the Vehicle Code, to read:

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) 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~~ *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) (A) 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.

(B) The board shall not have any jurisdiction over a dispute pursuant to this paragraph involving any member of the public, including a consumer, or other person that is not 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, unless that person has filed the dispute with the board or consents to jurisdiction by the board.

(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.

(c) 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, 3065.2, *3065.3, 3065.4*, 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.

(d) Notwithstanding subdivisions (b) and (c), 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.

(e) This section shall become operative on January 1, ~~2025~~, 2030.

SEC. 5. Section 3050.1 is added to the Vehicle Code, to read:

3050.1. (a) In a proceeding, hearing, or in the discharge of duties imposed under this chapter, the board, its executive director, or an administrative law judge designated by the board may administer oaths, take depositions, certify to official acts, and issue subpoenas to compel attendance of witnesses and the production of books, records, papers, and other documents in any part of the state.

(b) For purposes of discovery, the board or its executive director may, if deemed appropriate and proper under the circumstances, authorize the parties to engage in the civil action discovery procedures in Title 4 (commencing with Section 2016.010) of Part 4 of the Code of Civil Procedure, excepting the provisions of Chapter 13 (commencing with Section 2030.010) of that title. Discovery shall be completed no later than 15 days prior to the commencement of the proceeding or hearing before the board. This subdivision shall apply only

to those proceedings or hearings involving a petition filed pursuant to subdivision (b), or protest filed pursuant to subdivision (c) or (d), of Section 3050. The board, its executive director, or an administrative law judge designated by the board may issue subpoenas to compel attendance at depositions of persons having knowledge of the acts, omissions, or events that are the basis for the proceedings, as well as the production of books, records, papers, and other documents.

(c) This section shall remain in effect only until January 1, ~~2025~~, 2030, and as of that date is repealed.

SEC. 6. Section 3050.1 is added to the Vehicle Code, to read:

3050.1. (a) In a proceeding, hearing, or in the discharge of duties imposed under this chapter, the board, its executive director, or an administrative law judge designated by the board may administer oaths, take depositions, certify to official acts, and issue subpoenas to compel attendance of witnesses and the production of books, records, papers, and other documents in any part of the state.

(b) For purposes of discovery, the board or its executive director may, if deemed appropriate and proper under the circumstances, authorize the parties to engage in the civil action discovery procedures in Title 4 (commencing with Section 2016.010) of Part 4 of the Code of Civil Procedure, excepting the provisions of Chapter 13 (commencing with Section 2030.010) of that title. Discovery shall be completed no later than 15 days prior to the commencement of the proceeding or hearing before the board. This subdivision shall apply only to those proceedings or hearings involving a petition filed pursuant to subdivision (b), or protest filed pursuant to subdivision (c) of Section 3050. The board, its executive director, or an administrative law judge designated by the board may issue subpoenas to compel attendance at depositions of persons having knowledge of the acts, omissions, or events that are the basis for the proceedings, as well as the production of books, records, papers, and other documents.

(c) This section shall become operative on January 1, ~~2025~~, 2030.

SEC. 7. Section 3050.5 of the Vehicle Code is amended to read:

3050.5. Pursuant to Section 3016, the board shall establish a fee for the initial filing by any party in regard to any protest or petition filed pursuant to this chapter.

SEC. 8. Section 3050.7 is added to the Vehicle Code, to read:

3050.7. (a) The board may adopt stipulated decisions and orders, without a hearing pursuant to Section 3066, 3080, or 3085.2, 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.

(c) This section shall remain in effect only until January 1, ~~2025~~, 2030, and as of that date is repealed.

SEC. 9. Section 3050.7 is added to the Vehicle Code, to read:

3050.7. (a) The board may adopt stipulated decisions and orders, without a hearing pursuant to Section 3066 or 3080, 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.

(c) This section shall become operative on January 1, ~~2025~~ 2030.

SEC. 10. Article 3 (commencing with Section 3052) of Chapter 6 of Division 2 of the Vehicle Code is repealed.

SEC. 11. Section 3065 of the Vehicle Code is amended to read:

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 satisfy the warranty obligations of the franchisor, including, but not limited to, diagnostics, repair, and servicing and shall file a copy of its warranty reimbursement schedule with the board. The warranty reimbursement schedule shall be reasonable with respect to the time and compensation allowed to the franchisee for the warranty diagnostics, repair, servicing, and all other conditions of the obligation, including costs directly associated with the disposal of hazardous materials that are associated with a warranty repair. ~~The~~

(1) The franchisor shall use time allowances for the diagnosis and performance of work and service that are reasonable and adequate for a qualified technician to perform the work or services. ~~A~~ A franchisor shall not unreasonably deny a written request submitted by a franchisee for modification of a franchisor's uniform time allowance for a specific warranty repair, or a request submitted by a franchisee for an additional time allowance for either diagnostic or repair work on a specific vehicle covered under warranty, provided the request includes any information and documentation reasonably required by the franchisor to assess the merits of the franchisee's request.

(2) A franchisor shall not replace, modify, or supplement the warranty reimbursement schedule to impose a fixed percentage or other reduction in the time or compensation allowed to the franchisee for warranty repairs not attributable to a specific repair. A franchisor may reduce the allowed time or compensation applicable to a specific warranty repair only upon 15 days' prior written notice to the franchisee. ~~Any~~

(3) Any protest challenging a reduction in time or 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 reduction in time or compensation.

(b) In determining what constitutes a reasonable warranty reimbursement schedule under this section, a franchisor shall compensate each of its franchisees for parts and labor at rates ~~not less than~~ *equal to* the franchisee's retail labor rate and retail parts rate, as established pursuant to Section 3065.2. Nothing in this subdivision prohibits a franchisee and a franchisor from entering into a voluntary written agreement signed by both parties that compensates for labor and parts used to satisfy the warranty obligations of the franchisor *at rates other than the franchisee's retail rates*, provided that the warranty reimbursement schedule adequately and fairly compensates the franchisee.

(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. 12. Section 3065.2 is added to the Vehicle Code, to read:

3065.2. (a) A franchisee seeking to establish or modify its retail labor rate, retail parts rate, or both, to determine a reasonable warranty reimbursement schedule shall, no more frequently than once per calendar year, complete the following requirements:

(1) The franchisee shall submit in writing to the franchisor whichever of the following is fewer in number:

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

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

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

~~(B) A franchisee's retail labor rate, calculated pursuant to subparagraph (A), shall not exceed a 10-percent increase over the franchisee's baseline warranty labor rate.~~

~~(C) For purposes of this paragraph, a "baseline warranty labor rate" is the warranty labor rate that is in effect immediately prior to the franchisee's most current submission to establish or modify its warranty reimbursement schedule: that generated those charges.~~

(3) The franchisee shall calculate its retail parts rate by determining the total charges for parts from the qualified repair orders submitted, dividing that amount by the franchisee's total cost of the purchase of those parts, subtracting one, and multiplying by 100 to produce a percentage.

(4) The franchisee shall provide notice to the franchisor of its retail labor rate and retail parts rate calculated in accordance with this subdivision.

(b) For purposes of subdivision (a), qualified repair orders submitted under this subdivision shall be from a period occurring not more than 180 days before the submission. Repair orders submitted pursuant to this section may be transmitted electronically. A franchisee may submit either of the following:

(1) A single set of qualified repair orders for purposes of calculating both its retail labor rate and its retail parts rate.

(2) A set of qualified repair orders for purposes of calculating only its retail labor rate or only its retail parts rate.

(c) Charges included in a repair order arising from any of the following shall be omitted in calculating the retail labor rate and retail parts rate under this section:

- (1) Manufacturer, manufacturer branch, distributor, or distributor branch special events, specials, or promotional discounts for retail customer repairs.
- (2) Parts sold, or repairs performed, at wholesale.
- (3) Routine maintenance, including, but not limited to, the replacement of bulbs, fluids, filters, batteries, and belts that are not provided in the course of, and related to, a repair.
- (4) Items that do not have individual part numbers including, but not limited to, nuts, bolts, and fasteners.
- (5) Vehicle reconditioning.
- (6) Accessories.
- (7) Repairs of conditions caused by a collision, a road hazard, the force of the elements, vandalism, theft, or owner, operational, or third-party negligence or deliberate act.
- (8) Parts sold or repairs performed for insurance carriers.
- (9) Vehicle emission inspections required by law.
- (10) Manufacturer-approved goodwill or policy repairs or replacements.
- (11) Repairs for government agencies or service contract providers.
- (12) Repairs with aftermarket parts, when calculating the retail parts rate, but not the retail labor rate.
- (13) Repairs on aftermarket parts.
- (14) Replacement of or work on tires, including front-end alignments and wheel or tire rotations.
- (15) Repairs of motor vehicles owned by the franchisee or an employee thereof at the time of the repair.

(d) (1) A franchisor may contest to the franchisee the material accuracy of the retail labor rate or retail parts rate that was calculated by the franchisee under this section within 30 days after receiving notice from the ~~franchisee~~ *franchisee or, if the franchisor requests supplemental repair orders pursuant to paragraph (4), within 30 days after receiving the supplemental repair orders*. If the franchisor seeks to contest the retail labor rate, retail parts rate, or both, the franchisor shall submit no more than one notification to the franchisee. The notification shall be limited to an assertion that the rate is materially inaccurate 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 or retail parts rate, as applicable, on the basis of the repair orders submitted by the ~~franchisee~~ *franchisee or, if applicable, on the basis provided in paragraph (5)*. After submitting the notification, the franchisor shall not add to, expand, supplement, or otherwise modify any element of that notification, including, but not limited to, its grounds for contesting the retail labor rate, retail parts rate, or both, without justification. A franchisor shall not deny the franchisee's submission for the retail labor rate, retail parts rate, or ~~both~~ *both, under subdivision (a)*.

(2) If the franchisee agrees with the conclusions of the franchisor and any corresponding adjustment to the retail labor rate or retail parts rate, no further action shall be required. The new adjusted rate shall be deemed effective as of the 30th calendar day after the franchisor's receipt of the notice submitted pursuant to subdivision (a).

(3) In the event the franchisor provides all of the information required by paragraph (1) to the franchisee, and the franchisee does not agree with the adjusted rate proposed by the franchisor, the franchisor shall pay the franchisee at the franchisor's proposed adjusted retail labor rate or retail parts rate until a decision is rendered upon any board protest filed pursuant to ~~subdivision (j)~~ *Section 3065.4* or until any mutual resolution between the franchisor and the franchisee. The franchisor's proposed adjusted rate shall be deemed to be effective as of the 30th day after the franchisor's receipt of the notice submitted pursuant to subdivision (a).

(4) If the franchisor determines from the franchisee's set of repair orders submitted pursuant to subdivisions (a) and (b) that the franchisee's submission for a retail labor rate or retail parts rate is substantially higher than the franchisee's current warranty rate, the franchisor may request, in writing, within 30 days after the franchisor's receipt of the notice submitted pursuant to subdivision (a), all repair orders closed within the period of 30 days immediately preceding, or 30 days immediately following, the set of repair orders submitted

by the franchisee. If the franchisee fails to provide the supplemental repair orders, all time period under this section shall be suspended until the supplemental repair orders are provided.

(5) If the franchisor requests supplemental repair orders pursuant to paragraphs (1) and (4), the franchisor may calculate a proposed adjusted retail labor rate or retail parts rate, as applicable, based upon any set of the qualified repair orders submitted by the franchisee, if the franchisor complies with all of the following requirements:

(A) The franchisor uses the same requirements applicable to the franchisee's submission pursuant to paragraph (1) of subdivision (a).

(B) The franchisor uses the formula to calculate retail labor rate or retail parts as provided in subdivision (a).

(C) The franchisor omits all charges in the repair orders as provided in subdivision (c).

(e) If the franchisor does not contest the retail labor rate or retail parts rate that was calculated by the franchisee, or if the franchisor fails to contest the rate pursuant to subdivision (d), within 30 days after receiving the notice submitted by the franchisee pursuant to subdivision (a), the uncontested retail labor rate or retail parts rate shall take effect on the 30th day after the franchisor's receipt of the notice and the franchisor shall use the new retail labor rate or retail parts rate, or both, if applicable, to determine compensation to fulfill warranty obligations to the franchisee pursuant to this section.

(f) When calculating the retail parts rate and retail labor rate, all of the following shall apply:

(1) Promotional reward program cash-equivalent pay methods shall not be considered discounts.

(2) (A) The franchisor is prohibited from establishing or implementing a special part or component number for parts used in warranty work, if the result of the special part or component lowers compensation to the franchisee below that amount calculated pursuant to this section.

(B) This paragraph does not apply to parts or components that are subject to a recall and are issued a new special part or component number. This paragraph does not prohibit a franchisor from changing prices of parts in the ordinary course of business.

(g) When the franchisor is compensating the franchisee for the retail parts rate, all of the following shall apply:

(1) If the franchisor furnishes a part to a franchisee at no cost for use in performing warranty obligations, the franchisor shall compensate the franchisee the amount resulting from multiplying the wholesale value of the part by the franchisee's retail parts rate determined pursuant to this section.

(2) If the franchisor furnishes a part to a franchisee at a reduced cost for use in performing warranty obligations, the franchisor shall compensate the franchisee the amount resulting from multiplying the wholesale value of the part by the franchisee's retail parts rate determined pursuant to this section, plus the franchisee's cost of the part.

(3) The wholesale value of the part, for purposes of this subdivision, shall be the greater of:

(A) The amount the franchisee paid for the part or a substantially identical part if already owned by the franchisee.

(B) The cost of the part shown in a current franchisor's established price schedule.

(C) The cost of a substantially identical part shown in a current franchisor's established price schedule.

(h) When a franchisee submits for the establishment or modification of a retail labor rate, retail parts rate, or both, pursuant to this section, a franchisee's retail labor rate or retail parts rate shall be calculated only using the method prescribed in this section. When a franchisee submits for the establishment or modification of a retail labor rate, retail parts rate, or both, pursuant to this section, a franchisor shall not use, or require a franchisee to use, any other method, including, but not limited to, any of the following:

(1) Substituting any other purported repair sample for that submitted by a franchisee.

(2) Imposing any method related to the establishment of a retail labor rate or retail parts rate that is unreasonable or time consuming, or require the use of information that is unreasonable or time consuming to obtain, including part-by-part or transaction-by-transaction calculations or utilization of the franchisee's financial statement.

(3) Unilaterally calculating a retail labor rate or retail parts rate for a franchisee, except as provided in subdivision ~~(e)~~: (d).

(4) Using a franchisee's sample, submitted for establishing or increasing its retail ~~part~~ parts rate, to establish or reduce the franchisee's retail labor rate or using a franchisee's sample, submitted for establishing or increasing its retail labor rate, to establish or reduce the franchisee's retail parts rate.

(i) A franchisor shall not do any of the following:

(1) Attempt to influence a franchisee to implement or change the prices for which the franchisee sells parts or labor in retail repairs because the franchisee is seeking compensation or exercising any right pursuant to this section.

(2) Directly or indirectly, take or threaten 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:

(A) Assessing penalties, surcharges, or similar costs to a franchisee.

(B) Transferring or shifting any costs to a franchisee.

(C) Limiting allocation of vehicles or parts to a franchisee.

(D) Failing to act other than in good faith.

(E) Hindering, delaying, or rejecting the proper and timely payment of compensation due under this section to a franchisee.

(F) Establishing, implementing, enforcing, or applying any discriminatory policy, standard, rule, program, or incentive regarding compensation due under this section.

(G) Conducting or threatening to conduct nonroutine or nonrandom warranty, nonwarranty repair, or other service-related audits in response to a franchisee seeking compensation or exercising any right pursuant to this section.

(3) This subdivision does not prohibit a franchisor from increasing prices of vehicles or parts in the ordinary course of business.

~~(j)(1) If a franchisor fails to comply with this section or if a franchisee disputes the franchisor's proposed adjusted retail labor rate or retail parts rate, the franchisee may file a protest with the board for a declaration of the franchisee's retail labor rate or retail parts rate. In any protest under this section, the franchisor shall have the burden of proof that it complied with this section and that the franchisee's determination of the retail labor rate or retail parts rate is materially inaccurate or fraudulent.~~

~~(2) Upon a decision by the board pursuant to paragraph (1), the board may determine the difference between the amount the franchisee has actually received from the franchisor for fulfilled warranty obligations and the amount that the franchisee would have received if the franchisor had compensated the franchisee at the retail labor rate and retail parts rate as determined in accordance with this section for a period beginning 30 days after receipt of the franchisee's initial submission under subdivision (a). The franchisee may submit a request to the franchisor to calculate the unpaid warranty reimbursement compensation and the franchisor shall provide this calculation to the franchisee within 30 days after receipt of the request. The request for the calculation will also be deemed a request for payment of the unpaid warranty reimbursement compensation.~~

~~(3) If the franchisor fails to make full payment within 30 days after the franchisee submits a request for payment, the franchisee may file an action in superior court for injunctive and other appropriate relief to enforce the determination or order of the board. The franchisee may also recover in superior court its actual reasonable expenses in bringing and maintaining an enforcement action in superior court.~~

~~(4) Either the franchisor or the franchisee may seek judicial review of the board's determination pursuant to Section 3068.~~

~~(k)~~

(j) As used in this section, a "qualified repair order" is a repair order, closed at the time of submission, for work that was performed outside of the period of the manufacturer's warranty and paid for by the customer, but that would have been covered by a manufacturer's warranty if the work had been required and performed during the period of warranty.

SEC. 13. Section 3065.25 is added to the Vehicle Code, immediately following Section 3065.2, to read:

3065.25. As used in Sections ~~3065 and 3065.2~~, *3065, 3065.2, and 3065.4*, the following terms shall have the following meanings:

(a) "Parts" includes, but is not limited to, engine, transmission, and other part assemblies.

(b) "Warranty" includes a new vehicle warranty, a certified preowned warranty, a repair pursuant to a technical service bulletin on a vehicle covered under the period of warranty, a repair pursuant to a customer service campaign on a vehicle covered under the period of warranty, and a recall conducted pursuant to Sections 30118 to 30120, inclusive, of Title 49 of the United States Code.

SEC. 14. Section 3065.3 is added to the Vehicle Code, to read:

3065.3. (a) No franchisor shall establish or maintain a performance standard, sales objective, or program for measuring a dealer's sales, service, or customer service performance that is inconsistent with the standards set forth in subdivision (g) of Section 11713.13.

(b) A franchisee may file a protest with the board for determination of whether a franchisor has complied with this section and in that proceeding the franchisor shall have the burden of proof.

~~(c) This section shall remain in effect only until January 1, 2025, and as of that date is repealed.~~

SEC. 15. Section 3065.4 is added to the Vehicle Code, to read:

3065.4. (a) If a franchisor fails to comply with Section 3065.2, or if a franchisee disputes the franchisor's proposed adjusted retail labor rate or retail parts rate, the franchisee may file a protest with the board for a declaration of the franchisee's retail labor rate or retail parts rate. In any protest under this section, the franchisor shall have the burden of proof that it complied with Section 3065.2 and that the franchisee's determination of the retail labor rate or retail parts rate is materially inaccurate or fraudulent.

(b) Upon a decision by the board pursuant to subdivision (a), the board may determine the difference between the amount the franchisee has actually received from the franchisor for fulfilled warranty obligations and the amount that the franchisee would have received if the franchisor had compensated the franchisee at the retail labor rate and retail parts rate as determined in accordance with Section 3065.2 for a period beginning 30 days after receipt of the franchisee's initial submission under subdivision (a) of Section 3065.2. The franchisee may submit a request to the franchisor to calculate the unpaid warranty reimbursement compensation and the franchisor shall provide this calculation to the franchisee within 30 days after receipt of the request. The request for the calculation will also be deemed a request for payment of the unpaid warranty reimbursement compensation.

(c) If the franchisor fails to make full payment within 30 days after the franchisee submits a request for payment, the franchisee may file an action in superior court for injunctive and other appropriate relief to enforce the determination or order of the board. The franchisee may also recover in superior court its actual reasonable expenses in bringing and maintaining an enforcement action in superior court.

(d) Either the franchisor or the franchisee may seek judicial review of the board's determination pursuant to Section 3068.

~~SEC. 15.~~ **SEC. 16.** Section 3066 of the Vehicle Code is amended to read:

3066. (a) Upon receiving a protest pursuant to Section 3060, 3062, 3064, 3065, 3065.1, 3065.2, ~~or 3065.3,~~ *3065.3, or 3065.4*, the board shall fix a time within 60 days of the order, and place of hearing, and shall send by certified 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 shall 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 or 3062 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 an additional motor vehicle dealership or relocating an existing 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, or 3065.1, 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 when that issue is material to a protest filed pursuant to Section 3065 or 3065.1.

(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.

~~(e) This section shall remain in effect only until January 1, 2025, and as of that date is repealed.~~

~~SEC. 16. Section 3066 is added to the Vehicle Code, to read:~~

~~3066.(a) Upon receiving a protest pursuant to Section 3060, 3062, 3064, 3065, 3065.1, or 3065.2, the board shall fix a time within 60 days of the order, and place of hearing, and shall send by certified 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 shall 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 or 3062, 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 an additional motor vehicle dealership or relocating an existing 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, or 3065.1, 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 when that issue is material to a protest filed pursuant to Section 3065 or 3065.1.~~

~~(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.~~

~~(e) This section shall become operative on January 1, 2025.~~

SEC. 17. Article 6 (commencing with Section 3085) is added to Chapter 6 of Division 2 of the Vehicle Code, to read:

Article 6. Export and Sale-for-Resale Prohibition Hearings

3085. (a) An association may bring a protest challenging the legality of an export or sale-for-resale prohibition policy of a manufacturer, manufacturer branch, distributor, or distributor branch at any time on behalf of two or

more dealers subject to the challenged policy pursuant to subdivision (y) of Section 11713.3.

(b) For the purpose of this article, an association is an organization primarily owned by, or comprised of, new motor vehicle dealers and that primarily represents the interests of dealers.

(c) Relief for a protest pursuant to this section is limited to a declaration that an export or sale-for-resale prohibition policy of a manufacturer, manufacturer branch, distributor, or distributor branch violates the prohibitions of subdivision (y) of Section 11713.3. No monetary relief may be sought on behalf of the association or any dealers represented by the association.

(d) In a protest pursuant to this section, the association shall have the burden of proof to show that the challenged export or sale-for-resale prohibition policy violates subdivision (y) of Section 11713.3.

3085.2. (a) Upon receiving a protest pursuant to Section 3085, the board shall fix a time and place of hearing within 60 days, and shall send by certified mail a copy of the order to the manufacturer, manufacturer branch, distributor, distributor branch, the protesting association, and all individuals and groups that have requested notification by the board of protests and decisions of the board. 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 3085, the association shall have the burden of proof to establish a violation of the applicable section by the subject manufacturer, manufacturer branch, distributor, or distributor branch.

(c) 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.

3085.4. (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. The board shall act within 30 days after the hearing, within 30 days after the board receives a proposed decision when 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. Copies of the board's decision shall be delivered to the parties personally or sent to them by certified 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.

3085.6. Either party may seek judicial review of final decisions of the board. An appeal shall be filed within 45 days from the date on which the final order of the board is made public and is delivered to the parties personally or is sent to them by certified mail.

3085.8. The provisions of this article shall be applicable to any association which is primarily owned by or comprised of new motor vehicle dealers and acts on behalf of its new motor vehicle franchisees.

3085.10. This article shall remain in effect only until January 1, ~~2025~~, 2030, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, ~~2025~~, 2030, deletes or extends that date.

SEC. 18. Section 11713.3 of the Vehicle Code is amended to read:

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 that are of a model offered by the manufacturer or distributor to other franchisees in this state of the same line-make, if the vehicle, parts, or accessories are publicly advertised as being available for delivery or actually being delivered in this state. 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. The manufacturer or distributor shall not unreasonably withhold consent or condition consent 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~~ *meanings* 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) or Article 5 (commencing with Section 3070) 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) (1) To unfairly discriminate among its franchisees with respect to warranty reimbursement or authority granted to its franchisees to make warranty adjustments with retail customers.

(2) (A) To require a franchisee to perform service repair or warranty work on any vehicle model that is not currently available to the franchisee for sale or lease as a new vehicle.

(B) This subdivision shall not apply to any vehicle model that is not currently commercially available as a new vehicle. Nothing in this subdivision prohibits a franchisee and a manufacturer, manufacturer branch, distributor, distributor-branch branch, or affiliate from entering into a voluntary written agreement, signed by both parties, to perform service repair or warranty work on any vehicle model provided that the warranty work is reimbursed at the retail labor rate and retail parts rate as established pursuant to Section 3065.2.

(3) As used in this subdivision, "warranty" shall have the same meaning as defined in Section 3065.25.

(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, maintenance 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, maintenance 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, maintenance 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, parts, or vehicle sales or service incentives upon the sale of 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.

(F) Conditioning access to financing upon the sale of service contracts, debt cancellation agreements, maintenance agreements, or similar products endorsed, sponsored, or offered by the manufacturer, manufacturer branch, distributor, distributor branch, or affiliate, provided that this paragraph shall not limit the ability of a manufacturer, manufacturer branch, distributor, distributor branch, or affiliate to deny access to financing for service contracts, debt cancellation agreements, maintenance agreements, or similar products that do not comply with applicable state and federal laws or that do not meet the minimum, uniformly applied standards of the manufacturer, manufacturer branch, distributor, distributor branch, or affiliate.

(G) Requiring a dealer to provide a disclosure or notice different from the notice set forth in paragraph (4) of this subdivision for the sale of the service contracts.

(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) (1) 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 at least 48 hours before the sale or lease of the vehicle, 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. 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. In a proceeding in which a challenge to an adverse action is at issue, the manufacturer, manufacturer branch, distributor, or distributor branch shall have the burden of proof by a preponderance of the evidence to show that the vehicle was exported or resold in violation of an export or sale-for-resale prohibition policy, that the prohibition policy was provided to the dealer in writing at least 48 hours prior to the sale or lease, and that the dealer knew or reasonably should have known of the customer's intent to export the vehicle to a foreign country at the time of the sale or lease.

(2) An export or sale-for-resale prohibition policy shall not include a provision that expressly or implicitly requires a dealer to make further inquiries into a customer's intent, identity, or financial ability to purchase or lease a vehicle based on any of the customer's characteristics listed or defined in Section 51 of the Civil Code. A policy that is in violation of this paragraph is void and unenforceable.

(3) An export or sale-for-resale prohibition policy shall expressly include a provision stating the dealer's rebuttable presumption 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. A policy that is in violation of this paragraph is void and unenforceable.

(4) For purposes of this subdivision, "adverse action" means any activity that imposes, either expressly or implicitly, a burden, responsibility, or penalty on a dealer, including, but not limited to, nonroutine or

nonrandom audits, withholding of incentives, or monetary chargebacks, imposed by the manufacturer, manufacturer branch, distributor, or distributor branch, or through an affiliate.

(z) As used in this section, the following terms have the following meanings:

(1) "Affiliate" means a person who directly or indirectly through one or more intermediaries, controls, is controlled by, or is under the common direction and control with, another person. "Control" means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of any person.

(2) "Area of responsibility" means 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:

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, distributor branch, or affiliate 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, distributor branch, or affiliate, 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, distributor branch, or affiliate. This paragraph shall not apply to a specific good or service if the manufacturer, manufacturer branch, distributor, distributor branch, or affiliate provides the dealer with a lump-sum payment or series of payments toward 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.

(3) (A) A required facility alteration, expansion, or addition shall not be deemed reasonable if the facility has been modified within the last 10 years at a cost of more than two hundred fifty thousand dollars (\$250,000), and the modification was required, or was made for the purposes of complying with a franchisor's brand image program, and was approved by the manufacturer, manufacturer branch, distributor, distributor branch, or affiliate.

(B) This paragraph does not apply to a specific facility alteration, expansion, or addition that is necessary to enable the sale or service of zero-emission or near-zero-emission vehicles, as defined in Section 44258 of the Health and Safety Code.

(C) This paragraph does not apply to a specific facility alteration, expansion, or addition involving the exercise of the franchisor's trademark rights that is necessary to erect or maintain signs or to the use of any trademark.

(D) This paragraph does not apply to a specific facility alteration, expansion, or addition that is necessary to comply with any applicable health or safety laws.

(E) This paragraph does not apply to the installation of specialized equipment that is necessary to service a vehicle offered by a franchisor and available for sale by the franchisee.

(F) This paragraph does not apply to voluntary written agreements signed by both parties between a franchisee and a manufacturer, manufacturer branch, distributor, distributor branch, or affiliate.

(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) Require a franchisee to indemnify its franchisor, or any third party, for the actions of the franchisee that were properly made in compliance with a franchisor's policy, program, or requirement.

(3) 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.

(h) Restrict the ability of a dealer to select a digital service of a dealer's choice that is offered by a vendor of the dealer's choice, provided that the service offered by the vendor is approved by the manufacturer, manufacturer branch, distributor, distributor branch, or affiliate. Approval for services selected by dealers shall not be unreasonably withheld. For purposes of this subdivision, digital service includes, but is not limited to, ~~Internet Web site~~ *internet website* and data management services, but does not include warranty repair processes for a vehicle.

(i) Restrict, limit, or discourage a franchisee from checking or verifying the applicability of a technical service bulletin or customer service campaign to any vehicle.

(j) As used in this section, the following terms have the following meanings:

(1) "Affiliate" means a person who directly or indirectly through one or more intermediaries, controls, is controlled by, or is under the common direction and control with, another person. "Control" means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of any person.

(2) "Facility" or "facilities" includes, but is not limited to, premises, places, buildings, or structures.

SEC. 20. Section 11726 of the Vehicle Code is amended to read:

11726. Any licensee suffering pecuniary loss because of any willful failure by any other licensee to comply with any provision of Article 1 (commencing with Section 11700) or 3 (commencing with Section 11900) of Chapter 4 of Division 5 or with any regulation adopted by the department or any rule adopted or decision rendered by the board under authority vested in them may recover damages and reasonable attorney fees therefor in any court of competent jurisdiction. Any such licensee may also have appropriate injunctive relief in any such court.

SEC. 21. 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.

EXHIBIT 4

SENATE COMMITTEE ON TRANSPORTATION
Senator Jim Beall, Chair

Bill No: AB 179 **Hearing Date:** 6/25/2019
Author: Reyes
Version: 5/20/2019
Urgency: No **Fiscal:** Yes
Consultant: Randy Chinn

SUBJECT: New Motor Vehicle Board

DIGEST: This bill revamps numerous statutory provisions regarding the relationship among vehicle manufacturers (franchisors), vehicle dealers (franchisees), and the New Motor Vehicle Board (NMVB).

ANALYSIS:

Existing law:

- 1) Charges the California Department of Motor Vehicles (DMV) with licensing and regulating dealers, manufacturers, and distributors of motor vehicles who conduct business in California.
- 2) Establishes the NMVB within DMV and requires it to hear and decide certain protests presented by a motor vehicle franchisee.
- 3) Allows the NMVB, when determining whether there is good cause for a manufacturer to terminate a franchise, to consider whether the dealer conducted unfair business practices, is injurious to the public welfare, failed to provide for the needs of the consumers for motor vehicles, or failed to comply with the terms of the franchise.
- 4) Prescribes procedures to be followed by franchisors, franchisees, and NMVB regarding claims for warranty reimbursement or incentive compensation.
- 5) Requires every manufacturer to fulfill every warranty agreement and adequately and fairly compensate each franchised dealer for labor and parts used to fulfill the warranty. A copy of the warranty reimbursement

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schedule or formula must be filed with NMVB, and the schedule or formula is required to be reasonable with respect to time and compensation.

- 6) Allows the NMVB to consider the dealer's effective labor rate charged to its retail customers along with other relevant data in determining the adequacy and fairness of warranty compensation.
- 7) Makes it unlawful for a manufacturer or distributor to 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. In any proceeding in which a required facility alteration, expansion, or addition is an issue, the manufacturer or distributor has the burden of proving the reasonableness of the requirement.
- 8) Prohibits a manufacturer from competing with a dealer in the same line-make operating under an agreement or franchise from a manufacturer or distributor in the relevant market area in a 10-mile radius.
- 9) Allows any determinations of the DMV to be appealed by dealers to the NMVB. The NMVB can reverse or amend these decisions and reverse or amend any penalties imposed.

This bill:

- 1) Revises the criteria for determining the labor rate and allowable hours for which dealers are compensated by manufacturers for warranty work from a reasonableness standard to a specific formula based on actual invoices. NMVB is authorized to adjudicate disputes. Judicial review of NMVB decisions is authorized.
- 2) Prohibits manufacturers from requiring dealers to perform warranty work on vehicle models that are not available to the dealer to sell or lease.
- 3) Prohibits manufacturers from requiring dealers to perform facility upgrades more often than every 10 years if the prior upgrade cost more than \$250,000 with specified exemptions, include upgrades necessary for the sale or servicing of zero- or near zero-emission vehicles.

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- 4) Authorizes NMVB to hear complaints from franchisee associations about export and sale-for-resale restrictions imposed by franchisors until 2030.
- 5) Repeals Section 3052 of the Vehicle Code.
- 6) Prohibits manufacturers from discriminating against dealers who sell maintenance contracts, service contracts or similar products which are not approved by the manufacturer.
- 7) Deletes the authority of the NMVB to hear appeals of DMV decisions.
- 8) Prohibits manufacturers from limiting the dealers choice of digital services, as defined.

COMMENTS:

- 1) *Author's Statement.* AB 179 makes changes to the franchise relationship between California New Car Dealers and automobile manufacturers. New car dealers operating as local independently-owned franchised dealerships in our communities employ over 140,000 people in California, and in some communities are the major sources of economic activity. This bill ensure that the balance of power between large multinational automakers and California's new car dealers is a fair and competitive playing field.
- 2) *Frenemies.* The relationship between the auto manufacturers and their dealers is fraught. It is a commercial relationship between businesses that is overlain with many restrictions and requirements sought and fought over by the participants. Solutions to disputes are often brought to the Legislature. As the tech industry focusses its attention on transportation, disruption of the franchised dealer model is sure to come. Tesla, which does not have a dealer network, is the poster child for this. Electric vehicles, which require far less maintenance than traditional cars, pressure dealer margins. An increasingly stratified economy has made car ownership increasingly unaffordable, opening the door to different car sharing, transportation network companies, autonomous vehicles, and active transportation modes such as e-bikes and scooters.
- 3) *Familiar.* The basis for this bill is a similar bill by the same author last year (AB 2107), which was approved by this committee but vetoed.

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Most of the provisions of this bill are similar or identical to those contained in AB 2107. The biggest difference between the bills is the calculation of the reimbursement rates charged to manufacturers for the warranty work performed by dealers. This provision was fought over last year and was the basis of its veto. The reimbursement rate calculation contained in this bill is less controversial.

Under current law, the NMVB determines the hourly labor rate based on a reasonableness standard that considers the rate dealers charge to retail customers. This bill replaces that standard with a very specific formula with very detailed, almost contractual, criteria. While it is difficult to judge the reasonableness of this formula without knowledge of industry practices, this provision is very similar to provisions contained in agreements between these parties in 34 other states. This provision is not in itself the basis for the opposition.

- 4) *Look Better.* Dealers complain of frequent demands to update their facilities for brand imaging. This bill limits these requirements by deeming facility alterations, expansions, or additions as unreasonable if the facility has been modified in the last 10 years at a cost of more than \$250,000 for the purposes of complying with a manufacturer's brand image program. This limitation does not apply for upgrades necessary for the sale or servicing of zero- or near zero-emission vehicles, and for other reasons as specified. This provision was contained in last years AB 2107.
- 5) *Can't Make Me.* Several of the provisions of this bill stem from a dispute between dealers and a new line of car, Genesis, formerly Hyundai Genesis. Hyundai, seeking to break into the luxury car market, decided to spin off its Genesis car into a new brand of automobiles. According to supporters, manufacturers have told dealers that sold Hyundai Genesis cars that they can no longer service the cars they sold for warranty purposes. Manufacturers are also preventing dealers that sold Hyundai Genesis cars from selling the new Genesis brand. Other dealerships are being told that even though they cannot sell the Genesis, they are required to service them for warranty reimbursements.

In response, this bill makes it unlawful for a manufacturer to refuse to deliver any new vehicles that are of a make or model offered by the manufacturer to other dealers in the state of the same line make. Further, a manufacturer would be prohibited from requiring a dealer to provide service repairs on a vehicle model that is currently not available to the dealer to sell. These provisions were contained in last years AB 2107.

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2107.

- 6) *Digital Services.* This bill authorizes dealers to utilize their own digital services vendor, provided that the service is approved by the manufacturer. These digital services are intended to be internal business services such as the dealer's website and on-line advertising services. This is not intended to deal with telematics or services within the vehicle. This provision was contained in last years AB 2107.
- 7) *Exports.* In 2015 legislation was passed unanimously to allow the NMVB to hear protests by an association challenging the legality of an export policy of a manufacturer (AB 1178: Achadjian, Chapter 526, Statutes of 2015). That legislation sunset this year. This bill reauthorizes the exact same provisions until January 1, 2030. This provision was not contained in last years AB 2107.
- 8) *Unappealing.* The elimination of the NMVB's authority to hear appeals from DMV decisions, including the provisions of Article 3 beginning with Section 3052, was in response to concerns from the Judiciary Committee that the NMVB was a less friendly consumer forum than the DMV.
- 9) *Trying Again.* Last year's bill dealing with the manufacturer/dealer relationship was vetoed. The Governor's veto message was concerned solely with the warranty reimbursement provisions:

This bill modifies the statutory framework governing the relationship between new car dealers and manufacturers, including establishing a complex formula to determine the rate manufacturers will reimburse dealers for warranty and recall repairs.

Under current law, manufacturers are required to reimburse dealers for warranty and recall repairs at a "reasonable" rate negotiated between the two parties. This framework appears to be working reasonably well and I see no reason to adopt the rather complicated formula authorized in this bill--with perhaps unintended consequences.

- 10) *Double Referred.* This bill has been double referred to the Judiciary Committee.

Related Legislation:

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AB 2107 (Reyes, 2018) — was nearly identical to this bill. *This bill was vetoed.*

AB 1178 (Achadjian, Chapter 526, Statutes of 2015) — provided that a vehicle manufacturer, manufacturer branch, distributor, or distributor branch cannot take any adverse action against a dealer relative to an export or sale-for-resale prohibition if the dealer causes the vehicle to be registered in a state and collects or causes to be collected any applicable sale or use tax due to the state, as specified.

SB 155 (Padilla, Chapter 512, Statutes of 2013) — modified the relationship between motor vehicle dealers and manufacturers by, among other things, making changes regarding the use of flat-rate time schedules for warranty reimbursement, warranty and incentive claims, audits, protest rights, export policies, performance standards, and facility improvements.

SB 642 (Padilla, Chapter 342, Statutes of 2011) — modified and expanded the existing statutory framework regulating the relationship between vehicle manufacturers and their franchised dealers.

SB 424 (Padilla, Chapter 12, Statutes of 2009) — regulates actions that vehicle manufacturers may take with regard to their franchised dealers, and allows 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.

FISCA L EFFECT: Appropriation: Fiscal Com.: Local:

From the Assembly Appropriations Committee: Minor costs (New Motor Vehicle Board Account), likely in the tens of thousands of dollars annually, for NMVB to handle an increased number of hearings and the costs associated with protests that go to hearing. NMVB reports additional staff positions are not needed to handle the expected increase in protests.

POSITIONS: (Communicated to the committee before noon on Wednesday,
 June 19, 2019.)

SUPPORT:

AB 179 (Reyes) Page 7 of 5

California Conference of Machinists
California Motorcycle Dealers Association
California New Car Dealers Association

OPPOSITION:

Auto Alliance
Civil Justice Association of California
Global Automakers

-- END --

VIA EMAIL

New Motor Vehicle Board

Received
5-14-24

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FILED

New Motor Vehicle Board

Date: 5-14-24

By: RPP

ATTORNEYS FOR PROTESTANT

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of:

12 KM3G INC., d/b/a PUTNAM KIA OF
13 BURLINGAME,

14 Protestant,

15 v.

16 KIA AMERICA INC.,

17 Respondent.
18

PROTEST NO: PR-2803-22

**PROTESTANT’S PROPOSED FINDINGS
OF FACT AND CONCLUSIONS OF LAW**

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26 Pursuant to the New Motor Vehicle Board’s (“Board”) February 15, 2024, Order Establishing
27 Post-Hearing Briefing Schedule, Paragraph 1, Protestant, KM3G Inc., d/b/a Putnam Kia of Burlingame
28 (“Putnam”) hereby submits its Proposed Findings of Fact and Conclusions of Law.

1 **PROCEDURAL BACKGROUND**

2 I. STATEMENT OF THE CASE

3 1. Putnam submitted to Respondent, Kia America, Inc. (“Kia”) a request for an increase to
4 its warranty labor reimbursement rate to \$447.52 per hour on March 22, 2022 (reference to Putnam’s
5 “Submission” refers to the March 22, 2022, letter and accompanying documents). [Exh. J-3.001.]
6 Putnam submitted a letter, spreadsheet, and ROs for the increase pursuant to Vehicle Code section
7 3065.2, subdivision (a)(1)(B)¹; a 90-consecutive-day period submission with RO 10099 dated
8 11/03/2021 through RO 10636 dated 01/31/2022. [*Id.*; *see also* RT Vol. VIII, 45:7-46:3.]

9 2. On April 20, 2022, Kia issued a letter requesting an additional 30 days of ROs after the
10 90-day period of Putnam’s Submission. [Exh. J-4.001-.002; RT Vol. IV, 577:5-19; *see also* RT Vol. IX,
11 77:21-78:4.] The letter complied with Kia’s right to request supplemental repair orders pursuant to
12 California Vehicle Code section 3065.2(d)(4).

13 3. On April 27, 2022, Putnam submitted a cover letter with 30 days of additional ROs
14 following the 90-day period described in Putnam’s original submission. [Exh. J-5.001; RT Vol. IV,
15 579:4-13; RT Vol. VII, 132:21-24; RT Vol. VIII, 62:4-8 and 63:2-5; RT Vol. VIII, 63:21-64:20 (Mr.
16 Korenak testifying the 30 days of additional ROs were from February 1, 2022 through March 2, 2022)
17 and VIII, 72:11-19 (describing the remaining ROs on January 31, 2022 would also have been submitted
18 through March 2, 2022); RT Vol. IX, 78:3-79:4.]

19 4. On May 26, 2022, Kia issued a response to Putnam’s warranty reimbursement increase
20 requests (reference to Kia’s “Denial” refers to the May 26, 2022, letter and spreadsheet). [Exh. J-6.001;
21 RT Vol. II, 171:12-14; RT Vol. IX, 80:7-13.] Kia included a spreadsheet that included certain items Kia
22 felt were qualified repairs not included in Putnam’s original calculation. [Exh. J-6.004-.005; RT Vol. II,
23 171:15-21.]

24 5. Kia’s May 26, 2022, response denied Putnam’s requested labor rate and provided a
25 proposed adjusted labor rate of \$268.89. [Exh. J-6.003; RT Vol. IV, 585:1-11.] Kia issued the response
26 pursuant to Section 3065.2, subdivision (d)(1). [Cal. Veh. Code, § 3065.2, subd. (d)(1).]
27

28

¹ Unless otherwise indicated, all statutory references are to the California Vehicle Code.

1 6. On June 15, 2022, Putnam provided Kia a letter drafted by Mr. Kamenetsky responding
2 to Kia’s May 26, 2022, Denial. [Exh. J-7; RT Vol. VIII, 71:17-24; RT Vol. IX, 91:2-8.] Putnam also
3 provided Kia a letter dated July 28, 2022, seeking a response to the June 15, 2022, letter prior to filing a
4 Section 3065.4 Protest with the Board. [Exh. P-109.001.]

5 7. On September 15, 2022, Putnam filed a Protest pursuant to Vehicle Code section 3065.4
6 concerning Putnam’s Submission and Kia’s Denial.

7 8. The Board issued a Pre-Hearing Conference Order on November 18, 2022, with
8 subsequent amendments. The Pre-Hearing Conference Order provided a schedule for the Parties to
9 conduct discovery pursuant to the Board’s authority under Vehicle Code section 3050.1, subdivision (b).

10 9. On August 23, 2023, the Board issued an order assigning Administrative Law Judge
11 Diana Woodward Hagle to the merits hearing of the Protest and to the telephonic Pre-Hearing
12 Conference scheduled for August 30, 2023.

13 10. The merits hearing was held via Zoom on October 9 through 13, 2023, and February 12
14 through 15, 2024.

15 11. At the conclusion of the merits hearing, Administrative Law Judge Diana Woodward
16 Hagle issued an Order Establishing Post-Hearing Briefing Schedule. The record closed upon the
17 completion of the post-hearing briefing.

18 II. PARTIES AND COUNSEL

19 12. Protestant is an authorized Kia “franchisee” within the meaning of Vehicle Code sections
20 331.1, 3065.2, and 3065.4. At the hearing, Putnam was represented by Gavin M. Hughes, Esq. and
21 Robert A. Mayville, Jr., Esq. of the Law Offices of Gavin M. Hughes.

22 13. Respondent is a “franchisor” within the meaning of Vehicle Code sections 331.2, 3065.2,
23 and 3065.4. Kia was represented by John J. Sullivan, Esq. and Jonathan R. Stulberg, Esq. of Hogan
24 Lovells US, LLP.

25 III. SUMMARY OF WITNESS TESTIMONY AND EXHIBITS INTRODUCED

26 14. Kia called the following witness during the merits hearing:
27 James Nardini, the National Manager of Warranty, Technical, and Service Operations for Kia U.S.

28 15. Putnam called the following witnesses during the merits hearing:

1 Rad Reyes, the Service Manager for Putnam Kia;
 2 Kent Putnam, the dealer principal, owner, and CEO of Putnam Kia;
 3 Jeffrey J. Korenak, the Director of Implementation for FrogData, LLC; and
 4 Andrey Kamenetsky, the Group Operations Manager and CFO for the Putnam organization.

5 16. The Parties admitted into evidence approximately 63 exhibits or portions thereof.

6 IV. JOINT GLOSSARY OF TERMS

7 17. On October 6, 2023, Protestant and Respondent filed a Joint Glossary of Non-
 8 Controversial Terms:

Term	Definition
Actual Hours (“A/HRS)	The amount of time spent by a service technician to perform a repair on a motor vehicle.
Commercial Time Guide	A guide that provides time allowances for repairs not published by the manufacturer but by an independent third party.
Customer Pay Repair Order	A repair order written by the dealership’s service department for services to be paid for by a retail customer and not by the manufacturer under a warranty.
District WE04	A geographic area designated by Kia that consists of fourteen (14) authorized Kia dealers and generally encompasses the metropolitan areas of San Francisco, Oakland, and San Jose, California.
Flat Rate	A service technician payment method under which the technician is paid for each repair based on a time allowance, regardless of how much time the technician ends up spending on the repair.

Labor Time Standards (“LTS”)	The time allowances published by Kia for warranty repairs. Also referred to as the Kia “Factory Time Guide” of Kia “Factory Time Allowances.”
Qualified Repair Order	A repair order for work that was performed outside of the period of the manufacturer’s warranty and paid for by the customer, but that would have been covered by a manufacturer’s warranty if the work had been required and performed during the period of warranty. (Cal. Veh. Code, § 3065.2, subd. (j).)
Repair Order (“RO”)	A document generated by a dealership’s service department in connection with the repair or diagnosis of a customer’s motor vehicle, reflecting <i>inter alia</i> the repair services performed on the motor vehicle and the related charges.
Customer Pay Repair Rate	The price per hour that is charged by a dealer to a customer for the performance of repairs not covered under the manufacturer’s warranty.
Sold Hours (S/HRS)	The time allowance for a repair that Putnam Kia records on the Accounting Copy of the Repair Order.
Warranty Labor Rate	The price per hour that is paid by the franchisor to the franchisee for the performance of repairs covered under the manufacturer’s warranty.
Warranty-Like Customer Pay Repair Order	See Qualified Repair Order.

V. JOINT STIPULATION OF FACTS

18. On October 6, 2023, Protestant and Respondent filed a Joint Stipulation of Facts stipulating to the following:

1. Putnam is a new motor vehicle dealer, is duly licensed as a vehicle dealer by the State of California, and is located at 2 California Dr., Burlingame, CA 94010.

1 2. Kia is a U.S. distributor of Kia vehicles, parts and accessories and is duly licensed by
2 the State of California as a distributor.

3 3. Putnam and Kia are parties to a Kia Dealer Sales and Service Agreement (the “Kia
4 Dealer Agreement”), fully executed as of September 1, 2021.

5 4. Putnam is part of the Putnam Auto Group, a group of dealerships operating 11
6 franchises in Burlingame, California and nearby areas.²

7 5. Pursuant to the Kia Dealer Agreement, Putnam commenced Kia operations on or
8 about September 1, 2021.

9 6. Kia set Putnam’s initial warranty labor rate at \$225.27 per hour and its initial rate for
10 parts used in warranty repairs at dealer cost plus 40%.³

11 7. By letter dated March 22, 2022, Putnam requested an increase in its warranty labor
12 rate to \$447.52 per hour and in its warranty parts rate to dealer cost plus 83%.

13 8. Joint Exhibit J-3 is a true copy of Putnam’s March 22, 2022 letter and the
14 accompanying spreadsheet submitted by Putnam showing its calculations. Kia received Putnam’s
15 March 22, 2022 letter on March 24, 2022.

16 9. Along with the March 22, 2022 letter and spreadsheet, Putnam submitted to Kia
17 copies of all of its accounting copies of repair orders during the 90-day period between November 3,
18 2021 and January 31, 2022 (the “90-Day Period”). The repairs orders Putnam submitted consisted of
19 all sequential repair orders numbered 10099 through 10636.

20 10. Putnam’s submission of all repair orders for the 90-day Period conformed to
21 California Vehicle Code § 3065.2(a)(1)(B).

22 11. Putnam’s calculation of the \$447.52 rate was based on repairs reflected on 29 of the
23 538 repair orders written during the 90-Day Period. Putnam selected the 29 repair orders to be the
24 relevant “qualified repair orders” as described in California Vehicle Code § 3065.2.

25
26 ² As discussed during the hearing, the number of franchises owned by the Putnam Auto Group depends
27 on the time and how one counts separate franchises operated by the same franchisor. [RT Vol. IX,
163:16-165:13]

28 ³ Technically, Kia paid a \$225.30 per hour initial labor rate because Kia rounds up to the dealer’s
nearest five cents. [RT Vol. IX, 166:10-12.]

1 12. Putnam calculated the rate by dividing the charges on the 29 repair orders by the
2 number of “sold hours” shown for those repairs on those repair orders.

3 13. By letter dated April 20, 2022, Kia requested 30 days of additional repair orders
4 pursuant to California Vehicle Code § 3065.2(d)(4).

5 14. Joint Exhibit J-4 is a true copy of Kia’s April 20, 2022 letter.

6 15. By letter dated April 27, 2022, Putnam provided the additional repair orders to Kia.

7 16. Joint Exhibit J-5 is a true copy of Putnam Kia’s April 27, 2022 letter.

8 17. The additional repair orders covered the 30-day period from February 1, 2022 through
9 March 2, 2022. The additional repair orders Putnam submitted consisted of all sequential repair orders
10 numbered 10637 through 10845.

11 18. By letter dated May 26, 2022, Kia (i) denied the requested labor rate of \$447.52; (ii)
12 granted an increase to a proposed adjusted retail labor rate of \$268.89; and (iii) granted Putnam’s
13 requested parts increase to an 83% markup.

14 19. Joint Exhibit J-6 is a true copy of Kia’s May 26, 2022 letter and the accompanying
15 spreadsheet showing Kia’s calculation of the proposed adjusted retail labor rate.

16 20. Kia calculated the adjusted rate using the 90 days of repair orders starting on
17 November 12, 2021, and ending on February 10, 2022 (the “Adjusted 90-Day Period”).

18 21. Kia calculated the adjusted rate by dividing charges on 37 repair orders written during
19 the Adjusted 90-Day Period by the “actual hours” shown for those repairs on those repair orders.

20 22. Kia included in its calculation 14 repair orders that Putnam contends should be
21 excluded under California Vehicle Code § 3065.2(c).

22 23. Kia began paying Putnam the \$268.89 rate commencing with warranty repair orders
23 opened on May 28, 2022, and has been paying Putnam for warranty labor at that rate since that time.⁴

24 24. By letter dated June 15, 2022, Putnam objected to Kia’s calculation of the proposed
25 adjusted retail labor rate.

26 25. Joint Exhibit J-7 is a copy of Putnam’s June 15, 2022 letter.

27
28 ⁴ Technically, Kia is paying a \$268.90 labor rate because Kia rounds up to the dealer’s nearest five cents. [RT Vol. IX, 165:24-166:3.]

1 **BURDEN OF PROOF**

2 19. Pursuant to Vehicle Code section 3065.4, subdivision (a), Kia bears the burden of proof
3 to show (1) it complied with Section 3065.2 in responding to Putnam’s Submission and (2) Putnam’s
4 determination of the retail labor rate is materially inaccurate or fraudulent. [Cal. Veh. Code, § 3065.4,
5 subd. (a).]

6 **ISSUE PRESENTED**

7 20. The issue presented in this protest is whether Kia sustained its burden of proof to show it
8 complied with Section 3065.2 in responding to Putnam’s Submission and Putnam’s determination of the
9 retail labor rate is materially inaccurate or fraudulent. The Board may determine the difference between
10 the amount the franchisee has actually received from the franchisor for fulfilled warranty obligations and
11 the amount that the franchisee would have received if the franchisor had compensated the franchisee at
12 the retail labor rate and retail parts rate as determined in accordance with Section 3065.2. [Cal. Veh.
13 Code, § 3065.4, subd, (b).] In the alternative, the franchisee may submit a request to the franchisor to
14 calculate the unpaid warranty reimbursement compensation. [*Id.*]

15 **APPLICABLE LAW**

16 21. Vehicle Code section 3065.4 provides in relevant part the following:

17 (a) If a franchisor fails to comply with Section 3065.2, or if a franchisee disputes the
18 franchisor's proposed adjusted retail labor rate or retail parts rate, the franchisee may file
19 a protest with the board for a declaration of the franchisee's retail labor rate or retail parts
20 rate. In any protest under this section, the franchisor shall have the burden of proof that it
21 complied with Section 3065.2 and that the franchisee's determination of the retail labor
22 rate or retail parts rate is materially inaccurate or fraudulent.

23 (b) Upon a decision by the board pursuant to subdivision (a), the board may determine
24 the difference between the amount the franchisee has actually received from the
25 franchisor for fulfilled warranty obligations and the amount that the franchisee would
26 have received if the franchisor had compensated the franchisee at the retail labor rate and
27 retail parts rate as determined in accordance with Section 3065.2 for a period beginning
28 30 days after receipt of the franchisee's initial submission under subdivision (a) of Section
3065.2. The franchisee may submit a request to the franchisor to calculate the unpaid
warranty reimbursement compensation and the franchisor shall provide this calculation
to the franchisee within 30 days after receipt of the request. The request for the calculation
will also be deemed a request for payment of the unpaid warranty reimbursement
compensation.

[Cal. Veh. Code, § 3065.4, subd. (a) and (b).]

1 22. Vehicle Code section 3065.2 provides in relevant part the following:

2 (a) A franchisee seeking to establish or modify its retail labor rate, retail parts rate, or
3 both, to determine a reasonable warranty reimbursement schedule shall, no more
frequently than once per calendar year, complete the following requirements:

4 (1) The franchisee shall submit in writing to the franchisor whichever of the
following is fewer in number:

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

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

7 (2) The franchisee shall calculate its retail labor rate by determining the total
8 charges for labor from the qualified repair orders submitted and dividing that
amount by the total number of hours that generated those charges.

9 ...
(c) Charges included in a repair order arising from any of the following shall be omitted
in calculating the retail labor rate and retail parts rate under this section:

10 ...
11 (3) Routine maintenance, including, but not limited to, the replacement of bulbs,
fluids, filters, batteries, and belts that are not provided in the course of, and related
12 to, a repair.

13 ...
(8) Parts sold or repairs performed for insurance carriers.

14 ...
(11) Repairs for government agencies or service contract providers.

15 ...
(d) (1) A franchisor may contest to the franchisee the material accuracy of the retail labor
16 rate or retail parts rate that was calculated by the franchisee under this section within 30
17 days after receiving notice from the franchisee or, if the franchisor requests supplemental
18 repair orders pursuant to paragraph (4), within 30 days after receiving the supplemental
19 repair orders. If the franchisor seeks to contest the retail labor rate, retail parts rate, or
20 both, the franchisor shall submit no more than one notification to the franchisee. The
notification shall be limited to an assertion that the rate is materially inaccurate or
21 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
22 franchisor in determining the franchisor's position, and a proposed adjusted retail labor
rate or retail parts rate, as applicable, on the basis of the repair orders submitted by the
23 franchisee or, if applicable, on the basis provided in paragraph (5). After submitting the
notification, the franchisor shall not add to, expand, supplement, or otherwise modify any
24 element of that notification, including, but not limited to, its grounds for contesting the
retail labor rate, retail parts rate, or both, without justification. A franchisor shall not deny
the franchisee's submission for the retail labor rate, retail parts rate, or both, under
subdivision (a).

25 ...
26 (3) In the event the franchisor provides all of the information required by
27 paragraph (1) to the franchisee, and the franchisee does not agree with the adjusted
rate proposed by the franchisor, the franchisor shall pay the franchisee at the
franchisor's proposed adjusted retail labor rate or retail parts rate until a decision
28 is rendered upon any board protest filed pursuant to Section 3065.4 or until any

1 mutual resolution between the franchisor and the franchisee. The franchisor's
2 proposed adjusted rate shall be deemed to be effective as of the 30th day after the
franchisor's receipt of the notice submitted pursuant to subdivision (a).

3 (4) If the franchisor determines from the franchisee's set of repair orders
4 submitted pursuant to subdivisions (a) and (b) that the franchisee's submission for
5 a retail labor rate or retail parts rate is substantially higher than the franchisee's
6 current warranty rate, the franchisor may request, in writing, within 30 days after
7 the franchisor's receipt of the notice submitted pursuant to subdivision (a), all
8 repair orders closed within the period of 30 days immediately preceding, or 30
9 days immediately following, the set of repair orders submitted by the franchisee.
10 If the franchisee fails to provide the supplemental repair orders, all time periods
11 under this section shall be suspended until the supplemental repair orders are
12 provided.

13 (5) If the franchisor requests supplemental repair orders pursuant to paragraphs
14 (1) and (4), the franchisor may calculate a proposed adjusted retail labor rate or
15 retail parts rate, as applicable, based upon any set of the qualified repair orders
16 submitted by the franchisee, if the franchisor complies with all of the following
17 requirements:

18 (A) The franchisor uses the same requirements applicable to the
19 franchisee's submission pursuant to paragraph (1) of subdivision (a).

20 (B) The franchisor uses the formula to calculate retail labor rate or retail
21 parts as provided in subdivision (a).

22 (C) The franchisor omits all charges in the repair orders as provided in
23 subdivision (c).

24 (e) If the franchisor does not contest the retail labor rate or retail parts rate that was
25 calculated by the franchisee, or if the franchisor fails to contest the rate pursuant to
26 subdivision (d), within 30 days after receiving the notice submitted by the franchisee
27 pursuant to subdivision (a), the uncontested retail labor rate or retail parts rate shall take
28 effect on the 30th day after the franchisor's receipt of the notice and the franchisor shall
use the new retail labor rate or retail parts rate, or both, if applicable, to determine
compensation to fulfill warranty obligations to the franchisee pursuant to this section.

...

29 (h) When a franchisee submits for the establishment or modification of a retail labor rate,
30 retail parts rate, or both, pursuant to this section, a franchisee's retail labor rate or retail
31 parts rate shall be calculated only using the method prescribed in this section. When a
32 franchisee submits for the establishment or modification of a retail labor rate, retail parts
33 rate, or both, pursuant to this section, a franchisor shall not use, or require a franchisee to
34 use, any other method, including, but not limited to, any of the following:

...

35 (3) Unilaterally calculating a retail labor rate or retail parts rate for a franchisee,
36 except as provided in subdivision (d).

...

37 (j) As used in this section, a "qualified repair order" is a repair order, closed at the time
38 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.

1 [Cal. Veh. Code, § 3065.2.]

2 23. The Business and Professions Code section 9884.9(a) provides in relevant part the
3 following:

4 (a) The automotive repair dealer shall give to the customer a written estimated price for
5 labor and parts necessary for a specific job, except as provided in subdivision (e). No
6 work shall be done and no charges shall accrue before authorization to proceed is obtained
7 from the customer. No charge shall be made for work done or parts supplied in excess of
8 the estimated price, or the posted price specified in subdivision (e), without the oral or
9 written consent of the customer that shall be obtained at some time after it is determined
10 that the estimated or posted price is insufficient and before the work not estimated or
11 posted is done or the parts not estimated or posted are supplied. Written consent or
12 authorization for an increase in the original estimated or posted price may be provided by
13 electronic mail or facsimile transmission from the customer. The bureau may specify in
14 regulation the procedures to be followed by an automotive repair dealer if an
15 authorization or consent for an increase in the original estimated price is provided by
16 electronic mail or facsimile transmission. If that consent is oral, the dealer shall make a
17 notation on the work order of the date, time, name of person authorizing the additional
18 repairs, and telephone number called, if any, together with a specification of the additional
19 parts and labor and the total additional cost, and shall do either of the following:
20 24.

14 [Cal. Bus. & Prof. Code, § 9884.9, subd. (a).]

15 **SUMMARY OF RESPONDENT’S CONTENTIONS**

16 25. Kia argues it complied with Section 3065.2 in responding to Putnam’s Submission and
17 Putnam’s Submission is materially inaccurate and potentially fraudulent.

18 26. Kia argues Putnam used sold hours which were in aggregate far less than the actual hours
19 in Putnam’s repair orders. Kia claims the actual hours in Putnam’s ROs are the “hours that generated
20 those charges” as referenced in Vehicle Code section 3065.2, subdivision (a)(2).

21 27. Kia conceded most, if not all, the ROs it suggested were not included in Putnam’s
22 submission as “qualified repair orders” were, in fact, not qualified repair orders because the repairs were
23 for routine maintenance expressly excluded by Vehicle Code section 3065.2, subdivision (c)(3).

24 28. Kia argues RO 10298 is not a qualified repair order and should be removed from the
25 calculation of Putnam’s retail labor rate. Kia further suggests RO 10298 is evidence of potential fraud.

26 29. Kia claims Putnam’s requested labor rate is potentially fraudulent because it is more than
27 \$200 higher than the highest rate paid by Kia to any other Kia dealer for warranty repairs in California
28 and approximately \$200 higher than the hourly rates charged by luxury dealerships in Putnam’s market.

1 **SUMMARY OF PROTESTANT’S CONTENTIONS**

2 30. Putnam relies on Kia’s own Labor Time Standards (“LTS”) as the basis for sold hours in
3 its ROs and does not apply a multiplier to the LTS times for customer pay repair pricing. Putnam charges
4 its retail customers approximately \$440 per hour based on sold hours consistent with Kia’s LTS.

5 31. Putnam maintains it is reasonable to expect Kia to pay the same reimbursement rate for
6 warranty repairs as Putnam’s retail customers pay for customer-pay service repairs.

7 32. Putnam showed Kia failed to comply with Section 3065.2 because it failed to use hours
8 that generated the charges in Putnam’s ROs when calculating a proposed adjusted retail labor rate. The
9 actual hours of Putnam’s technicians do not generate charges to Putnam’s retail customers. Moreover,
10 it would be legally impermissible for Putnam to price its customer-pay repairs based on the actual hours
11 required for the repair pursuant to Business and Professions Code section 9884.9(a).

12 33. Kia failed to comply with Section 3065.2, subdivision (c)(3) when it included brake
13 repairs, battery replacements, and a bulb replacement for the purpose of reducing the calculation of
14 Putnam’s retail labor rate. Kia has conceded its Denial failed to comply with Section 3065.2, subdivision
15 (c)(3) concerning these routine maintenance repairs.

16 34. Putnam agrees RO number 10298 is not a qualified repair order and agrees with Kia’s
17 proposed removal of the RO from the calculation. The RO concerned a prepayment for diagnostic work
18 and the ordering of parts which was ultimately cancelled and not performed.

19 35. Putnam disputes the warranty rates of other Kia dealers or other dealers in Putnam’s
20 market are relevant to the formula set forth in Vehicle Code section 3065.2 to determine Putnam’s retail
21 labor rate. The formula divides the total charges for labor from the qualified repair orders submitted and
22 divides it by the total number of hours that generated those charges. [See Cal. Veh. Code, § 3065.2,
23 subd. (a)(2).] The rates of other dealers are not part of the formula.

24 36. To the extent the Board finds Kia complied with its statutory obligations and sees a need
25 to determine a retail labor rate pursuant to Vehicle Code section 3065.4, the rate should be \$436.51 based
26 on removing ROs 10298 and 10638 as not qualified repair orders and removing all the brake, battery,
27 and bulb repairs expressly excluded by Section 3065.2, subdivision (c)(3). The Board should sum the
28 remaining net labor charges and divide by the total number of sold hours in the qualified repair orders.

1 Doing so supports a retail labor rate of \$436.51. [See P-108.010 (total of the fourth tab labeled
2 “Calculation 2”).]

3 **FINDINGS OF FACT**⁵

4 I. WITNESS BACKGROUND FINDINGS

5 37. James Nardini Background: Mr. Nardini is the National Manager of Warranty, Technical,
6 and Service Operations for Kia U.S.⁶ [RT Vol. I, 45:11-19.] Mr. Nardini oversees the Warranty
7 Operations Team, the Technical Support Team, the service garage, and the Kia representatives who do
8 the reclamation back to the factories. [RT Vol. I, 46:1-6; *see also* RT Vol. I, 46:7-47:17 (describing the
9 departments).] Mr. Nardini’s Warranty Support Team receives increase requests for warranty labor rates
10 and the team performs labor rate review and approvals. [RT Vol. I, 47:18-23.]

11 38. Mr. Nardini’s experience in the automotive industry includes work for Isuzu Motors in
12 customer service, acting as an Isuzu district service and parts manager, and returning to Isuzu’s customer
13 affairs department handling the Lemon Law cases. Mr. Nardini then worked for Porsche Cars North
14 America starting in 2000. He again handled escalated customer affairs involving repurchases and
15 replacements. He then became the warranty manager for Porsche. [RT Vol. I, 48:5-50:10.] Mr. Nardini
16 started working for Kia in June 2021. He has worked as Kia’s national manager since starting work for
17 Kia. [RT Vol. I, 50:11-21.]

18 39. Mr. Nardini has never worked at a dealership, as a technician, as a service advisor, or in
19 any position in the service department for a dealership. [RT Vol. II, 331:4-16.] Mr. Nardini has never
20 priced a customer-pay repair order. [RT Vol. II, 331:17-19.]

21
22
23 ⁵ References to testimony, exhibits or other parts of the record supporting these findings are intended
24 to be examples of evidence relied upon to reach that finding, and not to be exhaustive. Findings of
25 Fact are organized under topical headings for readability only, and not to indicate an exclusive
26 relationship to the issue denoted by the topic heading. The Board may apply a particular finding to any
27 of the requirements of Section 3065.2 or burdens of proof described in Section 3065.4. Citations to the
28 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.

⁶ Kia America includes the three distributors, Kia Canada, Kia U.S., and Kia Mexico. [RT Vol. I,
45:20-25.] Mr. Nardini works for the U.S. portion of Kia America, Inc. [*Id.*]

1 40. At the time of Putnam’s submission, Mr. Nardini had been working for Kia for less than
2 a year. [RT Vol. II, 331:23-332:1.] He did not review Putnam’s entire submission at the time it was
3 submitted; Oscar Rodriguez, the warranty manager at the time, reviewed the submission. [RT Vol. II,
4 332:9-12.] Mr. Nardini did not review the submission prior to Kia issuing its May 26, 2022, denial letter.
5 [RT Vol. II, 332:13-15.] Mr. Nardini did not provide any substantive content to Kia’s May 26, 2022,
6 denial letter. [RT Vol. II, 334:3-6.] Mr. Nardini did not prepare the spreadsheet attached to Kia’s denial
7 letter; he believes Mr. Rodriguez did. [RT Vol. II, 334:7-11.]

8 41. Rad Reyes Background: Rad Reyes is currently the service manager for Putnam Kia. [RT
9 Vol. V, 922:2-5.] Mr. Reyes has worked in the automotive industry for 29 years. He started as a parts
10 department delivery driver and moved up to the parts counter, eventually into the service department as
11 a service advisor, and then a manager of one of the other makes. He has worked as the service manager
12 for Putnam Kia since September 2021. He is currently the service manager for both the Toyota and Kia
13 stores for the Putnam organization. He previously worked as the service manager for Putnam Mazda for
14 a couple of years before starting at Toyota. [RT Vol. V, 922:6-925:4.]

15 42. Mr. Reyes’s responsibilities as service manager involve managing the day-to-day
16 operations of the service department including dealing with customer issues, dispatching, payroll, hiring
17 and firing, and dealing with any shop issues that arise. [RT Vol. V, 925:5-15.]

18 43. Kent Putnam Background: Kent Putnam graduated from college in 1988 from the
19 University of San Francisco and attended the NADA Dealer Candidate Academy a few years later. He
20 has held various positions at new motor vehicle dealerships including porter, auto technician, service
21 advisor, salesman, sales manager, general manager, and dealer. Mr. Putnam is the dealer principal for
22 Putnam Kia and about 15 other franchises. [RT Vol. VII, 120:10-121:23.]

23 44. As dealer principal, Mr. Putnam is the owner and CEO of Putnam Kia. Broadly, he
24 ensures the continued viability of the business but is not involved in the day-to-day business operations
25 of the dealership. [RT Vol. VII, 123:22-124:4.]

26 45. Jeffrey J. Korenak Background: Jeffrey Korenak received a two-year associate in applied
27 sciences from the University of Wisconsin and received a couple certificates through Boston University.
28 [RT Vol. VIII, 7:4-11.] Mr. Korenak started working in the automotive industry doing sales and leasing

1 at Van Paxil Ford (now Bergstrom Auto Ford) in Green Bay, Wisconsin in 1984. Mr. Korenak then
2 became a sales consultant, route sales, for a company in Montana. He then ran a Christian education
3 program and was an associate pastor for Christian Life Center in Neenah, Wisconsin. He then returned
4 to the automotive industry as a sales and lease consultant for Dorsch Ford. After several years, he was
5 promoted to finance and then to finance manager for two years. He then became the general sales
6 manager of Saturn of Green Bay. He then became the general manager of the store and ran it for 10 to
7 12 years until it closed in 2010. [RT Vol. VIII, 7:17-8:18.]

8 46. He next worked for Zurich Insurance Company selling property and casualty and hail
9 insurance to car dealerships and then finance and insurance coaching and consulting. He then returned
10 to retail automotive work as the general sales manager and internet manager for Penske Lexus in
11 Madison, Wisconsin. He then worked for Zimbrick Automotive as a general sales manager at the
12 Hyundai store. He then moved to Austin, Texas and worked for AutoNation Toyota of South, Austin as
13 a sales and leasing consultant and was promoted to sales manager. He then worked in the service
14 department as an advisor after administering a sales team in the service department. He then learned
15 fixed operations by being a service advisor at Audi of South Austin. [RT Vol. VIII, 9:2-24.]

16 47. Mr. Korenak's current employer is FrogData, LLC. Mr. Korenak started work at
17 FrogData in 2020. [RT Vol. VIII, 8:19-22.] FrogData is a data platform company with the parent
18 company of Izmocars; Mr. Korenak's component of FrogData's operations is referred to as
19 WarrantyBoost+, which submits warranty reimbursement filings across the country. [RT Vol. VIII,
20 10:3-22.] Mr. Korenak is the Director of Implementation; he oversees the team of analysts and the data
21 team in the United States and in India, and he also handles client relations and the filing of warranty
22 reimbursement requests. [RT Vol. VIII, 10:24-11:7.] He submits labor rate submissions to
23 manufacturers and manages FrogData's process of extracting digital ROs from a dealership, inputting
24 repair order information in spreadsheet format, and the data analysis. [RT Vol. VIII, 11:8-12:24.] He
25 makes sure the submissions are timely, troubleshoots any issues, does a final check and review, and
26 becomes involved in rebuttal analysis concerning a factory response to a submission; he also hires, fires,
27 coaches, and trains staff. [RT Vol. VIII, 12:25-13:21.] Mr. Korenak has been involved in approximately
28 1,200 labor rate submission and about 400 in California, including submissions for all mass market

1 volume franchises. [RT Vol. VIII, 33:7-18.] He has been involved in approximately 120 to 125 Kia
2 submissions nationwide; with approximately 25 to 30 of those in California. [RT Vol. VIII, 33:22-34:2.]

3 48. Andrey Kamenetsky Background: Andrey Kamenetsky received his Bachelor's Degree
4 in international relations and economics from the School of International Service at American University
5 in Washington D.C. [RT Vol. IX, 7:4-9.] Mr. Kamenetsky started in the new motor vehicle industry as
6 a sales associate in October of 1993 for Putnam Toyota and has been in the new motor vehicle industry
7 for over 30 years. After working as a sales associate, he became a new sales manager for one to two
8 years. He then became the general sales manager for Putnam Toyota from 1996 to about 2003. Mr.
9 Kamenetsky then became the partner and general manager of the Putnam Toyota dealership from 2003
10 or 2004, until April or May of 2020. Thereafter, he became the group operations manager for all the
11 dealerships owned by Kent Putnam and has been in the position for a little less than four years. He has
12 also been the CFO since 2022. [RT Vol. IX, 7:15-11:22.] He is involved with the submission of warranty
13 labor rate and parts rate increase requests as group operations manager and has been involved in
14 approximately 20 to 30 submissions for the Putnam organization. [RT Vol. IX, 11:23-12:6.]

15 II. PUTNAM SECTION 3065.2 SUBMISSION

16 49. Kia's procedure when it receives a request for an increase to a warranty labor rate based
17 on repair orders starts with receipt of a letter from the dealer outlining the request, a list of the repair
18 orders supporting the requests, and a summary of the repair orders, the labor associated with the repairs,
19 the dollar value associated with the labor amount, and the average calculation. [RT Vol. I, 92:16-93:4.]

20 50. Kia has a manager who receives the information from the dealer. The manager will then
21 work with representatives on his or her team to go through all the documents. Kia double-checks the
22 dealership's math and it goes back to the manager. [RT Vol. I, 93:8-17.]

23 51. Mr. Nardini becomes involved with any submissions that request an increase of over 20
24 or 25 percent. [RT Vol. I, 94:18-95:5.]

25 52. On or about March 22, 2022, Putnam submitted a request for an increase to its warranty
26 labor reimbursement rate to \$447.52 per hour. [Exh. J-3.001.] Putnam submitted a letter, spreadsheet,
27 and ROs for the increase pursuant to Vehicle Code section 3065.2, subdivision (a)(1)(B); a 90-
28 consecutive-day period submission with RO 10099 dated 11/03/2021 through RO 10636 dated

1 01/31/2022. [*Id.*; *see also* RT Vol. VIII, 45:7-46:3.]

2 53. The letter was based on FrogData's standard format submission letter. [RT Vol. VIII,
3 24:3-25:3.] Mr. Korenak prepared the final version of the spreadsheet submitted with the letter. [RT
4 Vol. VIII, 26:15-19.] In selecting a 90-day period for the submission, FrogData selected from RO data
5 for the time period of October 1, 2021, through January 31, 2022. [RT Vol. VIII, 58:4-16.]

6 54. Putnam's spreadsheet outlines the repair orders supporting the request, the open and close
7 dates, the labor sale hours, the labor charge, any discounts, the net labor charge, the labor rate, the
8 operation code, the repair description, the repair line of the RO, the labor type, VIN, and linekey (a
9 combination of the RO number and repair line). [Exh. J-3.002-.003; RT Vol. II, 111:17-112:2, 112:20-
10 113:3, 113:10-115:21; *see also* RT Vol. VIII, 26:20-32:12 and 36:8-38:2.]

11 55. The spreadsheet contains a count column as the first column which counts the number of
12 ROs in the submission; repeated numbers in the count entry correspond to two different repair lines
13 concerning the same RO. [RT Vol. II, 116:1-23; *see also* Exh. J-3.002-.003.] There were 29 qualified
14 ROs supporting Putnam's original labor rate submission. [*Id.*]

15 56. The spreadsheet contains the totals of 21.4 as the total labor hours sold and \$9,577.01 as
16 the gross amount of labor sold. [Exh. J-3.002-.003; RT Vol. II, 116:24-118:11; RT Vol. VIII, 39:17-
17 40:5.] \$9,577.01 divided by the 21.4 hours is the calculation Putnam performed supporting its requested
18 \$447.52 labor rate. [*See* Exh. J-3.003; *see also* RT Vol. III, 555:2-5; RT Vol. VIII, 40:6-43:18.]

19 57. Labor sale hours are hours listed on the RO that are input by the service advisor. [RT
20 Vol. II, 113:4-9.]

21 58. Putnam used a vendor, FrogData, to prepare its submission. [RT Vol. VII, 127:6-13.]
22 Putnam and FrogData entered into a contract concerning Putnam's labor rate submission on or about
23 February 16, 2022. [RT Vol. VIII, 21:17-22:7 and 214:24-216:13.]

24 59. FrogData extracted Putnam's ROs digitally in performing its labor rate analysis. [RT
25 Vol. VIII, 16:18-17:8.] Frogdata performed a range selection analysis to determine the specific date
26 range of ROs for the submission from approximately a 180-day period of ROs. [RT Vol. VIII, 17:21-
27 19:5.]

28 ///

1 60. On April 20, 2022, Kia issued a letter requesting an additional 30 days of ROs after the
2 90-day period of Putnam’s submission. [Exh. J-4.001-.002; RT Vol. IV, 577:5-19; *see also* RT Vol. IX,
3 77:21-78:4.] The letter complied with Kia’s right to request supplemental repair orders pursuant to
4 California Vehicle Code section 3065.2(d)(4).

5 61. On April 27, 2022, Putnam submitted a cover letter and 30 days of additional ROs
6 following the 90-day period described in Putnam’s original submission. [Exh. J-5.001; RT Vol. IV,
7 579:4-13; RT Vol. VII, 132:21-24; RT Vol. VIII, 62:4-8 and 63:2-5; RT Vol. VIII, 63:21-64:20 (Mr.
8 Korenak testifying the 30 days of additional ROs were from February 1, 2022 through March 2, 2022)
9 and RT Vol. VIII, 72:11-19 (describing the remaining ROs on January 31, 2022 would also have been
10 submitted through March 2, 2022); RT Vol. IX, 78:3-79:4.] Kent Putnam provided a contact number
11 and email address in the event there was a need for additional information. [Exh. J-5.001; RT Vol. IV,
12 579:18-580:1.] Mr. Putnam also provided Jeff Korenak’s phone number and email address for any
13 questions concerning the submission. [Exh. J-5.001; RT Vol. IV, 580:2-6.]

14 62. On May 26, 2022, Kia issued a response to Putnam’s warranty reimbursement increase
15 request. [Exh. J-6.001; RT Vol. II, 171:12-14; RT Vol. IX, 80:7-13.] Kia provided a spreadsheet that
16 included certain repairs Kia felt were qualified repairs that should have been included in Putnam’s
17 original calculation. [Exh. J-6.004-.005; RT Vol. II, 171:15-21.]

18 63. The columns in Exhibit J-6.004-.005 from left to right include the RO count, the RO
19 number, the RO date (the open date), the labor sales hours (S/HRS), the actual hours (qualified) (A/HRS),
20 the net labor charge, the repair description, the labor rate based on the net labor charge column divided
21 by the Actual Hours (Qual) column, the “(S/Hrs) Avg” based on the net labor charge column divided by
22 the Labor Sale Hours column, and notes in red concerning Kia’s response. [Exh. J-6.004-.005; RT Vol.
23 II, 174:8-23.] Items in red were the items Kia felt were qualified; items in black were part of Putnam’s
24 original submission. [RT Vol. II, 175:12-24.]

25 64. Kia’s May 26, 2022, response denied Putnam’s requested labor rate and provided a
26 proposed adjusted labor rate of \$268.89. [Exh. J-6.003; RT Vol. IV, 585:1-11.]

27 65. In the Kia response to the Steven Creek Kia warranty labor rate request, Kia
28 acknowledged and accepted Section 3065.2 subdivisions (d)(2) and (d)(3) “appear to provide, however

1 illogically, that the adjusted rate will be ‘deemed’ effective as of the 30th day after the submission of the
2 notice under subsection (a).” [Exh. P-111.002; RT Vol. III, 408:11-409:2.] Mr. Nardini agreed Putnam
3 should be paid retroactively to 30 days after the submission here if a higher rate is determined. [RT Vol.
4 III, 409:6-12.]

5 66. Mr. Nardini was not aware of any labor rate submission except for Putnam’s where Kia
6 calculated a labor rate using actual hours instead of sold hours on repairs. [RT Vol. III, 412:25-413:17.]

7 67. On June 15, 2022, Putnam provided Kia a letter drafted by Mr. Kamenetsky responding
8 to Kia’s May 26, 2022, denial. [Exh. J-7; RT Vol. VIII, 71:17-24; RT Vol. IX, 91:2-8.] Putnam informed
9 Kia it uses factory guide times to determine the sold hours in its ROs. [RT Vol. IX, 98:5-13.]

10 III. KIA WARRANTY COVERAGE

11 68. New Kia vehicles sold to customers come with a warranty. [RT Vol. I, 51:4-7.] A
12 warranty repair is a repair of a component that is typically a defect in manufacturing or workmanship
13 that is covered by the factory for a specific period of time. [RT Vol. I, 76:10-14.] Kia provides certain
14 coverages for parts and labor for particular repairs for a specific period of time, including a regular
15 coverage, a power train coverage, and emissions coverage. [RT Vol. I, 51:8-16.]

16 69. Kia dealers are obligated as part of their franchise agreements to carry out warranty work
17 as presented to them by Kia customers. [RT Vol. I, 65:15-66:7; RT Vol. II, 338:25-339:7.] Dealers do
18 not advertise for warranty work. [RT Vol. II, 339:8-10.] The vehicle is presented to the dealership with
19 a reported condition, the condition is verified, diagnosed, and repaired by the dealership. If the vehicle
20 repair is covered under the terms of the warranty, the dealership will file a warranty claim with Kia,
21 which will then go through a series of validations and ultimately pay the claim. [RT Vol. I, 66:9-19.]
22 Kia dealer warranty claims are filed through a warranty tab on KDealer, Kia’s intranet site. [RT Vol. I,
23 66:20-67:2.] Dealers are compensated on their parts statement twice a month for submitted warranty
24 claims. [RT Vol. I, 67:16-24.]

25 70. Kia determines the labor time to pay a dealer for a repair based on a labor time guide.
26 The labor time guide provides the hours necessary for all the processes and procedures that are associated
27 with the repair of different components on a vehicle. The times are set up initially during manufacture
28 of the vehicle and Kia’s service garage will validate a number of the labor time guide hours on certain

1 types of repairs or extensive repairs. [RT Vol. I, 67:25-68:10.] Kia's labor time guide is referred to as
2 the Kia LTS or Kia Labor Time Standards. [RT Vol. I, 68:11-15; *see also* RT Vol. I, 83:6-20.]

3 71. Kia's LTS is developed during the engineering and building of the vehicles and afterward
4 through labor time studies. [RT Vol. II, 335:21-25.] A labor time study involves timing a technician's
5 repair or going through each of the procedures outlined in the repair process as well as other
6 confirmation. [RT Vol. II, 336:8-19.] Kia devotes a substantial amount of resources to determining its
7 labor time standards and believes its labor time standards are reasonable. [RT Vol. II, 336:1-7.]

8 72. Kia's LTS hours are a reasonable number of hours to allocate to a repair. [RT Vol. II,
9 337:14-17.]

10 73. Kia generally pays dealers for warranty labor based on Kia's labor time standards
11 multiplied by the dealer's warranty labor rate. [RT Vol. II, 335:1-8; RT Vol. III, 371:24-372:3.]

12 74. All OEMs have a published labor guide and the LTS is Kia's version of a time guide for
13 Kia vehicles. [RT Vol. II, 335:13-20.]

14 75. Kia provides for the payment of additional time beyond Kia's labor time standards under
15 certain extraordinary conditions. Exhibit 232 contains the policy for a dealer to receive actual labor time
16 reimbursement for extraordinary conditions. [RT Vol. I, 71:22-72:18.] Kia's default position is that
17 LTS repair times include diagnostic time. [Exh. R-232.001; RT Vol. III, 373:1-7.]

18 76. Kia will only pay for actual time for labor beyond Kia's LTS (referred to as XTT time)
19 in extraordinary conditions or extraordinary diagnostics. [Exh. R-232.001; RT Vol. III, 372:4-7 and
20 540:16-23.] XTT time does not apply to a routine instance of exceeding LTS hours and does not apply
21 to every repair. [RT Vol. III, 372:16-22.]

22 77. To receive payment based on XTT time, Kia's bulletin includes requirements a dealer
23 must meet. [Exh. R-232.001.] The technician must know he or she is dealing with an extraordinary
24 diagnosis before he starts it. [RT Vol. III, 375:9-376:6.] Wait time for the technician between submitting
25 information to Kia's Techline and receiving a response is not included in the time Kia will pay for XTT
26 time. [RT Vol. III, 376:15-377:12.] To receive XTT time, a technician must also follow Kia's repair
27 processes and procedures. [RT Vol. III, 378:6-379:4.] Moreover, a dealership cannot exceed 0.9 hours
28 of XTT time unless a dealership complies with a Techline assistance case and a prior warranty approval.

1 [Exh. R-232.002; RT Vol. III, 383:19-384:14.] XTT time also has listed exclusions. [Exh. R-232.002;
2 RT Vol. III, 384:15-385:24.]

3 78. Kia has the option of denying claims for XTT time based on examining the documentation
4 submitted by the dealer and determining, for example, the repair should only be subject to a certain
5 amount of additional time or denying the claim based on a failure to follow Kia's repair procedures. [RT
6 Vol. IV, 740:23-741:11.]

7 79. Mr. Reyes could not recall a single instance of seeking additional diagnostic time on a
8 warranty repair at Putnam Kia. [RT Vol. V, 957:20-958:4.]

9 80. Brake pad repairs are routine and ordinary and not an extraordinary repair. [RT Vol. III,
10 383:5-8.] A brake pad repair might present as a squeaking from the front tire of a vehicle but ultimately,
11 when the size and depth and the brake is shown to be worn down, the squeaking is a routine noise. [RT
12 Vol. III, 383:13-18.]

13 81. Exhibit R-230 is the Warranty Consumer Information Manual for Kia from 2021. [Exh.
14 R-230.001; RT Vol. I, 51:25-52:5.] Page R-230.004 summarizes the warranty program coverages
15 offered by Kia. [Exh. R-230.004; RT Vol. I, 52:10-24.] For example, the basic Kia warranty coverage
16 ends after 60 months in service or 60,000 miles in service whichever comes first. [*Id.*] The months in
17 service and miles in service columns simply show when the other listed Kia warranties end. [*Id.*]

18 82. Kia provides a service adjustment period of 12 months or 12,000 miles. [Exh. 230.004;
19 RT Vol. I, 52:25-53:4.] However, none of the repairs at issue in this Protest can fairly be considered
20 adjustments as discussed further below. The service adjustment warranty only covers minor adjustments
21 that do not require the replacement of a part. [RT Vol. I, 53:5-8.]

22 83. Kia's Basic Warranty Coverage "does not cover wear and maintenance items, or those
23 items excluded elsewhere in the manual. See 'Exceptions' and 'What is Not Covered.'" [Exh. R-
24 230.006; RT Vol. III, 353:15-354:6.]

25 84. Kia's Adjustment Coverage "means minor repairs not usually associated with the
26 replacement of parts...." [Exh. R-230.007.] Mr. Nardini was not aware of any Kia repairs where a brake
27 or replacement of parts might be included in the adjustment coverage. [RT Vol. III, 355:23-356:8.]

28 ///

1 85. Brake linings “are designed to wear out as part of the process of stopping your vehicle
2 safely and consistently while providing reasonable levels of noise and vibration during normal use.”
3 [Exh. R-230.008.] “The more wear factors which are present, the more rapid the wear. Resulting repairs
4 and replacements of linings *are not covered* by your warranty.” [*Id.* (emphasis added).]

5 86. Brakes are intended to wear out eventually. [RT Vol. III, 356:20-357:3.] Brakes stop a
6 vehicle with friction. [RT Vol. III, 357:4-15.] Brake pads start at a thickness of 10 millimeters and can
7 wear down to zero millimeters. [RT Vol. III, 358:10-16.] Brake pads are routinely replaced when they
8 get to 4, 3, or 2 millimeters. [RT Vol. III, 358:17-359:8.] Brake pads and shoes are identified in Kia’s
9 warranty manual as wear items. [Exh. R-230.011; RT Vol. III, 365:16-366:8.]

10 87. The Burlingame area, around the Putnam dealership, has stop-and-go traffic. [RT Vol.
11 III, 360:15-24.] The wear on brakes due to stop and go traffic results in wear that is not covered by Kia’s
12 warranty. [RT Vol. III, 360:25-361:4.]

13 88. Kia’s Original Equipment Battery warranty also covers replacement of batteries within
14 the first 36 months or 36,000 miles in service. [Exh. 230.004 and .007-.008; RT Vol. I, 55:17-24 and
15 59:9-25.] However, the replacement of batteries that are not provided in the course of and related to a
16 repair are expressly excluded from the calculation of a retail labor rate pursuant to Vehicle Code section
17 3065.2, subdivision (c)(3). [Cal. Veh. Code, § 3065.2, subd. (c)(3).] Kia’s battery warranty cannot
18 override the express exclusion of batteries in the statute.

19 89. Each Kia warranty comes in the format of a certain number of months or a certain number
20 of miles; the first is a time period and the second is not a period of time but a distance in miles. [RT
21 Vol. III, 353:2-14; *see also* RT Vol. V, 848:1-14 (Mr. Nardini agreeing the 36,000 miles in Kia’s 36
22 month/36,000 mile warranty is not a period but a distance).]

23 90. Alteration, modification, tampering, or rewiring of the vehicle that result in failures to the
24 vehicle are not covered by Kia’s warranties. [Exh. R-230.010; RT Vol. III, 361:9-362:3.] Similarly,
25 damage caused by unauthorized modifications to functionality or compatibility are excluded by the
26 warranty for the UVO system. [Exh. R-230.012; RT Vol. III, 368:7-21.]

27 91. Kia’s warranties exclude “Normal Maintenance,” including the exclusion of oil/fluid
28 changes and non-HID bulbs. [Exh. R-230.011; RT Vol. III, 366:9-368:6.]

1 92. Exhibit R-231 contains similar provisions to Exhibit R-230 but for Kia’s 2022 Warranty
2 and Consumer Information Manual; those provisions discussed during the hearing did not change from
3 the 2021 to the 2022 manual. [Exh. R-231.001; RT Vol. I, 64:2-15; RT Vol. III, 370:7-21.]

4 93. Kia does not share Kia dealer warranty rates with other neighboring Kia dealers. [RT
5 Vol. III, 403:23-405:3.]

6 94. When reviewing the submission for Stevens Creek Kia in June 15, 2020, Kia’s warranty
7 operations manager, Rachelle Nelson, (in a similar position to Oscar Rodriguez who signed Kia’s denial
8 letter to Putnam) stated Kia agreed to exclude bulbs and batteries from a labor rate calculation. [Exh. P-
9 111.001; RT Vol. III, 406:18-407:24.]

10 95. The Board finds the replacement of brake pads, resurfacing of rotors, replacement of
11 bulbs, and replacement of batteries are routine maintenance repairs expressly excluded from calculating
12 a retail labor rate. [Cal. Veh. Code, § 3065.2, subd. (c)(3).]

13 IV. CUSTOMER PAY REPAIRS

14 96. A customer-pay repair or maintenance related repair is one that is typically paid for by
15 the customer including, for example, oil changes, tires, brake pad wear, and other maintenance-related
16 repairs. [RT Vol. I, 76:15-25.] A customer-pay repair is also referred to as a retail repair. [RT Vol. I,
17 77:1-7.] There are also repairs that are outside the parameter of the manufacturer’s warranty and not
18 covered by the warranty which are then paid for by the customer—what Kia referred to during the
19 hearing as a customer-pay warranty-like repair. [RT Vol. I, 77:8-23.] Kia dealers are obligated to
20 provide service on all Kia products including customer-pay and warranty repairs. [Exh. J-1.023; RT
21 Vol. I, 79:6-20.]

22 97. Kia does not exercise any control over what Kia dealers charge for retail or customer-pay
23 repairs. [RT Vol. I, 81:16-20; RT Vol. III, 387:6-22.]

24 98. Kia does not restrict what time guides a dealer may use for pricing customer-pay repairs.
25 [RT Vol. I, 81:21-24; RT Vol. II, 337:8-13; RT Vol. III, 387:23-25.] Moreover, Kia does not require a
26 dealer use the same guide hours for all the times it submits in support of a labor rate request. [RT Vol.
27 III, 457:14-18.]

28 ///

1 V. KIA'S RELIANCE ON ACTUAL HOURS AS THE TOTAL NUMBER OF HOURS
2 GENERATING THE CHARGES TO CUSTOMERS.

3 99. Straight time, clock time, or punch time is the actual time a technician spends working
4 on a vehicle. A technician can punch on and off different repair lines. [RT Vol. I, 69:24-70:24.]

5 100. Putnam's spreadsheet submitted in support of its labor rate submission did not rely on or
6 list actual hours. [Exh. J-3.002-.003; RT Vol. II, 118:15-22.]

7 101. In its denial letter, Kia argued "In calculating its labor rate, however, the Dealership has
8 used book times that are, in the aggregate, far less than the actual number of hours that generated the
9 charges on the repair orders." [Exh. J-6.001-.002.] However, as Kia quoted from Section 3065.2(a)(2)
10 in the prior sentence, there is no use of the words "actual hours" in the calculation of a retail labor rate.
11 [Exh. J-6.001; RT Vol. IV, 585:13-586:7.] Kia's reference to "book times" in the final paragraph of
12 Exh. J-6 refers to the dealership's listed sold hours. [RT Vol. IV, 588:13-24 and 591:11-592:6.]

13 102. However, dividing the amounts charged by Putnam by the actual hours in repairs yields
14 vastly different labor rates between ROs. Using the actual hours for the division for Count 1/RO 10158
15 in Kia's spreadsheet would generate a labor rate of \$75.99/hr [Exh. J-6.004 (Count 1) (\$250.00 divided
16 by 3.29 actual hours)]; in contrast, for Count 18/RO 10426 in Kia's spreadsheet, dividing \$220.00 by
17 0.1 actual hours calculates a labor rate of \$2,200.00/hr [Exh. J-6.004 (Count 18)]. [See also RT Vol. IV,
18 616:19-617:17.] Applying actual hours to calculate Putnam's labor rate is inconsistent with how Putnam
19 generates its charges to its customers.

20 103. Putnam Kia's policies do not require a technician to clock on and off a job for a bathroom
21 break or to take a phone call. [RT Vol. V, 928:23-929:2.]

22 104. Putnam Kia does not price repairs based on actual time; the actual hours do not change
23 the price to the retail customer. [RT Vol. V, 944:7-945:1.] Putnam does not generate charges using
24 actual hours—Putnam generates charges using sold hours. [RT Vol. IX, 82:9-13.]

25 105. There are different levels of training for Kia technicians, including a lube tech, a line tech,
26 and a journeyman or master technician. [RT Vol. V, 946:18-949:7.] Not all technicians are equally
27 capable at Putnam Kia and not all the technicians can complete the same job in the same amount of time.
28 [RT Vol. V, 950:15-20.] However, the training and efficiency of the assigned technician does not impact

1 the price of a repair to Putnam Kia's customers. [RT Vol. V, 950:21-951:5.]

2 106. Putnam Kia also does not price diagnostic repairs based on actual hours but prices the
3 repairs based on a flat fee. [RT Vol. V, 951:6-9 and 951:22-24.] Putnam Kia charges a half an hour for
4 diagnostic based on experience with prior diagnostics. [RT Vol. V, 951:25-952:7.] Putnam Kia charges
5 a customer \$250.00 for a diagnosis on a customer paid repair when there is no repair performed. [RT
6 Vol. V, 955:13-24; RT Vol. VI, 98:5-99:1.] When a customer follows through with a repair, the
7 diagnostic fee is typically included in the repair price. [RT Vol. V, 955:25-956:3.]

8 107. In all the labor rate submissions Mr. Korenak has been involved, he has never based the
9 calculation of a retail labor rate on the actual hours. [RT Vol. VIII, 34:3-8.] No factory has responded
10 to Mr. Korenak's submissions and stated they only calculate retail labor rates using actual hours. [RT
11 Vol. VIII, 35:14-18.] No state requires the use of actual hours in determining a labor rate. [RT Vol.
12 VIII, 35:24-36:7.]

13 108. In the context of a warranty repair, if the dealership diagnoses a vehicle and does not
14 discover a warranty repair that must be performed, Kia will not reimburse the dealership for the
15 diagnosis. [RT Vol. V, 952:20-953:15.]

16 VI. TECHNICIAN COMPENSATION

17 109. Service technicians can be compensated for their work by a dealership based on what the
18 industry calls flat rate time. A flat rate technician is compensated based on the hours in the flat rate
19 manual for a given repair. [RT Vol. I, 81:25-82:10.] Flat rate time is the LTS time or whatever time
20 standard other manufacturers use. [RT Vol. I, 82:11-83:2.] For example, if a flat rate technician
21 performs a job which takes 8/10 of an hour with a flat rate of an hour, the technician is generally paid
22 based on the hour for the repair and not the 8/10 of a hour; the technician effectively earns a bonus for
23 being efficient. [RT Vol. I, 84:4-15.] A typical technician can be on average 110 to 120 percent efficient.
24 [RT Vol. I, 84:16-23.] A more experienced technician may complete a repair faster than an
25 inexperienced technician and is rewarded in terms of compensation as a result. [RT Vol. I, 84:24-85:11.]

26 110. Technicians may also be compensated hourly. An hourly technician is compensated a
27 fixed amount of money per hour while working at the dealership regardless of what flat rate repairs are
28 being performed. [RT Vol. I, 86:25-87:7.]

1 111. Service personnel apart from technicians are not usually compensated based on flat time;
2 for example, a shop foreman is usually compensated with a salary which might be supplemented if he or
3 she can beat flat-rate time. [RT Vol. III, 391:3-392:11.]

4 112. Both compensation structures are employed to compensate technicians. In California,
5 technicians must be paid based on actual hours if they do not have enough flat rate hours to meet
6 minimum wage. [RT Vol. III, 393:8-394:2; RT Vol. III, 397:12-398:5.]

7 113. Putnam Kia's technicians commute long distances to work at Putnam due to the high rent
8 in the area of the store. The necessary technician compensation has increased over the past several years.
9 [RT Vol. V, 925:17-926:14.] Putnam offers the technicians housing during the workweek to try to attract
10 service technicians to work at Putnam. [RT Vol. V, 927:6-20.]

11 114. Putnam's technicians are compensated hourly based on their clock time (separate from
12 the time clock for the ROs). [RT Vol. V, 927:21-928:22; *see also* RT Vol. VI, 47:25-49:3 (the actual
13 time on individual repairs is used to track technician efficiency, but it is not used for any other purposes
14 at Putnam; Mr. Reyes will talk to technicians about instances in ROs showing zero actual hours and
15 advise the technician to clock onto the correct repair when working on the repair).]

16 115. Putnam has one flat-rate technician who is compensated based on the time allocated to
17 perform a job from the LTS system. [RT Vol. V, 929:12-23 and 931:17-932:18.]

18 116. The minimum wage for a technician with his own tools at Putnam Kia is \$31 per hour.
19 [RT Vol. V, 933:22-25.]

20 117. When Putnam hired its technicians, it knew they could not be productive enough to justify
21 a flat-rate payment structure because no one had Kia experience. [RT Vol. V, 938:25-939:9.]

22 VII. PUTNAM KIA'S INITIAL WARRANTY LABOR REIMBURSEMENT RATE

23 118. A Kia dealer's initial labor rate is set based on a market survey looking at competitors or
24 like competitors in the dealer's market. [RT Vol. I, 87:23-88:5.] Thereafter, the dealer can submit a
25 certain number of repair orders pursuant to state law, and based on those retail or customer-pay repair
26 orders, Kia calculates a labor rate for the dealer. [RT Vol. I, 87:12-22.]

27 119. Exhibit J-2 is an example of a labor rate survey for a new dealer. [RT Vol. I, 88:6-16.]
28 Exhibit J-2 is the survey for Putnam Kia dated August 25, 2021. [Exh. J-2; RT Vol. I, 88:17-20.] Exhibit

1 J-2 is a Kia form. [RT Vol. V, 819:20-820:2.]

2 120. The survey lists franchises (Ford, General Motors, Honda, Hyundai, Mazda, Nissan, and
3 Toyota) and lists associated retail rates and warranty rates. At the bottom is an average of the warranty
4 rates. [Exh. J-2; RT Vol. I, 88:21-89:5.] The labor rate from a market survey is based on the warranty
5 rate and not the retail rates. [RT Vol. V, 857:23-858:4.]

6 121. In addition to the statutory procedure, a dealer may also submit a labor rate survey to
7 increase its labor rate for warranty labor reimbursement. [RT Vol. I, 92:3-15; *see also* RT Vol. III,
8 401:3-7.]

9 122. Kia established Putnam's original labor rate through the submission of a prefilled form
10 Putnam was instructed to fill out. The average of all the warranty labor rates from the listed brand names
11 became Putnam Kia's initial labor rate. [Exh. J-2; RT Vol. IX, 27:13-29:25.] Mr. Kamenetsky filled
12 out the columns in the spreadsheet labeled Dealer Name, Street and City, phone, Person Contacted,
13 Retail Rate, Effective Date, Warranty Rate and Effective Date. [RT Vol. IX, 30:2-9.] Kia approved
14 Putnam's initial rate of \$225.27. [Exh. J-2.002; RT Vol. IX, 31:13-16.]

15 123. None of the rates in Exhibit J-2.001 are the current warranty rates of the listed dealerships.
16 [RT Vol. IX, 31:17-23.] Each of the dealerships has a significantly higher warranty rate. [*Id.*]

17 124. Putnam could not submit a Section 3065.2 labor rate request when the franchise was
18 established because it did not have service department history and ROs to draw from. Putnam submitted
19 a Section 3065.2 request to increase both its parts rate and labor rate approximately five to six months
20 after Putnam began operations. [RT Vol. IX, 33:7-21.]

21 VIII. PUTNAM'S USE OF THE KIA LABOR TIME STANDARD ("LTS") TO PRICE CUSTOMER 22 PAY REPAIRS

23 125. Putnam Kia and the other Putnam franchises use factory time guides to price customer-
24 pay repairs. [RT Vol. VII, 134:8-12; *see also* RT Vol. IX, 25:21-26:13 (Mr. Kamenetsky testifying
25 Putnam does not use a multiplier in pricing customer-pay service work and Putnam Kia started
26 operations using the factory guide).] The Putnam organization has used the factory time guides to price
27 customer-pay repairs for approximately three years. [RT Vol. VII, 134:13-14.]

28 ///

1 126. Kia maintains labor time standards for repairs on its intranet, KDealer+. [RT Vol. II,
2 125:15-21.] Exhibit P-120 includes printouts from Kia’s KDealer based on OpCode Descriptions
3 applicable to specific VINs. [*Id.*; Exh. P-120.001-.021.] Each page of Exhibit P-120 includes
4 information from accessing Kia’s KDealer+ with the use of a labor description. [RT Vol. II, 126:12-
5 127:3.] For example, P-120.001 involved the search for “KNOCK SENSOR” as the OpCode
6 Description; No. 2 on the page shows an LTS time of 0.90 for a “Knock Sensor, R&R” (R&R means
7 remove and replace). [*Id.*; Exh. P-120.001.]

8 127. The time on the right side of the LTS printouts is the time Kia would pay the dealer for a
9 warranty repair matching the labor description. [RT Vol. II, 127:4-14.]

10 128. The documents in Exhibit P-120 are printouts from Kia’s intranet site. [RT Vol. II, 128:6-
11 15; *see also* Exh. P-120.] The information on the KDealer+ printouts is input by Kia’s product quality
12 department and is based on time studies. [RT Vol. II, 129:8-15.] The product quality department bases
13 the times on the assembly of the vehicle and a number of different factors. [*Id.*] The KDealer+ printouts
14 are Kia documents that are retrieved by a dealer after looking up a particular repair. [RT Vol. II, 130:2-
15 13.] LTS times are created and maintained by Kia. [RT Vol. III, 558:25-559:10.] Mr. Reyes printed
16 the LTS printouts from Kia’s KDealer and added the writing on the top of the printouts. [RT Vol. V,
17 1001:24-1002:19.]

18 129. Mr. Reyes also created Exhibit P-121. [RT Vol. VI, 8:2-6.] The list of RO numbers were
19 sent to Mr. Reyes and he noted the Warranty Time column values from Kia’s online warranty guide
20 (Kia’s LTS). [RT Vol. VI, 8:7-14.]

21 130. Eight (8) of the repairs in Exhibit J-3.002-.003 match Kia’s LTS printouts from Exhibit
22 P-120 exactly. [*See, infra*, Part X (ROs 10183, 10191, 10291, 10300, 10529 (Line A), 10534, 10585,
23 and 10590).]

24 131. A technician may spend a certain amount of time diagnosing a particular repair.
25 However, until the repair is performed, there may not be or Putnam may not have looked up the
26 corresponding labor operation for the diagnosis. [RT Vol. II, 140:11-20.]

27 132. Putnam’s use of Kia’s LTS to price customer pay repairs is not unique. Mr. Nardini
28 admitted he believes there are some Kia dealers who rely on the Kia LTS for pricing customer-pay

1 repairs besides Putnam. [RT Vol. II, 336:23-337:7.] Mr. Nardini further admitted dealers are permitted
2 to use LTS hours to price customer-pay repairs. [RT Vol. III, 388:1-3.]

3 133. Kia's LTS hours are a reasonable number of hours to allocate to a repair. [RT Vol. II,
4 336: 1-7 and 337:14-17.]

5 134. Hours in Kia's LTS will be updated all the time on a labor operation code level. [RT Vol.
6 III, 558:3-14.]

7 135. When using a guide to price customer-pay repairs, a dealership takes the guide hours for
8 the repair and multiplies by an hourly rate; in determining how much is charged to the customer, the
9 amount being charged is based on the guide hours. [RT Vol. II, 337:18-338:3.]

10 136. It is industry custom to use guide hours when pricing customer-pay repairs. [RT Vol. II,
11 338:4-7.]

12 137. Putnam Kia instructs its service advisors to price a job to a customer by logging into the
13 LTS system to look up op codes and times for any repairs and base the price off of Kia's warranty times.
14 [RT Vol. V, 943:15-23.] Putnam Kia's service advisors multiply the LTS times by \$440 to price the
15 labor on a customer pay repair. [RT Vol. V, 943:24-944:6.] Putnam Kia established this customer pay
16 rate at the beginning of the franchise operations. [*Id.*]

17 138. Putnam Kia "use[s] the LTS to figure out the labor times. The labor time, which would
18 be the sold hours. And then the sold hours are multiplied by 440. And then you also get the price of the
19 parts for the job. And then those are combined, and that estimate is given to the customer before the
20 work is done." [RT Vol. VI, 17:10-21.] Putnam Kia does not use actual hours to charge a customer for
21 a service repair—the charge is based on the sold hours. [RT Vol. VI, 17:22-24.] Putnam's service
22 advisor would not know the actual hours at the time of pricing the repair to the customer; the service
23 advisor only become aware of the actual hours when the work is actually done. [RT Vol. VI, 18:7-21.]

24 139. Putnam never uses actual hours to price a job on a customer repair because Putnam must
25 provide an estimate before the customer approves the repair and Putnam cannot know how long the
26 repair is going to take. [RT Vol. VI, 21:15-22:6; *see also* RT Vol. VII, 134:21-135:9; RT Vol. IX, 82:14-
27 83:10 (Mr. Kamenetsky testified Putnam does not use actual time to generate charges because Putnam
28 could not know the actual hours when quoting a price to a customer and customers do not participate in

1 the repair taking more or less time).]

2 140. Putnam uses the factory guide hours to create uniformity across all the Putnam lines for
3 pricing repairs. [RT Vol. VI, 74:19-23.] Putnam sought to use factory time guides to price customer
4 pay repairs to achieve uniform pricing. [RT Vol. VII, 135:14-20.] Putnam could not achieve uniform
5 pricing with a third-party time guide because the manufacturer requires the dealership use the
6 manufacturer's time guide for warranty repair orders. [RT Vol. VII, 135:21-24.]

7 141. In contrast to Putnam Kia's pricing using the Kia LTS guide, there are other third-party
8 time guides, including Mitchell, AllData, and Chilton, which take the warranty times from the LTS and
9 add a multiplier to them. [RT Vol. V, 958:5-959:6; *see also* RT Vol. VII, 136:20-137:9 (Mr. Putnam
10 describing it is customary in the auto repair to take the factory time guide and multiply it by a factor
11 (commonly 1.8 times or more) and use the multiplied time to price the repair); RT Vol. IX, 16:13-17:22
12 and 21:22-22:17.] The multiplier inflates the labor times. [RT Vol. V, 958:25-960:9; RT Vol. VI, 76:16-
13 22; *see also* RT Vol. IX, 26:14-25 (the effect of the inflated labor times is a dilution of the dealer's
14 effective labor rate).] The use of multiplied time guides at Putnam Toyota created a preference among
15 technicians for customer pay jobs because they paid more for a flat-rate technician. [RT Vol. V, 960:10-
16 961:7.] Putnam Kia never used a time guide other than Kia's LTS to price customer-pay repairs. [RT
17 Vol. VI, 74:24-75:9.]

18 142. There are instances where a price quoted to a customer might turn out to cost more for a
19 repair, but unless that difference is large, Putnam Kia will not renegotiate the price with the customer.
20 [RT Vol. V, 966:5-22.] Any mistake in quoting a price to the customer after work is actually done cannot
21 be charged to the customer. [RT Vol. V, 966:24-967:7.] The price of parts charged can also change
22 from what was quoted to the customer, but the customer price must remain the same as quoted. [RT
23 Vol. V, 967:8-18.]

24 IX. ROUTINE MAINTENANCE REPAIRS IN KIA'S DENIAL INCLUDING BRAKE, BULB,
25 AND BATTERY REPAIRS.

26 143. Mr. Nardini testified it is Kia's position brakes may be covered under its warranties
27 depending on what the customer reports and what the technician finds. [RT Vol. II, 176:3-14.] Mr.
28 Nardini admitted wear over time is not covered under Kia's warranty, however, suggested if something

1 else was reported, the repair could be covered under warranty. [*Id.*]

2 144. In Kia’s denial letter, Kia listed as a second reason for denial that certain qualified repair
3 orders should have been included but were not included in the original submission. [Exh. J-6.002; RT
4 Vol. IV, 596:3-21.] The repairs Kia’s denial letter contends should have been included appear in read
5 in the attached spreadsheet. [RT Vol. IV, 596:16-21.]

6 145. However, bulbs and batteries are expressly excluded from a labor rate calculation as
7 routine maintenance repairs in Section 3065.2, subdivision (c). [Cal. Veh. Code, § 3065.2, subd. (c)(3)
8 (excluding from the calculation “[r]outine maintenance, including, but not limited to, the replacement of
9 *bulbs*, fluids, filters, *batteries*, and belts that are not provided in the course of, and related to, a repair”)
10 (emphasis added).] As discussed further below, the repairs at issue here concerning bulbs and batteries
11 did not involve the replacement of bulbs or batteries in the course of and related to another warranty-
12 like repair.

13 146. Brakes are a routine maintenance item as well, as described in Kia’s warranty manual.
14 As also discussed above, Brake linings “are designed to wear out as part of the process of stopping your
15 vehicle safely and consistently while providing reasonable levels of noise and vibration during normal
16 use.” [Exh. R-230.008.] “The more wear factors which are present, the more rapid the wear. Resulting
17 repairs and replacements of linings *are not covered* by your warranty.” [*Id.* (emphasis added).]

18 147. Brakes are intended to wear out eventually. [RT Vol. III, 356:20-357:3.] Brakes stop a
19 vehicle with friction. [RT Vol. III, 357:4-15.] Brake pads start at a thickness of 10 millimeters and can
20 wear down to zero millimeters. [RT Vol. III, 358:10-16.] Brake pads are routinely replaced when they
21 get to 4, 3, or 2 millimeters. [RT Vol. III, 358:17-359:8.] Brake pads and shoes are identified in Kia’s
22 warranty manual as wear items. [Exh. R-230.011; RT Vol. III, 365:16-366:8.]

23 148. The brake repairs identified below [*see, infra*, Part X (ROs 10168, 10263, 10271, 10334,
24 10468, 10474, 10527, 10590 (second entry), and 10592)] show brake pads that wore down from 10
25 millimeters until they needed replacement. The repairs did not involve brake pads and rotors that simply
26 required de-glazing or adjustment.

27 149. The repairs identified by Kia as its second reason for denial in its May 26, 2022, letter are
28 not qualified repair orders that are to be used in calculating a labor rate. [Cal. Veh. Code, § 3065.2,

1 subd. (c)(3).] Kia’s inclusion of these repairs in its Denial shows Kia failed to comply with Section
2 3065.2.

3 150. Mr. Reyes testified brakes repairs are routine maintenance while caliper repairs are not.
4 [RT Vol. V, 968:20-969:5.] Calipers can last the entire life of the vehicle and do not break down often.
5 [RT Vol. V, 970:1-4.] In comparison, brake pads routinely need to be replaced due to wear and tear.
6 [RT Vol. V, 970:8-11.] Putnam Kia resurfaces rotors for every brake repair to avoid customers returning
7 with a concern regarding a vibration or other noise due to the rotor wearing to match the pad that was
8 replaced. [RT Vol. V, 970:12-971:6.]

9 151. Mr. Kamenetsky testified brakes are routine maintenance repairs based on the 20 to 30
10 submissions Putnam has submitted and the manufacturers’ warranties specifically excluding pads and
11 rotors from coverage as wear-and-tear or consumable items. [RT Vol. IX, 86:5-21.]

12 152. Mr. Korenak reviewed Kia’s spreadsheet attached to its denial letter and prepared a
13 spreadsheet responding to Kia’s analysis in Exhibit P-108. [Exh. P-108; RT Vol. VIII, 83:5-85:20 and
14 95:7-97:17.] The first tab labeled “Labor Submitted” is the original submission from Putnam to Kia.
15 [*Id.*; *see also* Exh. P-108.002-.003.] The second tab labeled “Kia Sent Back” is the excel version of the
16 pdf spreadsheet Kia sent with the denial letter. [*Id.*; *see also* Exh. P-108.004-.006.] The third tab labeled
17 “Calculation 1” is a calculation of a retail labor rate with excluding the RO removed by Kia and RO
18 10638 concerning transmission fluid. [*Id.*; *see also* Exh. P-108.007-.009.] The fourth tab labeled
19 “Calculation 2” is a calculation based on Calculation 1 and excluding or disqualifying repairs such as
20 batteries, bulbs, and brakes and calculating an end result of \$436.51. [*Id.*; *see also* Exh. P-108.010.]
21 The \$436.51 retail labor rate calculation was based on Putnam and FrogData’s understanding and
22 application of the California labor rate statute removing brakes, batteries, and bulbs (as well as the ROs
23 removed in Calculation 1—ROs 10298 and RO 10638). [RT Vol. VIII, 98:9-17.] The \$436.51
24 calculation is based on the RO range included in Kia’s denial letter spreadsheet. [RT Vol. VIII, 98:18-
25 21 and 110:20-111:17.]

26 X. RO BY RO EVIDENCE

27 153. The following summarizes the evidence concerning the ROs contained in Putnam’s
28 submission [*see* Exh. J-3.002-.003] and Kia’s response [*see* Exh. J-6.005-.006].

1 154. The information on the ROs includes the Service Advisor at the top of the page who is
2 the customer-facing individual who works with the customer concerning his or her vehicle and helps
3 interpret what the customer is stating before the vehicle is dispatched to the technician for diagnosis and
4 repair. [RT Vol. II, 146:5-14.] The mileage in / out box shows the actual mileage of the vehicle when
5 dropped offer and any additional mileage on the vehicle after repair are completed. [RT Vol. II, 146:15-
6 147:4.] The “Tag” box identifies a dealership tag number used by the dealership in tracking the vehicle
7 during the repair process. [RT Vol. II, 147:5-9.]

8 155. The “Promised” box indicates when the service advisor communicated to the owner when
9 the vehicle would be ready. [RT Vol. II, 148:21-149:1.] The “Invoice Date” is the date when the repair
10 order is invoiced. [RT Vol. II, 149:9-15.]

11 156. The “RO Opened” box is when the repair order was opened. [RT Vol. II, 149:16-20.]
12 The ROs have line numbers with capital letters to designate multiple repairs that were performed on the
13 vehicle. [RT Vol. II, 149:21-150:7.] For example, RO 10158 in Exhibit R-205 has Line A designation
14 as the first letter under the “LINE OPCODE TECH TYPE A/HR S/HRS LIST NET TOTAL” line on
15 the RO. [Exh. R-205.001.]

16 157. The A/HRS (Actual Hours) and S/HRS (Sold Hours) lines on the ROs indicate the actual
17 hours spent on a particular repair by the technician and the hours the service advisor sold to the customer,
18 respectively. [RT Vol. II, 150:8-22.] As an example, the Actual Hours on RO 10158, Line A are 3.29
19 hours and the Sold Hours are 0.50. [Exh. R-205.001; *see also* RT Vol. II, 151:3-154:3 (the line starting
20 with 400030 on R-205.001 reflects the technician ID number, the “C” refers to the type of repair as
21 customer-pay (it could also be “W” for warranty or “I” for internal), the 3.29 are the Actual Hours for
22 Line A, the 0.50 are the Sold Hours).]

23 158. The final pages of the ROs contain the start and finish times for the technician’s labor
24 (for example, the technician on RO 10158 started Line A at 10:32 and finished at 13:49). [Exh. R-
25 205.003; RT Vol. II, 158:25-159:12.] The page also shows the specific accounts the dealer uses
26 internally to assign the monies received or the receivables for a repair. [*Id.*]

27 159. The bottom right of the final page of the ROs shows the amount charged to the customer
28 on the RO including a subtotal for the labor amount. [RT Vol. II, 159:13-23.]

1 160. The ROs contain version numbers in the repair description which occurs when new or
2 updated information related to a repair line is added to the RO; the most recent version is generally the
3 largest numbered. [RT Vol. III, 454:9-455:10.]

4 161. With the sole exception of RO 10571 [see RT Vol. IX, 74:8-21], the parties agree and
5 Kia does not dispute Putnam's customers paid the amounts listed in the ROs. [RT Vol. IX, 46:3-11 and
6 49:1-22.]

7 *ROs in Exh. J-3.002-.003 only*

8 162. The following ROs are contained only in Putnam's submission and not Kia's response.
9 ROs 10133, 10148, and 10153 are outside the 90-day time period selected by Kia for the response starting
10 on November 12, 2021, and ending on February 10, 2022. [See Exh. J-6.003.] RO 10298 was removed
11 by Kia from its calculation as a RO that was not qualified under section 3065.2. [Exh. J-6.004.] As
12 discussed below, Putnam agrees RO 10298 should not be used in the calculation of its labor rate pursuant
13 to Section 3065.2.

14 **RO 10133**

15 163. The accounting copy of the repair order associated with RO 10133, Line A is contained
16 in Exhibit R-247. [See Exh. J-3.002 and Exh. R-247.001; RT Vol. III, 429:20-431:5.] RO 10133, Line
17 A concerns the replacement of a knock sensor. [Exh. R-247.001; RT Vol. III, 432:2-5, 434:6-18, 436:5-
18 9, and 438:22-439:8; RT Vol. V, 1003:18-20; RT Vol. VI, 13:3-19.] The RO shows sold hours of 1.4
19 hours and a corresponding \$646.00 charge for labor. [*Id.*; see also RT Vol. VI, 13:20-25]

20 164. Kia's LTS for a knock sensor repair and replacement is a total of 1.1 hours (0.90 for the
21 repair and 0.2 for associated diagnostic). [Exh. P-120.001; see also Exh. P-121.002; RT Vol. V,
22 1003:25-1005:3; RT Vol. VI, 16:15-21.] The sold hours on RO 10133, Line A are 0.3 hours higher than
23 the corresponding Kia LTS time for the repair.

24 165. The higher sold hours compared to the LTS hours could have been a mistake or the service
25 advisor added to the estimate. [RT Vol. VI, 20:19-23.]

26 **RO 10148**

27 166. The accounting copy of the repair order associated with RO 10148, Line U is contained
28 in Exhibit R-242. [See Exh. J-3.002 and Exh. R-242.002.] RO 10148, Line U concerns diagnostic

1 charges associated with a customer concern based on the airbag light being on. [Exh. R-242.002.] The
2 RO shows sold hours of 0.2 hours and a corresponding \$88.00 charge for labor. [*Id.*] The actual hours
3 on Lines U and V are listed as 0, however, page 6 of the RO shows the technician clocked time for lines
4 S, Y, V, and U together with a duration of 0.42 hours. [Exh. R-242.006; RT Vol. II, 226:24-227:4.]
5 Repair orders can start with letters after “A” if the RO is started or written up incorrectly and earlier lines
6 are modified or deleted. [RT Vol. VI, 138:22-140:9.]

7 **RO 10153**

8 167. The accounting copy of the repair order associated with RO 10153, Line A is contained
9 in Exhibit R-248. [*See* Exh. J-3.002 and Exh. R-248.001.] RO 10153, Line A concerns diagnostic
10 charges associated with a customer concern based on the rear driver side window not rolling up or down.
11 [Exh. R-248.001.] The RO shows sold hours of 0.3 hours and a corresponding \$132.00 charge for labor.
12 [*Id.*]

13 168. At the time of the diagnosis, the repair could not be completed because a part needed to
14 be ordered. [Exh. R-248.001; RT Vol. IV, 730:13-732:6.] The RO noted the customer would be paying
15 \$136.00 for labor during the next visit for the repair. [*Id.*] Putnam’s technicians needed to diagnosis the
16 vehicle prior to ordering the part necessary to proceed with a subsequent repair. [RT Vol. IV, 732:7-
17 19.] The work done at the time of the RO was diagnosis work. [RT Vol. IV, 733:18-734:2.]

18 169. When asked if this diagnosis would qualify for additional diagnostic time, Mr. Nardini
19 testified he did not see by the technician notes that the technician ran into too much trouble but it did
20 look like the technician spent more than three times the 0.3 sold hours in actual hours on the repair. [RT
21 Vol. II, 232:17-233:10.] Mr. Nardini did not claim the diagnosis would have qualified for XTT time.
22 [*Id.*]

23 **RO 10298**

24 170. The accounting copy of the repair order associated with RO 10298, Line A is contained
25 in Exhibit R-211. [*See* Exh. J-3.002 and Exh. R-211.001.] RO 10280 in Exhibit R-210 concerns the
26 same vehicle and circumstances as RO 10298. [*See* Exh. R-210.001-.002.] Exhibit P-119.001 also
27 concerns RO 10298 and is a copy of the Invoice copy of RO 10298. [Exh. P-119.001.] RO 10298
28 concerned a downpayment for diagnostic with parts on back order and further references RO 10280

1 (Exh. R-210). [Exh. R-211.001.] Ultimately, the customer called to cancel the parts order and repair.
2 [Id.] No repair was performed on the vehicle associated with RO 10298 and Putnam agrees the RO
3 should not be used in calculating a warranty labor rate pursuant to Section 3065.2. [RT Vol. IX, 87:7-
4 20.]

5 171. RO 10298 constituted the third reason for Kia’s denial of Putnam’s requested labor rate
6 in Kia’s denial letter. [Exh. J-6.002.] Kia’s proposed response to the inclusion of RO 10298 in the labor
7 rate calculation was to remove the RO from the calculation. [Id.] In response to Kia’s third reason for
8 the denial, Putnam agreed in its June 15, 2022, letter the RO should have been excluded from the labor
9 rate calculation. [Exh. J-7.009; RT Vol. IV, 692:21-693:10 and 724:3-11.] Putnam explained the
10 \$250.00 was prepayment for diagnostic but that the repair was subsequently cancelled and the RO should
11 not have been included in the calculation. [Exh. J-7.009-.010.; RT Vol. IV, 693:11-23.]

12 172. The vehicle in ROs 10280 and 10298 was towed in for service. [Exh. R-210.002; RT
13 Vol. IV, 724:23-725:14.] The vehicle was towed in due to vandalism; the vehicle was broken into and
14 the ignition was damaged. [RT Vol. V, 990:14-21.] The battery on the vehicle was so drained the
15 vehicle could not be jumped. [RT Vol. VI, 125:3-8.]

16 173. The mileage on ROs 10280 and 10298 were guesses because the vehicle had no ignition
17 and the vehicle would not start; Putnam Kia could not obtain mileage from it. [RT Vol. V, 991:1-11.]
18 In circumstances where the dealership cannot obtain mileage from the vehicle, Putnam asks the customer
19 for an estimate and would correct the estimate when the vehicle is repaired and can display its mileage.
20 [RT Vol. VI, 125:24-126:5.]

21 *ROs in Exh. J-3.002-.003 and J-6.004-.005*

22 174. The following ROs are contained in both Putnam’s submission [see Exh. J-3.002-.003]
23 and Kia’s response [see Exh. J-6.005-.006]. The parties agree these ROs are “qualified repair order[s]”
24 as defined by Section 3065.2, subdivision (j) and certain repairs in the ROs should be used in calculating
25 Putnam’s labor rate pursuant to Section 3065.2. [See J-3.002-.003 and Exh. J-6.005-.006.] The ROs are
26 within the 90-day time periods for Putnam’s original submission [November 3, 2021, through January
27 31, 2022 – Exh. J-3.001] and Kia’s response [November 12, 2021, through February 10, 2022 – Exh. J-
28 6.003].

1 **RO 10158**

2 175. The accounting copy of the repair order associated with RO 10158, Line A is contained
3 in Exhibit R-205. [See Exh. J-3.002 and Exh. R-205.001-.002.] RO 10158, Line A concerns diagnostic
4 charges associated with a customer concern based on the vehicle’s shifting lock. [Exh. R-205.001.] The
5 RO shows sold hours of 0.5 hours and a corresponding \$250.00 charge for labor.⁷ [Id.] While the
6 technician recommended the replacement of the BCM, the customer declined the repair following the
7 diagnostic. [Exh. R-205.002; RT Vol. III, 562:7-23.]

8 176. Mr. Nardini suggested a dealer could claim additional time for diagnosis (XTT time)⁸ if
9 the particular repair was difficult. [RT Vol. II, 155:7-156:2 (suggesting the 3.29 Actual Hours might
10 qualify for XTT time on RO 10158, Line A).] Mr. Nardini suggested the repair was an electrical-type
11 repair which is one of the types of repairs which would qualify for XTT time. [RT Vol. II, 156:4-12.]

12 177. The repair in Line A would not qualify for XTT time because the repair does not meet
13 the requirements for XTT being paid. [RT Vol. III, 561:17-21.] The actual time also exceeds the 0.9
14 minimum and does not include any calls to Techline. [RT Vol. III, 561:22-562:3.]

15 **RO 10165**

16 178. The accounting copy of the repair order associated with RO 10165, Line B is contained
17 in Exhibit R-249. [See Exh. J-3.002 and Exh. R-249.001.] RO 10165, Line B concerns the replacement
18 of a front window regulator and switch. [Exh. R-249.001-.002; RT Vol. III, 526:6-527:19; RT Vol. VI,
19 25:10-19.] The RO shows sold hours of 0.4 hours and a corresponding \$176.00 charge for labor. [Id.]

20 179. Kia’s LTS for replacing the power window switch is 0.3 hours and for replacing the
21 regulator is 0.3 hour totaling 0.6 hours. [Exh. P-120.002; RT Vol. VI, 20-26:12.] The sold hours on RO
22 10165, Line B are 0.2 hours lower than the corresponding Kia LTS time for the repair.

23 **RO 10180**

24 180. The accounting copy of the repair order associated with RO 10180, Lines A and B is

25 _____
26 ⁷ The customer was not charged based on the actual hours of 3.29 hour which would equate to a
27 \$1,447.60 charge if a \$440/hr rate were used to calculate the charge. [See RT Vol. III, 561:1-16.]

28 ⁸ XTT time involves payment for actual time based on the conditions outlined in the program. If the
dealership applies for, complies with the XTT provisions, and Kia grants a dealer’s application, Kia
can pay for additional actual time beyond the time in Kia’s LTS for a given diagnosis. [RT Vol. II,
249:6-23.]

1 contained in Exhibit R-250. [See Exh. J-3.002 and Exh. R-250.001.] RO 10180, Line A concerns a
2 replacement of the driver side clock spring. [Exh. R-250.001; RT Vol. VI, 180:1-12 and 185:6-20.] RO
3 10180, Line B concerns the replacement of both the front window switch and front passenger side
4 regulator's motor. [Exh. R-250.001; RT Vol. III, 464:18-466:1 and 531:14-532:11; RT Vol. VI, 27:17-
5 29:9.] The RO shows sold hours of 0.2 hours and a corresponding \$88.00 charge for labor on Line A
6 and 1.1 hours and a corresponding \$484.00 charge for labor on Line B. [*Id.*]

7 181. Kia's LTS for the replacement of both the front power window switches and the
8 replacement of a front window regulator motor is a total of 0.7 hours (0.40 for the switches and 0.3 for
9 the regulator). [Exh. P-120.003; RT Vol. III, 532:12-19 (Mr. Nardini agreeing with the 0.7 hour total
10 from the LTS hours and a 0.4 hour difference); RT Vol. VI, 195:1-19.] The sold hours on RO 10180,
11 Line B are 0.4 hours higher than the corresponding Kia LTS time for the repair.

12 182. Kia did not provide reliable evidence the sold hours for RO 10180, Line A of 0.2 hour
13 were less than the Kia LTS for a drive side clock spring replacement for the VIN in RO 10180.

14 **RO 10183**

15 183. The accounting copy of the repair order associated with RO 10183, Line A is contained
16 in Exhibit R-208. [See Exh. J-3.002 and Exh. R-208.001.] RO 10183, Line A concerns the installation
17 of a fuel door switch. [Exh. R-208.001; RT Vol. VI, 30:24-31:4.] The RO shows sold hours of 0.3 hours
18 and a corresponding \$176.00 charge for labor on Line A. [*Id.*; RT Vol. VI, 31:5-7.]

19 184. Kia's LTS for the replacement of a fuel filler door is 0.3 hours. [Exh. P-120.004; *see also*
20 Exh. P-121.002; RT Vol. VI, 31:8-24.] The sold hours on RO 10183, Line A match the corresponding
21 Kia LTS time for the repair.

22 **RO 10191**

23 185. The accounting copy of the repair order associated with RO 10191, Line C is contained
24 in Exhibit R-251. [See Exh. J-3.002 and Exh. R-251.006-.007.] RO 10191, Line C concerns the
25 installation of a new starter motor. [Exh. R-251.006; RT Vol. VI, 35:22-36:2.] The RO shows sold
26 hours of 0.6 hours and a corresponding \$264.00 charge for labor on Line C. [*Id.*; RT Vol. VI, 36:3-5]

27 186. Kia's LTS for the replacement of a starter motor assembly is 0.6 hours. [Exh. P-120.005;
28 *see also* Exh. P-121.002; RT Vol. VI, 35:3-10 and 36:6-37:13.] The sold hours on RO 10191, Line C

1 match the corresponding Kia LTS time for the repair.

2 **RO 10291**

3 187. The accounting copy of the repair order associated with RO 10291, Line F is contained
4 in Exhibit R-252. [See Exh. J-3.002 and Exh. R-252.004.] RO 10291, Line F concerns the replacement
5 of the rear side valve cover gasket (the part listed for the repair is the gasket-rocker cover). [Exh. R-
6 252.004; RT Vol. VI, 42:5-10.] The RO shows sold hours of 0.6 hours and a corresponding \$264.00
7 charge for labor on Line F. [Id.; RT Vol. VI, 42:11-13.]

8 188. Kia's LTS for the replacement of the Rocker Cover /or Gasket is 0.6 hours. [Exh. P-
9 120.006; see also Exh. P-121.002; RT Vol. VI, 43:18-44:17.] The sold hours on RO 10291, Line F
10 match the corresponding Kia LTS time for the repair.

11 **RO 10300**

12 189. The accounting copy of the repair order associated with RO 10300, Line A is contained
13 in Exhibit R-253. [See Exh. J-3.002 and Exh. R-253.001.] RO 10300, Line A concerns a BCM
14 replacement based on the car being stuck in park due to the shift lock not functioning properly. [Exh.
15 R-253.001; RT Vol. VI, 207:15-24.] The RO shows sold hours of 1.0 hours and a corresponding \$440.00
16 charge for labor on Line A. [Id.] The RO further notes the customer was aware of the labor cost at
17 \$440.00. [Id.]

18 190. During the hearing, Mr. Reyes searched for a BCM replacement for the vehicle in RO
19 10300, Line A in Kia's LTS and Putnam provided it as Exhibit P-123. [RT Vol. VII, 62:9-63:22.] The
20 LTS for RO 10300, Line A is 0.8 hours for the repair and 0.2 hours for the diagnostic tool operation for
21 a total of 1.0 hour. [Exh. P-123; RT Vol. VII, 64:6-15.] The sold hours on RO 10300, Line A match
22 the corresponding Kia LTS time for the repair.

23 **RO 10320**

24 191. The accounting copy of the repair order associated with RO 10320, Line A is contained
25 in Exhibit R-243. [See Exh. J-3.002 and Exh. R-243.001.] RO 10320, Line A concerns the installation
26 of a driver's side outside door handle. [Exh. R-243.001; RT Vol. VI, 46:14-47:1.] The RO shows sold
27 hours of 0.3 hours and a corresponding \$125.00 charge for labor on Line A. [Id.; RT Vol. VI, 47:2-3.]
28 RO 10320, Line A does not show any actual hours because sometimes technicians rush and punch on to

1 the wrong line or clock onto the wrong line. [RT Vol. VI, 47:4-12.]

2 192. Kia's LTS for the replacement of an outside door handle is 0.4 hours. [Exh. P-120.007;
3 *see also* RT Vol. VI, 52:3-15.] The sold hours on RO 10320, Line A are 0.1 hours lower than the
4 corresponding Kia LTS time for the repair. The difference was likely a mistake. [RT Vol. VI, 21-22.]

5 **RO 10346**

6 193. The accounting copy of the repair order associated with RO 10346, Line A is contained
7 in Exhibit R-212. [See Exh. J-3.002 and Exh. R-212.001.] RO 10346, Line A concerns a diagnosis
8 related to a vehicle starting but shutting itself off in less than a minute. [Exh. R-212.001.] The RO
9 shows sold hours of 1.5 hours and a corresponding \$660.00 charge for labor on Line A. [*Id.*]

10 194. To the extent Kia claims there was any repair in RO 10346, Line A, it concerns adjusting
11 the plug locking mechanism. [See RT Vol. IV, 572:14-573:23; RT Vol. VII, 17:25-18:14.] Kia did not
12 provide any evidence of the LTS time for adjusting the plug locking mechanism and there is no evidence
13 the LTS for the adjustment exceeds 1.5 hours.

14 195. The customer was not charged for the actual hours on Line A of RO 10346; the customer
15 was charged 1.5 hours times \$440/hr for a total of \$660. [RT Vol. IV, 573:24-575:13.]

16 196. Line B of RO 10346 shows Kia paid Putnam for a warranty repair based on 0.2 sold hours
17 despite the repair requiring 0.45 actual hours—approximately twice the number of the applicable LTS.
18 [RT Vol. IV, 575:14-576:11.]

19 **RO 10352**

20 197. The accounting copy of the repair order associated with RO 10352, Line A is contained
21 in Exhibit R-254. [See Exh. J-3.002 and Exh. R-254.001-.002.] RO 10352, Line A concerns the
22 diagnosis and replacement of a valve-purge control. [Exh. R-254.001-.002; RT Vol. III, 487:1-15; RT
23 Vol. VI, 54:6-19.] The RO shows sold hours of 1.3 hours and a corresponding \$382.00 charge for labor
24 on Line A. [*Id.*; RT Vol. VI, 54:20-25.]

25 198. Kia's LTS for the replacement of a Purge Control Solenoid Valve is 0.3 hours. [Exh. P-
26 120.008; *see also* Exh. P-121.002; RT Vol. III, 487:25-488:20; RT Vol. VI, 55:13-56:8.] During the
27 hearing, Kia identified its LTS included 0.2 additional hours for diagnostic time associated with a Purge
28 Control Solenoid Valve repair increasing the total Kia LTS for this repair to 0.5 hours. [Exh. R-269; RT

1 Vol. V, 837:24-3840:20.] The sold hours on RO 10183, Line A are 0.8 hours higher than the
2 corresponding Kia LTS time for the repair. [*Id.*; *see also* RT Vol. V, 871:6-25 (Mr. Nardini confirming
3 the sold hours are 0.8 hours higher than the corresponding Kia LTS for the repair).]

4 **RO 10404**

5 199. The accounting copy of the repair order associated with RO 10404, Line A is contained
6 in Exhibit R-255. [*See* Exh. J-3.002 and Exh. R-255.001-.002.] RO 10404, Line A concerns the reseal
7 of an oil pan assembly. [Exh. R-255.001-.002; RT Vol. III, 489:25-490:8 and 534:7-14; RT Vol. VI,
8 56:19-24.] The RO shows sold hours of 0.8 hours and a corresponding \$401.19 charge for labor on Line
9 A. [*Id.*; RT Vol. VI, 56:2-57:2.]

10 200. Kia's LTS for the replacement of an oil pan assembly is 0.9 hours. [Exh. P-120.009; *see*
11 *also* Exh. P-121.002; RT Vol. III, 534:15-21 (Mr. Nardini agreeing the LTS hours for the repair are 0.9
12 hours and the sold hours are 0.1 hour less than the LTS hours); RT Vol. VI, 57:3-12.] The sold hours
13 on RO 10404, Line A are 0.1 hours lower than the corresponding Kia LTS time for the repair.

14 **RO 10415**

15 201. The accounting copy of the repair order associated with RO 10415, Line A is contained
16 in Exhibit R-256. [*See* Exh. J-3.002 and Exh. R-256.001-.003.] RO 10415, Line A concerns the
17 diagnosis and replacement of the vehicle's PCM (including an electronic control module and PCB
18 block). [Exh. R-256.001-.003; RT Vol. III, 472:6-18; RT Vol. VI, 60:10-18.] The RO shows sold hours
19 of 1.0 hours and a corresponding \$440.00 charge for labor on Line A. [*Id.*; RT Vol. VI, 60:19-25] The
20 customer received a discount on the labor for the repair of \$44.01. [*Id.*]

21 202. Kia's LTS for the replacement of the metal core PCB block assembly is 0.2 hours. [Exh.
22 P-120.010; *see also* Exh. P-121.002; RT Vol. VI, 61:1-15.] Kia introduced a further LTS printout during
23 the hearing that showed the LTS time for a replacement of the engine control module has a time of 0.4
24 hours with an additional 0.2 hours for the diagnostic tool for a total of 0.6 hours. [Exh. R-268; RT Vol.
25 V, 831:3-15 and 835:17-836:12.] Combining the 0.6 hours for the engine control module and 0.2 hours
26 for the metal core PCB block assembly show the applicable LTS hours for RO 10415, Line A is 0.8
27 hours. In total, the sold hours on RO 10415, Line A are 0.2 hours higher than the corresponding Kia
28 LTS time for the repair. [*Id.*; *see also* RT Vol. V, 866:7-867:4 (Mr. Nardini confirming Line A's sold

1 hours are 0.2 hours higher than the corresponding Kia LTS time).]

2 203. Mr. Nardini claimed Putnam might have obtained XTT time for this repair if it were a
3 warranty repair because it concerned an electrical issue. [RT Vol. II, 245:24-246:17.] However, the RO
4 does not show compliance with the requirements of Kia’s XTT time reimbursement bulletin; for
5 example, there is no narrative concerning any contact with Techline. [RT Vol. III, 537:21-538:13 and
6 539:11-540:8.]

7 **RO 10426**

8 204. The accounting copy of the repair order associated with RO 10426, Line D is contained
9 in Exhibit R-257. [See Exh. J-3.002 and Exh. R-257.003.] RO 10426, Line D concerns the replacement
10 of a clock spring. [Exh. R-257.003; RT Vol. III, 478:10-481:14 and 548:2-12; RT Vol. VI, 71:15-72:24.]
11 The RO shows sold hours of 0.4 hours and a corresponding \$220.00 charge for labor on Line D. [*Id.*;
12 RT Vol. VI, 73:3-5.]

13 205. Kia’s LTS for the replacement of a clock spring assembly is 0.6 hours. [Exh. P-120.011;
14 *see also* Exh. P-121.002; RT Vol. III, 548:13-20 (Mr. Nardini agreeing the LTS time for the clock spring
15 assembly repair and replacement is 0.6 hours; 0.2 hours less than the sold hours in Line D); RT Vol. VI,
16 73:6-20.] The sold hours on RO 10426, Line D are 0.2 hours lower than the corresponding Kia LTS
17 time for the repair.

18 **RO 10454**

19 206. The accounting copy of the repair order associated with RO 10454, Line A is contained
20 in Exhibit R-258. [See Exh. J-3.002 and Exh. R-258.001-.002.] RO 10454, Line A concerns a diagnosis
21 related to a hybrid warning light or check engine light. [Exh. R-258.001-.002; *see also* RT Vol. II, 236:4-
22 16.] The RO shows sold hours of 0.2 hours and a corresponding \$100.00 charge for labor on Line A.
23 [*Id.*]

24 207. Mr. Nardini claimed the diagnosis in this RO might have qualified for additional
25 diagnostic time if the accident and water getting in as described in the RO were pulled out. [RT Vol. II,
26 238:4-15 (answering whether the vehicle may qualify for additional diagnostic time with “Well, yes and
27 no...”).] The evidence does not support the RO as written would qualify for XTT time due to the
28 accident and water. [Exh. R-258.001-.002.]

1 208. While Mr. Nardini indicated Kia would be willing to round down from 1.02 actual hours
2 to 1 actual hours [RT Vol. II, 240:22-241:10], Kia did not round down when it included RO 10454, Line
3 A in its spreadsheet in response to Putnam’s submission [Exh. J-6.004 (Count 19); RT Vol. IV, 735:18-
4 736:3].

5 209. In RO 10454, the customer was charged based on the 0.2 sold hours and not the actual
6 hours—the customer was charged \$100.00 and not \$400.00 or \$440.00. [Exh. R-258.001; RT Vol. IV,
7 736:15-22.]

8 **RO 10486**

9 210. The accounting copy of the repair order associated with RO 10486, Line A is contained
10 in Exhibit R-259. [See Exh. J-3.002 and Exh. R-259.001-.002.] RO 10486, Line A concerns a diagnosis
11 and replacement of a fuel sending unit. [Exh. R-259.001-.002; RT Vol. III, 551:19-22; RT Vol. VI,
12 84:14-22.] The RO shows sold hours of 1.5 hours and a corresponding \$660.00 charge for labor on Line
13 A. [*Id.*; RT Vol. VI, 84:23-25.]

14 211. Kia’s LTS for the replacement of a fuel sender assembly is 0.5 hours with an additional
15 0.2 hours for the diagnosis. [Exh. P-120.012; *see also* Exh. P-121.002; RT Vol. III, 551:23-552:10 (Mr.
16 Nardini agreeing the LTS hours for the repair include 0.5 hours for the repair and 0.2 hours for the
17 diagnosis totaling 0.7 hours); RT Vol. VI, 85:1-19.] The sold hours on RO 10486, Line A are 0.8 hours
18 higher than the corresponding Kia LTS time for the repair. Mr. Reyes believed the service advisor could
19 have been trying to oversell; the service advisors are salespersons at Putnam. [RT Vol. VI, 85:23-86:2;
20 *see also* RT Vol. VI, 166:10-23 (Mr. Reyes testifying service advisors are paid on commission and the
21 more charges they generate, the higher their commission is going to be).]

22 212. The actual hours on RO 10486, Line A are 0.65 hours compared to 1.50 sold hours. [RT
23 Vol. III, 482:24-483:9.] The customer was not charged based on the actual hours. [*Id.*] Calculating a
24 labor rate for this RO using the actual hours and amount charged to the customer would get a labor rate
25 of \$1,015.38/hr compared to a \$440.00/hr labor rate when calculated using sold hours. [RT Vol. III,
26 483:10-16.] Moreover, dividing the amount charged to the customer by the 0.7 hours from Kia’s LTS
27 would calculate a \$942.86/hr labor rate. [RT Vol. III, 483:17-21.]

28 ///

1 **RO 10529**

2 213. The accounting copy of the repair order associated with RO 10529, Lines A and B are
3 contained in Exhibit R-260. [See Exh. J-3.002 and Exh. R-260.001-.003.] RO 10529, Line A concerns
4 a differential pinion oil seal repair and replacement. [Exh. R-260.001-.002; RT Vol. III, 493:17-23; RT
5 Vol. VI, 88:88:1-6.] The RO shows sold hours of 1.0 hours and a corresponding \$440.00 charge for
6 labor on Line A. [*Id.*; RT Vol. VI, 88:18-21.] RO 10529, Line B concerns the repair and replacement
7 of a windshield washer fluid pump. [Exh. R-260.002-.003; RT Vol. III, 494:4-9; RT Vol. VI, 89:2-12.]
8 The RO shows sold hours of 0.4 hours and a corresponding \$200.00 charge for labor on Line B. [*Id.*;
9 RT Vol. VI, 90:4-7.]

10 214. Kia's LTS for the replacement of a differential pinion oil seal is 1.0 hours. [Exh. P-
11 120.013; *see also* Exh. P-121.002; RT Vol. III, 496:20-23; RT Vol. VI, 88:10-24.] The sold hours on
12 RO 10529, Line A match the corresponding Kia LTS time for the repair. [See also RT Vol. III, 493:24-
13 494:3 (Mr. Nardini agreeing the LTS and sold hours match).] Kia's LTS for the replacement of a Washer
14 Motor & Pump is 0.5 hours. [Exh. P-120.014; *see also* Exh. P-121.002; RT Vol. III, 496:24-497:3; RT
15 Vol. VI, 90:10-24.] The sold hours on RO 10529, Line B are 0.1 hours lower than the corresponding
16 Kia LTS time for the repair.

17 **RO 10534**

18 215. The accounting copy of the repair order associated with RO 10534, Line B is contained
19 in Exhibit R-261. [See Exh. J-3.002 and Exh. R-261.001-.002.] RO 10534, Line B concerns a
20 replacement of the windshield washer fluid pump. [Exh. R-261.001-.002; RT Vol. VI, 92:22-93:11.]
21 The RO shows sold hours of 0.5 hours and a corresponding \$220.00 charge for labor on Line B. [*Id.*;
22 RT Vol. VI, 94:21-24.]

23 216. Kia's LTS for the replacement of a Washer Motor & Pump is 0.5 hours. [Exh. P-120.015;
24 *see also* Exh. P-121.002; RT Vol. VI, 94:25-96:11.] The sold hours on RO 10534, Line B match the
25 corresponding Kia LTS time for the repair.

26 **RO 10553**

27 217. The accounting copy of the repair order associated with RO 10553, Line A is contained
28 in Exhibit R-262. [See Exh. J-3.002 and Exh. R-262.001.] RO 10553, Line A concerns a diagnosis

1 related to the tailgate door handle not operating. [Exh. R-262.001.] The RO shows sold hours of 0.5
2 hours and a corresponding \$250.00 charge for labor on Line A. [*Id.*]

3 **RO 10571**

4 218. The accounting copy of the repair order associated with RO 10571, Line A is contained
5 in Exhibit R-244. [See Exh. J-3.002 and Exh. R-244.001-.002.] RO 10571, Line A concerns the
6 replacement of a sunroof motor. [Exh. R-244.001-.002; *see also* RT Vol. II, 254:18-256:3 and RT Vol.
7 III, 498:3-13; RT Vol. VI, 99:5-100:4.] The RO shows sold hours of 1.3 hours and a corresponding
8 \$608.31 charge for labor on Line A. [*Id.*; RT Vol. VI, 100:5-7.]

9 219. Kia's LTS for the replacement of a Panorama Sunroof Motor Assembly is 2.4 hours.
10 [Exh. P-120.016; RT Vol. II, 258:10-16; *see also* Exh. P-121.002; RT Vol. VI, 100:10-101:2.] The sold
11 hours on RO 10571, Line A are 1.1 hours lower than the corresponding Kia LTS time for the repair.

12 220. The repair in RO 10571, Line A concerns a Claim Number 2688461, Protective Asset
13 Extended Warranty. [Exh. P-118.013; RT Vol. IX, 60:11-16.] Protective Life VSC provided
14 authorization for payment for an extended warranty claim on RO 10571, Line A. [Exh. P-125; RT Vol.
15 IX, 70:15-23.] Repairs for service contract providers or insurance carriers are excluded from the
16 calculation of a retail labor rate under Section 3065.2. [Cal. Veh. Code, § 3065.2, subd. (c)(8) and (11).]

17 221. Removing RO 10571, Line A from Putnam's original submission results in a change from
18 the calculated retail labor rate of \$447.52 to \$446.20. [Exh. J-3.002-.003.] The inclusion of the repair
19 did not render Putnam's Submission materially inaccurate.

20 **RO 10581**

21 222. The accounting copy of the repair order associated with RO 10581, Line A is contained
22 in Exhibit R-263. [See Exh. J-3.002 and Exh. R-263.001.] RO 10581, Line A concerns a replacement
23 of the downhill indicator light (bulb replacement). [Exh. R-263.001; RT Vol. III, 500:21-501:6; RT Vol.
24 VI, 101:24-102:12.] The RO shows sold hours of 0.5 hours and a corresponding \$125.00 charge for
25 labor on Line A. [*Id.*]

26 223. Kia's LTS for the replacement of a Bulb is 0.2 hours. [Exh. P-120.017; *see also* Exh. P-
27 121.002; RT Vol. VI, 102:13-103:2.] The sold hours on RO 10581, Line A are 0.3 hours higher than
28 the corresponding Kia LTS time for the repair.

1 **RO 10585**

2 224. The accounting copy of the repair order associated with RO 10585, Line A is contained
3 in Exhibit R-264. [See Exh. J-3.002 and Exh. R-264.001.] RO 10585, Line A concerns a replacement
4 of a rear trunk latch assembly. [Exh. R-264.001; RT Vol. VI, 108:7-20.] The RO shows sold hours of
5 0.3 hours and a corresponding \$132.00 charge for labor on Line A. [*Id.*; RT Vol. VI, 108:21-23.]

6 225. Kia’s LTS for the replacement of a Tailgate Latch Assembly is 0.3 hours. [Exh. P-
7 120.018; *see also* RT Vol. III, 510:20-511:9; RT Vol. VI, 109:1-18.] The sold hours on RO 10585, Line
8 A match the corresponding Kia LTS time for the repair. [See also RT Vol. III, 511:7-512:9 (Mr. Nardini
9 agreeing the sold hours and Kia’s LTS for the repair match).]

10 **RO 10590**

11 226. The accounting copy of the repair order associated with RO 10590, Line E is contained
12 in Exhibit R-265. [See Exh. J-3.003 and Exh. R-265.004.] RO 10590, Line E concerns a reseal of the
13 oil pan. [Exh. R-265.004; RT Vol. VI, 110:12-17.] The RO shows sold hours of 1.0 hours and a
14 corresponding \$431.52 charge for labor on Line E. [*Id.*; RT Vol. VI, 111:8-10.]

15 227. Kia’s LTS for the replacement of a Lower Oil Pan /or Gasket is 1.0 hours. [Exh. P-
16 120.019; *see also* Exh. P-121.002; RT Vol. VI, 110:18-111:7.] The sold hours on RO 10590, Line E
17 match the corresponding Kia LTS time for the repair.

18 228. Kia included in its response spreadsheet a brake repair not included in Putnam’s original
19 calculation. [Exh. J-6.005.] However, during the hearing, Kia stipulated the second repair Kia included
20 for RO 10590 was not a qualified repair. [RT Vol. II, 196:19-197:4.] The brake repair in RO 10590 is
21 Line G contained in Exhibit R-265. [Exh. J-6.005; Exh. R-265.005.] The repair included the resurfacing
22 of both front rotors and replacement of the front brake pads which had worn down to 4 millimeters.
23 [Exh. R-265.005; RT Vol. IV, 623:4-19.] Mr. Nardini agreed the repair in Line G of RO 10590
24 concerned brake wear because the cause was normal wear and tear. [RT Vol. IV, 622:22-3.] Mr. Nardini
25 agreed the repair described in Line G of RO 10590 was not a qualified repair. [RT Vol. IV, 623:20-22.]

26 229. Kia’s spreadsheet and the RO, Line G list 1.47 actual hours for the labor on the repair,
27 1.5 sold hours, and a net labor charge of \$281.58. [Exh. J-6.005 (listed in Court 30, second entry); Exh.
28 R-265.005.] The Labor Rate and “(S/Hrs) Avg” columns are \$191.55 and \$187.72 on the spreadsheet—

1 both lower than the totals on the spreadsheet; removing the second repair on the RO from the calculation
2 increases both calculated labor rates in Kia's spreadsheet. [Exh. J-6.004-.005.]

3 **RO 10591**

4 230. The accounting copy of the repair order associated with RO 10591, Line A is contained
5 in Exhibit R-266. [See Exh. J-3.003 and Exh. R-266.001-.002.] RO 10591, Line A concerns a
6 replacement of the VCMA (variable charge motion actuator). [Exh. R-266.001-.002; see also RT Vol.
7 II, 251:17-253:5; RT Vol. VI, 112:24-113:12.] The RO shows sold hours of 0.6 hours and a
8 corresponding \$264.00 charge for labor on Line A. [*Id.*; RT Vol. VI, 113:24-25.]

9 231. Kia's LTS for the replacement of a VCM Motor Assembly is 0.6 hours. [Exh. P-120.020;
10 see also Exh. P-121.002; RT Vol. VI, 114:1-7.] During the hearing, Kia introduced an LTS printout
11 which showed the repair for a VCM Motor Assembly included an additional 0.2 hours for diagnostic
12 time for a total of 0.8 hours for the LTS time for the repair in RO 10591, Line A. [Exh. R-270; RT Vol.
13 V, 841:15-844:11.] The sold hours on RO 10591, Line A are 0.2 lower than the corresponding Kia LTS
14 time for the repair (including the additional 0.2 hours of diagnostic time). [*Id.*; see also RT Vol. V,
15 886:14-887:16 (confirming the sold hours on RO 10591, Line A are 0.2 hours (or 12 minutes) lower than
16 the corresponding LTS time for the repair and diagnosis).]

17 **RO 10617**

18 232. The accounting copy of the repair order associated with RO 10617, Line A is contained
19 in Exhibit R-267. [See Exh. J-3.003 and Exh. R-267.001-.002.] RO 10617, Line A concerns a diagnosis
20 related to the vehicle's check engine light. [Exh. R-267.001-.002; see also RT Vol. VII, 52:1-10.] The
21 RO shows sold hours of 0.3 hours and a corresponding \$132.00 charge for labor on Line A. [*Id.*]

22 **RO 10631**

23 233. The accounting copy of the repair order associated with RO 10631, Line F is contained
24 in Exhibit R-214. [See Exh. J-3.003 and Exh. R-214.003-.004.] RO 10631, Line F concerns a
25 replacement of the front passenger side caliper assembly as well as a brake fluid service. [Exh. R-
26 214.003-.004; RT Vol. III, 518:6-519:13; RT Vol. VI, 115:20-116:23.] The RO shows sold hours of 1.3
27 hours and a corresponding \$572.00 charge for labor on Line F. [*Id.*]

28 ///

1 234. Kia’s LTS for the replacement of a Brake Caliper Assembly is 0.5 hours. [Exh. P-
2 120.019; *see also* Exh. P-121.002; RT Vol. III, 519:14-520:1; RT Vol. VI, 117:13-24.] The sold hours
3 on RO 10631, Line F are 0.8 hours higher than the corresponding Kia LTS time for the repair. The Kia
4 LTS in Exhibit P-120 for RO 10631, Line F does not include the brake fluid service. [RT Vol. VI, 118:6-
5 25.]

6 235. As part of the RO on Line B, Kia reimbursed Putnam based on the sold hours of 0.50
7 hours and not the 1.02 actual hours. [RT Vol. III, 516:21-517:4.] Similarly, Kia paid Putnam using the
8 sold hours on Line C of 0.80 hours and not the 0.47 actual hours. [RT Vol. III, 517:5-13.] Kia also paid
9 Putnam using the sold hours on Line D of 0.30 hours and not the 0.16 actual hours. [RT Vol. III, 517:14-
10 23.]

11 236. During the hearing, Kia referenced Line F of RO 10631 as including a brake repair in
12 Putnam’s Part’s rate submission, however, Line F of RO 10631 concerned a brake fluid replacement
13 provided in the course of, and related to, a repair—namely the replacement of a failed caliper. [Exh. R-
14 214.003-004; RT Vol. V, 852:15-853:20.] There is no reference the brake pads needed to be replaced
15 due to wear and tear on RO 10631. [RT Vol. V, 853:24-854:3.] Calipers are not designed to suffer wear
16 in ordinary operation. [RT Vol. V, 854:4-855:10.] There is not brake pad replacement or rotor
17 resurfacing in RO 10631, Line F. [RT Vol. V, 856:10-15.]

18 *ROs in Exh. J-6.004-.005 only*

19 237. The following ROs were added within the range of Putnam’s original submission in Kia’s
20 response or were added to the end of Putnam’s original submission because Kia’s response selected a
21 90-day period through February 10, 2022 (while Putnam’s ended on January 31, 2022). [Exh. J-6.003-
22 .005; *see also* J-3.001 (showing the ending date of the 90-days relied on for Putnam’s original
23 submission).]

24 238. In general, those ROs Kia added back in during the period of Putnam’s original
25 submission should have been excluded from the labor rate calculation pursuant to Vehicle Code section
26 3065.2, subdivision (c). [See Cal. Veh. Code, § 3065.2, subd. (c) (excluding from the calculation under
27 (c)(3) routine maintenance repairs “including, but not limited to, the replacement of bulbs, fluids, filters,
28 batteries, and belts that are not provided in the course of, and related to, a repair.”)] Those repairs

1 associated with ROs 10168, 10181, 10263, 10271, 10298, 10334, 10468, 10474, 10527, 10590, and
2 10592 largely concern brake pad replacements which are routine maintenance repairs as discussed
3 further below (RO 10181 involves the replacement of a brake light specifically named as a routine
4 maintenance repair under Vehicle Code section 3065.2, subdivision (c)(3) (“bulbs”)).

5 239. Mr. Nardini confirmed Kia added in counts 3, 5, 8, 9, 13, 20, 21, 23, 30, and 32 during
6 the period of Putnam’s original submission. [Exh. J-6.004-.005; RT Vol. IV, 607:6-21.] Each of counts
7 3, 5, 8, 9, 13, 20, 21, 23, 30, and 32 decreased the overall labor rate for Putnam as calculated using the
8 sold hours in the ROs. [RT Vol. IV, 617:22-619:5.]

9 240. In addition, those repairs added to the end of the time period of Putnam’s original
10 submission (ROs 10638, 10646, 10655, 10679, 10680, and 10712)⁹ include further repairs that should
11 have been excluded as routine maintenance repairs under Vehicle Code section 3065.2, subdivision
12 (c)(3) as discussed further below. Mr. Nardini confirmed Kia was adjusting the 90-day period in its
13 denial letter by removing earlier dated ROs and including later dated ROs. [Exh. J-6.005; RT Vol. IV,
14 601:19-602:15, 606:23-607:5, and 607:22-24.]

15 **RO 10168**

16 241. Mr. Nardini testified line A of the RO describes a noise from underneath the vehicle as
17 well as a vibration. [RT Vol. II, 176:24-177:12; *see also* Exh. R-206.001.] Mr. Nardini claimed the
18 items described might be covered by the adjustment period warranty. [RT Vol. II, 181:18-182:3.] Line
19 C of RO 10168 is the authorization to perform the brake service; Line C lists 1.96 actual hours, 1.80 sold
20 hours, and a total cost to the customer of \$289.08 (the same figures included for the RO in Exhibit J-
21 6.004). [Exh. R-206.002-.003; Exh. J-6.004; RT Vol. II, 183:15-17.]

22 242. RO 10168, Line A indicates the technician confirmed the noise was coming from the
23 right front brakes at 1 millimeter. [Exh. R-206.001-.002; RT Vol. IV, 635:9-22.] The repair replacing
24 the brakes occurs on Line C of the RO. [RT Vol. IV, 635:24-636:7.] No amount of adjustment,
25 polishing, or resurfacing would restore the brake pads described in RO 10168 from 1 millimeter all the
26

27 ⁹ Mr. Nardini confirmed RO 10631 was the last RO in Putnam’s submission. [RT Vol. IV, 599:12-25.]
28 Count numbers 35, 36, 37, 38, 39, and (second) 37 were added by Kia to the original set of ROs
submitted by Putnam. [RT Vol. IV, 600:9-14.]

1 way back to 10 millimeters. [RT Vol. IV, 639:2-640:9.] The repair in RO 10168, Line A concerned the
2 replacement of brake pads and resurfacing of rotors due to ordinary wear and tear not covered by Kia’s
3 warranty. [RT Vol. IV, 640:10-16.]

4 **RO 10181**

5 243. Line C of RO 10181 states the third brake light (the high center-mount stop lamp in the
6 back of the vehicle) is out. [Exh. R-207.002-.003; RT Vol. II, 185:19-186:1.] Mr. Nardini claimed the
7 repair would have been covered under the adjustments portion of Kia’s warranty if the bulb had gone
8 out within the period of the adjustments portion of Kia’s warranty. [RT Vol. II, 186: 2-6.] Line C of
9 RO 10181 includes the bulb replacement with the actual hours for the labor involved in the replacement
10 of 0.06 hours, sold hours of 0.06, and a charge of \$20.00. [Exh. R-207.002; *see also* Exh. J-6.004 (listing
11 the same figures for the RO).]

12 244. Line C of RO 10181 does not describe it is an HID bulb replacement. [RT Vol. IV,
13 652:25-653:12.] Bulbs wear away and burn out eventually. [RT Vol. IV, 653:22-654:2.] For this repair,
14 the bulb was approximately two years old, and the vehicle had traveled 78,000 miles. [Exh. R-207.002-
15 .003; RT Vol. IV, 654:8-21.] Kia’s warranties exclude normal maintenance items, including but not
16 limited to spark plugs, engine belts, filters, wiper blades and *bulbs*, except HID bulbs.¹⁰ [Exh. R-
17 230.011; RT Vol. IV, 661:2-8.]

18 245. The vehicle in RO 10181 is roughly 60,000 miles outside Kia’s adjustment period. [Exh.
19 R-207.001-.003; RT Vol. IV, 662:17-20.] Mr. Nardini agreed the bulb replacement in Line C of RO
20 10181 was not a warrantable repair at the mileage of the vehicle. [RT Vol. IV, 663:18-25.]

21 **RO 10263**

22 246. Line B of RO 10263 concerns a brake repair; the customer stated the brakes made a
23 squealing sound when the brakes were applied, especially in the morning. [Exh. R-209.001-.002; RT
24 Vol. II, 189:10-15.] Mr. Nardini claimed a brake squeal noise can be covered under the adjustment
25 period of Kia’s warranty based on removing some of the glazing on the pads and rotors. [RT Vol. II,
26 189:16-190:8.] The repair included resurfacing the rotors and replacing the front brake pads which were
27

28 ¹⁰ As a matter of policy—not warranty—Kia will repair or replace such maintenance items up to the
vehicle’s first service or 12 months/12,000 miles, whichever comes first. [Exh. R-230.011.]

1 at 2 millimeters.¹¹ [Exh. R-209.001-.002; RT Vol. II, 190:10-19.] The RO states the cause for the
2 customer concern was “wear and tear.” [Exh. R-209.001; RT Vol. IV, 642:3-8.] The brake repair
3 described by Line B of RO 10263 included 0.51 Actual Hours for labor, 1.50 Sold Hours, and a labor
4 charge of \$268.36. [Exh. R-209.001; *see also* Exh. J-6.004 (listing the same figures for the RO).]

5 247. The repair in RO 10263, Line B concerned the replacement of brake pads and resurfacing
6 of rotors. [Exh. R-209.001-.002; RT Vol. IV, 643:6-10.] The brake pads had worn down from 10
7 millimeters down to 2 millimeters as the result of ordinary wear and tear. [RT Vol. IV, 643:11-20.] Mr.
8 Nardini conceded the wear part—i.e., the brake pad replacement—would not be covered by warranty
9 and the cause of the squeaks he identified in the RO were coming from the brakes. [RT Vol. IV, 644:2-
10 14; *see also* RT Vol. IV, 644:25-645:4 (Mr. Nardini agreeing the outcome was the replacement of the
11 pads and rotors).] Mr. Nardini agreed the brake pad replacement would not be covered by Kia’s
12 adjustment warranty because no amount of polishing, resurfacing, or adjustment could bring a 2-
13 millimeter brake pad back up to 10 millimeters. [RT Vol. IV, 644:15-24.]

14 **RO 10271**

15 248. During the hearing, Kia stipulated the repair associated with RO 10271 included in its
16 spreadsheet in Exhibit J-6.004 should not have been included and stipulated to removing it from the
17 calculation. [RT Vol. II, 192:3-19.] The repair description shows the repair concerned brake pad
18 replacement and rotor resurfacing. [Exh. J-6.004.] Kia’s spreadsheet included 2.06 actual hours for the
19 labor on the repair, 1.1 sold hours, and a net labor charge of \$289.04. [Exh. J-6.004 (listed in Count 9).]
20 The Labor Rate and “(S/Hrs) Avg” columns are \$140.31 and \$262.76 on the spreadsheet—both lower
21 than the totals on the second page of the spreadsheet; removing the RO from the calculation increases
22 both calculated labor rates in Kia’s spreadsheet. [Exh. J-6.004-.005.]

23 **RO 10334**

24 249. During the hearing, Kia stipulated the repair associated with RO 10334 included in its
25 spreadsheet in Exhibit J-6.004 should not have been included as a qualified repair order and stipulated
26 to removing it from the calculation. [RT Vol. II, 214:20-25.] The repair description shows the repair
27

28 ¹¹ The repair also included lubrication involving fluids that are not generally covered by warranty. [RT
Vol. IV, 642:23-643:5.]

1 concerned brake pad replacement and rotor resurfacing. [Exh. J-6.004.] Kia’s spreadsheet included 2.98
2 actual hours for the labor on the repair, 1.2 sold hours, and a net labor charge of \$283.53. [Exh. J-6.004
3 (listed in Count 13).] The Labor Rate and “(S/Hrs) Avg” columns are \$95.14 and \$236.28 on the
4 spreadsheet—both lower than the totals on the second page of the spreadsheet; removing the RO from
5 the calculation increases both calculated labor rates in Kia’s spreadsheet. [Exh. J-6.004-.005.]

6 **RO 10468**

7 250. Line A of RO 10468 concerns a brake repair; the customer described a squeal sound when
8 the brakes were applied and the brakes sinking further than normal. [Exh. R-213.001; RT Vol. II,
9 193:20-194:1.] Mr. Nardini claimed the brake pedal sinking to the floor might have been covered by
10 warranty. [RT Vol. II, 194:2-6.] Mr. Nardini admitted not all the work might have been covered by
11 warranty. [RT Vol. II, 194:7-13.] The cause for the repair noted in the RO is “due to wear and tear.”
12 [Exh. R-213.001; *see also* RT Vol. IV, 648:12-14.] Kia’s spreadsheet notes labor sales hours of 1.5,
13 actual hours (qual) of 0.35, and net labor charge of \$309.74 for the repair.¹² [Exh. J-6.004.]

14 251. The front brake pads for this vehicle had worn down from 10 millimeters to 4 millimeters
15 prior to the repair described in the RO. [Exh. R-213.001; RT Vol. IV, 649:3-12.] The repair in Line A
16 of RO 10468 is a removal and replacement of the front brake pads and resurfacing of both front rotors.¹³
17 [Exh. R-213.001; RT Vol. IV, 649:13-23.] The resurfacing of rotors and the replacement of brake pads
18 is an ordinary maintenance item, and no amount of polishing or adjusting would have taken 4-millimeter
19 brake pads to 10 millimeters. [RT Vol. IV, 650:7-14.] Mr. Nardini agreed the repair in Line A of RO
20 10468 was not a qualified repair. [RT Vol. IV, 650:15-17.]

21 **RO 10474**

22 252. During the hearing, Kia stipulated to withdraw consideration of RO 10474 from its labor
23 rate calculation. [RT Vol. II, 195:9-19.] Kia’s spreadsheet included 0.5 actual hours for the labor on the
24 repair, 1.5 sold hours, and a net labor charge of \$285.28. [Exh. J-6.004 (listed in Court 21).] The repair
25 description shows the repair concerned a brake pad replacement. [Exh. J-6.004.] The Labor Rate and

26 _____
27 ¹² The \$309.74 is not on the RO in Exhibit R-213, however, the \$281.58 charge plus the \$28.16
discount is equal to \$309.74. [Exh. R-213.001; RT Vol. IV, 647:13-648:3.]

28 ¹³ The repair also involved a brake fluid service, however, fluid replacement is not covered as a
warranty item. [RT Vol. IV, 649:20-650:6.]

1 “(S/Hrs) Avg” columns are \$570.56 and \$190.19 on the spreadsheet—the sold hours based column is
2 lower than the average for the column and the removal of the RO would increase the average; the actual
3 hours based column is higher than the average for the column and the removal of the RO would decrease
4 the average. [Exh. J-6.004-.005.]

5 **RO 10527**

6 253. During the hearing, Kia stipulated to withdraw consideration of RO 10527 from its labor
7 rate calculation; Kia stipulated it was not a qualified repair. [RT Vol. II, 196:6-7 and 196:15-16.] Kia’s
8 spreadsheet included 0.44 actual hours for the labor on the repair, 1.5 sold hours, and a net labor charge
9 of \$281.58. [Exh. J-6.004 (listed in Court 23).] The repair description shows the repair concerned brake
10 pad replacement and resurfacing of both rotors. [Exh. J-6.004.] The Labor Rate and “(S/Hrs) Avg”
11 columns are \$639.95 and \$187.72 on the spreadsheet—the sold hours based column is lower than the
12 average for the column and the removal of the RO would increase the average; the actual hours based
13 column is higher than the average for the column and the removal of the RO would decrease the average.
14 [Exh. J-6.004-.005.]

15 **RO 10592**

16 254. During the hearing, Kia stipulated to withdraw consideration of RO 10592 from its labor
17 rate calculation; Kia stipulated it was not a qualified repair. [RT Vol. II, 197:21-23.] Kia’s spreadsheet
18 included 0.82 actual hours for the labor on the repair, 1.5 sold hours, and a net labor charge of \$281.58.
19 [Exh. J-6.004 (listed in Court 32).] The repair description shows the repair concerned front brake pad
20 replacements. [Exh. J-6.005.] The Labor Rate and “(S/Hrs) Avg” columns are \$343.39 and \$187.72 on
21 the spreadsheet—the sold hours based column is lower than the average for the column and the removal
22 of the RO would increase the average; the actual hours based column is higher than the average for the
23 column and the removal of the RO would decrease the average. [Exh. J-6.004-.005.]

24 **RO 10638**

25 255. The Exhibit associated with RO 10638 (Kia’s spreadsheet Count 35) appears as R-215.
26 [Exh. R-215.001.] Line A of the RO concerns a diagnosis with actual hours, sold hours, and customer
27 charges matching the information listed in Kia’s spreadsheet. [Exh. R-215.001-.002; Exh. J-6.005; RT
28 Vol. II, 198:19-199:8.] Mr. Nardini testified the repair would have been covered under warranty if done

1 during the period of warranty. [RT Vol. II, 199:9-11.] Mr. Nardini suggested the vehicle may have been
2 covered under Kia’s emission-related warranty. [RT Vol. II, 200:15-24.]

3 256. Ultimately, as described in Line A of RO 10638, the technician describes, “Upon further
4 inspection, checked transmission fluid level. Found that it was low and that the fluid was dark and had
5 a burnt smell. At this time, would recommend to performed [sic] transmission service, and recheck
6 vehicle. Test-drove at highway speeds. Vehicle did not stall and HEV light did not turn on. Recheck
7 for DTC. Not DTC at this time. Vehicle operating as designed.” The transmission fluid was low and
8 had to be filled back up. [Exh. R-215.001-.002; RT Vol. IV, 666:8-667:5.]

9 257. Oil and fluid changes are not warrantable repairs under Kia’s warranty. [Exh. R-230.011;
10 RT Vol. IV, 668:23-669:14.] Transmission fluid is a fluid and filling up the transmission fluid in this
11 repair is not a warrantable repair. [RT Vol. IV, 669:15-670:1; *see also* Cal. Veh. Code, § 3065.2, subd.
12 (c)(3) (specifically listing fluids as a routine maintenance item).]

13 **RO 10646**

14 258. The Exhibit associated with RO 10646 (Kia’s spreadsheet Count 36) appears as R-216.
15 [Exh. R-216.001.] Line A of the RO concerns a diagnosis and battery replacement with actual hours,
16 sold hours, and customer charges matching the information listed in Kia’s spreadsheet. [Exh. R-216.001;
17 Exh. J-6.005; RT Vol. II, 205:5-25.] Mr. Nardini testified the repair would have been covered under
18 warranty if performed during the period of warranty. [RT Vol. II, 206:1-14.] Mr. Nardini suggested
19 Kia’s battery warranty of 36,000 in three years would have covered the battery if the repair had been
20 performed during the period of the warranty. [RT Vol. II, 206:12-14.]

21 259. Batteries, similar to bulbs, wear out over time. Batteries charge while the vehicle is
22 running and lose charge when the vehicle is not running generating wear and tear on the battery. [RT
23 Vol. IV, 671:3-15.] In the ordinary operation of a vehicle, batteries will eventually wear out. [RT Vol.
24 IV, 671:22-25.]

25 260. In its June 15, 2020, response to Stevens Creek Kia’s Warranty Labor Rate Request, Kia
26 agreed bulbs and batteries were exclude from the calculation as maintenance items. [Exh. P-111.001.]
27 Vehicle Code section 3065.2, subdivision (c)(3) expressly excludes bulbs and batteries from the
28 calculation of a retail labor rate as routine maintenance items. [Cal. Veh. Code, § 3065.2, subd. (c)(3)]

1 (unless they are provided in the course of and related to a repair).]

2 261. The only repair performed in Line A of RO 10646 was to replace a battery. There is no
3 repair related to the battery replacement in Line A of RO 10646. [Exh. R-216.001; RT Vol. IV, 676:9-
4 16.]

5 **RO 10655**

6 262. The Exhibit associated with RO 10655 (Kia's spreadsheet Count 37) appears as R-217.
7 [Exh. R-217.001.] Line D of the RO concerns a battery replacement with actual hours, sold hours, and
8 customer charges mostly¹⁴ matching the information listed in Kia's spreadsheet. [Exh. J-6.005; Exh. R-
9 217.003; RT Vol. II, 208:19-209:2.] Mr. Nardini testified the repair would have been covered under
10 warranty if performed during the period of warranty. [RT Vol. II, 209:3-210:23.] Mr. Nardini suggested
11 Kia's battery warranty of three years/36,000 miles would have covered the battery if the repair had been
12 performed during the period of the warranty. [RT Vol. II, 210:18-23.]

13 263. Batteries, similar to bulbs, wear out over time. Batteries charge while the vehicle is
14 running and lose charge when the vehicle is not running generating wear and tear on the battery. [RT
15 Vol. IV, 671:3-15.] In the ordinary operation of a vehicle, batteries will eventually wear out. [RT Vol.
16 IV, 671:22-25.]

17 264. In its June 15, 2020, response to Stevens Creek Kia's Warranty Labor Rate Request, Kia
18 agreed bulbs and batteries were exclude from the calculation as maintenance items. [Exh. P-111.001.]
19 Vehicle Code section 3065.2, subdivision (c)(3) expressly excludes bulbs and batteries from the
20 calculation of a retail labor rate as routine maintenance items. [Cal. Veh. Code, § 3065.2, subd. (c)(3)
21 (unless they are provided in the course of and related to a repair).]

22 265. The only repair performed in Line D of RO 10655 is a battery replacement. There are no
23 other repairs related to the battery replacement in Line D of RO 10655. [RT Vol. IV, 679:11-17.] The
24 cause of the battery failure is described as due to wear and tear. [Exh. R-217.003; RT Vol. IV, 679:18-
25 22.]

26
27
28 ¹⁴ The RO lists 87.05 for the net labor charge while the spreadsheet lists 87.50. The difference appears to be a typographical error in the spreadsheet.

1 **RO 10679**

2 266. The parties did not dispute RO 10679 is a qualified RO. [See Exh. J-6.004-.005.] RO
3 10679, Line A concerns the installation of a lamp assembly. [Exh. J-6.005 and P-108.010 (Tab 4).]

4 **RO 10680**

5 267. The parties did not dispute RO 10680 is a qualified RO. [See Exh. J-6.004-.005.] RO
6 10680, Line A concerns the replacement of the driveshaft and clean up of grease residue. [Exh. J-6.005
7 and P-108.010 (Tab 4).]

8 **RO 10712**

9 268. The parties did not dispute RO 10712 is a qualified RO. [See Exh. J-6.004-.005.] RO
10 10712, Line A concerns repair of the main driver side door switch. [Exh. J-6.005 and P-108.010 (Tab
11 4).]

12 **Summary of RO Evidence**

13 269. As noted and shown above, eight (8) of the repairs in Exhibit J-3.002-.003 match Kia's
14 LTS printouts exactly including ROs 10183, 10191, 10291, 10300, 10529 (Line A), 10534, 10585, and
15 10590.

16 270. Eight (8) of the entries in Exhibit J-3.002-.003 concerning ROs in Putnam's original
17 submission show they were for diagnostics only with no corresponding LTS time. [Exh. P-121.002; RT
18 Vol. III, 416:9-417:17 (ROs 10148, 10153, 10158, 10298, 10454, and 10617); *see also* Exh. R-262.001
19 and Exh. P-121.002 (showing a diagnosis related to the truck latch assembly with 0.5 hours and a
20 corresponding \$250.00 charge for labor in RO 10553); Exh. R-212.001 (concerning a diagnosis
21 corresponding to sold hours of 1.5 hours and a corresponding charge of \$660.00 for RO 10346)¹⁵.]

22 271. In the context of a warranty repair, if a customer has a diagnosis performed, the customer
23 does not have to pay for the work to be done. [RT Vol. III, 418:10-14; *see also* RT Vol. III, 421:17-19
24 (as a practical matter, there is no diagnosis without a repair in the warranty context).] However, in the
25 customer-pay context, a customer may decline to have the work performed after diagnosis. [RT Vol.

26 _____
27 ¹⁵ To the extent Kia claims there was any repair in RO 10346, Line A, it concerns adjusting the plug
28 locking mechanism. [See RT Vol. IV, 572:14-573:23; RT Vol. VII, 17:25-18:14.] Kia did not provide
evidence of the LTS time for adjusting the plug locking mechanism and there is no evidence the LTS
for the adjustment exceeds 1.5 hours.

1 III, 418:15-419:7; RT Vol. III, 421:20-24.]

2 272. There are no individualized diagnosis times in Kia's labor time standards because the
3 diagnosis is generally considered part of the associated repair (unless the LTS specifies differently). [RT
4 Vol. III, 421:6-16.] As a result, Putnam could not directly apply Kia's LTS for diagnosis only repairs.
5 In addition, the charge for the diagnosis precedes a determination of what the repair will need to be for
6 the vehicle because the technician will need to diagnosis a vehicle before knowing how to repair it.
7 Putnam's pricing of diagnostic repairs does not show inconsistency with Kia's LTS for customer-pay
8 repairs.

9 273. The total difference between the sold hours and LTS hours in ROs 10133, 10165, 10180
10 (second entry), 10320, 10352, 10404, 10415, 10426, 10486, 10529 (second entry) 10571, 10581, 10591,
11 and 10631, sums to 1.6 more sold hours than the corresponding LTS hours. Because the difference
12 between the sold hours in the RO and the LTS hours shows the sold hours Putnam used were in aggregate
13 higher, the difference between the values benefits Kia in the calculation of Putnam's retail labor rate.
14 The lower time values from the precise application of Kia's LTS would result in a higher retail labor
15 rate.

16 274. If all the ROs had instead been equal to Kia's LTS and the charges to the customers had
17 remained unchanged, the total number of hours generating the charges in Exhibit J-3.002-.003 would
18 have been 1.6 hours less or 19.8 hours (21.4 hours minus 1.6 hours). This would have supported a
19 request for a \$483.69 per hour labor rate (\$9,577.01 – the total in the Net Labor Charge column – divided
20 by 19.8 hours).¹⁶

21 275. To the extent Kia relies on the differences between Putnam's sold hours and Kia's LTS
22 hours, the differences do not constitute a material inaccuracy. If Putnam's sold hours had conformed to
23 Kia's LTS hours exactly, the retail labor rate supported by Putnam's ROs would have been greater not
24 less. In addition, most of the differences are no more than 0.3 hours different.

25
26
27 ¹⁶ If RO 10571 concerning the sunroof motor replacement under an extended warranty plan is excluded
28 and the difference increased to +2.7 hours, the calculation would be \$512.14 (\$9,577.01 divided by
18.7 hours).

1 276. Kia stipulated six (6) entries in its spreadsheet should not have included in its spreadsheet
2 in response to Putnam’s labor rate submission; Kia agreed ROs 10271, 10334, 10474, 10527, the second
3 entry for 10590, and 10592 were not qualified repairs. [RT Vol. II, 192:3-19 (RO 10271); RT Vol. II,
4 214:20-25 (RO 10334); RT Vol. II, 195:9-19 (RO 10474); RT Vol. II, 196:6-7 and 196:15-16 (RO
5 10527); RT Vol. II, 196:19-197:4 (second entry for RO 10590); RT Vol. II, 197:21-23 (RO 10592); *see*
6 *also* RT Vol. IV, 608:12-609:2 (confirming Kia stipulated counts 9, 13, 21, 23, 30 (second entry), and
7 32 are not qualified repairs).] The corresponding entries in Kia’s spreadsheet are Counts 9, 13, 21, 23,
8 30 (second entry), and 32. [Exh. J-6.004-.005.] The entries contribute 1.1, 1.2, 1.5, 1.5, 1.5, and 1.5 to
9 the Labor Sale Hours column of the spreadsheet; a total of 8.3 hours. [*Id.*] Similarly, the entries
10 contribute 2.06, 2.98, 0.5, 0.44, 1.47, and 0.82 to the Actual Hours (Qual) column of the spreadsheet; a
11 total of 8.27 hours. [*Id.*] Additionally, the entries contribute \$289.04, \$283.53, \$285.28, \$281.58,
12 \$281.58, and \$281.58 to the Net Labor Charge column of the spreadsheet; a total of \$1,702.59.

13 277. Removing the entries Kia stipulated should not have been included in the first place from
14 Kia’s response spreadsheet would have changed Kia’s calculations of totals for the Labor Sales Hours,
15 Actual Hours (Qual), and Net Labor Charge columns to 26.36 (34.66 – 8.3), 35.67 (43.94 – 8.27), and
16 \$10,112.49 (\$11,815.08 - \$1,702.59), respectively. Calculating the totals for the Labor Rate and S/Hrs
17 Avg columns using these revised totals would have calculated \$283.50/hr (\$10,112.49 / 35.67 hours) for
18 the Labor Rate column (greater than the calculated \$268.89/hr) and \$383.63/hr (\$10,112.49 / 26.36
19 hours) for the S/Hrs Avg column (greater than the calculated \$340.89/hr).¹⁷

20 278. These calculations show Kia’s inclusion of the routine maintenance brake repairs in its
21 spreadsheet were included to dilute Putnam’s effective labor rate on the qualified repairs. Without the
22 repairs Kia stipulated were not qualified repairs, the rates it calculated based on actual hours and sold
23 hours would be approximately \$15/hr and over \$40/hr higher, respectively.

24
25 ¹⁷ The original \$268.89/hr rate in Exhibit J-6.005 is calculated by dividing \$11,815.08 (the total under
26 the net labor charge column) by 43.94 hours (the total under the Actual Hours (Qual) column). [RT
27 Vol. IV, 611:14-612:9.] Similarly, the \$340.89/hr rate in Exhibit J-6.005 is calculated by dividing
28 \$11,815.08 (the total under the net labor charge column) by 34.66 hours (the total under the Labor Sale
Hours (i.e., sold hours in the ROs) column). [Exh. J-6.004-005.] Kia contends the labor rate should be
calculated using a division by the actual hours while Putnam contends the hours that generated the
charges are based on the sold hours in its ROs. [RT Vol. IV, 614:3-15.]

ANALYSIS

I. KIA’S DENIAL FAILED TO COMPLY WITH SECTION 3065.2

279. Kia’s Denial showed Kia failed to comply with Section 3065.2 in responding to Putnam’s Submission. Kia relied on repairs specifically excluded as routine maintenance by Section 3065.2, subdivision (c)(3) in the Denial. Kia then admitted at hearing most, if not all, the ROs it argued Putnam had wrongly excluded from the calculation of a retail labor rate should be excluded from the calculation of a retail labor rate pursuant to Section 3065.2, subdivision (c)(3). Kia should have never included the repairs expressly excluded by Section 3065.2 in its calculation of Putnam’s retail labor rate.

280. Kia’s Denial further fails to comply with Section 3065.2 because “the total number of hours that generated those charges” cannot mean the actual hours in Putnam’s ROs as a matter of statutory interpretation. The actual hours a technician works on a repair does not influence the price a retail customer ultimately pays for the labor required by a repair. Moreover, the industry custom is to price repairs using guide hours. Repairs cannot be priced using actual hours because Business and Professions Code section 9884.9(a) requires a customer receive an estimate of the charges for a repair before the repair is ever performed.

281. The sold hours in Putnam’s ROs are based on the LTS hours from Kia’s KDealer+ intranet. The hours in Kia’s own LTS are reasonable durations of time to use in pricing Putnam’s customer pay repairs. Kia will rely on the same LTS hours when it reimburses Putnam for warranty repairs.

282. To the extent Putnam’s sold hours deviate from Kia’s LTS hours, on aggregate Putnam charged more sold hours than the corresponding aggregate of LTS hours for the repairs. If Putnam had used Kia’s lower LTS hours on each repair, the retail labor rate sought by Putnam in the Submission would have been higher. Any deviation from Kia’s LTS hours by Putnam was not materially inaccurate. Moreover, there is no requirement Putnam must uniformly price all repairs according to a particular guide.

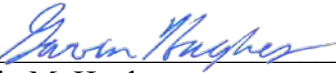
283. Kia also fails to comply with Section 3065.2 because its Denial relies on warranty labor rates and retail rates of other dealers. The labor rates of other dealers is not relevant to the formula set forth in Section 3065.2.

1 **PROPOSED DECISION**

2 Based on the evidence presented and the findings herein, IT IS HEREBY ORDERED THAT
3 Protest No. PR-2803-22 is sustained. Respondent failed to establish its burdens of proof under Vehicle
4 Code section 3065.4(a) that it complied with Section 3065.2 and that Protestant's requested retail labor
5 rate is materially inaccurate or fraudulent. Protestant's requested retail labor rate of \$447.52 per hour is
6 the retail labor rate determined in accordance with Section 3065.2.

7
8
9 Dated: May 14, 2024

LAW OFFICES OF
GAVIN M. HUGHES

10
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13

14 KM3G, INC. d/b/a PUTNAM KIA OF
15 BURLINGAME)

16 Protestant,)

17 vs.)

18 KIA AMERICA, INC,)

19 Respondent.)
20)
21)
22)
23)

PROTEST NO. PR-2803-22

24 **RESPONDENT'S POST-HEARING BRIEF**
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1 Respondent Kia America, Inc. (“Kia”) respectfully submits this post-hearing brief in
2 support of its position that (1) the Protest of Protestant KM3G, Inc. d/b/a Putnam Kia of
3 Burlingame (“Putnam Kia”) should be overruled and (2) the Board should calculate Putnam
4 Kia’s retail labor rate by dividing the charges on the qualified repair orders submitted to Kia by
5 Putnam Kia by the actual hours that generated those charges, resulting in a rate of \$262.93 per
6 hour, the highest rate that Kia would be paying to any Kia dealer in the State of California.
7

8 **ISSUES PRESENTED**

9 1. Was the labor rate of \$447.52 per hour requested by Putnam Kia “materially
10 inaccurate”? Veh. Code §§ 3065.2(d)(1), 3065.4(a).
11

12 2. May a franchisee establish its retail labor rate by dividing the total charges on its
13 qualified repair orders by the number of “sold hours” that it assigns to the particular repairs,
14 regardless of the number of actual hours that generated the charges? Veh. Code § 3065.2(a)(2).
15

16 3. May a franchisor rebut a franchisee’s requested labor rate by dividing the total
17 charges on the qualified repair orders submitted by the franchisee by the actual number of hours
18 that generated the charges? Veh. Code § 3065.2(a)(2).
19

20 4. Did Kia’s response to Putnam Kia’s request for a labor rate of \$447.52 per hour
21 comply with section 3065.2(d)? Veh. Code §§ 3065.2(d)(1), (4), (5), 3065.4(a).
22

23 5. What, if anything, is the difference between the \$268.90 per hour amount that Kia
24 has been paying Putnam Kia for warranty labor since May 28, 2022, and the amount that Putnam
25 Kia would have received if Kia had compensated Putnam Kia at the retail labor rate as
26 determined in accordance with section 3065.2 for a period beginning 30 days after Kia’s receipt
27
28

1 of Putnam Kia’s initial submission under subdivision (a) of Section 3065.2? Veh. Code §
2 3065.4(b).

3
4 **SUMMARY OF KIA’S POSITION**

5 The very first sentence of the statute that the Board must interpret and apply in this case,
6 as a matter of first impression, states that a “a franchisee seeking to establish or modify its retail
7 labor rate, . . . to determine a **reasonable** warranty reimbursement schedule shall . . . follow the
8 following requirements: . . .” Veh. Code § 3065.2(a)(1) (emphasis added).

9 The evidence in this case establishes that the labor rate of \$447.52 requested by Putnam
10 Kia is not “reasonable.” It is more than \$200 higher than the highest rate that Kia is paying to
11 any other Kia dealer in California. [Ex. P-111.003; II 300:7-24; see II 110:14-24]. It is
12 approximately \$250 more than the *average* rate being paid to Kia dealers in Putnam Kia’s
13 District in California. [II 109:5-8].

14
15 The statutory formula for “determining a reasonable warranty reimbursement schedule”
16 with respect to labor is to “determine the total charges for labor from the qualified repair orders
17 submitted [by the franchisee] and dividing that amount by the total number of hours that
18 generated those charges.” Veh. Code § 3065.2(a)(2). The threshold issue in this case is whether
19 that calculation should (or alternatively, can) be made by using the actual labor hours that
20 generated the charges, rather than the “sold” hours – i.e., time allowances – that Putnam Kia
21 entered on the repair orders.
22

23 Kia’s position is that hours means hours, not “sold hours.” This position conforms to the
24 plain language of the statute and is supported by (i) the Vehicle Code’s use of “time allowances”
25 when it means time allowances (the same thing as “sold hours”) in nearby statutory provisions;
26 (ii) the legislature’s change of the language, in drafting section 3065.2(a)(2), from “time
27
28

1 allowances” to “hours”; and (iii) the rule that statutes should be interpreted reasonably and in a
2 way to avoid absurd results.

3 Putnam Kia takes the position that it can “sell” any number of hours it chooses and then
4 divide its labor charges by that number of “sold” hours, regardless of the number of actual hours
5 its technicians spend on the repair. Putnam Kia’s interpretation allows a franchisee to pick and
6 choose any labor time guide – published, unpublished, commercial, or factory – or any
7 combination thereof, or no labor time guide at all, or simply use a service advisor’s discretion
8 concerning the number of “sold” hours. Such a lack of any objective standard is not a reasonable
9 way to interpret a statute. And giving franchisees unilateral authority to determine the number of
10 “sold” hours will inevitably lead to franchisee manipulation of sold hours to yield the highest
11 possible statutory rate.
12

13 Indeed, that is exactly what happened here – following the enactment of section 3065.2,
14 the Putnam Auto Group more than doubled its hourly rates and correspondingly reduced the
15 number of hours that it “sold” for customer-pay, warranty-like repairs. [See pp. 5-6, *infra*].
16

17 Putnam Kia says that its sold hours are reasonable because its “policy” is to use the time
18 allowances in Kia’s Labor Time Standards (“LTS”) to establish the “sold” hours. [I 32:4-11; V
19 943:15-944:2, VI 17:10-21; IX 98:11-13; see VII 12:19-13:5]. But the evidence established that
20 Putnam Kia did not use an LTS time allowance on over 74% of the repairs on which the based its
21 \$447.52 request. [See pp. 12-14 *infra*]. Moreover, section 3065.2 does not refer to time
22 allowances or time guides or provide any standard for what time guides or allowances might be
23 acceptable or unacceptable to use in the denominator of the statutory calculation. Adopting
24 Putnam Kia’s position that the franchisor must unquestioningly accept the franchisee’s “sold”
25
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1 hours will lead to an inflationary spiral of warranty rates, at the ultimate expense of the
2 consumer, who pays for the warranty when he or she purchases the car.

3 Kia takes the following positions on the issues presented:

4 1. Putnam Kia's requested labor rate of \$447.52 was materially inaccurate because
5 (i) it was calculated using "sold" hours that were, in the aggregate, far less than the actual
6 number of hours that generated the charges; (ii) its use of sold hours did not conform to any
7 particular policy, standard, or time guide; (iii) its use of sold hours resulted in a rate that is far
8 outside of the competitive range of other dealers in California; (iv) it included one repair order
9 with a \$2,500 hourly rate that was clearly not "qualified"; (v) it failed to include at least two
10 qualified repair orders; (vi) the evidence showed errors in Putnam Kia's repair orders and flaws
11 in its vendor's procedures; and (vii) the proponents of Putnam Kia's calculation provided
12 contradictory and shifting positions as to which repair orders should be included or excluded as
13 qualified.
14

15
16 2. A franchisee should not be entitled to use "sold" hours in the statutory calculation,
17 especially where, as here, those sold hours are far less than the hours that generated the charges
18 and result in a rate difference of almost \$200 per hour.

19 3. A franchisor should be entitled to rebut the requested labor rate by using the
20 actual technician hours because it conforms to the plain language of the statute, the statutory
21 intent to provide "reasonable" compensation, the terms in nearby sections of the Vehicle Code,
22 the legislative history, and rules of statutory construction.
23

24 4. Kia's response to Putnam Kia's request complied with section 3065.2(d) because
25 Kia sent a timely notification contesting the rate on the grounds that it was materially inaccurate
26 and potentially fraudulent, providing a full explanation of its reasons for the allegation, evidence
27
28

1 substantiating its position, a copy its calculations, and a proposed adjusted retail labor rate on the
2 basis of the repair orders submitted by Putnam Kia using the same formula to calculate the rate
3 as provided in section 3065.2(a). While the parties dispute whether Kia’s calculation should
4 have included certain repair orders related to brakes, bulbs, and batteries, Kia had a reasonable
5 basis for including those repair orders in its calculations.
6

7 5. For purposes of this case, Kia will accept that the 29 repair orders submitted by
8 Putnam Kia in support of its rate requests are “qualified repair orders,” with the exception of
9 Repair Order (“RO”) 10298, which Putnam Kia has conceded is not qualified. Kia will also
10 stipulate to withdrawing the adjusted labor rate of \$268.90 per hour that it calculated using repair
11 orders for an adjusted 90-day period, which included repair orders involving brakes, bulbs, and
12 batteries. Kia submits that the calculation should be performed using the actual hours on Putnam
13 Kia’s original set of repair orders (except for RO 10298) as well as on two qualified repair orders
14 that were omitted from Putnam Kia’s original set. As shown on Exhibit A attached to this brief,
15 the resulting labor rate is \$262.93 per hour, which Kia (pursuant to its practice) would round up
16 to \$262.95 per hour and pay to Putnam Kia on a going forward basis. Kia notes that \$262.95 per
17 hour would be the highest labor rate paid to any Kia dealer in California.
18
19

20 I. FACTUAL BACKGROUND

21 A. The Putnam Auto Group Reacts to Section 3065.2

22 Putnam Kia is part of the Putnam Auto Group, a group of dealerships operating
23 franchises in Burlingame, California and nearby areas. [Stipulation of Facts, dated Oct. 6, 2023
24 (“Stip.”), ¶ 4]. In response to the enactment of section 3065.2, the Group’s principal, Kent
25 Putnam, made changes to the way his dealerships price warranty-like customer-pay repairs. [VII
26 141:7-14].
27
28

1 Prior to the January 2020 effective date of section 3065.2, at least one dealership in the
2 Group was charging less than \$200 per hour. [IX 113:21-114:3]. After the effective date, Mr.
3 Putnam raised the labor rates charged by all his dealerships for customer-pay, warranty-like
4 repairs from a range of about \$220 to \$250 per hour and, later, to a higher range of \$420 to \$460
5 per hour. [VII 141:24-142:2; IX 114:4-11, 115:19-116:7]. Mr. Putnam acknowledged that his
6 dealerships charge the \$420 to \$460 rate only for repairs that are going to be included in the
7 statutory calculation under section 3065.2. [VII 142:3-18, 145:12-14]. Lower rates are charged
8 for other service work. [VII 142:7-21, 152:21-153:7; *see, e.g.*, Exh. R-263.001, Line A; VI
9 103:10-106:23].
10

11 At the same time, Mr. Putnam reduced the number of “sold hours” that would be used for
12 the same repairs previously performed. [VII 157:10-20]. According to Mr. Putnam, “the price
13 to the customer did not go up.” [VII 136:17-18].
14

15 In effecting these rate increases, the Putnam Automotive Group made no effort to make
16 its rates for warranty-like customer-pay work competitive with other dealerships. [IX 119:13-
17 17]. Putnam Kia does not disclose to its customers that it is charging them \$440 an hour. [VII
18 146:11-13, 147:3-6; IX 126:23-127:1; V 963:9-13.]. Nor does it disclose how many “sold”
19 hours it is selling to the customer. [V 963:14-16; IX 126:14-22]. While the customer receives a
20 “customer copy” of the repair order, that document does not state the number of hours that have
21 been “sold,” the number of actual hours that were involved in the repair, or the hourly rate that
22 the customer is being charged. [VII 146:14-147:2].
23

24 Thus, in response to the enactment of section 3065.2, the Putnam Auto Group quite
25 deliberately changed its practices to maximize its rates under the statutory formula. It more than
26 doubled its hourly rates for warranty-like customer-pay work while it reduced the number of
27
28

1 “sold hours” hours it assigned to repairs. As shown below, the result of these devices is a
2 requested rate more than \$200 per hour higher than that paid to any other Kia dealer in
3 California.
4

5 **B. Putnam Kia’s Initial Labor Rate**

6 Putnam Kia entered into a Kia Dealer Sales and Service Agreement (the “Dealer
7 Agreement”), and commenced Kia dealership operations, on September 1, 2021. [Stip, ¶ 3, 5;
8 Ex. J-1.007]. To establish its initial warranty labor rate, Putnam Group employee Andrey
9 Kamenetsky completed a market survey form dated August 25, 2021, setting forth the retail labor
10 rates and warranty labor rates of other “mass market” dealerships in its vicinity. [Exhibit J-
11 2.001; IX 28:11-29:2; V 892:13-20; VII 160:22-161:19]. The average of those warranty rates
12 was \$225.27. [Exh. J-2.001; VII 161:24-162:2]. Kia granted Putnam Kia a rate of \$225.30
13 (rounding the rate up to the nearest .05). [Stip ¶ 6; see J-4.001 (noting that Putnam Kia was
14 seeking an increase “from \$225.30 to \$447.50 per hour”)]. This was close to the highest rate
15 being paid by Kia in California. [See Exh. P-111.003; II 300:7-24; see also II 110:14-24].
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17

18 Notably, all of the rates for other brands that Putnam Kia placed on the form were from
19 dealerships in the Putnam Auto Group. [VII 161:20-23; IX 30:22-31:2]. Mr. Kamenetsky made
20 no effort to contact any dealerships outside of the Putnam Auto Group for competitive labor
21 rates. [IX 148:15-19, 151:14-152:7].
22

23 **C. Putnam Kia Requests an Increase to \$447.52**

24 Less than seven months after it opened, Putnam Kia submitted a letter, dated March 22,
25 2022, requesting that Kia raise its labor rate to \$447.52 and raise its parts markup to dealer cost
26 plus 83%. [Ex. J-3.001; Stip. ¶ 7]. The letter was accompanied by a spreadsheet showing the
27 calculation of the \$447.52 rate. [Ex. J-3.002-.003; Stip. ¶ 8]. Putnam Kia also submitted
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1 accounting copies of all repair orders, bearing sequential numbers 10099 through 10636, opened
2 during the 90-day period between November 3, 2021 and January 31, 2022 (the “**90-Day**
3 **Period**”). [Stip. ¶ 9]. Kia received these materials (the “**Submission**”) on March 24, 2022.
4 [Stip. ¶ 8].

5
6 The Submission was prepared by FrogData, LLC, a vendor that prepares warranty rate
7 submissions for dealers. [VII 127:2-13, 129:4-11]. On the spreadsheet, FrogData listed 29 of
8 the 538 sequential repair orders as “qualified repair orders,” containing 31 repairs, on which the
9 calculation of \$447.52 was made. [Exh. J-3.002-003]. FrogData divided the total charges of
10 \$9,577.01 on the qualified repairs by the number of “sold hours” related to the 31 qualified
11 repairs (21.4) to arrive at the \$447.52 rate. [Exh. J-3.003].

12
13 No one from Putnam Kia reviewed any of the repair orders prior to making the
14 Submission. [IX 37:19-39:8]. And no witness who had actually reviewed the 538 repair orders
15 and made the determination of which ones were “qualified” was presented by Putnam Kia at the
16 hearing. [VIII 13:22-14:4, 31:16-18, 47:23-25 (FrogData employee who determined qualified
17 repair orders was Robin Brantley)]. However, FrogData’s “Director of Implementation,” Jeff
18 Korenak, who reviewed the Submission and wrote the cover letter, did testify. [VIII 10:24-11:1,
19 31:19-32:4].

20
21 FrogData made its calculations under subsection (1)(B) of Vehicle Code section 3065.2,
22 which requires the use of all qualified repair orders within a 90 consecutive day period, rather
23 than under subsection (1)(A), which requires the use of 100 consecutive qualified repair orders,
24 because FrogData found only 29 qualified repair orders within a 90-day period. [VIII 43:13-
25 44:7]. Mr. Korenak acknowledged that Putnam Kia is an “extremely low volume dealership with
26 respect to repair orders.” [VIII 136:2-4].
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1 Mr. Korenak testified that, in performing its calculations, FrogData simply records
2 whatever number of sold hours appears on the repair order. [VIII 169:20-24]. It does not check
3 to see whether the number of sold hours recorded by the dealer appears to be reasonable for the
4 work that has been performed. [VIII 170:3-6, 170:19-171:2]. Nor does it verify whether the
5 sold hours on the repair order come from a manufacturer’s time guide or from some other time
6 guide. [VIII 170:10-18].
7

8 Mr. Korenak admitted that, if every one of a dealer’s repair orders said .10 sold hours,
9 that is the number of sold hours that FrogData would use. [VIII 169:25-170:2]. He also testified
10 that, if a repair order would otherwise be “qualified” but the dealer failed to list any “sold” hours
11 on the repair order, he would not include it in the calculations – even if it had actual labor time
12 that went into the repair for which the customer subsequently paid. [VIII 156:10-157:15].
13

14 Mr. Korenak acknowledged that a “qualified repair order” under section 3065.2 is for
15 work that would have been covered by the warranty if performed within the period of warranty,
16 and that therefore the first thing one must do to determine whether a repair order is qualified is to
17 look at the manufacturer’s warranty. [VIII 135:7-15]. Mr. Korenak admitted, however, that
18 FrogData does not even have a copy of Kia’s warranty. [VIII 135:16-19].
19

20 **D. Kia Responds to the Request for \$447.52**

21 By letter dated April 20, 2022, Kia requested 30 days of additional repair orders pursuant
22 to section 3065.2(d)(4). [Exh. J-4.001; Stip. ¶¶ 13-14.] The additional repair orders were
23 provided to Kia by letter dated April 27, 2022. [Exh. J-5; Stip. ¶¶ 15-16]. They covered the 30-
24 day period from February 1, 2022 through March 2, 2022, and consisted of the sequential repair
25 orders numbered 10637 through 10845. [Stip. ¶ 17].
26
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1 By letter dated May 26, 2022 (the “**Notification**”), Kia denied the requested labor rate of
2 \$447.52 and granted an increase to a proposed adjusted retail labor rate of \$268.90. [J-6.003;
3 Stip. ¶¶ 18-19]. Kia also granted Putnam Kia’s requested parts rate increase. [J-6.003; VII
4 130:3-5; Stip. ¶ 18]. In the Notification, Kia took the position that the requested labor rate of
5 \$447.52 per hour was “materially inaccurate” for three reasons. [J-6.001].
6

7 First, Kia pointed out that in calculating the labor rate, Putnam Kia used sold hours
8 (which the letter referred to as “book times”) that were “in the aggregate, far less than the actual
9 number of hours that generated the charges on the repair orders.” [J-6.001-.002; IV 588:22-25
10 (“book times” was referring to the “sold hours”). As “one example,” Kia referred to RO 10158,
11 where Putnam Kia calculated its hourly rate for a \$250 job by using .50 when the actual number
12 of hours that generated the charge to the customer was 3.29 hours. [J-6.002; see Exh. R-
13 205.001].
14

15 Second, Kia took the position that Putnam Kia had failed to include in its calculations
16 certain repairs involving brakes, batteries and bulbs which Kia contended would have been
17 covered by the Kia warranty if the work had been performed during the period of coverage for
18 those particular items. [J-6.002]. Kia added these items, highlighted in red, on the
19 accompanying spreadsheet with the note “Qualifying repair that dealer did not include in
20 calculations.” [J-6.004-.005; II 174:11-23].
21

22 Third, Kia pointed out that Putnam Kia had included in its calculations RO 10298, on
23 which Putnam Kia had billed a customer \$250 for .10 sold hours, resulting in an hourly rate of
24 \$2,500, and the repair order did not reflect that any qualifying repair had been performed and in
25 fact indicated that the customer had declined service. Accordingly, Kia stated that it was
26 removing this repair order from its calculations. [J-6.002].
27
28

1 Kia further stated that it believed that the \$447.52 rate was “potentially fraudulent” and
2 did not represent “reasonable” compensation under section 3065(a) because it was more than
3 \$200 per hour higher than the highest rate paid by Kia to any other Kia dealer in California and
4 approximately \$200 per hour higher than the hourly retail rates charged by luxury dealerships in
5 Putnam Kia’s own market. [Exh. J-6.002].

7 Kia calculated the adjusted labor rate of \$268.90 using the 90 days of repair orders
8 starting on November 12, 2021, and ending on February 10, 2022 (the “**Adjusted 90-Day**
9 **Period**”). [Exh. J-6.003; Stip. ¶ 20.]

10 Kia calculated the adjusted rate by dividing the charges on 37 repair orders written during
11 the Adjusted 90-Day Period by the “actual hours” shown for those repairs on those repair orders.
12 [Stip. ¶ 21]. This calculation was shown on the spreadsheet attached to the Notification, on
13 which Kia listed the repair orders included in its calculation and divided the total charges of
14 \$11,815.08 by 43.94, the total number of actual hours, resulting in a rate of \$268.89. [Exh. J-
15 6.004-.005]. Kia rounded this rate up to \$268.90. [See Exh. J-6.003].

17 Kia began paying Putnam Kia \$268.90 per hour for warranty labor on May 28, 2022, and
18 has been paying Putnam Kia for warranty labor at that rate since that time. [Stip. ¶ 23.]

19
20 **E. Putnam Kia Replies to Kia’s Notification**

21 In a letter dated June 15, 2022 (the “**Reply**”), Putnam Kia responded to the Notification
22 and took the positions (among others) that: (1) the “hours” referred to in section 3065.2(a)(2) are
23 “sold hours,” not actual hours; and (2) in calculating the adjusted labor rate, Kia had included a
24 total of 13 repair orders involving brakes, bulbs, and/or battery repairs that should have been
25 excluded pursuant to section 3065.2(c)(3) as “routine maintenance” items. [Exh. J-7.001, .003,
26 .007-.008].
27

1 In its Reply, Putnam Kia “agreed that the vendor FrogData should not have included [RO
2 10298] in our submission” because “it did not result in a repair.” [Exh. J-7.009-.010].
3

4 **II. THE REQUESTED RATE WAS MATERIALLY INACCURATE**

5 As shown below, Putnam Kia’s requested rate of \$447.52 was materially inaccurate
6 because (i) it was calculated using “sold” hours that were far less than the actual number of hours
7 that generated the charges and did not conform to any time guide or consistent policy; (ii) its use
8 of sold hours resulted in a rate that is more than \$200 higher than the labor rate of any other Kia
9 dealer, and more than double the average rate of Kia dealers, in California; and (iii) the
10 information on which the calculation was based was riddled with errors, contradictions, and
11 inconsistencies, including the inclusion of one repair order with a \$2,500 hourly rate that
12 concededly should have been excluded, the failure to include at least two qualified repair orders,
13 mistakes made by Putnam Kia’s service department, and self-contradictory and shifting positions
14 taken by FrogData and Putnam Kia.
15

16 **A. Putnam Kia’s “Sold Hours” Are Too Small and Too Erratic**

17 Putnam Kia contends that its “sold” hours are reasonable time allowances because it is
18 Putnam Kia’s “policy” to use the Kia LTS time allowances for all repairs. As shown below,
19 however, Putnam Kia failed to apply that policy about 75% of the time. Moreover, the premise
20 on which Putnam Kia’s position is based is that a dealer can use any number of sold hours it
21 chooses and the franchisor must accept the number, however much they vary from the actual
22 hours that generate the charges.
23

24 Kent Putnam testified to his belief that the statute does not require Putnam Kia to use any
25 time guide at all. [VII 147:20-22]. Consistent with this position, he testified that, even though
26 the Kia LTS for the repair performed on RO 10571-A was 2.4 hours, and the actual hours that
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1 Putnam Kia’s technicians worked on the repair were 2.87 hours, Kia had to accept the 1.3 “sold”
2 hours that Putnam Kia’s service advisor placed on the repair order, notwithstanding its effect of
3 increasing the hourly rate. [Exh. R-244; Ex. P-120.016; VII 148:5-19, 150:11-18, 150:22-
4 151:19].

5
6 Contrary to its defense of using sold hours, Putnam Kia did not use an applicable Kia
7 LTS time allowance on 23 of the 31 (or 74.19%) repairs used for the calculation in the
8 Submission. Putnam Kia’s service manager, Rad Reyes, conceded that the dealership did not use
9 an applicable Kia LTS time allowance on the following 15 repairs:

10 RO 10133-A [Exh. R-204.001; also Exh. R-247.001; V 1003:8-15, 1004:25-
11 1005:13; VI 20:11-23].

12 RO 10165-B [Exh. R-249.001-.002; VI 24:12-26:4, 211:3-18].

13 RO 10180-A [Exh. R-250.001; VI 185:6-20].

14 RO 10180-B [Exh. R-250.001; VI 27:7-29:22].

15 RO 10320-A [Exh. R-243.001; VI 51:14-52:22].

16 RO 10346-A [Exh. R-212.001; VII 16:16-18:14].

17 RO 10352-A [Exh. R-254.001; VI 55:13-24].

18 RO 10404-A [Exh. R-255.001; VI 56:9-57:15].

19 RO 10415-A [Exh. R-256.001; VI 58:17-19, 60:10-61:16].

20 RO 10426-D [Exh. R-257.003; VI 71:15-18, 73:3-20].

21 RO 10486-A [Exh. R-259.001; VI 84:14-86:4].

22 RO 10529-B [Exh. R-260.002 [VI 89:2-6, 90:25-91:8, 91:16-18].

23 RO 10571-A [Exh. R-244.001; VI 99:5-7, 100:5-101:6].

24 RO 10581-A [Exh. R-263.001; VI 101:24-25, 107:11-16].

25 RO 10631-F [Exh. R-214.003; VI 114:15-16, 118:16-119:10].
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1 Further, Putnam Kia acknowledged that it did not use a Kia LTS time allowance on any
2 of the “qualified repair orders” in its Submission that contained a diagnosis without a repair. [VI
3 46:1-13]. That is because the Kia LTS generally does not provide a separate time allowance for a
4 diagnosis without a repair. [II 373:1-6, 488:11-17, 753:6-8]. There were seven (7) such
5 diagnostic repair orders in the Submission: RO 10148-U [Exh. R-242.002]; RO 10153-A [Exh.
6 R-248.001]; RO 10158-A [Exh. R-205.001]; RO 10298-A [Exh. R-211.001]; RO #10454-A
7 [Exh. R-258.001]; RO 10553-A [Exh. R-263.001]; RO 10617-A [Exh. R-267.001].
8

9 Thus, Putnam Kia conceded that 22 (15 + 7) of the 31 qualified repairs it submitted did
10 not use an LTS time allowance. In addition, Kia established that an additional qualified repair
11 from the Submission did not use the correct LTS time allowance. On RO 10591-A, the Putnam
12 Kia’s service advisor entered .60 sold hours. [Exh. R-266.001]. The LTS, however, allowed .80
13 hours for this repair. [V 843:14-844:11; Exh. R-270.001]. Thus, on 23 of 31 – or 74.19% – of
14 the repair order lines on which Putnam Kia’s requested labor rate was based, Putnam Kia did not
15 in fact use an applicable LTS time allowance.
16

17 To explain these variations from Putnam Kia’s claimed policy, Mr. Kamenetsky and Mr.
18 Reyes testified that the service advisors who create the repair orders have discretion to charge a
19 number of sold hours different from the Kia LTS time allowance. [IX 128:7-15; VI 185:18-20,
20 210:6-9; see VI 176:11-14]. Mr. Kamenetsky also testified that there is in fact no written policy
21 requiring Putnam Kia’s service advisors to use the LTS time allowances and that the unwritten
22 policy is “just” a “guideline.” [IX 127:7-18].
23

24 Putnam Kia’s pricing of diagnostic repair orders also did not follow its purported policy.
25 Mr. Reyes testified that Putnam Kia charges a “flat fee” for diagnostic time rather than an
26 amount based on sold hours. [V 951:22-24]. He further testified that the policy was to enter .50
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1 “sold” hours and charge a flat fee of \$250. [V 951:25-952:7; VI 98:24-99:1]. However, the
2 number of sold hours on five (5) of the seven (7) diagnostic repair orders that were used as
3 “qualified repair orders” in the Submission was less than .50. See RO 10148-U [Exh. R-242.002
4 (.20 sold hours)]; RO 10153-A [Exh. R-248.001 (.30 sold hours); VI 196:13-21, VII 84:8-85:9];
5 RO 10298-A [Exh. R-211.001 (.10 sold hours)]; RO 10454-A [Exh. R-258.001 (.20 sold hours);
6 VI 220:4-9, 221:6-16; V 955:7-19]; RO 10617-A [Exh. R-267.001 (.30 sold hours)].
7

8 Moreover, as shown below, these small amounts of “sold” hours assigned to diagnostic
9 work typically bore no relationship to the far greater number of actual hours spent on these
10 diagnoses. And Putnam Kia’s contention that its use of “sold” hours means that it will receive
11 the same compensation from Kia and its retail customers for the same work is inaccurate because
12 Kia will pay its dealers for the actual time expended on a difficult diagnosis if the dealer follows
13 the XTT procedure. [Exh. R-232; I 70:25-74:7].
14

15 Mr. Nardini testified that each of the following Putnam Kia repairs included in the
16 calculation of the \$447.52 rate would have qualified for the payment of the actual time spent by
17 the technician under Kia’s “XTT” time policy, if the work had been done when the vehicle was
18 in warranty and Putnam Kia had followed the XTT procedures:

19 RO 10180-A, diagnostic work on which the technician spent 3.29 hours but
20 Putnam Kia assigned only .50 “sold” hours [Exh. R-205.001; II 145:12-20, 151:3-
21 8, 152:17-154:3, 154:7-23, 155:7-156:17];

22 RO 10346-A, diagnostic work and a repair on which the technician spent 3.42
23 hours but Putnam Kia assigned only 1.50 sold hours [Exh. R-212.001; II 164:13-
165:17, 166:2-17];

24 RO 10153-A, diagnostic work on which the technician spent .98 hours but
25 Putnam Kia assigned only .30 sold hours [Exh. R-248.001; II 231:2-233:6];

26 RO 10454-A, diagnostic work on which the technician spent 1.02 hours but
27 Putnam Kia assigned only .20 sold hours. [Exh. R-258.001; II 236:4-16, 237:19-
28 25, 238:4-15];

1 RO 10415-A, diagnostic work and a repair on which the technician spent 2.92
2 hours but Putnam Kia assigned only 1.00 sold hours [Exh. R-256.001; II 244:2-
22, 245:1-5, 245:24-246:17; III 537:21-538:3, 538:18-539:1]; and

3 RO 10591-A, diagnostic work on which the technician spent 1.14 hours but
4 Putnam Kia assigned only .60 sold hours. [Exh. R-266.001; II 251:9-16, 252:18-
5 253:20].

6 In short, Putnam Kia’s contention that its “policy” concerning the use of Kia LTS time
7 allowances simply ensures that it will be paid the same compensation for warranty repairs and
8 warranty-like customer-pay repairs is incorrect because (1) Putnam Kia does not follow that
9 policy three-quarters of the time and (2) the policy ignores the availability of XTT time for
10 difficult-to-diagnose warranty repairs.

11
12 **B. The Requested Rate Is Far Outside the Range of Competitive Rates**

13 There is a huge disparity between Putnam Kia’s requested rate of \$447.52 per hour and
14 the labor rates of other new motor vehicle dealers, further demonstrating that Putnam Kia’s use
15 of “sold hours” results in a materially inaccurate rate that is not a “reasonable warranty
16 reimbursement schedule” under section 3065.2(a).

17 As of March 2022, when Putnam Kia submitted its request to be paid \$447.52 per hour,
18 the average warranty labor rate that Kia was paying to dealers in California was \$183 per hour.
19 [II 107:1-9.] Putnam Kia is located in Kia’s District 4 in California, which covers San Jose
20 northward to Marin County, including the San Francisco Bay area and Silicon Valley. [II
21 107:16-18, 109:22-110:3]. As of the time of the hearing in October 2023, the average warranty
22 labor rate that Kia was paying to dealers in District 4 was approximately \$199 per hour, which
23 was one of the higher average district rates in the nation. [II 109:5-8].

24 As of the time of the hearing in October 2023, the highest labor rate that Kia was paying
25 to any dealer in California other than Putnam Kia was \$236.30 per hour, which was being paid to
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1 Stevens Creek Kia in the San Jose area, part of District 4. [Ex. P-111.003; II 300:7-24; see II
2 110:14-24]. The warranty rates that Kia was paying to the other Kia dealers in District 4 during
3 the time period from Putnam Kia's Submission through the date of the hearing were as follows:

4 Kia of Marin, **\$180.40** granted in February 2022 [Exh. P-116.001; II 283:18-
5 284:5];

6 Kia of Santa Rosa, **\$163.50** granted in August 2022 [Exh. P-116.002, II 284:6-15]
7 and **\$188.10** granted in August 2023 [Exh. R-237, II 285:4-18];

8 Capitol Kia in San Jose, **\$206.30** granted in June 2022 [Exh. P-116.003; II
9 286:12-23] and **\$236.10** granted in June 2023 [Exh. R-238, II 287:7-18];

10 Oakland Kia, **\$216** granted in June 2022 [Exh. P-116.004; II 289:2-15];

11 Kia of Vacaville, **\$176.80** granted in April 2022 [Exh. P-116.005; II 293:18-
12 294:1];

13 Quinn Kia of Fremont, **\$199.30** granted in April 2022 [Exh. P-116.006; II 294:18-
14 22];

15 Hilltop Kia in Richmond, **\$187.90** granted in October 2021 [Exh. P-116.008; II
16 294:93-295:7];

17 Concord Kia, **\$194.10** granted in April 2021 [Exh. P-116.009; II 295:8-17] and
18 **\$210** granted in January 2023 [R-239; II 296:2-9];

19 Dublin Kia, **\$184.70** granted in August 2021 [Exh. P-116.010; II 296:2-9] and
20 **\$199.30** granted in April 2023 [Exh. 240; II 300:14-21].

21 Mr. Korenak testified that he had been the supervisor on about 1200 labor rate
22 submissions, about 400 of which were in California. [VIII 33:7-13, 173:7-19]. Mr. Korenak was
23 not aware of any dealership in California, other than a Putnam Automotive Group dealership,
24 that receives a labor rate of over \$400 an hour. [VIII 173:20-23] At the time of his deposition in
25 September 2023, Mr. Korenak testified that he was not aware of any dealer in California, other
26 than a Putnam Automotive Group dealership, that received a labor rate of over \$350 an hour.
27 [VIII 174:6-8]. At the hearing, Mr. Korenak conceded that he could think of only two other non-
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1 Putnam dealers in California who received a warranty labor rate of over \$300 an hour. [VIII
2 175:1-9].

3 In short, Putnam Kia's requested rate of \$447.52 an hour is completely out of line with
4 the rates of other California dealers and does not represent a "reasonable compensation
5 schedule" under section 3065.2(a).
6

7 **C. Putnam Kia's Position Is Riddled with Errors and Inconsistencies**

8 There were numerous errors with respect to information in Putnam Kia's repair orders,
9 flaws in FrogData's procedures for selecting qualified repair orders, and self-contradictory
10 positions taken by FrogData and Putnam Kia as to the classification of qualified repair orders.
11

12 In its Notification, Kia took the position that RO 10298-A should not have been included
13 in the Submission because Putnam Kia "booked .10 hours and billed the customer \$250,
14 resulting in an hourly rate of \$2500, for ordering a part" and that the repair order "does not
15 reflect that any qualifying repair was performed and in fact indicates that the customer declined
16 service." [Exh. J-6.002]. In its Reply, Putnam Kia "agreed that the vendor FrogData should not
17 have included [RO 10298] in our submission" because "it did not result in a repair . . ." [Exh. J-
18 7.009-.010].
19

20 Putnam Kia's rationale for agreeing to remove RO 10298-A, however, was inconsistent
21 with the inclusion of three other "qualified repair orders" in its Submission that did not result in a
22 repair, namely RO 10158-A (Exh. R-205.001); RO 10454-A (Exh. R-258.001); and RO 10617-A
23 (Exh. R-267.001). Putnam Kia has not proposed to remove any of these three repair orders from
24 its calculations. Putnam Kia's rationale is also inconsistent with its failure to include RO 10152-
25 B [Exh. R-272.002], a diagnosis that **did** result in a repair, in its Submission, as discussed below.
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1 FrogData’s inclusion of RO 10298-A calls into question its criteria for selecting
2 “qualified repair orders.” RO 10298-A states only that the customer had a complaint and that the
3 customer “approved parts to order.” [Exh. R-211.001]. There is no actual technician time listed
4 on the repair order, and the \$250 charge for .10 “sold” hours results in an hourly rate of \$2,500.
5 [Exh. R-211.001; Exh. J-3.002, Count 10, “Labor Rate” column]. While Mr. Korenak initially
6 claimed in his hearing testimony that this was a “diagnostic,” he ultimately admitted that there is
7 no diagnosis described and that a diagnosis cannot be done in zero time. [VIII 162:19-163:16].

9 Mr. Korenak testified on redirect that, in response to Kia’s removal of RO 10298-A in its
10 May 2022 Notification, he agreed with Mr. Kamenetsky that the repair order should be removed
11 because it was “common sense” and he didn’t think that the dealership was charging a \$2,500
12 rate. [VIII 185:5-186:2]. This testimony led the ALJ to comment that “we all agree \$2,500 is
13 not a proper part of the ultimate calculation.” [VIII 186:6-8]. Mr. Korenak’s testimony
14 concerning his agreement with Mr. Kamenetsky to remove the RO was, however, impeached on
15 cross-examination: Mr. Korenak had testified at his deposition in **September 2023** that he
16 believed that the repair order **should** have been included in the calculation. [VIII 203:14-204:2].

18 In addition, FrogData failed to include in the Submission at least two qualified repair
19 orders that were included among the 90-day set of repair orders that it submitted to Kia.

20 Mr. Korenak agreed that RO 10246-B [Exh. R-271.001], which was **not** included in the
21 Submission, was for the repair that the customer authorized on a prior diagnostic repair order,
22 RO 10153 [Exh. R-248], which **was** included in the Submission. [VIII 151:23-152:16]. Mr.
23 Korenak conceded that RO 10246-B was a qualified repair order. [VIII 152:17-19].
24 Accordingly, Mr. Korenak agreed that RO 10246-B should have been included in FrogData’s
25 calculations, but was not. [VIII 153:2-12 (“Looks like we missed it.”)].
26
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1 Similarly, Mr. Korenak conceded that RO 10152-B [Exh. R-272.002], which was **not**
2 included in FrogData’s Submission, was a “diagnosis of a qualified repair order” which later
3 resulted in a repair on RO 10183-A [Exh. R-208], which **was** included in FrogData’s submission.
4 [VIII 153:17-25].

5 Despite this admission, Mr. Korenak took the position that RO 10152-B was not a
6 qualified repair order because, even though the technician spent .28 hours on the diagnosis,
7 Putnam Kia did not place any “sold” hours on the repair order. [VIII 155:1-14, 156:10-19].
8 While Mr. Korenak conceded that “you have to do a diagnosis before you do the repair” [VIII
9 156:13-15), he defended not including the repair order simply because he “can’t put in 0000.”
10 [VIII 155:4]. When asked what FrogData does “if the dealer does not bill any time even though
11 the time is spent on what would otherwise be a qualified repair,” he responded: “we don’t record
12 it.” [VIII 156:20-23].

13 Mr. Korenak’s position that a dealer’s failure to enter sold hours, even when there are
14 actual technician hours, means that a repair order is not “qualifying,” should be rejected. Indeed,
15 Mr. Kamenetsky contradicted Mr. Korenak’s rationale. He testified that “a diagnosis where time
16 was documented on the diagnosis, I believe that that is a qualified repair order.” [IX 132:13-15].
17 Actual time of .28 for the diagnosis was documented on RO 10152-B. [Exh. R-272.002].

18 A qualified repair order is one “for work that was performed outside of the period of the
19 manufacturer’s warranty and paid for by the customer, but that would have been covered by a
20 manufacturer’s warranty if the work had been required and performed during the period of
21 warranty.” There is no dispute that the diagnostic work performed on RO 10152-B was work
22 that would have been covered by Kia’s warranty if the work had been required and performed
23 during the period of warranty; indeed, FrogData admitted this by including the repair order for
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1 the actual performance of the repair, RO 10183-A, in its Submission. [Exh. J-3.002, Count 7;
2 Exh. R-208.001]. Moreover, the customer paid for both the diagnostic work and the repair when
3 the customer paid the bill on RO 10183-A. [Exh. R-208.002]. The dealer should not be allowed
4 to exclude hours that generate the charges for warranty repairs by simply failing to put down a
5 number of “sold” hours on the repair order.
6

7 Mr. Korenak’s description of FrogData’s processes further undermine his purported
8 expertise with respect to the statute. For example, Mr. Korenak testified that, in compiling the
9 repair orders for the 90-consecutive-day period, FrogData selects the “opened date” of the repair
10 orders rather than the “closed date.” [VIII 28:7-11]. The statute, however, requires the
11 franchisee to submit “all repair orders **completed** in any 90-consecutive-day period.” [Veh.
12 Code § 3065.2(1)(B) (emphasis added)].
13

14 In addition to the foregoing errors, the evidence demonstrated a number of mistakes,
15 irregularities, and inconsistencies with respect to the repair orders that appear to affect the
16 accuracy of the calculations concerning Putnam Kia’s requested labor rate.

17 When asked by Putnam Kia’s counsel why no actual hours were recorded for the repair
18 on RO 10320-A, Mr. Reyes suggested that the actual hours may have been recorded by the
19 technician for the routine “tire pressure” check on Line B, which contained the following entry
20 under “A/HRS”: “ISP 0.27.” [Ex. R-243.001; VI 47:4-12]. Mr. Reyes explained that
21 “sometimes technicians, they rush and they’ll punch on to the wrong line, or they’ll clock on to
22 the wrong line.” [VI 47:10-12]. Mr. Reyes testified that the amount of time recorded for the tire
23 pressure check is “usually none or a very, very minimal amount.” [VII 76:8-10]. He further
24 explained that ISP is an “internal line” for work that is not charged to the customer. [VII 100:7-
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1 17.]. As the ALJ observed during the hearing, “this is a variation that may lead us to calculate
2 these figures erroneously.” [VII 75:4-5].

3 Mr. Reyes also testified repeatedly that, in creating repair orders, Putnam Kia’s service
4 advisors had made serious errors. [See, e.g., VI 55:24 (“a gross mistake”); VI 57:15 (“another
5 mistake”); VI 101:05-06 (“not following directions at all”)].

6
7 In addition to taking inconsistent positions as to whether or not a repair order containing
8 a diagnosis without a repair is a qualified repair order, Putnam Kia changed its position during
9 the hearing as to whether certain repair orders that supported Kia’s arguments should be included
10 in the calculations.

11 For example, Mr. Kamenetsky testified, on the final day of the hearing, to his belief that
12 RO 10158-A [Exh. R-205.001], which had been included in FrogData’s calculations [Exh. J-
13 3.002, Count 4], but which Kia had cited in its Notification as an example of a huge disparity
14 between sold hours and actual hours [Exh. J-6.002 (.50 sold versus 3.29 actual)], was not a
15 qualified repair order because someone had modified the vehicle. [IX 95:15-98:3, 132:21-
16 134:4].

17
18 Similarly, as mentioned above, Kent Putnam testified that Kia was required to accept
19 Putnam Kia’s service advisor’s decision to enter only 1.30 sold hours on RO 10571-A for a
20 repair that actually took 2.87 hours and had an LTS time allowance of 2.40 hours. [VII 150:8-
21 151:19; Exh. R-244.001]. In reaction to this damaging testimony [see IX 72:18-73:6], Putnam
22 Kia presented new documents and took the position on the last day of the hearing that this repair
23 order should never have been included in the Submission because it was an extended warranty
24 repair. [See IX 47:14-17].
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1 These new position concerning RO 10158-A and RO 10517-A on the last day of the
2 hearing contradicted evidence that Putnam Kia had presented just the day before, as both of these
3 repair orders were included in Putnam Kia’s proposed recalculation of the labor rate presented
4 through Mr. Korenak. [See Exh. P-108; VIII 116:10-17 (Mr. Korenak testified that that the
5 Board should adopt, “as the most accurate application of section 3065.2,” his Calculation 2 in P-
6 108, which excludes ROs that should not be included but does not exclude either of these ROs].

7
8 As the ALJ observed when Putnam Kia presented its new evidence concerning RO
9 10571-A, the evidence “really goes to the issue – or the conclusion, not the issue, that the
10 information contained on repair orders upon which FrogData relies can be erroneous, because
11 it’s misleading or incomplete and needs backup documents. . . . And that is the limitation and –
12 of the information that FrogData relies on, and makes the ultimate calculations suspect.” [IX
13 76:6-16].

14 15 **III. REMOVAL OF BRAKES, BULBS AND BATTERIES**

16 There was conflicting evidence about whether the brake, bulb, and battery repairs that
17 Kia used in its recalculation of the labor rate should have been included. While, as shown below,
18 Kia had a reasonable basis for considering these to be qualified repair orders, Kia is now
19 stipulating to the removal of these repairs from the calculation for purposes of this case.
20

21 Kia established that brake repairs, including brake pads, were covered by the Kia
22 warranty during the 12-month adjustment period. [Exh. R-230.008; Exh. R-231.008; I 60:14-
23 61:11]. Mr. Korenak agreed that there is no strict rule that a brake pad cannot be part of a
24 qualified repair order or one of the items calculated in a warranty labor rate, and that it depends
25 on the circumstances of the repair. [VIII 157:24-159:19].
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1 Kia also established that bulb repairs are covered during the 12-month adjustment period.
2 [Exh. 230.011; Exh. 231.011; III 369:2-3, 371:1-4; IV 657:4-15, 660:7-11]. Mr. Reyes
3 confirmed the existence of this coverage. [VI 104:18-22]. Similarly, Mr. Korenak took the
4 position that the replacement of a bulb can sometimes be a qualified repair. In fact, FrogData
5 included in the Submission RO 10581-A, which involved the replacement of a bulb. [Exh. J-
6 3.002, Count 24; Exh. R-263]. When asked to explain why FrogData considered this to be a
7 qualified repair order, Mr. Korenak initially questioned whether it had been included on
8 FrogData’s spreadsheet. [VIII 160:19-24]. After being assured that it had been [VIII 161:5-8],
9 Mr. Korenak testified that “the analyst chose to take the labor” because “there was an indicator
10 light that went on” and “there was a ticking sound and diagnostics were involved.” [VIII
11 161:17-25].
12

13
14 Kia also proved that batteries are covered by a three-year warranty. [Exh. 230.08; Exh.
15 231.08; I 59:9-60:10]. Accordingly, customer-pay repairs of brakes, bulbs and batteries fit
16 within the statutory definition of a qualified repair order, i.e., a repair order “for work that was
17 performed outside of the period of the manufacturer’s warranty and paid for by the customer, but
18 that would have been covered by a manufacturer’s warranty if the work had been required and
19 performed during the period of warranty.” Veh. Code § 3065.2(j).
20

21 However, the statute also provides that the following “shall be omitted in calculating the
22 retail labor rate”: charges arising from “Routine maintenance, including, but not limited to, the
23 replacement of bulbs, fluids, filters, batteries, and belts **that are not provided in the course of,**
24 **and related to, a repair.**” Veh. Code § 3065.2(c)(3) (emphasis added).

25 Mr. Nardini testified that a number of the brake, bulb, and battery repairs would have or
26 could have been covered by the applicable Kia warranty in circumstances on the same basis that
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1 Mr. Korenak explained FrogData’s inclusion of RO 10581-A – i.e., the customer complained of
2 unusual noises and there were diagnostics involved. [See, e.g., II 176:24-177:20, 189:10-191:9,
3 193:22-194:6, 198:19-200:24]. On cross-examination, however, Mr. Nardini conceded that it
4 was questionable whether certain of the items should be included in light of the statutory
5 exclusion of routine maintenance. [IV 638:2-10, 644:15-24, 650:3-17, 669:20-670:1, 676:13-16,
6 684:7-14].
7

8 At the hearing, Kia stipulated to the removal of six of the brake repairs that it had added
9 to its calculation on Ex. J-6.004-.005. [IV 608:22-23]. Kia now stipulates to the removal of the
10 remainder of the brake, bulb, and battery repairs challenged by Putnam Kia on Ex. J-7.007.
11

12 **IV. CALCULATION OF PROTESTANT’S RETAIL LABOR RATE**

13 In light of Kia’s stipulation to remove brakes, bulbs and batteries from the calculation,
14 and Putnam Kia’s changes of position during the hearing as to whether certain repair orders
15 included in its original calculation should be excluded, Kia submits that Putnam Kia’s retail
16 labor rate should be recalculated based on the 29 repair orders submitted by Putnam Kia in
17 support of its original Submission, with the exception of RO 10298-A, which Putnam Kia has
18 conceded is not qualified. For purposes of this calculation, Kia will stipulate that the remaining
19 28 repair orders are “qualified repair orders.” Kia submits that this is a fair starting point for the
20 calculation since Putnam Kia took the position in its Submission that these repair orders were
21 qualified.
22

23 In addition, RO 10246-B and RO 10152-B should be included in the calculation because
24 they were included in the original 90-day set of 538 repair orders and, for the reasons discussed
25 above, they are qualified repair orders
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1 Kia is submitting, as Exhibit A to its brief, a chart listing the 30 repair orders included in
2 its calculation as well as the sold hours and actual hours relating to each repair. While there are
3 30 repair orders, Kia has listed 27 total repairs because (a) two of the repair orders, RO 10180
4 and RO 10529, each have two lines that are included in the calculation, for a total of 32 line
5 items; and (b) there are five instances where a line item on one repair order is the diagnosis and a
6 line item on another repair order is the actual repair (“**Split Repair Orders**”). Kia has combined
7 the Split Repair Orders as a single repair for calculating the number of hours and the charges
8 involved in the diagnosis and repair
9

10 On 16 of the repair orders, which contain 17 of the 27 repairs, Kia has simply transposed
11 the sold hours and actual hours contained on the relevant line of the repair order. These 17
12 repairs are as follows:

- 13 RO 10133-A [Exh. R-204.001];
- 14 RO 10165-B (Exh. R-249.001-002);
- 15 RO 10346-A [Exh. R-212.001];
- 16 RO 10352-A [Exh. R-254.001];
- 17 RO 10404-A [Exh. R-255.001];
- 18 RO 10415-A [Exh. R-256.001];
- 19 RO 10454-A [Exh. R-258.001];
- 20 RO 10486-A [Exh. R-259.001];
- 21 RO 10529-A [Exh. R-260.001];
- 22 RO 10529-B [Exh. R-260.002];
- 23 RO 10534-B [Exh. R-261.001-.002];
- 24 RO 10571-A [Exh. R-244.001];
- 25 RO 10581-A [Exh. R-263.001];

1 RO 10590-D [Exh. R-265.004];
2 RO 10591-A [Exh. R-266.001];
3 RO 10671-A [Exh. R-267.001]; and
4 RO 10631-F [Exh. R-214.003].

5 Five of the remaining 10 repairs are on Split Repair Orders. Kia has calculated the
6 charges, sold hours, and actual hours on these repairs as follows:

7
8 RO 10148-U contains a diagnosis concerning an airbag without a repair. The customer
9 was charged \$88.00 for the diagnosis, and the service advisor entered .20 sold hours but no
10 actual technician hours. [Exh. R-242.002]. A diagnosis cannot be performed in zero hours.
11 [163:14-16]. RO 10148 does, however, contain .42 actual hours of “ISP” time attributable to the
12 air pressure test, which Mr. Reyes testified should take no time or very, very minimal time.
13 [Exh. R-242.005, bottom of page; VII 76:8-10]. RO 10180-A is the repair related to the
14 diagnosis. [Exh. 250.001]. The customer was charged \$88.00 for the repair, and the service
15 advisor entered .20 sold hours, but the technician recorded .85 actual hours. [*Id.*] So the total
16 charges listed on Exhibit A for this diagnosis and repair are \$176.00 (\$88.00 plus \$88.00), and
17 the total actual hours are 1.27 (.85 for the repair plus .42 for the diagnosis).

18
19 RO 10153-A contains a diagnosis concerning power windows. [Exh. R-10153.001]. The
20 customer was charged \$132; the service advisor entered .30 sold hours; and the technician
21 recorded .98 actual hours. [*Id.*] RO 10246-B contains the repair resulting from that diagnosis.
22 [Exh. R-271.001; VIII 151:23-152:7-16]. Putnam Kia did not charge the customer any
23 additional amount for the repair and the technician did not assign any actual hours to Line B.
24 [Exh. R-271.001]. A repair, however, cannot be performed in zero hours. RO 10246 contains
25 .55 ISP hours attributed to the air pressure check. [Ex. R-271.002]. Accordingly, on Exhibit A
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1 Kia has listed charges of \$132 and actual hours of 1.53 (.98 plus .55) for this diagnosis and
2 repair.

3 RO 10158-A was a diagnosis concerning a “shifting lock.” [Exh. R-205.001]. The
4 customer was charged \$250.00; the service advisor entered .50 sold hours; and the technician
5 recorded 3.29 actual hours. [Id.] RO 10300-A is the repair related to this diagnosis. [Exh. R-
6 253.001; VII 69:6-72:9]. The customer was charged \$440.00 for the repair; the service advisor
7 entered 1.00 sold hours; but there are no actual technician hours recorded for the repair on Line
8 A. [Exh. R-253.001]. When asked how there could be no actual time recorded for this repair,
9 Rad Reyes pointed to the 2.56 hours of ISP time recorded on Line B for the tire pressure check.-
10 [Id.; VII 71:22-72:24]. Mr. Reyes testified that the 2.56 “presumably would be for this repair.”
11 [VII 72:12-13]. Accordingly, on Exhibit A Kia has listed \$690 (\$250 plus \$440) and 5.85 (3.29
12 hours plus 2.56 hours) for this diagnosis and repair.
13
14

15 RO 10152-B is a diagnosis of a fuel door switch issue. [Exh. R-272.002]. The technician
16 spent .28 actual hours on the diagnosis (recorded on Line B itself as ISP time), although the
17 service advisor did not enter any “sold hours” and the customer was not charged for the
18 diagnosis time on this repair order. [Id.] RO 10183-A is the repair of the fuel door switch
19 following the diagnosis. [Exh. R-208.001; VIII 153:17-25]. The customer was charged \$176.00;
20 the service advisor entered .30 sold hours; and the technician spent .43 actual hours on the repair.
21 Accordingly, Kia has entered on Exhibit A charges of \$176.00 and actual hours of .71 (.28 plus
22 .43) for the diagnosis and repair.
23

24 RO 10553-A is the diagnosis of a tailgate door handle issue. [Exh. R-262.001]. The
25 customer was charged \$250.00; the service advisor entered .50 sold hours; and the technician
26 recorded .72 actual hours. [Id.] RO 10585-A is the repair of the tailgate issue. [Exh. R-
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1 264.001). The customer was charged \$132.00; the service advisor entered .30 sold hours; and
2 the service technicians recorded .26 actual hours. [*Id.*] Accordingly, on Exhibit A Kia has listed
3 total charges of \$382 (\$250 plus \$132) and total actual hours of .98 (.72 plus .26) for the
4 diagnosis and repair.

5
6 On two of the remaining five repairs, the actual hours recorded on the specific repair line
7 of the repair order did not include related diagnostic time. On the other three remaining repairs,
8 the specific repair line failed to contain any actual hours or contained a nonsensical amount of
9 actual hours. The actual hours for these five repairs on Exhibit A is explained below.

10 RO 10426-D involved the replacement of a clock spring. [Exh. R-257.003]. The
11 customer was charged \$220.00; the service advisor entered .40 sold hours; and there are .10
12 technician actual hours recorded on Line D. [*Id.*] The .10 actual hours, however, do not include
13 the diagnosis that led to this repair, which is on Line B of the repair order. [See Exh. R-257.003,
14 “Version 3” under Line D, “06JAN22” entry: “Replaced Clock Spring See Line B for
15 Diagnosis”]. The actual diagnosis time on Line B, for which the customer was not separately
16 charged, is .12 (recorded as ISP time). [Exh. R-257.001, Line B]. Accordingly, Kia has entered
17 on Exhibit A total charges of \$220.00 and total actual hours of .22 (.10 plus .12) for the diagnosis
18 and repair.
19

20 RO 10291-F states that “during inspection, found rear side valve cover gasket leak” and
21 that the customer authorized the recommended repair. [Exh. R-252.004]. The customer was
22 charged \$264.00; the service advisor entered .60 sold hours; and there are .23 actual technician
23 hours recorded on Line F. [*Id.*] These actual hours, however, do not include the inspection time,
24 which is recorded on Line A as ISP time of .58. [Exh. R-252.001]. Accordingly, Kia has
25 entered actual hours of .81 (.23 and .58) on Exhibit A.
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1 RO 10180-B is a power window repair. [Exh. R-250.001]. The service advisor entered
2 1.10 sold hours but the actual hours recorded are only .02. [Id.] Actual technician hours of .02
3 (72 seconds) for a repair with 1.10 sold hours is nonsensical. Accordingly, Kia has used the sold
4 hours figure in its calculation on Exhibit A.

5 RO 10191-C is the installation of a new starter. [Exh. R-251.006]. The customer was
6 charged \$264.00; the service advisor entered .60 sold hours; but there are only .02 actual hours
7 recorded for this repair. [Id.]. Because .02 hours (72 seconds) is nonsensical, Kia has used the
8 sold hours of .60 on Exhibit A.

9 RO 10320-A is the installation of a driver's side outer door handle. [Exh. R-243.001].
10 The customer was charged \$125.00; the service advisor entered .30 sold hours; but there are no
11 actual technician hours recorded on Line A. [Id.] The actual hours entry is nonsensical, because
12 obviously the work could not have been done in zero hours. Accordingly, Kia has used the sold
13 hours of .30 on Exhibit A.

14 As shown on the last page of Exhibit A attached to this brief, the resulting labor rate is
15 \$262.93 per hour (\$9326.02 divided by 35.47 actual hours). Kia (pursuant to its practice)
16 proposes to round this amount up to \$262.95 per hour and pay that rate to Putnam Kia on a going
17 forward basis. The rate of \$262.95 per hour is close to the \$268.90 rate that Kia granted to
18 Putnam Kia in its Notification and has been paying Putnam Kia since May 28, 2022, and it
19 would remain the highest labor rate paid to any Kia dealer in California.

20 **ARGUMENT**

21 **THE STATUTE SAYS "HOURS," NOT "SOLD HOURS"**

22 In enacting section 3065.2, the Legislature declared that its intent was to provide
23 "reasonable" compensation for dealers at "retail" rates. The Legislature noted that existing
24

1 California law required manufacturers “to provide **reasonable** reimbursement” for warranty
2 work, but did not have a “clear procedure to determine whether a reimbursement is **reasonable**”
3 and did not “require franchisees to be rate reimbursed for warranty work at a **retail** rate.”
4 Assem. Bill No. 179 (2019-2020 Reg. Sess.) sec. 1(c) (emphasis added). Accordingly, the
5 Legislature declared, in pertinent part: “It is the intent of this act to ensure that new motor
6 vehicle dealers are treated fairly by their franchisors [and] that dealers are **reasonably**
7 compensated for performing warranty repairs on behalf of their franchisors.” *Id.*, sec. 1(i)
8 (emphasis added).
9

10 Consistent with this declared purpose, the statute provides a method to “determine a
11 **reasonable** warranty reimbursement schedule.” Veh. Code § 3065.2(a) (emphasis added). It
12 permits the dealer to submit a range of “qualified” repair orders and “calculate its retail labor rate
13 by determining the total charges for labor from the qualified repair orders submitted and dividing
14 that amount by the total number of hours that generated those charges.” Veh. Code §
15 3065.2(a)(2).
16

17 Using actual hours conforms to the plain language of the statute, provides a specific,
18 objective measure for calculation, and is supported by well-established principles of statutory
19 construction. Requiring the franchisor to accept the dealer’s “sold hours” or selected time
20 allowances adds language that is not in the statute, provides no objective standard by which to
21 evaluate a dealer’s request, and is contrary to established principles of statutory construction.
22

23 The California Supreme Court has summarized the rules of statutory construction as
24 follows:

25 Our fundamental task in construing a statute is to ascertain the intent of the
26 lawmakers so as to effectuate the purpose of the statute. We begin by examining
27 the statutory language, giving the words their usual and ordinary meaning. *If*
28 *there is no ambiguity, then we presume the lawmakers meant what they said, and*

1 *the plain meaning of the language governs.* If, however, the statutory terms are
2 ambiguous, then we may resort to extrinsic sources, including the ostensible
3 objects to be achieved and the legislative history. In such circumstances, we
4 “select the construction that comports most closely with the apparent intent of
5 the Legislature, with a view to promoting rather than defeating the general
6 purpose of the statute, and *avoid an interpretation that would lead to absurd
7 consequences.*”

8 *Day v. City of Fontana* (2001) 25 Cal.4th 268, 272 [105 Cal.Rptr.2d 457] (emphasis added)
9 (citations omitted). In addition, the words of the statute “should be construed in their statutory
10 context” and “should be given the same meaning throughout a code unless the Legislature has
11 indicated otherwise.” *Hassan v. Mercury Am. River Hosp.* (2003) 31 Cal.4th 709, 715 [3
12 Cal.Rptr.3d 623].

13 Here, the plain meaning of “the hours that generated those charges” is the hours that
14 generated those charges – not some other unit of time that the dealership decides to “sell” to the
15 customer. The dictionary definition of an “hour” is “the 24th part of a day; 60 minutes.”
16 (Merriam Webster’s Collegiate Dictionary (10th ed. 1997) p. 561.)

17 Since the word “hours” is unambiguous, there is no need to resort to “extrinsic sources.”
18 Nevertheless, extrinsic sources – i.e., the legislative history, statutory purpose, and avoidance of
19 absurd consequences – reinforce the use of the plain meaning of “hours.” In contrast, Putnam
20 Kia’s interpretation would rewrite the statute, ignore the legislative history, and lead to absurd
21 consequences – starting with Putnam Kia receiving \$200 more per hour than any other Kia
22 dealer in California and more than twice the California *average* labor rate..

23 First of all, Putnam Kia asks the Board to amend section 3065.2(a)(2) by changing the
24 word “hours” to “time allowances” and/or “sold hours.” California, however, follows the “plain
25 meaning” rule: i.e., if the plain, commonsense meaning of a statute’s language is unambiguous,
26 the plain meaning controls. As the California Supreme Court has stated:
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1 “It is well settled that the proper goal of statutory construction ‘is to ascertain and
2 effectuate legislative intent, giving the words of the statute their usual and
3 ordinary meaning. When the statutory language is clear, we need go no further.’”

4 *Satele v. Super. Ct.* (2019) 7 Cal.5th 852, 858 [249 Cal.Rptr.3d 562] (citations omitted). Here,
5 the statutory language is clear – an hour is an hour, not some other unit of time constructed by
6 the dealer.

7 Second, Putnam Kia’s interpretation would not give the same terms the same meaning
8 throughout the Vehicle Code. In nearby statutory sections that address warranty reimbursement,
9 the Legislature specifically used the term “time allowances” or a similar term when it intended to
10 refer to time allowances rather than hours. *See* Veh. Code § 3065(a)(1) (requiring the franchisor
11 to use reasonable “time allowances” and not to unreasonably deny a dealer’s request for
12 modification of a “time allowance” or a request for “an additional time allowance”); Veh. Code §
13 3065(a)(2) (restricting the franchisor’s ability to reduce “the allowed time”).
14

15 In section 3065.2(a)(2), however, the Legislature did not say that the charges should be
16 divided by the total “time allowances” that generated those charges, or refer to time allowances
17 at all – it referred to the “hours” that generated the charges. Throughout the Vehicle Code, the
18 word “hours” is used in its ordinary meaning of 60 minutes. *See, e.g.,* Veh. Code § 38335
19 (headlamp requirements for “one-half hour after sunset to one-half hour before sunrise”); Veh.
20 Code § 23309(a) (issuing agency “shall maintain a customer service telephone line that shall be
21 operated by a live person for at least 35 hours per week between the hours of 8 a.m. to 5 p.m.”);
22 Veh. Code § 42001.7(b) (persons convicted of littering or dumping waste on roads or highways
23 shall be required “to pick up litter or clean up graffiti for not less than eight hours”). Moreover,
24 when the Legislature intended that an “hour” in the Vehicle Code mean something other than 60
25 minutes, it specifically so provided. *See* Veh. Code 15250.1(b) (for the purpose of meeting
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1 requirement of “15 hours” of behind-the-wheel training, “every 50 minutes of driving time is
2 deemed to be an hour of training.”).

3 Third, the legislative history of section 3065.2 not only demonstrates that the Legislature
4 knew how to refer to time allowances when it intended to do so, but that it deliberately decided
5 not to use the term “time allowances” in section 3065.2(a)(2). In 2018, the Legislature passed a
6 bill that would have included the phrase “time allowances” in section 3065.2(a)(2). Under that
7 bill, a dealer’s retail labor rate would have been calculated by “determining the total charges for
8 labor from the qualified orders submitted and dividing that amount by the total number of hours
9 allowed pursuant to the franchisor’s time allowances that would be used to compensate the
10 franchisee for the same work, had it been performed under warranty.” Assem. Bill No. 2107
11 (2017-2018 Reg. Sess.) sec. 12, § 3065.2(a)(2)(A) (emphasis added). Following the Governor’s
12 veto of that bill, the Legislature removed any reference to time allowances and instead referred to
13 “the total number of hours that generated those charges.”
14
15

16 Putnam Kia is effectively asking the Board to override the Governor’s veto and amend
17 the statute enacted by the Legislature by reinserting the words “time allowances” into its
18 language. That is a task for the Legislature, not the Board. “Where the same word or phrase
19 might have been used in the same connection in different portions of a statute but a different
20 word or phrase having different meaning is used instead, the construction employing that
21 different meaning is to be favored.” *Playboy Enters., Inc. v. Super. Ct.* (1984) 154 Cal.App.3d
22 14, 21 [201 Cal.Rptr. 207] cited with approval in *Briggs v. Eden Council for Hope &*
23 *Opportunity* (1999) 19 Cal.4th 1106, 1117 [81 Cal.Rptr.2d 471] (“Where different words or
24 phrases are used in the same connection in different parts of a statute, it is presumed the
25 Legislature intended a different meaning.”). The Legislature might have used “time allowances”
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1 in section 3065.2(a)(2), as it did in section 3065. It did not do so. It said “hours,” which has a
2 different, unambiguous meaning.

3 Fourth – and perhaps most importantly – under Putnam Kia’s interpretation of the statute
4 there is no objective standard by which to evaluate a dealer’s request for an increase. The dealer
5 can “sell” whatever number of hours it chooses to maximize the hourly rate that the
6 manufacturer has to pay for warranty repairs, regardless of the number of hours it actually takes
7 to do the repair. Adopting this interpretation of the statute would effectively permit the dealer to
8 dictate the hourly rate that the manufacturer must pay, however divorced from the actual number
9 of hours that generate the charges and from competitive retail rates.
10

11 Finally, adopting Putnam Kia’s interpretation would lead to absurd consequences and be
12 inconsistent with the declared statutory purpose of providing “reasonable” compensation.
13 Putnam Kia’s demand for \$447.52 per hour is simply not a reasonable, competitive retail rate, as
14 demonstrated by the evidence concerning the rates paid to other California dealers.
15

16 The cost of warranty repairs is obviously baked into the prices that manufacturers
17 charge for their vehicles. Therefore, the cost of unreasonable warranty labor rates will ultimately
18 be borne by the consumer. Putnam Kia should not be permitted to inflate its labor rate by using
19 sold hours that are, in the aggregate, far less than the actual hours that generate the charges for its
20 repairs.
21

22 CONCLUSION

23 For all of the foregoing reasons, Kia respectfully submits that the Board should overrule
24 Putnam Kia’s protest and determine that Putnam Kia’s retail labor rate is \$262.93.
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Exhibit A

Ex. No.	RO # Line #	VIN	Repair Count	Labor Charges	Sold Hours	Actual Hours	Actual Hours Labor Rate
R-247.001	10133 A	KNDJX3A56F7125922	1	\$ 646.00	1.4	1.42	\$ 454.93
R-242.001;.005 R-250.001	10148 U 10180 A	KNDPC3A21C7248762	1	\$ 176.00	0.4	1.27	\$ 138.58
R-250.001	10180 B	KNDPC3A21C7248762	1	\$ 484.00	1.1	1.1	\$ 440.00
R-248.001 R-271.001-002	10153 A 10246 B	5XXGR4A68FG491097	1	\$ 132.00	0.3	1.53	\$ 86.27
R-205.001 R-253.001	10158 A 10300 A	5XYPK4A50GG034387	1	\$ 690.00	1.5	5.85	\$ 117.95
R-249.001	10165 B	KNDPB3A20B7097690	1	\$ 176.00	0.4	0.8	\$ 220.00
R-208.001 R-272.001	10183 A 10152 B	5XYKWDA29DG377151	1	\$ 176.00	0.3	0.71	\$ 247.89

Exhibit A

Ex. No.	RO # Line #	VIN	Repair Count	Labor Charges	Sold Hours	Actual Hours	Actual Hours Labor Rate
R-251.006	10191 C	KNAGM4A71B5137845	1	\$ 264.00	0.6	0.6	\$ 440.00
R-252.004	10291 F	5XYKT3A10CG263287	1	\$ 264.00	0.6	0.81	\$ 325.93
R-243.001	10320 A	KNDJE723567240747	1	\$ 125.00	0.3	0.3	\$ 416.67
R-212.001	10346 A	KNAGM4AD0D5047482	1	\$ 660.00	1.5	3.42	\$ 192.98
R-254.001	10352 A	KNDJT2A22A7050267	1	\$ 382.00	1.3	1.23	\$ 310.57
R-255.001	10404 A	KNDJP3A54H7441824	1	\$ 401.19	0.8	0.97	\$ 413.60
R-256.001	10415 A	5XYPK4A57GG063434	1	\$ 395.00	1	2.92	\$ 135.27
R-257.001;.003	10426 D	KNAGM4AD0F5087578	1	\$ 220.00	0.4	0.22	\$ 1,000.00

Exhibit A

Ex. No.	RO # Line #	VIN	Repair Count	Labor Charges	Sold Hours	Actual Hours	Actual Hours Labor Rate
R-258.001	10454 A	KNDCE3LC5H5052552	1	\$ 100.00	0.2	1.02	\$ 98.04
R-259.001	10486 A	KNALN4D70E5145107	1	\$ 660.00	1.5	0.65	\$ 1,015.38
R-260.001	10529 A	5XYPGDA3XGG060527	1	\$ 440.00	1	1.84	\$ 239.13
R-260.002	10529 B	5XYPGDA3XGG060527	1	\$ 200.00	0.4	0.61	\$ 327.87
R-261.002	10534 B	KNDPN3AC5H7229321	1	\$ 220.00	0.5	0.5	\$ 440.00
R-262.001 R-264.001	10553 A 10585 A	KNDMG4C7XC6446414	1	\$ 382.00	0.8	0.98	\$ 389.80
R-244.001	10571 A	KNDJX3AEXG7016476	1	\$ 608.31	1.3	2.87	\$ 211.95
R-263.001	10581 A	KNDPB3AC3F7756943	1	\$ 125.00	0.5	0.92	\$ 135.87

Exhibit A

Ex. No.	RO # Line #	VIN	Repair Count	Labor Charges	Sold Hours	Actual Hours	Actual Hours Labor Rate
R-265.004	10590 E	5XYPGDA50GG145202	1	\$ 431.52	1	0.99	\$ 435.88
R-266.001	10591 A	KNAFU4A21A5103838	1	\$ 264.00	0.6	1.14	\$ 231.58
R-267.001	10617 A	KNDJX3A57E7737268	1	\$ 132.00	0.3	0.37	\$ 356.76
R-214.003	10631 F	KNAFW4A37D5656730	1	\$ 572.00	1.3	0.43	\$ 1,330.23
Totals			27	\$9,326.02	21.3	35.47	\$ 262.93

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ATTESTATION

Counsel for Respondent hereby attests to the factual accuracy and legal sufficiency of the matters set forth above.

Date: May 14, 2024



Jonathan R. Stulberg
John J. Sullivan

Attorneys for Respondent
KIA AMERICA, Inc.

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PROOF OF SERVICE

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is Hogan Lovells US LLP, 1999 Avenue of the Stars, Suite 1400, Los Angeles, California 90067. On May 14, 2024, I served a copy of the within document(s):

RESPONDENT’S POST-HEARING BRIEF

- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, the United States mail at Los Angeles, California addressed as set forth below.
- by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
- by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

Gavin M. Hughes	Attorneys for Protestant
Robert A. Mayville, Jr	
LAW OFFICES OF GAVIN M. HUGHES	KM3G, INC. d/b/a PUTNAM KIA OF
3436 American River Drive, Suite 10	BURLINGAME
Sacramento, CA 95864	
Telephone: (916) 900-8022	
gavin@hughesdealerlaw.com	
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New Motor Vehicle Board	
1507 – 21st Street, Suite 330	
Sacramento, CA 95811	
Telephone: (916) 445-1888	
Email: nmvp@nmvp.ca.gov	

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. Executed on May 14, 2024, at Los Angeles, California.

/s/ Jonathan Stulberg
Jonathan Stulberg

VIA EMAIL

New Motor Vehicle Board

Received
5-14-24

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FILED

New Motor Vehicle Board

Date: 5-14-24

By: RPP

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KIA AMERICA, INC.

12 **THE STATE OF CALIFORNIA**
13 **NEW MOTOR VEHICLE BOARD**

15 KM3G, INC. d/b/a PUTNAM KIA OF
16 BURLINGAME)

Protestant,)

PROTEST NO. PR-2803-22

17 vs.)

18 KIA AMERICA, INC,)

19 Respondent.)

RESPONDENT'S PROPOSED DECISION

1 **PROCEDURAL BACKGROUND**

2 **Statement of the Case**

3
4 1. On September 15, 2022, KM3G Inc., d/b/a Putnam Kia of Burlingame (“**Putnam**
5 **Kia**” or “**Protestant**”) filed this protest against Kia America, Inc. (“**Kia**,” “**KUS**” or
6 “**Respondent**”) with the New Motor Vehicle Board (the “**Board**”) pursuant to Vehicle Code
7 section 3065.4.

8 2. The protest alleged that Kia failed to comply with section 3065.2¹ in responding to
9 Putnam Kia’s March 22, 2022 request for an increase in the compensation that Kia pays Putnam Kia
10 for warranty labor.

11 3. A hearing on the merits was held before Administrative Law Judge Diana
12 Woodward Hagle on October 9-13, 2023 and February 12-15, 2024.

13 4. After the parties made their post-hearing filings, the matter was submitted on June
14 25, 2024.

15 **Parties and Counsel**

16 5. Protestant is a new motor vehicle dealer, it is duly licensed as a vehicle dealer by the
17 State of California, and it is located at 2 California Drive, Burlingame, California 94010.
18 [Stipulation of Facts, dated Oct. 6, 2023 (hereinafter “**Stip.**”), ¶ 1]. Protestant is a “franchisee” of
19 Kia within the meaning of sections 331.1, 3065.2, and 3065.4.

20 6. Protestant is represented by the Law Offices of Gavin M. Hughes, by Gavin M.
21 Hughes, Esquire and Robert A. Mayville, Junior, Esquire, at 3436 American River Drive, Suite 10,
22 Sacramento, CA 95864.

23 7. Respondent is the U.S. distributor of Kia motor vehicles, parts and accessories and is
24 duly licensed by the State of California as a distributor. [Stip. ¶ 2]. Respondent is a “franchisor” of
25 Protestant within the meaning of sections 331.2, 3065.2, and 3065.2.
26
27
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¹ This reference and all subsequent references to any “section” are references to the Vehicle Code.

1 any element of that notification, including, but not limited to, its grounds for contesting the retail
2 labor rate, retail parts rate, or both, without justification. A franchisor shall not deny the
3 franchisee's submission for the retail labor rate, retail parts rate, or both, under subdivision (a)."
4 [Veh. Code § 3065(d)(1)].

5 17. "If the franchisor determines from the franchisee's set of repair orders submitted
6 pursuant to subdivisions (a) and (b) that the franchisee's submission for a retail labor rate or retail
7 parts rate is substantially higher than the franchisee's current warranty rate, the franchisor may
8 request, in writing, within 30 days after the franchisor's receipt of the notice submitted pursuant to
9 subdivision (a), all repair orders closed within the period of 30 days immediately preceding, or 30
10 days immediately following, the set of repair orders submitted by the franchisee. If the franchisee
11 fails to provide the supplemental repair orders, all time periods under this section shall be
12 suspended until the supplemental repair orders are provided." [Veh. Code § 3065.2(d)(4)].

13 18. "If the franchisor requests supplemental repair orders pursuant to paragraphs (1) and
14 (4) [of section 3065(d)], the franchisor may calculate a proposed adjusted retail labor rate or retail
15 parts rate, as applicable, based upon any set of the qualified repair orders submitted by the
16 franchisee, if the franchisor complies with all the following requirements:

17 "(A) The franchisor uses the same requirements applicable to the franchisee's
18 submission pursuant to paragraph (1) of subdivision (a).

19 "(B) The franchisor uses the formula to calculate retail labor rate or retail parts as
20 provided in subdivision (a).

21 "(C) The franchisor omits all charges in the repair orders as provided in subdivision
22 (c)." [Vehicle Code § 3065.2(d)(5)].

23
24 19. "In the event the franchisor provides all of the information required by paragraph (1)
25 [of section 3065.2(d)] to the franchisee, and the franchisee does not agree with the adjusted rate
26 proposed by the franchisor, the franchisor shall pay the franchisee at the franchisor's proposed
27 adjusted retail labor rate or retail parts rate until a decision is rendered upon any board protest filed
28

1 pursuant to Section 3065.4 or until any mutual resolution between the franchisor and the franchisee.
2 The franchisor’s proposed adjusted rate shall be deemed to be effective as of the 30th day after the
3 franchisor’s receipt of the notice submitted pursuant to subdivision (a).” [Veh. Code §
4 3065.2(d)(3)].

5
6 **Provisions Applicable to Franchisee Protests**

7 20. “If a franchisor fails to comply with Section 3065.2, or if a franchisee disputes the
8 franchisor’s proposed adjusted retail labor rate or retail parts rate, the franchisee may file a protest
9 with the board for a declaration of the franchisee’s retail labor rate or retail parts rate. In any protest
10 under this section, the franchisor shall have the burden of proof that it complied with Section 3065.2
11 and that the franchisee’s determination of the retail labor rate or retail parts rate is materially
12 inaccurate or fraudulent.” [Veh. Code § 3065.4(a)].

13 21. “Upon a decision by the board pursuant to subdivision (a), the board may determine
14 the difference between the amount the franchisee has actually received from the franchisor for
15 fulfilled warranty obligations and the amount that the franchisee would have received if the
16 franchisor had compensated the franchisee at the retail labor rate and retail parts rate as determined
17 in accordance with Section 3065.2 for a period beginning 30 days after receipt of the franchisee’s
18 initial submission under subdivision (a) of Section 3065.2. . . .” [Veh. Code § 3065.4(b)].

19 **ISSUES PRESENTED**

20 22. Was the labor rate of \$447.52 per hour requested by Putnam Kia materially
21 inaccurate? [Veh. Code § 3065.2(d)(1), 3065.4(a)].

22 23. May a franchisee establish its retail labor rate by dividing the total charges on its
23 qualified repair orders by the number of “sold hours” that its service advisors decide to assign to the
24 particular repairs, regardless of the number of actual technician hours that generated the charges?
25 [Veh. Code § 3065.2(a)(2)].
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1 24. May a franchisor rebut a franchisee’s requested labor rate by dividing the total
2 charges on the qualified repair orders submitted by the franchisee by the actual number of
3 technician hours that generated the charges? [Veh. Code § 3065.2(a)(2)].

4 25. Did Kia’s response to Putnam Kia’s request for a labor rate of \$447.52 per hour
5 comply with section 3065.2? [Veh. Code §§ 3065(d)(1), (4), (5), 3065.4(a)].

6 26. What, if anything, is the difference between the \$268.90 per hour amount that Kia
7 has been paying Putnam Kia for warranty labor since May 28, 2022, and the amount that Putnam
8 Kia would have received if Kia had compensated Putnam Kia at the retail labor rate as determined
9 in accordance with Section 3065.2 for a period beginning 30 days after Kia’s receipt of Putnam
10 Kia’s initial submission under subdivision (a) of Section 3065.2? [Veh. Code § 3065.4(b)].

11 **BURDEN OF PROOF**

12 27. The franchisor has the burden of proving that it complied with Section 3065.2 and
13 that the franchisee’s determination of the retail labor rate was materially inaccurate or fraudulent.
14 [Veh. Code § 3065.4(a)].

15 28. The standard is preponderance of the evidence, which is met if the proposition is
16 more likely to be true than not true – i.e., if there is a greater than 50% chance that the proposition is
17 true.
18

19 **SUMMARY OF PROTESTANT’S CONTENTIONS**

20 29. Putnam Kia contends that (i) its requested labor rate increase followed the
21 calculation specified in section 3065.2(a)(2) by dividing the charges on the qualified repair orders
22 by the number of “sold” hours that Putnam Kia’s service advisors entered on the qualified repair
23 orders [I 30:11-16]; (ii) it uses the time allowances in the Kia Labor Times Standards (“LTS”) to
24 determine the number of sold hours, which will result in its receiving the same compensation from
25 Kia for a warranty repair as it receives for the same customer-pay, warranty-like repair [I 32:4-11];
26 (iii) it is “impossible to price a job based on actual hours” because California law requires a dealer
27 to provide up-front pricing and that the actual hours are unknown before a repair job begins [I
28

1 31:15-21]; (iv) it is irrelevant that the requested \$447.52 rate is more than \$200 higher than the
2 labor rate of any other Kia dealer in California [I 30:7-10]; and (v) Kia’s response to Putnam Kia’s
3 request, in which it denied the request for \$447.52 per hour and calculated an adjusted rate of
4 \$268.90 per hour [Exh. J-6.001-.005] did not comply with the statute because Kia used actual hours
5 and included certain repairs orders in its calculation related to brakes, bulbs, and batteries that
6 Putnam Kia contends are excluded under section 3065.2(c)(3).

7
8 **SUMMARY OF RESPONDENT’S CONTENTIONS**

9 30. Kia contends that Protestant’s requested rate of \$447.52 was materially inaccurate
10 because (i) it was based on “sold” hours that were, in the aggregate, far less than the actual number
11 of hours that generated the charges; (ii) it generated an hourly rate that is more than \$200 higher
12 than the labor rate of any other Kia dealer in California, contrary to the statutory intent to provide a
13 “reasonable warranty reimbursement schedule” and contrary to the rule that a statute should not be
14 interpreted to produce “absurd” results; and (iii) the calculation included at least one repair order
15 that Putnam Kia admits was not qualified, omitted at least two others that were qualified repair
16 orders, and is suspect due to various errors and inconsistencies shown at the hearing.

17 31. Kia contends that using actual hours to calculate Putnam Kia’s retail labor rate
18 applies the plain language of section 3065.2(a)(2) and is the only interpretation that provides an
19 objective standard. Putnam Kia’s interpretation, on the other hand, allows a franchisee to pick and
20 choose a labor time guide – published, unpublished, commercial, or factory – or any combination
21 thereof, or no labor time guide at all, or simply use a service advisor’s discretion concerning the
22 number of “sold” hours. Section 3065.2 does not mention “sold” hours or time allowances (unlike
23 nearby sections of the Vehicle Code) and does not provide any guidance for what is or is not an
24 acceptable time guide or an acceptable number of “sold” hours. And giving franchisees unilateral
25 authority to determine the number of “sold” hours will inevitably lead to franchisee manipulation of
26 sold hours to yield the highest possible statutory rate. Kia contends that is exactly what has
27 occurred here: following the enactment of section 3065.2, Putnam Kia’s principal more than
28

1 doubled the hourly rates at all of his dealerships while reducing the number of “sold” hours for the
2 same warranty-like customer-pay repairs previously performed.

3 32. Kia further contends that Putnam Kia’s argument that it is requesting the “same”
4 compensation as it receives for warranty-like customer-pay repairs is flawed because (i) Putnam Kia
5 did not in fact use a Kia LTS time allowance on 74% of the repair orders that it submitted in support
6 of its request; (ii) Kia will reimburse dealers for the actual technician time that involves a difficult
7 diagnosis, which applies to several of the repair orders submitted by Putnam Kia; and (iii) the
8 statute is not concerned with how the dealer “prices” the repair: the statutory formula simply
9 requires that the total charges be divided by the hours that generated the charges.

10 33. Kia further contends that it complied with section 3065.2: it served a notification that
11 contested the requested rate on the ground that it was materially inaccurate, and it provided an
12 explanation of its reasons for the allegation, evidence substantiating its position, its calculations,
13 and a proposed adjusted retail labor rate, which it has been paying Putnam Kia during the pendency
14 of this proceeding. While Kia contends that it had a reasonable basis for including repair orders
15 involving brakes, bulbs, and batteries in its calculations, it is now stipulating to withdraw those
16 repair orders and proposes that Putnam Kia’s rate be calculated using the actual hours on the repair
17 orders in Putnam Kia’s original submission, except for one repair order that both sides agree is not
18 qualified and adding two repair orders that Kia contends are qualified.

19
20 **IDENTIFICATION OF WITNESSES**

21 **A. Respondent’s Witnesses**

22 34. Respondent called as its principal witness James Nardini, who is Kia’s National
23 Manager of Warranty, Technical and Service Operations. [I 44:13-15, 45:11-15]. Among his other
24 responsibilities, he oversees the Warranty Operations Team at Kia. [I 46:1-6.] He has been
25 working for franchisors in the automotive industry since 1989 in the areas of customer service and
26 warranty oversight and management. [I 48:8-49:10]. Prior to his employment with Kia in 2021, he
27 served as the Warranty Manager for Porsche Cars North America, working with its 180 dealers in
28 the U.S. regarding all warranty related concerns. [I 48:24-49:10, 50:11-14]. He has extensive

1 experience in warranty-related matters and in reviewing and auditing dealer repair orders. [I 49:11-
2 50:10]. He is familiar with the information contained on dealer repair orders and has reviewed the
3 thousands of such repair orders during his career. [II 147:24-148:7]. Mr. Nardini testified
4 concerning coverage under Kia’s warranty, Kia’s warranty policies and procedures, and Kia’s
5 position with respect to the accuracy of Putnam Kia’s request for a labor rate increase.

6 35. Respondent also relied on testimony from Protestant’s four witnesses identified
7 below. It was agreed between the parties that Respondent could elicit testimony for its case-in-chief
8 during cross-examination of Protestant’s witnesses rather than calling Protestant’s witnesses and
9 then having them testify a second time during Protestant’s presentation of its case. [See V 919:20-
10 25].

11 Protestant’s Witnesses

12 36. Kent Putnam is the dealer principal for Putnam Kia and “about 15” other franchises
13 in the Putnam Automotive Group, most of which are located on the peninsula south of San
14 Francisco. [VII 121:3-17]. Mr. Putnam identified his employer as “Putnam Automotive.” [VII
15 121:22-23]. He is not involved in the day-to-day operations of Putnam Kia. [VII 124:2-4]. Mr.
16 Putnam testified concerning the establishment of retail labor rates at his franchised dealerships.

17 37. Rad Reyes is the service manager of both Putnam Kia and Putnam Toyota, another
18 dealership in the Putnam Automotive Group. [V 924:23-25]. Mr. Reyes has been with the Putnam
19 Automotive Group for 29 years. [V 923:16-19]. He became the service manager of Putnam Kia at
20 the start of the franchise in September 2021. [V 924:14-18]. Mr. Reyes testified concerning
21 Putnam Kia’s policies and procedures with respect to the pricing of customer-pay service work and
22 with respect to a number of the repair orders submitted by Putnam Kia in support of its request for a
23 labor rate increase.

24 38. Andrey Kamenetsky is employed by Putnam Automotive, Inc. [IX 108:5-14]. Since
25 April or May of 2020, he has been the Group Operations Manager of the dealerships in the Putnam
26 Automotive Group. [IX 10:18-11:2]. In 2022, he added the title of CFO. [IX 11:6-13]. From 1993
27 through 2003, he held sales and sales manager positions at Putnam Toyota. [IX 7:15-8:13, 9:1-
28

1 10:3]. In 2003, he became a partner in, and the General Manager of, Putnam Toyota. [IX 10:4-7].
2 One of Mr. Kamenetsky’s responsibilities as Group Operations Manager is the submission of
3 warranty labor rate and parts rate increase requests to the franchisors of the dealerships in the
4 Putnam Automotive Group. [IX 11:14-12:6]. He had no prior experience in making warranty rate
5 requests prior to becoming the Group Operations Manager. [IX 109:24-110:2]. In addition, he had
6 no involvement with, or knowledge of, the pricing of service labor before getting involved in
7 warranty increase submissions. [IX 18:11-21]. He has no experience in a dealership service
8 department or in the writing of repair orders. [IX 109:17-23]. Mr. Kamenetsky testified concerning
9 the Putnam Auto Group’s establishment of retail labor rates, submission of requests for warranty
10 rate increases, and Putnam Kia’s position with respect to “qualified repair orders” and Kia’s
11 response to Putnam Kia’s request for a labor rate increase.

12 39. Jeff Korenak is the “Director of Implementation” for FrogData, LLC. [VIII 10:24-
13 11:1]. FrogData is a “big data platform company” that provides “an analytic tool for car
14 dealerships.” [VIII 10:3-22]. All of FrogData’s customers are car dealers. [VIII 131:1-3]. Mr.
15 Korenak oversees a “team of analysts” in the United States and India, does client relations, and
16 submits labor rate request increases to franchisors on behalf of franchisees. [VIII 11:2-10]. While
17 he has been employed in the auto industry on-and-off since the 1980’s, none of his prior positions
18 involved the type of data analysis performed at FrogData. [See VIII 7:17-8:18, 9:2-10:2, 129:16-
19 130:22]. Mr. Korenak testified concerning FrogData’s procedures, FrogData’s submission to Kia in
20 support of Putnam Kia’s request for a labor rate increase, and his experience with other rate increase
21 submissions in California and elsewhere.

22 STIPULATIONS OF THE PARTIES

23
24 40. Prior to the hearing, the parties entered into a 25-paragraph Stipulation of Facts
25 (previously defined herein as the “**Stip.**”). A few of the facts stipulated to are set forth immediately
26 below. Others will be referred to in the Findings of Fact below.

27 41. Putnam Kia and Kia are parties to a Kia Dealer Sales and Service Agreement (the
28 “**Kia Dealer Agreement**”), fully executed as of September 1, 2021. [Stip. ¶ 3].

1 42. Putnam Kia is part of the Putnam Auto Group, a group of dealerships operating
2 franchises in Burlingame, California and nearby areas. [Stip ¶ 4].

3 43. Pursuant to the Kia Dealer Agreement, Putnam Kia commenced Kia dealership
4 operations on or about September 1, 2021. [Stip. ¶ 5].

5
6 **FINDINGS OF FACT**

7 **A. Definition of Terms and Related Information**

8 44. A “Repair Order” or “RO” is “[a] document generated by a dealership’s service
9 department in connection with the repair or diagnosis of a customer’s motor vehicle, reflecting *inter*
10 *alia* the repair services performed on the motor vehicle and the related charges.” [Glossary, dated
11 October 6, 2023 (the “Glossary”), p. 3].

12 45. “Warranty-like customer pay repair order” is another term sometimes used for a
13 “qualified repair order.” [Glossary, p. 3]. The definition of a “qualified repair order” is in section
14 3065.2(j). See paragraph 10 above.

15 46. Repair Orders may have multiple “Lines” listing separate repairs. To indicate the
16 relevant line being discussed, this Proposed Decision will cite Repair Orders in the form “RO
17 [number]-[Line designation], as in “RO 10133-A.”

18 47. “Sold hours” or “S/HRS” means “[t]he time allowance for a repair that Putnam Kia
19 records on the Accounting Copy of the Repair Order.” [Glossary, p. 3.] Sold hours are entered on
20 the Repair Order under the heading “S/HRS”. [See *id.*; see, e.g., Exh. R-205.001].²

21 48. “Actual hours” or “A/HRS” means “[t]he amount of time spent by a service
22 technician to perform the repair [or diagnosis] on a motor vehicle.” [Glossary, p. 2; see, e.g., Exh.
23 R-205.001, Line A (recording 3.29 A/HRS for a diagnosis)]. Actual hours are entered on the Repair
24 Order under the heading “A/HRS.” [*Id.*]

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28 ² Respondent’s counsel was unfamiliar with the apparent convention in Board hearings to number the pages of exhibits with “.001, .002” etc. and instead numbered them “Page 1 of [total pages],” etc. Herein, Respondent will cite page 1 of a Respondent’s exhibit as “.001,” page 2 as “.002,” etc.

1 49. “Flat rate” is “[a] service technician payment method under which the technician is
2 paid for each repair based on a time allowance, regardless of how much time the technician ends of
3 spending on the repair.” [Glossary, p. 2].

4 50. “Straight time” means the actual hours spent by the technician. [V 937:25-938:1].

5 51. Most dealerships pay their technicians based on “flat rate” time, meaning the amount
6 of time allocated for the particular job in the flat rate labor time manual used by the dealership. [I
7 81:25-82:10].

8 52. A flat rate technician can be paid for more hours that the time the technician actually
9 works if the technician is efficient. [V 931:17-23, 933:6-17]. For example, if a technician takes .80
10 of an hour to complete a repair that has a flat rate of one hour, the technician still gets paid for one
11 hour for that repair. [I 84:4-10]. Thus, payment by flat rate incentivizes technicians to be efficient.
12 [I 84:11-15].

13 53. Mr. Nardini testified that, in his experience, technician efficiency on warranty repairs
14 is usually between 110 and 120%, meaning that technicians typically perform the work faster than
15 the manufacturer’s flat rate time allowances. [I 84:16-23; III 388:4-389:9].

16 54. The technicians at Putnam Kia are compensated on an hourly basis for whatever
17 number of hours they are present at the dealership. [V 927:21-928:2]. As of October 2023, Putnam
18 Kia had only one flat-rate technician. [V 929:12-13]. That technician was the only flat rate
19 technician at Putnam Kia because “He was the only one that was open to the idea to do it.” [V
20 933:1-5].

21 55. According to Mr. Reyes, technicians prefer to be compensated on straight time rather
22 than flat rate when they are “not very motivated, you know, they just kind of want to lay back and
23 get paid for the time they are there.” [V 939:10-18]. “But a technician that hustles and can
24 produce, you know, they are prone to want to be flat rate.” [V 939:18-20.]

25 **B. The Kia Vehicle Warranty**

26 56. Every new Kia vehicle comes with a warranty that covers parts and labor for specific
27 periods that are determined by months in service or miles in service. There are different coverage
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1 periods for different items, including but not limited to basic coverage, powertrain coverage, service
2 adjustment coverage, original equipment battery coverage, and emissions coverage. [I 51:4-16,
3 52:6-24; Exh. 230.04; Exh. 231.04].

4 57. The Kia warranty includes a “Service Adjustment” period of 12 months or 12,000
5 miles. [I 52:25-53:4; Ex 230.04; Ex 231.04]. During the Service Adjustment period, there is
6 warranty coverage for brakes and brake pads. [I 53:22-54:4]. Kia’s Warranty and Consumer
7 Information Manual for 2021 and 2022 provides: “Brake linings, including pads and shoes, and
8 clutch linings are warranted for 12 months/12,000 miles, whichever comes first, if they fail to
9 function properly during normal use.” [Exh. R-230.008; Exh. R-231.008; I 60:14-61:13].

10 58. Kia also covers the replacement of bulbs during the Service Adjustment period.
11 Kia’s Warranty and Consumer Information Manual for 2021 and 2022 provides: “Normal
12 maintenance items including . . . bulbs except HID bulbs are not warranted. However, as a matter
13 of policy, Kia will repair or replace such maintenance items of a new vehicle during the vehicle’s
14 initial ownership period, but only up to the first service interval of 12 month/12,000 miles,
15 whichever comes first.” [Exh. 230.011; Exh. 231.011; III 369:2-3; 371:1-4; IV 657:4-15]. Putnam
16 Kia’s service manager, Mr. Reyes, confirmed the existence of this coverage in response to a
17 question from Putnam Kia’s counsel. [VI 104:18-22 (“In a lot of cases, bulbs can be covered under
18 what they call an adjustment period, which is like – I believe it’s like a year or 12,000 miles,
19 something like that. So in that case, you know, sometimes bulbs would be under warranty, but for a
20 very limited time.”)].

21 59. The Kia warranty also includes battery coverage. Kia’s Warranty and Consumer
22 Information Manual for both 2021 and 2022 provides: “The original equipment battery is covered
23 by a limited warranty for a period of 36 months/36,000 miles. During 36 months/36,000 miles of
24 the warranty period, a defective battery will be replaced at no cost to you. Kia will cover
25 diagnostic, installation and replacement battery costs.” [Exh. 230.08; Exh. 231.08; I 59:9-60:10].

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1 **C. Kia Warranty Policies and Procedures**

2 60. The Kia Dealer Agreement obligates the dealer to perform warranty work on Kia
3 vehicles as presented to the dealer by the consumer. [I 65:15-66:7, 79:6-20; Exh. J-1.023, Sections
4 C.1 and C.3].

5 61. If the particular condition reported by the consumer is covered by the warranty and
6 corrected by the dealership, the dealer electronically files a warranty claim with Kia and Kia, after
7 validating the claim, will pay the claim, typically within 15 days. [I 66:9-67:2].

8 62. Kia generally pays for the dealer’s labor in performing a warranty repair by
9 multiplying the dealer’s warranty labor rate by the labor time allowed for the particular repair in the
10 Kia Labor Times Standards, or “LTS.” [I 67:25-68:15, II 335:1-4].

11 63. While the time allowances for repairs in Kia’s LTS generally include diagnostic
12 time, certain labor operations do allow separate diagnostic time. [II 373:1-6; III 488:11-17; IV
13 753:6-8; V 952:16-19].

14 64. A Kia dealer performing a warranty repair can receive compensation for diagnostic
15 time in addition to that provided in the LTS for certain difficult-to-diagnose conditions, including
16 electrical problems, provided that the dealer follows the procedures set forth in Kia’s Warranty
17 Bulletin 2020-17, entitled “Diagnostics and Additional Time Utilization.” [Exh. R-232; I 71:22-
18 73:13]. The bulletin refers to such requests for additional time as “XTT” time. [Exh. R-232.001.]

19 65. If the dealership follows the procedures set forth in Bulletin 2020-17, Kia will pay
20 the dealer for the actual time that the technician spends diagnosing the repair. [I 73:14-74:4.] Mr.
21 Nardini testified that Kia regularly grants applications for such additional diagnostic time.
22 [I 74:5-7].

23 **D. Kia’s Establishment and Modification of Warranty Labor Rates**

24 66. Kia establishes the initial warranty labor rate for a newly appointed dealer by having
25 the dealer do a market survey of competitors who sell brands that compete with Kia in the dealer’s
26 market and granting the newly appointed dealer a rate based on the average of the warranty rates of
27 those competing dealers in the dealer’s market. [I 87:23-88:5, 88:21-89:5; Exh. J-2.001].
28

1 67. Kia considers its competitors to be “mass market” brands that sell hundreds of
2 thousands of new vehicles per year, such as Ford, Chevrolet, Honda, Mazda, Kia and Toyota. [I
3 89:6-15]. These and other mass market brands are listed on the Kia market survey form. [See Exh.
4 J-2.001]. The form does not list luxury brands such as Porsche, Mercedes, and Audi. [*Id.*]
5 According to Mr. Nardini, who worked at Porsche from 2000 until 2021 and served as its Warranty
6 Manager, the labor rates charged by dealerships that sell luxury vehicles are typically much higher
7 than the labor rates of dealerships that sell mass market brands such as Kia. [I 90:3-14; see I 48:22-
8 50:14].

9 68. In order to complete the market survey, the Kia dealer must contact the dealerships
10 in its area that sell competing brands to find out their retail labor rates and warranty labor rates.
11 [Exh. J-2.001; V 819:20-820:18, 890:21-891:15, 894:24-895:3, 898:13-17]. Kia dealers are able to
12 obtain this information from the dealers of competing brands and regularly submit market survey
13 forms with such information upon the establishment of a new dealership. [V 898:18-23, 900:11-14].

14 69. Subsequent to the establishment of the initial rate, a Kia dealer can apply for an
15 increase by submitting a new market survey or by using the method prescribed by state statute. [II
16 764:21:765:10; IV 891:16-20, 894:15-20]. The record includes examples of Kia dealers in Putnam
17 Kia’s district who requested and received labor rate increases through the market survey method
18 subsequent to the enactment of section 3065.2. [P-116.001; III 764:21-765:10; IV 898:24-899:16;
19 P-116.004; II 768:19-22; IV 899:25-900:7].

20 **E. How Putnam Automotive Prices Customer-Pay Repairs**

21 70. In response to the enactment of section 3065.2, Kent Putnam made changes to the
22 way his dealerships price warranty-like customer pay repairs. [VII 141:7-14].

23 71. After the statute was enacted, Mr. Putnam raised the labor rates charged by his
24 dealerships for warranty-like customer pay repairs from a range of about \$220 to \$250 per hour to a
25 higher range of \$420 to \$460 per hour. [VII 141:24-142:2].

26 72. At the same time, Mr. Putnam reduced the number of hours that would be sold to
27 customers for the same warranty-like customer pay repairs previously performed. [VII 157:10-20]
28

1 73. Mr. Putnam acknowledged that his dealerships charge the \$420 to \$460 rate only for
2 repairs that would be included in the statutory calculation under section 3065.2. [VII 142:3-6,
3 145:12-14]. His dealerships' rates are lower for other types of repairs and service work. [VII
4 142:7-21, 152:21-153:7]. For example, Putnam Kia submitted RO 10581-A as a "qualified repair
5 order" but priced it as a routine maintenance item, not based on sold hours or an hourly rate. [VI
6 103:10-106:23]. The labor charge was \$125 and the actual technician hours were .92, resulting in
7 an actual hourly rate of \$135.87 (i.e., $\$125 \div .92 = \135.87). [Exh. R-263.001, Line A].

8 74. Mr. Kamenetsky provided a similar, and somewhat more detailed, account of the
9 Putnam Auto Group's increase in its warranty-like, customer pay hourly rate in response to the
10 enactment of section 3065.2. He testified that, prior to January 2020, Putnam Toyota's customer-
11 pay rate for warranty-like repairs was under \$200 per hour. [IX 113:21-114:3]

12 75. According to Mr. Kamenetsky, in January 2020, Putnam Toyota made its initial
13 increase request under section 3065.2, which raised its warranty labor rate to somewhere in the
14 \$220 to \$230 range. [IX 114:4-11, 115:19-24].

15 76. Subsequent to January 2020, the Putnam Automotive Group hired FrogData, which
16 initially made submissions that raised the dealerships' warranty labor rates to the low-to-mid \$300
17 range. [IX 115:25-116:7].

18 77. By the time of the hearing in February 2024, FrogData had made subsequent
19 requests for increases for the Putnam Automotive Group dealerships that raised their warranty labor
20 rates to the low-to-mid \$400 range. [IX 118:20-119:5].

21 78. In making these rate increases, the Putnam Automotive Group made no effort to
22 make its rates for warranty-like customer-pay work competitive with other dealerships. [IX 119:13-
23 17].

24 79. Mr. Putnam testified that, following the enactment of section 3065.2, Putnam
25 Automotive "did some basic math," and that "the price to the customer did not go up." Instead,
26 Putnam Automotive reduced the number of hours being "sold" to its customers. [VII 134:8-17,
27 136:15-19, 137:10-19, 155:11-12, 157:10-20].

28

1 80. Mr. Putnam testified that the reason for adopting the \$440 rate was that “we wanted
2 our pricing to be uniform so whoever the customer is pays the same.” [VII 135:14-20]. However,
3 Mr. Kamenetsky testified that there is no such uniform rate throughout the Putnam Automotive
4 Group dealerships. [IX 120:2-10].

5 81. In response to his counsel’s question whether he had a concern that using a \$440 an
6 hour customer-pay rate would drive customers away, Mr. Putnam testified that he did not and that
7 “of course, we mystery-shop our competitors to make sure we’re competitive.” [VII 138:11-17].
8 On cross-examination, however, he admitted that the mystery shopping is for maintenance type
9 work. [VII 145:15-18]. He further testified that he does not have any knowledge of what
10 surrounding Kia dealers are doing with respect to how they price jobs. [VII 138:15-21].

11 82. Moreover, Mr. Putnam testified at his deposition that in setting the range of \$420 to
12 \$460 per hour, he did not look at anything other than what his own dealerships were charging. [VII
13 144:15-24].

14 83. Putnam Kia does not tell its customers how many “sold” hours it is selling to them.
15 [V 963:14-16; IX 126:14-22].

16 84. Putnam Kia never tells its customers that it is charging them \$440 an hour. [VII
17 146:11-13, 147:3-6; IX 126:23-127:1; V 963:9-13].

18 85. While the customer receives a “customer copy” of the repair order, that document
19 does not state the number of hours that have been “sold” to the customer, the number of actual
20 hours that were involved in the repair, or the hourly rate that the customer is being charged. [VII
21 146:14-147:2].

22 **F. Establishment of Putnam Kia’s Initial Warranty Labor Rate**

23 86. When Putnam Kia opened on September 1, 2021, its initial warranty labor rate was
24 \$225.30 per hour, based on the average warranty labor rate of the competing brands shown on the
25 market survey form filled out by Mr. Kamenetsky and dated August 25, 2021. [Exh. J-2.001; IX
26 28:11-29:2; V 892:15-22; VII 160:22-161:19].
27
28

1 87. All of the dealerships whose rates Mr. Kamenetsky filled in on the form were
2 Putnam Automotive Group dealerships. [VII 161:20-23; IX 30:22-31:2]. Mr. Kamenetsky made no
3 effort to contact any dealerships outside of the Putnam Auto Group for competitive labor rates. [IX
4 148:15-19, 151:14-152:7].

5 88. While the market survey form had a space to fill in retail and warranty labor rates for
6 a Hyundai dealership, Mr. Kamenetsky did not make any effort to contact a competitive Hyundai
7 franchise. [IX 152:8-12]. When asked the reason for not doing so, Mr. Kamenetsky responded “I
8 really don’t know.” [IX 152:13-22].

9 89. As of August 25, 2021, the average of the warranty rates being paid to the Putnam
10 Automotive Group dealerships that Mr. Kamenetsky listed on the market survey form was \$225.27.
11 [Exh. J-2.001; VII 161:24-162:2].

12 **G. Putnam Kia’s March 22, 2022 Request for \$447.52**

13 90. On March 22, 2022 – less than seven months after the \$225.30 per hour rate was
14 established – Putnam Kia submitted a request for a rate of \$447.52 per hour, accompanied by a
15 spreadsheet and accounting copies of repair orders (the “**Submission**”). [Exh. J-3.001-.003; Stip. ¶¶
16 7-9). The Submission was prepared by FrogData. [VII 127:2-13, 129:4-11].

17 91. As of the time of the hearing in February 2024, FrogData had made 31 warranty
18 increase submissions for Putnam Automotive since the enactment of section 3065.2. [VIII 131:4-
19 18]. Putnam Kia provided and paid for personal counsel to represent Mr. Korenak at his deposition
20 in this matter. [VIII 131:22-132:6, 132:19-24].

21 92. The FrogData employee who actually created the Submission was Robin Brantley.
22 [VIII 13:22-14:4, 14:18-15:9]. Ms. Brantley did not testify at the hearing. Moreover, Kia contends
23 that her identity and the fact that she created the Submission was not disclosed to Kia prior to the
24 hearing. [VIII 50:13-16].

25 93. In order to prepare the submission, FrogData’s data team in India extracted repair
26 orders from Putnam Kia’s dealer management system (“DMS”). [VIII 132:25-133:24]. FrogData
27 extracted repair orders opened by Putnam Kia from October 1, 2021 through January 31, 2022.
28

1 [VIII 58:4-16]. FrogData had access to a larger range of repair orders but did not extract or
2 consider them. [VIII 58:20-59:23; IX 36:22-37:3].

3 94. Mr. Korenak testified that Putnam Kia is an “extremely low volume dealership with
4 respect to repair orders” and, accordingly, he agreed that the Putnam Kia submission did not present
5 the problem of having massive amounts of data to extract or review. [VIII 136:2-7].

6 95. The repair orders that FrogData reviewed and from which it selected the “qualified
7 repair orders” on which the requested labor rate was based covered the 90-day period from
8 November 3, 2021 to January 31, 2022. [Exh. J-3.001; VIII 23:23-25:6]. The review covered the
9 repair order range beginning with RO 10099 and ending with RO 10636, for a total of 538 repair
10 orders. [Exh. J-3.001; VIII 136:21-24].

11 96. The FrogData employee who made the determination of which of the 538 repair
12 orders were qualified repair orders was Robin Brantley. [VIII 31:16-18, 47:23-25]. Mr. Korenak
13 did not personally review the 538 repair orders to determine which were qualified repair orders.
14 [VIII 31:19-32:4, 123:12-124:24].

15 97. FrogData deemed 29 of the 538 repair orders to be “qualified repair orders” under
16 section 3065.2 and deemed a total of 31 repairs to be qualified repairs. [Exh. J-3.002-.003; VIII
17 137:3-6]. FrogData applied yellow highlighting on the repair orders to indicate which repairs it
18 considered to be qualified and which lines of the repair orders contained the qualified repairs. [VIII
19 149:24-150:5].

20 98. Mr. Korenak testified that his understanding of a “qualified repair order” under the
21 California statute was a repair that the “manufacturer would have paid for . . . while the car was in
22 warranty,” and he agreed that in order to determine that the first thing one has to do is look at the
23 manufacturer’s warranty. [VIII 135:7-15].

24 99. Mr. Korenak admitted, however, that in performing its analysis, FrogData did not
25 even have a copy of Kia’s warranty. [VIII 135:16-19]. Mr. Kamenetsky, the Putnam employee
26 who interfaces with FrogData, testified that he would “certainly” have the expected FrogData to
27 have a copy of the Kia warranty in order to determine whether a repair would have been covered by
28 the Kia warranty if the repair had taken place during the period of warranty. [IX 129:8-21].

1 100. Mr. Korenak testified that FrogData simply records whatever number of sold hours
2 the dealer puts on the qualified repair order, and that if the dealer put .10 sold hours on every repair
3 order, that is the number FrogData would use in making its calculations. [VIII 169:20-170:2].

4 101. FrogData does not check to see whether the number of sold hours recorded by the
5 dealer appears to be reasonable for the work that has been performed. [VIII 170:3-6, 170:19-
6 171:2]. The actual number of sold hours and dollars charged are irrelevant to FrogData. [VIII 46:4-
7 16].

8 102. FrogData does not do anything to determine whether the sold hours on the repair
9 order come from a manufacturer’s time guide or from some other commercial time guide. [VIII
10 170:10-18].

11 103. FrogData does not include in its analysis any repair order where, even if labor is
12 actually performed by a technician in what would otherwise be a qualified repair order, the dealer
13 does not place any sold hours on the repair order. [VIII 156:10-157:15].

14 104. FrogData made its calculations under subsection (1)(B) of Vehicle Code section
15 3065.2, which requires the use of all qualified repair orders within a 90 consecutive day period,
16 rather than under subsection (1)(A), which requires the use of 100 consecutive qualified repair
17 orders, because FrogData found only 29 qualified repair orders within a 90-day period. [VIII 43:13-
18 44:7].

19 105. FrogData calculated the requested \$447.52 labor rate based on 31 repairs contained
20 on 29 repair orders opened between November 8, 2021 and January 31, 2022. [Exh. J-3.002-003].
21 FrogData divided (i) the aggregate amount of \$9,577.01 that the repair orders indicated were
22 charged for the labor on the 31 repairs by (ii) 21.4, the aggregate number of “sold hours” that
23 Putnam Kia’s service advisors entered on those 31 repairs. [Exh. J-3.003; VIII 39:17-40:10; see II
24 116:13-118:11; III 555:2-5].

25 **H. Kia’s Request for Additional Repair Orders**

26 106. By letter dated April 20, 2022, Kia requested 30 days of additional repair orders
27 pursuant to section 3065.2(d)(4). [Exh. J-4.001; Stip. ¶¶ 13-14.]
28

1 107. In response to Kia’s request for an additional 30 days of repair orders, FrogData
2 went into Putnam Kia’s DMS and pulled the repair orders opened during the 30 days immediately
3 following the repair orders that had previously been submitted, beginning on February 1, 2022.
4 [VIII 61:17-62:9, 67:9-11, 67:23-68:5].

5 108. The additional repair orders were provided to Kia by letter dated April 27, 2022.
6 [Exh. J-5.001; Stip. ¶¶ 15-16]. The additional repair orders covered the 30-day period from
7 February 1, 2022 through March 2, 2022, and consisted of the sequential repair orders numbered
8 10637 through 10845. [Stip. ¶ 17]

9
10 **I. Kia’s Response to Putnam Kia’s Request**

11 109. By letter dated May 26, 2022 (the “**Notification**”), Kia denied the requested labor
12 rate of \$447.52 and granted an increase to a proposed adjusted retail labor rate of \$268.90. [Exh. J-
13 6.003; Stip. ¶¶ 18-19]. Kia also granted Putnam Kia’s requested parts rate increase. [Exh. J-6.003;
14 VII 130:3-5]

15 110. In the Notification, Kia took the position that the requested labor rate of \$447.52 per
16 hour was “materially inaccurate” for three reasons. [Exh. J-6.001].

17 111. First, Kia pointed out that in calculating the labor rate, Putnam Kia used “sold hours”
18 (which the letter referred to as “book times”) that were “in the aggregate, far less than the actual
19 number of hours that generated the charges on the repair orders.” [Exh. J-6.001-.002; IV 588:22-25
20 (“book times” means the same as “sold hours”). As “one example,” Kia referred to RO 10158-A,
21 where Putnam Kia calculated its hourly rate for a \$250 job by using .50 when the actual number of
22 hours that generated the charge to the customer was 3.29 hours. [Exh. J-6.002; see Exh. R-205.001,
23 Line A.]

24 112. Second, Kia took the position that Putnam Kia had failed to include in its
25 calculations certain repairs involving brakes, batteries and bulbs which Kia contended would have
26 been covered by the Kia warranty if the work had been performed during the period of coverage for
27 those particular items. [Exh. J-6.002]. Kia added these items, highlighted in red, on the
28

1 accompanying spreadsheet with the note “Qualifying repair that dealer did not include in
2 calculations.” [Exh. J-6.004-.005; II 174:11-23].

3 113. Third, Kia pointed out that Putnam Kia had included in its calculations RO 10298,
4 on which Putnam Kia had billed a customer \$250 for .10 sold hours, resulting in an hourly rate of
5 \$2,500, and the repair order did not reflect that any qualifying repair had been performed and in fact
6 indicated that the customer had declined service. Accordingly, Kia stated that it was removing this
7 repair order from its calculations. [Exh. J-6.002; see Exh. R-211.001].

8 114. Kia further stated that it believed that the \$447.52 rate was “potentially fraudulent”
9 and did not represent “reasonable” compensation under section 3065(a) because it was more than
10 \$200 per hour higher than the highest rate paid by Kia to any other Kia dealer in California and
11 approximately \$200 per hour higher than the hourly retail rates charged by luxury dealerships in
12 Putnam Kia’s own market. [Exh. J-6.002].

13 115. Kia calculated the adjusted labor rate of \$268.90 using the 90 days of repair orders
14 starting on November 12, 2021, and ending on February 10, 2022 (the “**Adjusted 90-Day Period**”).
15 [Exh. J-6.003; Stip. ¶ 20.]

16 116. Kia calculated the adjusted rate by dividing the charges on 37 repair orders written
17 during the Adjusted 90-Day Period by the “actual hours” shown for those repairs on those repair
18 orders. [Stip. ¶ 21]. This calculation was shown on the spreadsheet attached to the Notification on
19 which Kia listed the repair orders included in its calculation and divided the total charges of
20 \$11,815.08 by 43.94, the total number of actual hours, resulting in a rate of \$268.89. [J-6.004-.005].
21 Kia rounded this rate up to \$268.90. [See Exh. J-6.003].

22 117. Kia began paying Putnam Kia \$268.90 per hour for warranty labor on May 28, 2022,
23 and has been paying Putnam Kia for warranty labor at that rate since that time. [Stip. ¶ 23.]

24 **J. Putnam Kia's Reply**

25 118. In a letter dated June 15, 2022 written by Mr. Kamenetsky (the “**Reply**”), Kia
26 responded to the Notification and took the positions (among others) that: (1) the “hours” referred to
27 in section 3065.2(a)(2) are “sold hours,” not actual hours; (2) in calculating the adjusted labor rate,
28

1 Kia had included a total of 13 repair orders involving brakes, bulbs, and/or battery repairs that
2 should have been excluded pursuant to section 3065.2(c)(3) as “routine maintenance” items; and (3)
3 one of the repair orders in Kia’s calculation that was added as a result of adjusting the 90-day
4 period, RO 10638, was “a diagnosis without resulting repair” and therefore was not a qualifying
5 repair order. [Exh. J-7.001, .003, .007-.008; IX 91:2-8].

6 119. In the Reply, Putnam Kia “agreed that the vendor FrogData should not have included
7 [RO 10298] in our submission” because “it did not result in a repair, similarly to our contention that
8 KUS should remove/withdraw **RO 10638** which KUS added into our submission.” [Exh. J-7.009-
9 .010 (emphasis in original)].

10 **K. Material Inaccuracy: Sold Hours vs. Actual Hours**

11 120. Kia contends that it was entitled to propose an adjusted rate based on the actual
12 technician hours that generated the charges because (1) the plain language of section 3065.2(a)(2)
13 says “hours,” not “sold hours”; and (2) permitting a dealer to increase its hourly rate by allowing it
14 to use whatever number of “sold” hours it chooses, no matter how unreasonable that number or how
15 different from the actual hours expended, would result in there being no objective standard for the
16 number of hours that could be used in the denominator of the statutory calculation.

17 121. Putnam Kia counters Kia’s argument by claiming that its “sold” hours are reasonable
18 time allowances because, it contends, Putnam Kia uses the Kia LTS time allowances to determine
19 sold hours. [I 30:19-23]. However, there is nothing in section 3065.2 that refers to using the
20 manufacturer’s time allowances or any other time allowances, and the statute provides no standard
21 to govern a dealer’s choice of time allowances.

22 122. Kent Putnam confirmed his understanding that the statute does not require Putnam
23 Kia to use any time guide at all. [VII 147:20-22]. That would mean that a dealership could “sell”
24 any number of hours that it chooses in order to maximize the resulting hourly rate – which is what
25 Mr. Putnam did when he decreased the number of sold hours and increased the hourly rates at his
26 dealerships in response to the enactment of section 3065.2. [VII 155:11-12 (“[W]e didn’t raise the
27 price to our customers. We just changed how we calculated it.”)]
28

1 123. Mr. Putnam testified that, even though the Kia LTS for the repair performed on RO
2 10571-A was 2.4 hours [Exh. P-120.016], and the actual hours that Putnam Kia’s technicians
3 worked on the repair were 2.87 hours [Exh. R-244.001, Line A], Kia had to accept the 1.3 “sold”
4 hours that Putnam Kia’s service advisor placed on the repair order notwithstanding its effect of
5 increasing the hourly rate. [VII 148:5-19, 150:11-18, 150:22-151:19].

6 124. Moreover, Putnam Kia’s argument that its “sold” hours are reasonable because it
7 uses the Kia LTS times is contradicted by the fact, demonstrated below, that Putnam Kia did not use
8 an LTS time allowance on 74% of the qualified repair orders in its Submission.

9 125. Messrs. Reyes, Putnam and Kamenetsy all testified that, for any warranty-like
10 customer pay repair, it is Putnam Kia’s policy that the service advisor must log into the Kia LTS
11 system, look up the operation code and the warranty time allowance for the repair, and multiply that
12 time allowance by \$440. [V 943:15-944:2; VI 17:10-21; IX 98:11-13; see VII 12:19-13:5].

13 126. However, there is, in fact, no written policy to that effect. [IX 127:7-14]. And Mr.
14 Kamenetsky testified that the “policy” is “just” a “guideline.” [IX 127:15-18].

15 127. In addition, Mr. Kamenetsky and Mr. Reyes testified that the service advisors who
16 create the repair orders have discretion to charge a number of sold hours different from the Kia LTS
17 time allowance. [IX 128:7-15; VI 185:18-20, 210:6-9; see VI 176:11-14].

18 128. Mr. Reyes admitted that there are many instances where the Putnam Kia service
19 advisors do not use the LTS time allowance in assigning “sold” hours to a repair order. [VI 165:10-
20 15; VII 82:2-5].

21 129. Mr. Reyes conceded that Putnam Kia did not use the applicable Kia LTS time
22 allowance on the following 15 repairs of the 31 that were used in the Submission:

23 RO 10133-A [Exh. R-204.001; also Exh. R-247.001; V 1003:8-15, 1004:25-1005:13;
24 VI 20:11-23].

25 RO 10165-B [Exh. R-249.001-.002; VI 24:12-26:4, 211:3-18].

26 RO 10180-A [Exh. R-250.001; VI 185:6-20].
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- RO 10180-B [Exh. R-250.001; VI 27:7-29:22].
- RO 10320-A [Exh. R-243.001; VI 51:14-52:22].
- RO 10346-A [Exh. R-212.001; VII 16:16-18:14].
- RO 10352-A [Exh. R-254.001; VI 55:13-24].
- RO 10404-A [Exh. R-255.001; VI 56:9-57:15].
- RO 10415-A [Exh. R-256.001; VI 58:17-19, 60:10-61:16].
- RO 10426-D [Exh. R-257.003; VI 71:15-18, 73:3-20].
- RO 10486-A [Exh. R-259.001; VI 84:14-86:4].
- RO 10529-B [Exh. R-260.002; VI 89:2-6, 90:25-91:8, 91:16-18].
- RO 10571-A [Exh. R-244.001; VI 99:5-7, 100:5-101:6].
- RO 10581-A [Exh. R-263.001; VI 101:24-25, 107:11-16].
- RO 10631-F [Exh. R-214.003; VI 114:15-16, 118:16-119:10].

130. Further, Putnam Kia concedes that it did not use a Kia LTS time allowance on any of the “qualified repair orders” in its Submission that contained a diagnosis without a repair. [VI 46:1-13]. That is because the Kia LTS generally does not provide a separate time allowance for a diagnosis without a repair. [III 373:1-7, 488:11-17; IV 753:6-8]. There were seven (7) such diagnostic repair orders in the Submission: RO 10148-U [Exh. R-242.002]; RO 10153-A [Exh. R-248.001]; RO 10158-A [Exh. R-205.001]; RO 10298-A [Exh. R-211.001]; RO #10454-A [Exh. R-258.001]; RO 10553-A [Exh. R-263.001]; RO 10617-A [Exh. R-267.001].

131. Thus, as shown in the two preceding paragraphs, Putnam Kia conceded that 22 of the 31 qualified repairs it submitted did not use an LTS time allowance.

1 132. In addition, Kia established that an additional qualified repair from the Submission
2 did not use the correct LTS time allowance. On RO 10591-A, the Putnam Kia’s service advisor
3 entered .60 sold hours. [Exh. R-266.001]. The LTS, however, allowed .80 hours for this repair. [V
4 843:14-844:11; Exh. R-270.001].

5 133. Thus, on 23 of 31 – or 74% – of the repair order lines on which Putnam Kia’s
6 requested labor rate was based, Putnam Kia did not in fact use an applicable LTS time allowance.

7 134. Similarly, Putnam Kia’s pricing of diagnostic repair orders did not follow its
8 purported policy. Mr. Reyes testified that Putnam Kia charges a “flat fee” for diagnostic time rather
9 than an amount based on sold hours. [V 951:22-24]. He further testified that the policy was to enter
10 .50 “sold” hours and charge a flat fee of \$250. [V 951:25-952:7; VI 98:24-99:1].

11 135. However, the number of sold hours on five of the seven diagnostic repair orders that
12 were used as “qualified repair orders” in the Submission was less than .50. RO 10148-U [Exh. R-
13 242.002 (.20 sold hours)]; RO 10153-A [Exh. R-248.001 (.30 sold hours); VI 196:13-21; VII 84:8-
14 85:9]; RO 10298-A [Exh. R-211.001 (.10 sold hours)]; RO 10454-A [Exh. R-258.001 (.20 sold
15 hours); VI 220:4-9, 221:6-16; V 955:7-19]; RO 10617-A [Exh. R-267.001 (.30 sold hours)].

16 136. Moreover, as shown below, these small amounts of “sold” hours assigned to
17 diagnostic work typically bore no relationship to the far greater number of actual hours spent on
18 these diagnoses. And Putnam Kia’s contention that its use of “sold” hours means that it will receive
19 the same compensation from Kia and its retail customers for the same work is inaccurate because
20 Kia will pay its dealers for the actual time expended on a difficult diagnosis if the dealer follows the
21 XTT procedure. [Exh. R-232; I 70:25-74:7].

22 137. RO 10180-A involved diagnostic work on which the technician spent 3.29 hours but
23 Putnam Kia assigned .50 “sold” hours on the repair order. [Exh. R-205.001; II 145:12-20, 151:3-8,
24 152:17-154:3]. If RO 10180-A had been a warranty repair rather than a customer-pay diagnosis, it
25 would have qualified for the payment of the actual time spent by the technician under Kia’s XTT
26 policy. [II 154:7-23, 155:7-156:17.]

27 138. RO 10346-A involved diagnostic work and the repair of a safety locking mechanism.
28 [Exh. R-212.001; II 164:13-165:17]. Putnam Kia assigned 1.50 sold hours but the technician spent

1 3.42 hours on the diagnosis. [Exh. R-212.001; II 165:1-8]. If RO 10346-A had been a warranty
2 repair rather than a customer-pay repair, it would have qualified for the payment of the actual time
3 spent by the technician on diagnosis under Kia’s XTT policy. [II 166:2-17.]

4 139. RO 10153-A involved diagnostic work concerning non-functioning power windows
5 on which the technician spent .98 hours but Putnam Kia assigned only .30 sold hours. [Exh. R-
6 248.001; II 231:2-232:16]. If RO 10153-A had been a warranty repair rather than a customer-pay
7 diagnosis, it would have qualified for the payment of the actual time spent by the technician on
8 diagnosis under Kia’s XTT policy. [II 232:17-233:6].

9 140. RO 10454-A involved diagnostic work concerning a customer’s complaint that “a
10 hybrid warning light or check engine light is on.” [Exh. R-258.001; II 236:4-16.] The technician
11 spent 1.02 hours on the diagnosis but Putnam Kia assigned only .20 sold hours. [Exh. R-258.001; II
12 237:19-25]. If RO 10454-A had been a warranty repair rather than a customer-pay diagnosis, the
13 work would have qualified to be paid for actual hours under Kia’s XTT policy. [II 238:4-15].

14 141. RO 10415-A involved diagnostic work and a repair related to the customer’s
15 complaint that the vehicle would not start. [Exh. R-256.001; II 244:2-22]. The technician spent
16 2.92 hours on the diagnosis and repair but Putnam Kia assigned only 1.00 sold hours. [Exh. R-
17 256.001, Line A; II 245:1-5]. If RO 10415-A had been a warranty repair rather than a customer-pay
18 repair, the work would have qualified Putnam Kia to be paid for the actual hours worked by the
19 technician under Kia’s XTT policy. [II 245:24-246:17; III 537:21-538:3, 538:18-539:1].

20 142. RO 10591-A involved diagnostic work concerning a “check engine light” and
21 vehicle noises upon starting. [Exh. R-266.001; II 251:9-16.] The technician spent 1.14 hours on the
22 diagnosis but Putnam Kia assigned only .60 sold hours. If RO 10591-A had been a warranty repair
23 rather than a customer-pay diagnosis, the work would have qualified for compensation for the actual
24 hours spent under Kia’s XTT policy. [II 252:18-253:20].

25 143. Despite the availability of the XTT procedure, Putnam Kia has never requested XTT
26 time on a warranty repair. [V 957:20-958:1; VII 22:18-23:1]. Mr. Kamenetsky testified that he was
27 unaware that there was a procedure for requesting additional labor time on a warranty repair [IX
28 128:16-23], and Mr. Reyes testified that he was “not entirely familiar” with XTT time. [VII 21:25-

1 22:4]. However, Putnam Kia’s unfamiliarity with the availability of additional time does not
2 counter the point that a dealer can obtain additional warranty compensation from Kia for a difficult
3 diagnosis when a car is in warranty, and the availability of this “straight time” further undermines
4 Putnam Kia’s argument that using “sold” hours means that it will receive the same compensation
5 from Kia as from a consumer.

6 144. Putnam Kia contends that it cannot use actual hours to “price” a repair because it
7 must give the customer an estimate before it begins the work. [I 31:15-21]. But the section
8 3065.2(a)(2) calculation is not based on how a dealership “prices” a repair; it simply provides that,
9 in calculating the dealership’s retail labor rate, the franchisee shall divide the “total charges” by “the
10 total number of hours that generated those charges.” [Veh. Code § 3065.2(a)(2)].

11 145. In addition, Putnam Kia’s argument about having to estimate the price up-front is
12 overstated. Mr. Kamenetsky admitted that, while a dealer must give a customer an estimate of the
13 cost of repairs before performing work, if the technician starts work and sees that the vehicle is
14 going to require more work than originally estimated, the service department can contact the
15 customer, make a change in the estimate and seek the customer’s authorization to do the work at an
16 increased estimate. [IX 125:21-126:4; Cal. Code Regs., tit. 16, § 3354(a) (procedure for increasing
17 original estimate)]. Mr. Reyes testified that if the customer authorizes the price of a repair job, but
18 it turns out that the job costs more, “we would then call the customer and say that there is – you
19 know, a different price.” [V 966:5-22]. Mr. Reyes admitted that it is not inconvenient to contact
20 the customer if Putnam Kia has underestimated the price of a repair job. [VI 165:5-9].

21 **L. Material Inaccuracy: Competitive Labor Rates**

22 146. The huge disparity between Putnam Kia’s requested rate of \$447.52 per hour and the
23 labor rates of other new motor vehicle dealers supports Kia’s argument that Putnam Kia’s use of
24 “sold hours” results in a materially inaccurate rate that is not a “reasonable warranty reimbursement
25 schedule” under section 3065.2(a).
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1 147. As of March 2022, when Putnam Kia submitted its request to be paid \$447.52 per
2 hour, the average warranty labor rate that Kia was paying to dealers in California was \$183 per
3 hour. [II 107:1-9.]

4 148. As of the time of the hearing in October 2023, there was no Kia dealer in the United
5 States receiving a warranty labor rate of over \$300 per hour, much less \$400 per hour. [II 105: 21-
6 106:7.]

7 149. Putnam Kia is located in Kia's District 4 in California, which covers San Jose
8 northward to Marin County, including the San Francisco Bay area and Silicon Valley. [II 107:16-
9 18, 109:22-110:3].

10 150. As of the time of the hearing in October 2023, the average warranty labor rate that
11 Kia was paying to dealers in District 4 was approximately \$199 per hour, which was one of the
12 higher average district rates in the nation. [II 109:5-8].

13 151. As of the time of the hearing in October 2023, the highest labor rate that Kia was
14 paying to any dealer in California other than Putnam Kia was \$236.30 per hour, to Stevens Creek
15 Kia in the San Jose area, part of District 4. [Exh. P-111.003; II 300:7-24; see II 110:14-24].

16 152. As of the time of the hearing in October 2023, the warranty rates that Kia was paying
17 to the other Kia dealers in District 4 during the time period from Putnam Kia's submission of its
18 requested labor rate were as follows:

19 Kia of Marin, **\$180.40** granted in February 2022 [Exh. P-116.001; II 283:18-284:5];

20 Kia of Santa Rosa, **\$163.50** granted in August 2022 [Exh. P-116.002; II 284:6-15]
21 and **\$188.10** granted in August 2023 [Exh. R-237; II 285:4-18];
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23 Capitol Kia in San Jose, **\$206.30** granted in June 2022 [Exh. P-116.003; II 286:12-
24 23] and **\$236.10** granted in June 2023 [Exh. R-238; II 287:7-18];

25 Oakland Kia, **\$216** granted in June 2022 [Exh. P-116.004; II 289:2-15];
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27 Kia of Vacaville, **\$176.80** granted in April 2022 [Exh. P-116.005; II 293:18-294:1];
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1 Quinn Kia of Fremont, **\$199.30** granted in April 2022 [Exh. P-116.006; II 294:18-
2 22];

3 Hilltop Kia in Richmond, **\$187.90** granted in October 2021 [Exh. P-116.008; II
4 294:93-295:7];

5
6 Concord Kia, **\$194.10** granted in April 2021 [Exh. P-116.009; II 295:8-17] and **\$210**
7 granted in January 2023 [R-239; II 296:2-9]; and

8 Dublin Kia, **\$184.70** granted in August 2021 [Exh. P-116.010; II 296:2-9] and
9 **\$199.30** granted in April 2023 [Exh. 240; II 300:14-21].
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11 153. Mr. Korenak’s testimony confirmed that the \$447.52 rate requested by Putnam Kia
12 was much higher than the range of warranty labor rates being paid to other dealers in California.
13 Mr. Korenak testified that he had been the supervisor on about 1200 labor rate submissions, about
14 400 of which were in California. [VIII 33:7-13, 173:7-19].

15 154. Mr. Korenak was not aware of any dealership in California, other than a Putnam
16 Automotive Group dealership, that receives a labor rate of over \$400 an hour. [VIII 173:20-23]

17 155. At the time of his deposition in September 2023, Mr. Korenak testified that he was
18 not aware of any dealer in California, other than a Putnam Automotive Group dealership, that
19 received a labor rate of over \$350 an hour. [VIII 174:6-8]. At the hearing, he testified that he “may
20 have” one non-Putnam dealer in California who was requesting over \$350 an hour. [VIII 173:24-
21 174:5].

22 156. Mr. Korenak conceded that he could think of only two other non-Putnam dealers in
23 California who received a warranty labor rate of over \$300 an hour. [VIII 175:1-9].

24 **M. Material Inaccuracy: Repair Order Errors**

25 157. The evidence established that there were a number of errors with respect to
26 information in the repair orders, weaknesses in the procedure for selecting qualified repair orders,
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1 and self-contradictory positions taken by FrogData and Putnam Kia as to the classification of
2 qualified repair orders.

3 158. In its Notification, Kia took the position that RO 10298-A should not have been
4 included in the Submission because Putnam Kia “booked .10 hours and billed the customer \$250,
5 resulting in an hourly rate of \$2500, for ordering a part” and that the repair order “does not reflect
6 that any qualifying repair was performed and in fact indicates that the customer declined service.”
7 [Exh. J-6.002]. In its Reply, Putnam Kia “agreed that the vendor FrogData should not have
8 included [RO 10298] in our submission” because “it did not result in a repair” [Exh. J-7.009-
9 .010].

10 159. Notably, Putnam Kia’s rationale for agreeing to remove RO 10298-A was
11 inconsistent with the inclusion of three other “qualified repair orders” in its Submission that did not
12 result in a repair, namely RO 10158-A (Exh. R-205.001); RO 10454-A (Exh. R-258.001); and RO
13 10617-A (Exh. R-267.001). Putnam Kia has not proposed to remove any of these three repair
14 orders from its calculations. Putnam Kia’s rationale is also inconsistent with its failure to include
15 RO 10152-B [Exh. R-272.002], a diagnosis that **did** result in a repair, in its Submission, as
16 discussed in paragraph 164 below.

17 160. FrogData’s inclusion of RO 10298-A calls into question its criteria for selecting
18 “qualified repair orders.” RO 10298-A states only that the customer had a complaint and that the
19 customer “approved parts to order.” [Exh. R-211.001]. There is no actual technician time listed on
20 the repair order, and the \$250 charge for .10 “sold” hours results in an hourly rate of \$2,500. [Exh.
21 R-211.001; Exh. J-3.002, Count 10, “Labor Rate” column]. While Mr. Korenak initially claimed
22 that this was a “diagnostic,” he ultimately admitted that there is no diagnosis described and that a
23 diagnosis cannot be done in zero time. [VIII 162:19-163:16].

24 161. Mr. Korenak testified on redirect that, in response to Kia’s removal of RO 10298-A
25 in its May 2022 Notification, he agreed with Mr. Kamenetsky that the repair order should be
26 removed because it was “common sense” and he didn’t think that the dealership was charging a
27 \$2,500 rate. [VIII 185:5-186:2]. This testimony led the ALJ to comment that “we all agree \$2,500
28 is not a proper part of the ultimate calculation.” [VIII 186:6-8]. Mr. Korenak’s testimony

1 concerning his agreement with Mr. Kamenetsky to remove the RO was, however, impeached on
2 cross-examination: Mr. Korenak had testified at his deposition in **September 2023** that he believed
3 that the repair order **should** have been included in the calculation. [VIII 203:14-204:2].

4 162. In addition, as shown below, FrogData failed to include in the Submission at least
5 two qualified repair orders that were included among the 90-day set of repair orders that it
6 submitted to Kia.

7 163. Mr. Korenak agreed that RO 10246-B [Exh. R-271.001], which was **not** included in
8 the Submission, was for the repair that the customer authorized on a prior repair order, RO 10153
9 [Exh. R-248], which **was** included in the Submission. [VIII 151:23-152:16]. Mr. Korenak
10 conceded that RO 10246-B was a qualified repair order. [VIII 152:17-19]. Accordingly, Mr.
11 Korenak agreed that RO 10246-B should have been included in FrogData’s calculations, but was
12 not. [VIII 153:2-12 (“Looks like we missed it.”)].

13 164. Similarly, Mr. Korenak conceded that RO 10152-B [Exh. R-272.002], which was
14 **not** included in FrogData’s Submission, was a “diagnosis of a qualified repair order” which later
15 resulted in a repair on RO 10183-A [Exh. R-208], which **was** included in FrogData’s submission.
16 [VIII 153:17-25].

17 165. Nevertheless, Mr. Korenak took the position that RO 10152-B was not a qualified
18 repair order because, even though the technician spent .28 hours on the diagnosis, Putnam Kia did
19 not place any “sold” hours on the repair order. [VIII 155:1-14, 156:10-19]. While Mr. Korenak
20 conceded that “you have to do a diagnosis before you do the repair” [VIII 156:13-15), he defended
21 his position by saying that “I can’t put in 0000.” [VIII 155:4]. When asked what FrogData does “if
22 the dealer does not bill any time even though the time is spent on what would otherwise be a
23 qualified repair,” he responded: “we don’t record it.” [VIII 156:20-23].

24 166. Mr. Korenak’s position that a repair order can be excluded simply because it
25 contains no “sold” hours is further evidence that sold hours are not a reliable basis for calculating an
26 hourly labor rate. By failing to place any “sold” hours on a repair order, even when work is being
27 performed for which Putnam Kia would later be paid, Putnam Kia is misstating the number of hours
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1 that generated the charges. The customer's ultimate payment covered both the diagnostic work
2 performed on RO 10152-A and the repair performed on RO 10183-A. [See Exh. R-208.001-.002].

3 167. In addition, any argument that the diagnostic work performed on RO 10152-B does
4 not fit the definition of a “qualified repair order” – i.e., a repair order “for work that was performed
5 outside the period of the manufacturer’s warranty and paid for by the customer, but that would have
6 been covered by a manufacturer’s warranty if the work had been required and performed during the
7 period of warranty” – is inconsistent with FrogData’s position that all of the following seven repair
8 orders, each of which contains a diagnosis without a repair, **are** qualified repair orders: RO 10148-
9 U [Exh. R-242.002]; RO 10153-A [Exh. R-248.001]; RO 10158-A [Exh. R-205.001]; RO 10298-A
10 [Exh. R-211.001]; RO 10454-A [Exh. R-258.001]; RO 10553-A [Exh. R-263.001]; and RO 10617-
11 A [Exh. R-267.001]. These repair orders are all listed on the spreadsheet of qualified repair orders
12 that FrogData submitted in support of the \$447.52 rate. [Exh. J-3.002, Count 2, 3, 4, 10, 18, and 22;
13 Exh. J-.003, Count 28]. Moreover, Mr. Kamenetsky contradicted Mr. Korenak’s rationale for
14 excluding RO 10152-B. He testified that “a diagnosis where time was documented on the
15 diagnosis, I believe that that is a qualified repair order.” [IX 132:13-15]. Actual time of .28 for the
16 diagnosis was documented on RO 10152-B. [Exh. R-272.002].

17 168. Moreover, Mr. Korenak’s description of FrogData’s processes undermine his
18 purported expertise with respect to the statute. For example, Mr. Korenak testified that, in
19 compiling the repair orders for the 90-consecutive-day period, FrogData selects the “opened date”
20 of the repair orders rather than the “closed date.” [VIII 28:7-11]. The statute, however, requires the
21 franchisee to submit “all repair orders **completed** in any 90-consecutive-day period.” [Veh. Code §
22 3065.2(1)(B) (emphasis added)].

23 169. In addition to the foregoing errors, the evidence demonstrated a number of mistakes
24 and irregularities in the repair orders that appear to affect the accuracy of the calculations
25 concerning Putnam Kia’s requested labor rate.

26 170. When asked by Putnam Kia’s counsel why no actual hours were recorded for the
27 repair on RO 10320-A, Mr. Reyes suggested that the actual hours may have been recorded by the
28 technician for the routine “tire pressure” check on Line B, which contained the following entry

1 under “A/HRS”: “ISP 0.27.” [Exh. R-243.001; VI 47:4-12]. Mr. Reyes explained that “sometimes
2 technicians, they rush and they’ll punch on to the wrong line, or they’ll clock on to the wrong line.”
3 [VI 47:10-12]. Mr. Reyes testified that the amount of time recorded for the tire pressure check is
4 “usually none or a very, very minimal amount.” [VII 76:8-10]. He further explained that ISP is an
5 “internal line” for work that is not charged to the customer. [VII 100:7-17.]. As the ALJ observed
6 during the hearing, “this is a variation that may lead us to calculate these figures erroneously.” [VII
7 75:4-5].

8 171. Mr. Reyes also testified repeatedly that, in creating repair orders, Putnam Kia’s
9 service advisors had made serious errors. [See, e.g., VI 55:24 (“a gross mistake”); VI 57:15
10 (“another mistake”); VI 101:05-06 (“not following directions at all”).]

11 172. Moreover, as demonstrated above, FrogData and Putnam Kia have taken inconsistent
12 positions as to whether or not a repair order containing a diagnosis without a repair is a qualified
13 repair order that should be included in the calculations.

14 173. In addition, Putnam Kia changed its position during the hearing as to whether certain
15 repair orders that supported Kia’s arguments should be included in the calculations. For example,
16 Mr. Kamenetsky testified, on the final day of the hearing, that RO 10158-A [Exh. R-205.001],
17 which had been included in FrogData’s calculations [Exh. J-3.002, Count 4], but which Kia had
18 cited in its Notification as an example of a huge disparity between sold hours and actual hours [Exh.
19 J-6.002 (.50 sold versus 3.29 actual)], did not appear to be a qualified repair order because someone
20 had modified the vehicle. [IX 95:15-98:3].

21 174. Similarly, Kent Putnam had testified, on cross-examination, that Kia was required to
22 accept Putnam Kia’s service advisor’s decision to enter only 1.30 sold hours on RO 10571-A for a
23 repair that actually took 2.87 hours and had an LTS time allowance of 2.40 hours. [VII 150:8-
24 151:19; Exh. R-244.001]. In reaction to this damaging testimony [see IX 72:18-73:6], Putnam Kia
25 presented new documents and took the position on the last day of the hearing that this repair order
26 should never have been included in the Submission because it was an extended warranty repair.
27 [See IX 47:14-17, 53:14-54:06].

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1 175. These new positions concerning RO 10158-A and RO 10517-A on the last day of the
2 hearing contradicted evidence that Putnam Kia had presented just the day before, as these repair
3 orders were included in Putnam Kia’s proposed recalculation of the labor rate presented through
4 Mr. Korenak. [See Exh. P-108; VIII 116:10-17 (Mr. Korenak testifies that that the Board should
5 adopt, “as the most accurate application of section 3065.2,” his Calculation 2 in P-108, which lists
6 ROs excluded from the calculation and does not exclude either of these ROs].

7 176. As the ALJ observed when Putnam Kia presented its new evidence concerning RO
8 10571-A, the evidence “really goes to the issue – or the conclusion, not the issue, that the
9 information contained on repair orders upon which FrogData relies can be erroneous, because it’s
10 misleading or incomplete and needs backup documents. . . . And that is the limitation and – of the
11 information that FrogData relies on, and makes the ultimate calculations suspect.” [IX 76:6-16].

12 **N. Material Inaccuracy: Brakes, Bulbs and Batteries**

13 177. There was conflicting evidence about whether the brake, battery and bulb repairs that
14 Kia used in its recalculation of the labor rate should have been included.

15 178. Kia established that brake repairs, including brake pads, are covered by the Kia
16 warranty during the 12-month adjustment period. [Exh. R-230.008; Exh. R-231.008; I 60:14-61:11].

17 179. Mr. Korenak agreed that there is no strict rule that a brake pad cannot be part of a
18 qualified repair order or one of the items calculated in a warranty labor rate, and that it depends on
19 the circumstances of the repair. [VIII 157:24-159:19].

20 180. Kia also established that bulb repairs are covered during the 12-month adjustment
21 period. [Exh. 230.011; Exh. 231.011; III 369:2-3, 371:1-4; IV 657:4-15, 660:7-11]. Mr. Reyes
22 confirmed the existence of this coverage. [VI 104:18-22].

23 181. Similarly, Mr. Korenak took the position that the replacement of a bulb can
24 sometimes be a qualified repair. In fact, FrogData included in the Submission RO 10581-A, which
25 involved the replacement of a bulb. [Exh. J-3.002, Count 24; Exh. R-263]. When asked to explain
26 why FrogData considered this to be a qualified repair order, Mr. Korenak initially questioned
27 whether or not it had been included on FrogData’s spreadsheet. [VIII 160:19-24]. After being
28

1 assured that it had been included [VIII 161:5-8], Mr. Korenak testified that “the analyst chose to
2 take the labor” because “there was an indicator light that went on” and “there was a ticking sound
3 and diagnostics were involved.” [VIII 161:17-25].

4 182. Kia also proved that batteries are covered by a three-year warranty. [Exh. 230.08;
5 Exh. 231.08; I 59:9-60:10].

6 183. Accordingly, customer-pay repairs of brakes, bulbs and batteries fit within the
7 statutory definition of a qualified repair order, i.e., a repair order “for work that was performed
8 outside of the period of the manufacturer’s warranty and paid for by the customer, but that would
9 have been covered by a manufacturer’s warranty if the work had been required and performed
10 during the period of warranty.” [Veh. Code § 3065.2(j)].

11 184. However, the statute also provides that the following “shall be omitted in calculating
12 the retail labor rate”: charges arising from “Routine maintenance, including, but not limited to, the
13 replacement of bulbs, fluids, filters, batteries, and belts that are not provided in the course of, and
14 related to, a repair.” [Veh. Code § 3065.2(c)(3)].

15 185. Mr. Nardini testified that a number of the brake, bulb, and battery repairs would have
16 or could have been covered by the applicable Kia warranty in circumstances on the same basis that
17 Mr. Korenak explained FrogData’s inclusion of RO 10581-A – i.e., the customer complained of
18 unusual noises and there were diagnostics involved. [See, e.g., II 176:24-177:20, 189:10-191:9,
19 193:22-194:6, 198:19-200:24]. On cross-examination, however, Mr. Nardini conceded that it was
20 questionable whether certain of the items should be included in light of the statutory exclusion of
21 routine maintenance. [IV 638:2-10, 644:15-24, 650:3-17, 669:20-670:1, 676:13-16, 684:7-14].

22 186. At the hearing, Kia stipulated to the removal of six of the brake repairs that it had
23 added to its calculation on Ex. J-6.004-.005. [IV 608:22-23]. Now, in its post-hearing submissions,
24 Kia has stipulated to the removal of all of the brake, bulb, and battery repairs challenged by Putnam
25 Kia on Ex. J-7.007. Accordingly, it is unnecessary for the Board to rule on this issue in this matter.

26 187. In light of the conflicting evidence and testimony from both sides concerning when
27 items such as brakes, bulbs, and batteries may be considered qualified repairs, I find that Kia had a
28

1 reasonable basis to include these items in calculating an adjusted labor rate in its Notification and
2 has acted in good faith in including them and now withdrawing them.

3
4 **A. Findings on Statutory Issues**

5 188. Based on the foregoing, I find that Kia complied with section 3065.2. It provided a
6 notification to Putnam Kia asserting that the proposed labor rate was materially inaccurate, it
7 provided an explanation of its reasons for the allegation, evidence substantiating its position, a copy
8 of its calculations and a proposed adjusted labor rate. It has also paid that adjusted rate while this
9 proceeding has been pending. While Kia has stipulated in the course of this proceeding to remove
10 brakes, bulbs, and batteries from the calculation and has proposed a different calculation based on
11 the evidence at the hearing, a franchisor's failure to propose an adjusted rate that fits perfectly
12 within the statutory formula does not constitute noncompliance with the statute, any more than a
13 franchisee's errors in calculation, inclusion of a non-qualified repair order, or omission of a
14 qualified repair order is a violation of the statute.

15 189. Based on the plain language of section 3065.2(a)(2), the legislative history of the
16 statute, and the rules of statutory construction, discussed below, and based on the evidence
17 discussed above, I find that Kia has carried its burden that the \$447.52 retail labor rate calculated by
18 FrogData and proposed by Putnam Kia was materially inaccurate. The calculation failed to
19 consider the actual hours that generated the charges; it used sold hours that did not conform to any
20 particular policy, standard, or time guide; it resulted in an hourly rate that is far outside the range of
21 competitive labor rates; it included one repair order with a \$2,500 hourly rate that "common sense"
22 required it to exclude; it failed to include at least two qualified repair orders; and the proponents of
23 the calculation (FrogData and Putnam Kia) provided self-contradictory and shifting positions as to
24 which repair orders should be included as qualified.

25 **O. Determination of Protestant's Retail Labor Rate**

26 190. For purposes of resolving this case, Kia has stated that it will stipulate that the 29
27 repair orders submitted by Putnam Kia in support of its rate requests are "qualified repair orders,"
28

1 with the exception of RO 10298-A, which Putnam Kia has conceded is not qualified. This is a fair
2 starting point for the calculation, as Putnam Kia took the position in its Submission that these repair
3 orders were qualified.

4 191. Kia has taken the position that, in addition, RO 10246-B and RO 10152-B should be
5 included in the calculation because they were included in the original 90-day set of 538 repair
6 orders and (a) Mr. Korenak conceded that RO 10246-B was a qualified order that FrogData
7 “missed,” and (b) Mr. Korenak’s position that RO 10152-B is not a qualified repair order is
8 inconsistent with FrogData’s inclusion of other repair orders consisting of a diagnosis prior to or
9 without a succeeding qualified repair, and the diagnostic work performed on RO 10152-B was part
10 of the technician hours that generated the charges on RO 10183-A [Exh. R-208], which **was**
11 included in FrogData’s submission [VIII 153:17-25]. I find that these two repair orders are
12 qualified repair orders and should be included in the calculation.

13 192. Kia has submitted, in Exhibit A to its brief, a chart listing the 30 repair orders
14 included in its calculation as well as the sold hours and actual hours relating to each repair. While
15 there are 30 repair orders, Kia has listed 27 total repairs because (a) two of the repair orders, RO
16 10180 and RO 10529, each have two lines that are included in the calculation, for a total of 32 line
17 items; and (b) there are five instances where a line item on one repair order is the diagnosis and a
18 line item on another repair order is the actual repair (“**Split Repair Orders**”). Kia has combined the
19 Split Repair Orders as a single repair for calculating the number of hours and the charges involved
20 in the diagnosis and repair

21 193. On 16 of the repair orders, which contain 17 of the 27 repairs, Kia has simply
22 transposed the sold hours and actual hours contained on the relevant line of the repair order. These
23 17 repairs are as follows:

24 RO 10133-A [Exh. R-204.001; also Exh. R-247.001];

25 RO 10165-B (Exh. R-249.001-002);

26
27 RO 10346-A [Exh. R-212.001];

28

1 RO 10352-A [Exh. R-254.001];
2 RO 10404-A [Exh. R-255.001];
3
4 RO 10415-A [Exh. R-256.001];
5
6 RO 10454-A [Exh. R-258.001];
7
8 RO 10486-A [Exh. R-259.001];
9
10 RO 10529-A [Exh. R-260.001];
11 RO 10529-B [Exh. R-260.002];
12
13 RO 10534-B [Exh. R-261.001-.002];
14
15 RO 10571-A [Exh. R-244.001];
16
17 RO 10581-A [Exh. R-263.001];
18
19 RO 10590-D [Exh. R-265.004];
20
21 RO 10591-A [Exh. R-266.001];
22
23 RO 10671-A [Exh. R-267.001]; and
24
25 RO 10631-F [Exh. R-214.003].

21 194. Five of the remaining 10 repairs are on Split Repair Orders. The calculation of
22 charges, sold hours, and actual hours on these repairs is addressed in the following five paragraphs

23 195. RO 10148-U contains a diagnosis concerning an airbag without a repair. The
24 customer was charged \$88.00 for the diagnosis, and the service advisor entered .20 sold hours but
25 no actual technician hours. [Exh. R-242.002]. A diagnosis cannot be performed in zero hours.
26 [163:14-16]. RO 10148 does, however, contain .42 actual hours of “ISP” time attributable to the air
27 pressure test which Mr. Reyes testified should take no time or very, very minimal time. [Exh. R-
28 242.005, bottom of page; VII 76:8-10]. RO 10180-A is the repair related to the diagnosis. [Exh.

1 250.001]. The customer was charged \$88.00 for the repair, and the service advisor entered .20 sold
2 hours, but the technician recorded .85 actual hours. [Id.] So the total charges listed on Exhibit A
3 for this diagnosis and repair are \$176.00 (\$88.00 plus \$88.00), and the total actual hours are 1.27
4 (.85 for the repair plus .42 for the diagnosis).

5 196. RO 10153-A contains a diagnosis concerning power windows. [Exh. R-248.001].
6 The customer was charged \$132; the service advisor entered .30 sold hours; and the technician
7 recorded .98 actual hours. [Id.] RO 10246-B contains the repair resulting from that diagnosis.
8 [Exh. R-271.001; VIII 151:23-152:7-16]. Putnam Kia did not charge the customer any additional
9 amount for the repair and the technician did not assign any actual hours to Line B. [Exh. R-
10 271.001]. A repair cannot be performed in zero hours. RO 10246 contains .55 ISP hours attributed
11 to the air pressure check. [Ex. R-271.002]. Accordingly, on Exhibit A Kia has listed charges of
12 \$132 and actual hours of 1.53 (.98 plus .55) for this diagnosis and repair.

13 197. RO 10158-A was a diagnosis concerning a “shifting lock.” [Exh. R-205.001]. The
14 customer was charged \$250.00; the service advisor entered .50 sold hours; and the technician
15 recorded 3.29 actual hours. [Id.] RO 10300-A is the repair related to this diagnosis. [Exh. R-
16 253.001; VII 69:6-72:9]. The customer was charged \$440.00 for the repair; the service advisor
17 entered 1.00 sold hours; but there are no actual technician hours recorded for the repair on Line A.
18 [Exh. R-253.001]. When asked how there could be no actual time recorded for this repair, Rad
19 Reyes pointed to the 2.56 hours of ISP time recorded on Line B for the tire pressure check. [Id.; VII
20 71:22-72:24]. Mr. Reyes testified that the 2.56 “presumably would be for this repair.” [VII 72:12-
21 13]. Accordingly, on Exhibit A Kia has listed \$690 (\$250 plus \$440) and 5.85 (3.29 hours plus 2.56
22 hours) for this diagnosis and repair.

23 198. RO 10152-B is a diagnosis of a fuel door switch issue. [Exh. R-272.002]. The
24 technician spent .28 actual hours on the diagnosis (recorded on Line B itself as ISP time), although
25 the service advisor did not enter any “sold hours” and the customer was not charged for the
26 diagnosis time on this repair order. [Id.] RO 10183-A is the repair of the fuel door switch
27 following the diagnosis. [Exh. R-208.001; VIII 153:17-25]. The customer was charged \$176.00;
28 the service advisor entered .30 sold hours; and the technician spent .43 actual hours on the repair.

1 Accordingly, Kia has entered on Exhibit A charges of \$176.00 and actual hours of .71 (.28 plus .43)
2 for the diagnosis and repair.

3 199. RO 10553-A is the diagnosis of a tailgate door handle issue. [Exh. R-262.001]. The
4 customer was charged \$250.00; the service advisor entered .50 sold hours; and the technician
5 recorded .72 actual hours. [Id.] RO 10585-A is the repair of the tailgate issue. [Exh. R-264.001].
6 The customer was charged \$132.00; the service advisor entered .30 sold hours; and the service
7 technicians recorded .26 actual hours. [Id.] Accordingly, on Exhibit A Kia has listed total charges
8 of \$382 (\$250 plus \$132) and total actual hours of .98 (.72 plus .26) for the diagnosis and repair.

9 200. On two of the remaining five repairs, the actual hours recorded on the specific repair
10 line of the repair order did not include related diagnostic time. On the other three remaining repairs,
11 the specific repair line failed to contain any actual hours or contained a nonsensical amount of
12 actual hours. The actual hours for these five repairs on Exhibit A is explained in the following five
13 paragraphs.

14 201. RO 10426-D involved the replacement of a clock spring. [Exh. R-257.003]. The
15 customer was charged \$220.00; the service advisor entered .40 sold hours; and there are .10
16 technician actual hours recorded on Line D. [Id.] The .10 actual hours, however, do not include the
17 diagnosis that led to this repair, which is on Line B of the repair order. [See Exh. R-257.003,
18 “Version 3” under Line D, January 6, 2022 entry: “Replaced Clock Spring see Line B for
19 diagnosis.”] The actual diagnosis time on Line B, for which the customer was not separately
20 charged, is .12 (recorded as ISP time). [Exh. R-257.001, Line B]. Accordingly, Kia has entered on
21 Exhibit A total charges of \$220.00 and total actual hours of .22 (.10 plus .12) for the diagnosis and
22 repair.

23 202. RO 10291-F states that “during inspection, found rear side valve cover gasket leak”
24 and that the customer authorize the recommended repair. [Exh. R-252.004]. The customer was
25 charged \$264.00; the service advisor entered .60 sold hours; and there are .23 actual technician
26 hours recorded on Line F. [Id.] These actual hours, however, do not include the inspection time,
27 which is recorded on Line A as ISP time of .58. [Exh. R-252.001]. Accordingly, Kia has entered
28 actual hours of .81 (.23 and .58) on Exhibit A.

1 numerous errors and provided self-contradictory and shifting positions as to which repair orders
2 should be included as qualified.

3 208. The opening sentence of section 3065.2 states that it provides a method for a dealer
4 to “determine a **reasonable** warranty reimbursement schedule.” Veh. Code § 3065.2(a) (emphasis
5 added).

6 209. In enacting section 3065.2, the Legislature noted that existing California law
7 required manufacturers “to provide **reasonable** reimbursement” for warranty work, but did not have
8 a “clear procedure to determine whether a reimbursement is **reasonable**” and did not “require
9 franchisees to be reimbursed for warranty work at a retail rate.” Assem. Bill No. 179 (2019-2020
10 Reg. Sess.) sec. 1(c) (emphasis added). Accordingly, the Legislature declared, in pertinent part: “It
11 is the intent of this act to ensure that new motor vehicle dealers are treated fairly by their franchisors
12 [and] that dealers are **reasonably** compensated for performing warranty repairs on behalf of their
13 franchisors.” *Id.*, sec. 1(i) (emphasis added).

14 210. The statute provides that the franchisee shall “calculate its retail labor rate by
15 determining the total charges for labor from the qualified repair orders submitted and dividing that
16 amount by the total number of hours that generated those charges.” Veh. Code § 3065.2(a)(2).

17 211. The California Supreme Court has summarized the rules of statutory construction as
18 follows:

19 Our fundamental task in construing a statute is to ascertain the intent of the
20 lawmakers so as to effectuate the purpose of the statute. We begin by examining the
21 statutory language, giving the words their usual and ordinary meaning. *If there is no*
22 *ambiguity, then we presume the lawmakers meant what they said, and the plain*
23 *meaning of the language governs.* If, however, the statutory terms are ambiguous,
24 then we may resort to extrinsic sources, including the ostensible objects to be
25 achieved and the legislative history. In such circumstances, we “select the
26 construction that comports most closely with the apparent intent of the Legislature,
27 with a view to promoting rather than defeating the general purpose of the statute, and
28 *avoid an interpretation that would lead to absurd consequences.*”

1 *Day v. City of Fontana* (2001) 25 Cal.4th 268, 272 [105 Cal.Rptr.2d 457] (emphasis added)
2 (citations omitted). In addition, the words of the statute “should be construed in their statutory
3 context” and “should be given the same meaning throughout a code unless the Legislature has
4 indicated otherwise.” *Hassan v. Mercury Am. River Hosp.* (2003) 31 Cal.4th 709, 715 [3
5 Cal.Rptr.3d 623].

6 212. California follows the “plain meaning” rule: i.e., if the plain, commonsense meaning
7 of a statute’s language is unambiguous, the plain meaning controls. As the California Supreme
8 Court has stated:

9 “It is well settled that the proper goal of statutory construction ‘is to ascertain and
10 effectuate legislative intent, giving the words of the statute their usual and ordinary
11 meaning. When the statutory language is clear, we need go no further.”

12 *Satele v. Super. Ct.* (2019) 7 Cal.5th 852, 858 [249 Cal.Rptr.3d 562] (citations omitted).

13 213. Kia’s contention that the word “hours” in the statutory phrase “the hours that
14 generated those charges” means the actual hours that the technician(s) worked on the repairs
15 conforms to the plain, commonsense, usual and ordinary meaning of the word “hours.” The
16 dictionary definition of an “hour” is “the 24th part of a day; 60 minutes.” (Merriam Webster’s
17 Collegiate Dictionary (10th ed. 1997) p. 561.)

18 214. Moreover, resort to extrinsic sources and canons of construction support Kia’s
19 position.

20 215. First, Putnam Kia’s interpretation would not give the same terms the same meaning
21 throughout the Vehicle Code. In nearby statutory sections that address warranty reimbursement, the
22 Legislature specifically used the term “time allowances” or a similar term when it intended to refer
23 to time allowances rather than hours. Veh. Code § 3065(a)(1) (requiring the franchisor to use
24 reasonable “time allowances” and not to unreasonably deny a dealer’s request for modification of a
25 “time allowance” or a request for “an additional time allowance”); Veh. Code § 3065(a)(2)
26 (restricting the franchisor’s ability to reduce “the allowed time”).
27
28

1 216. By contrast, in section 3065.2(a)(2) the Legislature did not say that the charges
2 should be divided by the total “time allowances” that generated those charges, or refer to time
3 allowances at all – it referred to the “hours” that generated the charges. Throughout the Vehicle
4 Code, the word “hours” is used in its ordinary meaning of 60 minutes. *See, e.g.*, Veh. Code § 38335
5 (headlamp requirements for “one-half hour after sunset to one-half hour before sunrise”); Veh.
6 Code § 23309(a) (issuing agency “shall maintain a customer service telephone line that shall be
7 operated by a live person for at least 35 hours per week between the hours of 8 a.m. to 5 p.m.”);
8 Veh. Code § 42001.7(b) (persons convicted of littering or dumping waste on roads or highways
9 shall be required “to pick up litter or clean up graffiti for not less than eight hours”). Moreover,
10 when the Legislature intended that an “hour” in the Vehicle Code be something other than 60
11 minutes, it specifically so provided. *See* Veh. Code 15250.1(b) (for the purpose of meeting
12 requirement of “15 hours” of behind-the-wheel training, “every 50 minutes of driving time is
13 deemed to be an hour of training.”).

14 217. Second, the legislative history of section 3065.2 demonstrates that the Legislature
15 knew how to refer to time allowances when it intended to do so, and that it deliberately decided not
16 to use the term “time allowances” in section 3065.2(a)(2). In 2018, it passed a bill that would have
17 included the phrase “time allowances” in section 3065.2(a)(2). Under that bill, a dealer’s retail
18 labor rate would have been calculated by “determining the total charges for labor from the qualified
19 orders submitted and dividing that amount by the total number of hours *allowed pursuant to the*
20 *franchisor’s time allowances* that would be used to compensate the franchisee for the same work,
21 had it been performed under warranty.” Assem. Bill No. 2107 (2017-2018 Reg. Sess.) sec. 12, §
22 3065.2(a)(2)(A) (emphasis added). Following the Governor’s veto of that bill, the Legislature
23 removed any reference to time allowances and instead referred to “the total number of hours that
24 generated those charges.”

25 218. Third, “[w]here the same word or phrase might have been used in the same
26 connection in different portions of a statute but a different word or phrase having different meaning
27 is used instead, the construction employing that different meaning is to be favored.” *Playboy*
28 *Enters., Inc. v. Super. Ct.* (1984) 154 Cal.App.3d 14, 21 [201 Cal.Rptr. 207] cited with approval in

1 *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1117 [81 Cal.Rptr.2d 471]
2 (“Where different words or phrases are used in the same connection in different parts of a statute, it
3 is presumed the Legislature intended a different meaning.”). Here, the Legislature used “hours”
4 rather than “time allowances,” despite the use of the latter term in a prior version of the bill and in
5 nearby sections of the Vehicle Code.

6 219. Fourth, under Putnam Kia’s interpretation of the statute, the dealer could “sell”
7 whatever number of hours it chooses in order to maximize the hourly rate that the manufacturer has
8 to pay for warranty repairs, regardless of the number of hours it actually takes to do the repairs. The
9 statute does not refer to manufacturer’s time guides or to commercial time guides and provides no
10 standard by which to determine whether or not to accept any such guide or, alternatively, the
11 number of sold hours a dealer places on a repair order. Adopting Putnam Kia’s interpretation of the
12 statute would effectively permit dealers to dictate the hourly rate that the manufacturer must pay,
13 however divorced from the actual number of hours that generate the charges and from competitive
14 retail rates.

15 220. Fifth, adopting Putnam Kia’s interpretation would lead to absurd consequences and
16 be inconsistent with the declared statutory purpose of providing “reasonable” compensation.
17 Putnam Kia’s demand for \$447.52 per hour is not reasonable when compared to the warranty rates
18 of the other Kia dealers in Putnam Kia’s District, most of which were established pursuant to
19 section 3065.2, nor is it reasonable when compared to the warranty labor rates of Kia dealers and
20 other dealers in California generally.

21 221. While the statute does not contain any prohibition on using “sold hours” if the
22 franchisee submits a request based on sold hours and the franchisor does not object, Kia acted in
23 conformity with the plain language of section 3065.2(a)(2) when it proposed an adjusted labor rate
24 based on the actual hours that generated the charges on the repair orders submitted by Putnam Kia.

25 222. Kia’s Notification complied with its obligations under section 3065.2. Kia contested
26 the material accuracy of the requested labor rate; it provided a full explanation of its reasons for
27 contesting the material accuracy along with evidence substantiating its position; it proposed an
28 adjusted retail labor rate on the basis of the repair orders in the Submission and the additional 30

1 days of repair orders requested under the statute; and it provided its calculations. *See Veh. Code §*
2 *3065.2 (d)(1), (4), (5).* Kia had a reasonable basis for including brakes, bulb, and battery repairs in
3 its calculations of an adjusted rate: those items fit within the definition of “qualified repair orders”
4 because each of those items is covered by Kia for some period of the warranty. Moreover, Putnam
5 Kia’s own Submission included at least one brake repair and at least one bulb repair, and Mr. Reyes
6 and Mr. Korenak acknowledged that such items are covered by the warranty, depending on the
7 circumstances.

8 223. While Kia adduced evidence of material inaccuracy at the hearing that was not cited
9 in its Notification, the statute requires a franchisor to cite “all reasons” but not “all” evidence
10 supporting those reasons. It is standard practice in proceedings challenging a franchisor’s notice
11 that both sides develop, through discovery and examination of witnesses, additional evidence to
12 support their contentions. Further, statutes that require a franchisor to provide its “reasons” or
13 “grounds” for its position have never been interpreted to require the franchisor to provide in the
14 notice all evidence supporting those reasons. *Mall Chevrolet, Inc. v. General Motors LLC*, 2021
15 WL 426193, at *8 (D.N.J. Feb. 8, 2021), *aff’d*, __ F. 4th __, No. 21-2283, 2024 WL 1819822, at
16 *10 (3d Cir. Apr. 26, 2024).

17 224. To the extent that Kia has presented any argument or evidence that supplements or
18 otherwise modifies any element of its Notification, I find that Kia did so with “justification” under
19 section 3065(d)(1). The statute gives the franchisor only 30 days to review the 90 days of repair
20 orders submitted by the franchisee. It is not possible for the franchisor to identify and discover all
21 of the issues concerning the submitted repair orders without the opportunity to question witnesses
22 and obtain backup documents, to which section 3065.2 does not give the franchisor the right during
23 the 30-day response period.

24 225. Based on the evidence presented and the findings herein, IT IS HEREBY
25 ORDERED that Putnam Kia’s protest be overruled and IT IS HEREBY DETERMINED that
26 Putnam Kia’s retail labor rate is \$ 262.95 per hour.

27
28

Exhibit A

Ex. No.	RO # Line #	VIN	Repair Count	Labor Charges	Sold Hours	Actual Hours	Actual Hours Labor Rate
R-247.001	10133 A	KNDJX3A56F7125922	1	\$ 646.00	1.4	1.42	\$ 454.93
R-242.001;.005 R-250.001	10148 U 10180 A	KNDPC3A21C7248762	1	\$ 176.00	0.4	1.27	\$ 138.58
R-250.001	10180 B	KNDPC3A21C7248762	1	\$ 484.00	1.1	1.1	\$ 440.00
R-248.001 R-271.001-002	10153 A 10246 B	5XXGR4A68FG491097	1	\$ 132.00	0.3	1.53	\$ 86.27
R-205.001 R-253.001	10158 A 10300 A	5XYPK4A50GG034387	1	\$ 690.00	1.5	5.85	\$ 117.95
R-249.001	10165 B	KNDPB3A20B7097690	1	\$ 176.00	0.4	0.8	\$ 220.00
R-208.001 R-272.001	10183 A 10152 B	5XYKWDA29DG377151	1	\$ 176.00	0.3	0.71	\$ 247.89

Exhibit A

Ex. No.	RO # Line #	VIN	Repair Count	Labor Charges	Sold Hours	Actual Hours	Actual Hours Labor Rate
R-251.006	10191 C	KNAGM4A71B5137845	1	\$ 264.00	0.6	0.6	\$ 440.00
R-252.004	10291 F	5XYKT3A10CG263287	1	\$ 264.00	0.6	0.81	\$ 325.93
R-243.001	10320 A	KNDJE723567240747	1	\$ 125.00	0.3	0.3	\$ 416.67
R-212.001	10346 A	KNAGM4AD0D5047482	1	\$ 660.00	1.5	3.42	\$ 192.98
R-254.001	10352 A	KNDJT2A22A7050267	1	\$ 382.00	1.3	1.23	\$ 310.57
R-255.001	10404 A	KNDJP3A54H7441824	1	\$ 401.19	0.8	0.97	\$ 413.60
R-256.001	10415 A	5XYPK4A57GG063434	1	\$ 395.00	1	2.92	\$ 135.27
R-257.001;.003	10426 D	KNAGM4AD0F5087578	1	\$ 220.00	0.4	0.22	\$ 1,000.00

Exhibit A

Ex. No.	RO # Line #	VIN	Repair Count	Labor Charges	Sold Hours	Actual Hours	Actual Hours Labor Rate
R-258.001	10454 A	KNDCE3LC5H5052552	1	\$ 100.00	0.2	1.02	\$ 98.04
R-259.001	10486 A	KNALN4D70E5145107	1	\$ 660.00	1.5	0.65	\$ 1,015.38
R-260.001	10529 A	5XYPGDA3XGG060527	1	\$ 440.00	1	1.84	\$ 239.13
R-260.002	10529 B	5XYPGDA3XGG060527	1	\$ 200.00	0.4	0.61	\$ 327.87
R-261.002	10534 B	KNDPN3AC5H7229321	1	\$ 220.00	0.5	0.5	\$ 440.00
R-262.001 R-264.001	10553 A 10585 A	KNDMG4C7XC6446414	1	\$ 382.00	0.8	0.98	\$ 389.80
R-244.001	10571 A	KNDJX3AEXG7016476	1	\$ 608.31	1.3	2.87	\$ 211.95
R-263.001	10581 A	KNDPB3AC3F7756943	1	\$ 125.00	0.5	0.92	\$ 135.87

Exhibit A

Ex. No.	RO # Line #	VIN	Repair Count	Labor Charges	Sold Hours	Actual Hours	Actual Hours Labor Rate
R-265.004	10590 E	5XYPGDA50GG145202	1	\$ 431.52	1	0.99	\$ 435.88
R-266.001	10591 A	KNAFU4A21A5103838	1	\$ 264.00	0.6	1.14	\$ 231.58
R-267.001	10617 A	KNDJX3A57E7737268	1	\$ 132.00	0.3	0.37	\$ 356.76
R-214.003	10631 F	KNAFW4A37D5656730	1	\$ 572.00	1.3	0.43	\$ 1,330.23
Totals			27	\$9,326.02	21.3	35.47	\$ 262.93

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ATTESTATION

Counsel for Respondent hereby attests to the factual accuracy and legal sufficiency of the matters set forth above.

Date: May 14, 2024



Jonathan R. Stulberg
John J. Sullivan

Attorneys for Respondent
KIA AMERICA, Inc.

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PROOF OF SERVICE

I am a citizen of the United States and employed in Los Angeles County, California.

I am over the age of eighteen years and not a party to the within-entitled action. My business address is Hogan Lovells US LLP, 1999 Avenue of the Stars, Suite 1400, Los Angeles, California 90067. On May 14, 2024, I served a copy of the within document(s):

RESPONDENT’S PROPOSED DECISION

- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, the United States mail at Los Angeles, California addressed as set forth below.
- by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
- by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. Executed on May 14, 2024, at Los Angeles, California.

/s/ Jonathan Stulberg
Jonathan Stulberg

VIA EMAIL

New Motor Vehicle Board

Received
6-25-24

FILED

New Motor Vehicle Board

Date: 6-25-24

By: RPP

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

12 In the Matter of the Protest of:

13 KM3G INC., d/b/a PUTNAM KIA OF
14 BURLINGAME,

15 Protestant,

16 v.

17 KIA AMERICA INC.,

18 Respondent.

PROTEST NO: PR-2803-22

**PROTESTANT'S POST-HEARING
REPLY BRIEF**

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OTHER AUTHORITIES

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1 Pursuant to the Board’s Order Establishing Post-Hearing Briefing Schedule, Protestant, KM3G
2 Inc., d/b/a Putnam Kia of Burlingame (“Putnam”), hereby submits its Post-Hearing Reply Brief.

3 **INTRODUCTION**

4 Respondent, Kia America, Inc. (“Kia” or “Respondent”), bears the burden to demonstrate it
5 complied with the requirements of Vehicle Code section 3065.2 in responding to Putnam’s Retail Labor
6 Rate Submission (“Submission”). Respondent’s belated decision to agree to the removal of all disputed
7 brakes, bulb, and battery repairs confirms Kia failed to comply with the requirements of Section 3065.2
8 when it included these nonqualified repairs with the calculation accompanying its Denial. Respondent’s
9 failure to comply with for the plain language of Section 3065.2 should bar Respondent from continuing
10 to challenge Putnam’s Submission.

11 In addition to demonstrating its compliance with Section 3065.2, Respondent is also required to
12 demonstrate the Submission be materially inaccurate or fraudulent. The parties are in agreement the
13 central issue in this protest is the legal question of whether Section 3065.2 requires the “hours that
14 generated those charges” be the actual technician hours or the hours sold to the customer.

15 Respondent incorrectly alleges Putnam advocates for a determination that a franchisee may use
16 any number of sold hours free of any objective standard. Instead, Protestant argues Section 3065.2
17 permits a franchisee to select guide hours that are reasonable. In this instance, Protestant selected Kia’s
18 factory guide hours (“Labor Time Standards” or “LTS”) as a reasonable source for the base sold hours
19 used to price customer pay repairs. Kia cannot argue the use of its own guide hours is unreasonable.
20 Moreover, Kia cannot argue Putnam’s use of sold hours *greater* than Kia’ LTS times is unreasonable.
21 Kia had the opportunity to argue any instance where Putnam’s sold hours are less than its own LTS guide
22 hours should be considered potentially unreasonable or fraudulent. Instead, Kia argues that instances
23 where Putnam’s sold hours are more than what Kia determined to be reasonable somehow renders the
24 Repair Order (“RO”) sold hours to be materially inaccurate. Kia ignores the fact that Putnam’s
25 calculated rate would have been *higher* had Putnam strictly used the precise Kia LTS times.

26 Respondent also argues the use of Kia’s LTS hours is prohibited by Section 3065.2. Kia relies
27 on the difference between the initially proposed language of Section 3065.2 (that would have required
28 the use of the factory time allowances) with the enacted version of Section 3065.2, which requires the

1 use of “hours generating those charges.” The effective version of Section 3065.2 is broader and intended
2 to encompass *any* time guide that provides a reasonable basis to determine charges to customers for non-
3 warranty repairs. Again, Kia may argue the use of guide hours below what Kia determined to be
4 reasonable, as set forth in its LTS, is unreasonable. However, Kia should be estopped from arguing
5 guide hours at or above its own LTS can be considered unreasonable or fraudulent.

6 Respondent argues Section 3065.2 should be interpreted to require the use of actual technician
7 hours when calculating a retail labor rate based upon the statutory language of the “hours generating”
8 the charges. This argument fails because customer charges are independent of actual technician hours
9 and must be priced before any work is performed. Actual hours do not “generate” the charges because
10 they occur after the customer charges are determined.

11 ARGUMENT

12 I. RESPONDENT FAILS TO SHOW THE SUBMISSION IS MATERIALLY INACCURATE.

13 At page 4 of Respondent’s Post-Hearing Brief (“Kia’s Brief”), Respondent argues the
14 Submission is materially inaccurate for the following reasons:

15 *(i) Kia alleges Putnam’s rate was calculated using sold hours that are in aggregate less than*
16 *the actual technician hours.*

17 As explained in section I.A below, actual technician hours cannot be used to generate charges to
18 customers. California law requires service repair charges be determined upfront, before any work is
19 completed. [Cal. Bus. & Prof. Code, § 9884.9, subd. (a).] The Legislature could not have intended
20 Section 3065.2 to be interpreted as Respondent argues given the existing legal requirement to determine
21 charges upfront.

22 The difference in actual hours compared to the Submission sold hours is of no consequence. The
23 record is replete with testimony confirming Kia’s LTS times are lower than the multiplied times found
24 in commercial guides. As a result, the Kia LTS times are the lowest available guide hours. Because of
25 this, Putnam’s sold hours will predictably be lower than the actual technician hours in many instances.

26 *(ii) Kia alleges Putnam’s sold hours did not conform to any policy, standard or time guide.*

27 This is incorrect. Putnam witnesses testified the dealership’s policy is for the service advisors to
28 use the Kia LTS time allowances when pricing customer pay repairs. The service advisors also have

1 discretion to add additional time as may be appropriate. On average, the sold hours in the Putnam ROs
2 are greater than the average Kia LTS hours across the same repairs resulting in a lower requested labor
3 rate than applying the Kia LTS hours would have supported. [*See, infra*, Parts I.B and I.C.]

4 *(iii) Kia alleges Putnam's calculated rate is higher than the competitive range of other dealers*
5 *in California.*

6 Kia is unable to point to any portion of Section 3065.2 that would permit the Board's
7 consideration of the rates of other dealers—this simply is not a consideration authorized by Section
8 3065.2. [*See, infra*, Part I.D.]

9 *(iv) Kia points to the Submission's initial inclusion of an RO with an hourly rate of \$2,500.*

10 Even before this protest was filed, Putnam acknowledged it was an error to include RO 10298 in
11 the Submission because it did not include a diagnostic or repair. Moreover, Putnam has never argued it
12 intended to price any repair at \$2,500 per hour. Putnam presented evidence for what the properly
13 calculated retail labor rate should be after the removal of RO 10298. [*See, infra*, Part I.E.]

14 *(v) Kia alleges the Submission failed to include two qualified repairs.*

15 Respondent's claim is unsupported by the record. The two repairs Kia references (RO10246-B
16 and RO 10152-B) were properly excluded from the Submission because they did not include diagnostics
17 nor repairs and they did not include customer charges. [*See, infra*, Part I.F.]

18 *(vi) Kia alleges errors and flaws in Frog Data's procedures.*

19 Frog Data works with the raw ROs and does not rely on documentation outside of the ROs
20 themselves. Frog Data takes the RO data at face value and presumes it to be correct. The two isolated
21 incidences of ROs that should have been excluded from the Submission were addressed at hearing. The
22 first, RO 10298 (included in error because no repair nor diagnosis was performed), was acknowledged
23 before the Protest was filed. The second, RO 10571 (included in error because it was a repair performed
24 pursuant to an extended warranty), was addressed during the hearing. The removal of these two ROs
25 permits the correct rate to be calculated pursuant to Section 3065.2 and does not render the Submission
26 materially inaccurate. [*See, infra*, Part II.]

27 *(vii) Respondent claims Putnam advocated contradictory and shifting positions.*

28 This claim is without support in the record. Putnam agreed RO 10298 should not have been

1 included with the submission. The only other instance of a changed position concerning whether any
2 RO should be considered a qualified repair was in response to the discovery that RO 10571 was
3 performed as part of an extended warranty program. RO 10571 should be excluded from the calculation
4 because it is an extended warranty repair excluded by Section 3065.2, subdivision (c)(8) and (11). [*See*,
5 *infra*, Part II.]

6 A. **Kia’s argument the difference between Sold Hours and Actual Hours renders the**
7 **Submission to be materially inaccurate is inconsistent with how Putnam prices**
8 **customer pay repairs and industry custom.**

9 The actual technician hours employed on any given repair in no way affect the charges to the
10 customer. [RT Vol. V, 943:10-945:1 (Reyes describing how Putnam prices customer pay repairs and
11 why the price is independent of actual hours); *see also* RT Vol. V, 950:21-951:5 (Mr. Reyes testifying
12 the training and efficiency of the assigned technician does not impact the price of a repair to Putnam
13 Kia’s customers); RT Vol. V, 946:18-949:7 and 950:15-20 (Mr. Reyes describing the different levels of
14 training for Kia technicians and confirming not all technicians are equally capable and not all technicians
15 could complete the same job in the same amount of time); RT Vol. VI, 17:22-24 and 18:7-21; RT Vol.
16 VII, 134:21-135:9; RT Vol. IX, 82:14-83:10 (Mr. Kamenetsky testified Putnam does not use actual time
17 to generate charges because Putnam could not know the actual hours when quoting a price to a customer
18 and customers do not participate in the repair taking more or less time).] Putnam assumes some risk that
19 the number of actual hours required for a repair may exceed the number of hours sold to the customer.
20 The actual technician charges cannot and do not generate the charges to the customer.

21 In addition, actual technician hours play no role in how charges are generated to service
22 customers as matter of custom in the industry. [*See* Cal. Bus. & Prof. Code, § 9884.9, subd. (a) (requiring
23 a written estimate prior to any service work being performed); *see also* RT Vol. VII 134:21-135:9 (Mr.
24 Putnam explaining it is not possible to charge service customers based on actual hours); RT Vol. VI,
25 17:22-24 (Putnam Kia does not use actual hours to charge a customer for a service repair—the charge is
26 based on the sold hours).] The charges to the customer are determined prior to any work being
27 performed. [*Id.*] It would violate Section 9884.9 to perform a repair for a retail customer without a prior
28 estimate approved by the customer. Kia has not evaluated any other dealer’s labor rate request based on
actual technician hours. This shows Kia’s practice is to ordinarily conform to industry custom by using

1 sold hours. [RT Vol. III, 412:25-413:17.]

2 **B. Putnam’s policy is to use Kia’s LTS as a baseline to price customer pay repairs.**

3 While a significant disparity in sold hours and technician hours may provide reasons to
4 investigate more closely, the place to begin is with Kia’s LTS. [RT Vol. II, 334:22-335:20 (Mr. Nardini
5 explaining Kia generally pays dealers for warranty work based on Kia’s LTS hours).] The question
6 being what has Kia determined to be a reasonable number of hours for the repair? This is the objective
7 baseline Respondent claims is required. [See Kia’s Brief, 3:9-13.] Kia developed the LTS for the purpose
8 of determining the number of hours assigned to warranty repairs completed by Kia dealers. Kia dealers
9 are reimbursed for warranty repairs based on their retail labor rate and the LTS hours for each repair.
10 [See RT Vol. II, 336:1-337:16 (Mr. Nardini explaining how Kia creates the LTS times and why they are
11 reasonable).]

12 Mr. Reyes testified to the LTS times for each of the qualified repairs provided with the
13 Submission. His testimony confirms the sold hours from the Submission ROs, in aggregate, exceed the
14 Kia LTS times.

<u>ROs of Different Repair LTS hours and Sold Hours in Kia’s Brief¹</u>	<u>Sold Hours of the Repair</u>	<u>Kia’s LTS hours for the Repair</u>	<u>Difference (“+” meaning the Sold Hours exceed the LTS hours and “-” meaning the LTS hours exceed the Sold Hours)</u>
RO 10133, Line A	1.4 sold hours [Exh. R-247.001; see also RT Vol. VI, 13:20-25]	1.1 LTS hours [Exh. P-120.001; RT Vol. V, 1003:25-1005:3; RT Vol. VI, 16:15-21; RT Vol. VI, 20:19-23]	+0.3
RO 10165, Line B	0.4 sold hours [Exh. R-249.001-.002; RT Vol. III, 526:6-527:19; RT Vol. VI, 25:10-19]	0.6 LTS hours [Exh. P-120.002; RT Vol. VI, 20-26:12.]	-0.2

25 ¹ Putnam reproduces the list Kia presents on Kia’s Brief page 13 to compare the sold hours and LTS
26 hours for this chart. Putnam prepared a similar chart based on the record evidence and prior to receipt
27 of Kia’s list in Protestant’s Post-Hearing Opening Brief, Part IV.B. The chart in Protestant’s Post-
28 Hearing Opening Brief showed the total difference between the sold hours and LTS hours to be +1.6
hours; i.e., the sold hours in Putnam’s ROs exceeded the LTS hours by 1.6 hours. Applying the total
number of LTS hours instead of the total number of sold hours would have supported a \$483.69 per
hour labor rate—higher than the \$447.52 requested in the Submission.

1	RO 10180, Line A	0.2 sold hours [Exh. R-250.001; RT Vol. III, 464:18-466:1 and 531:14-532:11; RT Vol. VI, 27:17-29:9]	N/A ²	N/A
2				
3				
4	RO 10180, Line B	1.1 sold hours [Exh. R-250.001; RT Vol. III, 464:18-466:1 and 531:14-532:11; RT Vol. VI, 27:17-29:9]	0.7 LTS hours [Exh. P-120.003; <i>see also</i> RT Vol. III, 532:12-19; RT Vol. VI, 195:1-19]	+0.4
5				
6				
7	RO 10320, Line A	0.3 sold hours [Exh. R-243.001; RT Vol. VI, 46:14-47:3]	0.4 LTS hours [Exh. P-120.007; <i>see also</i> RT Vol. VI, 52:3-15]	-0.1
8				
9	RO 10346, Line A	1.5 sold hours [Exh. R-212.001]	N/A ³	N/A
10	RO 10352, Line A	1.3 sold hours [Exh. R-254.001-.002; RT Vol. III, 487:1-15; RT Vol. VI, 54:6-19; RT Vol. VI, 54:20-25]	0.5 LTS hours [Exh. P-120.008; Exh. R- 269; RT Vol. III, 487:25- 488:20; RT Vol. VI, 55:13-56:8; RT Vol. V, 837:24-3840:20]	+0.8
11				
12				
13	RO 10404, Line A	0.8 sold hours [Exh. R-255.001-.002; RT Vol. III, 489:25- 490:8 and 534:7-14; RT Vol. VI, 56:19-24; RT Vol. VI, 56:2-57:2]	0.9 LTS hours [Exh. P-120.009; RT Vol. III, 534:15-21; RT Vol. VI, 57:3-12]	-0.1
14				
15				
16				
17	RO 10415, Line A	1.0 sold hours [Exh. R-256.001-.003; RT Vol. III, 472:6-18; RT Vol. VI, 60:10-25]	0.8 LTS hours [Exh. P-120.010; Exh. R- 268; RT Vol. VI, 61:1-15; RT Vol. V, 831:3-15 and 835:17-836:12]	+0.2
18				
19				

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23 ² Kia did not provide reliable evidence of what the LTS hours would have been for this repair. As Mr. Reyes clarified prior to the citation relied on by Kia for this RO and Line, he could not rely on the LTS for a similar repair on a different vehicle because the LTS hours can be different for the same repair on a different vehicle. “It just depends on how the vehicle is built and all that.” [RT Vol. VI, 183:3-23.] Kia never offered the LTS hours for RO 10180, Line A to show how the sold hours and LTS hours might compare.

24

25

26

27 ³ To the extent Kia claims there was any repair in RO 10346, Line A, it concerns adjusting the plug locking mechanism. [See RT Vol. IV, 572:14-573:23; RT Vol. VII, 17:25-18:14.] Kia did not provide evidence of the LTS time for adjusting the plug locking mechanism and there is no evidence the LTS for the adjustment exceeds 1.5 hours.

28

1	RO 10426, Line D	0.4 sold hours [Exh. R-257.003; RT Vol. III, 478:10-481:14 and 548:2-12; RT Vol. VI, 71:15-72:24; RT Vol. VI, 73:3-5]	0.6 LTS hours [Exh. P-120.011; RT Vol. III, 548:13-20; RT Vol. VI, 73:6-20]	-0.2
2	RO 10486, Line A	1.5 sold hours [Exh. R-259.001-.002; RT Vol. III, 551:19-22; RT Vol. VI, 84:14-25]	0.7 LTS hours [Exh. P-120.012; RT Vol. III, 551:23-552:10; RT Vol. VI, 85:1-19]	+0.8
3	RO 10529, Line B	0.4 sold hours [Exh. R-260.002-.003; RT Vol. III, 494:4-9; RT Vol. VI, 89:2-12; RT Vol. VI, 90:4-7]	0.5 LTS hours [Exh. P-120.014; RT Vol. III, 496:24-497:3; RT Vol. VI, 90:10-24]	-0.1
4	RO 10571, Line B	1.3 sold hours [Exh. R-244.001-.002; RT Vol. II, 254:18- 256:3 and RT Vol. III, 498:3-13; RT Vol. VI, 99:5-100:7]	2.4 LTS hours [Exh. P-120.016; RT Vol. II, 258:10-16; Exh. P- 121.002; RT Vol. VI, 100:10-101:2]	-1.1 ⁴
5	RO 10581, Line A	0.5 sold hours [Exh. R-263.001; RT Vol. III, 500:21-501:6; RT Vol. VI, 101:24- 102:12]	0.2 LTS hours [Exh. P-120.017; RT Vol. VI, 102:13-103:2]	+0.3
6	RO 10631, Line F	1.3 sold hours [Exh. R-214.003-.004; RT Vol. III, 518:6- 519:13; RT Vol. VI, 115:20-116:23]	0.5 LTS hours [Exh. P-120.019; RT Vol. III, 519:14-520:1; RT Vol. VI, 117:13-24]	+0.8

19
20 The total of the fourth column above shows +1.8 sold hours more than Kia's LTS. This number
21 jumps to +2.9 after RO 10571-B is removed, which is required by Section 3065.2, subdivision (c)
22 because it is an extended warranty repair. On average, the sold hours exceed the LTS hours for the
23 repairs listed on page 13 of Kia's Brief. Putnam's use of Kia's LTS hours is not materially inaccurate.

24
25 ⁴ As discussed during the hearing, RO 10571 concerned an extended warranty repair that should have
26 been excluded from the calculation. The repair in RO 10571, Line A concerns a Claim Number
27 2688461, Protective Asset Extended Warranty. [Exh. P-118.013; RT Vol. IX, 60:11-16.] Protective
28 Life VSC provided authorization for payment for an extended warranty claim on RO 10571, Line A.
[Exh. P-125; RT Vol. IX, 70:15-23.] Repairs for service contract providers or insurance carriers are
excluded from the calculation of a retail labor rate under Section 3065.2. [Cal. Veh. Code, § 3065.2,
subd. (c)(8) and (11).] Excluding RO 10571 from the calculation of the difference in this section of
Putnam's Post-Hearing Brief would increase the total difference by 1.1 hours.

1 Any overall discrepancy between the sold hours and LTS hours shows Putnam is not attempting to use
2 unreasonably low sold hours to generate a higher effective labor rate. To the extent Putnam's service
3 advisors are applying their discretion in pricing customer pay repairs, the discretion resulted in a lower
4 requested labor rate in the Submission than would have resulted from the strict application of Kia's LTS
5 hours.

6 C. **Kia's claim that Putnam Kia's Sold Hours do not follow Kia's LTS times is**
7 **misleading.**

8 Kia alleges Putnam failed to apply the Kia LTS times about 75% of the time. [Kia's Brief, 12:18-
9 20.] This is misleading in several ways. First, Kia includes diagnostic hours sold to customers in its
10 75% figure. There are few if any instances where the Kia LTS provides guide hours for diagnostic only
11 repairs. [RT Vol. V, 951:22-952:19 (Reyes describing how Putnam prices diagnostic hours sold and the
12 general lack of LTS guide hours for diagnostic).] Instead, Putnam applies an hourly rate of \$500 to the
13 amount of time the service advisor estimates to be reasonable for the diagnostic at issue. Second, the
14 Putnam sold hours exceed the Kia LTS times, in aggregate. [See, supra, Part I.B.]

15 Kia claims Putnam is advocating for the ability to use any source of sold hours without any
16 objective standard—this is not accurate. [Kia's Brief, 3:3-13.] Putnam service advisors are instructed
17 to use the Kia LTS times. [RT Vol. V, 943:15-944:6; see also RT Vol. VI, 17:10-21.] However, the
18 service advisors have some discretion to increase the sold hours above Kia's LTS where appropriate.
19 [RT Vol. IX, 127:7-128:15.] *The objective standard is Kia's own LTS times.*

20 Several witnesses confirmed commonly used third-party commercial guides provide time
21 allowances greater than those listed in the Kia LTS. [RT Vol. IX, 21:22-26:13 (Mr. Kamenetsky
22 describing the multiplier applied to factory guide hours in commercial time guides); RT Vol. V, 958:5-
23 960:9 (Mr. Reyes describing use of multiplied factory time in commercial guides).] These third-party
24 time guides apply a multiple to the Kia LTS times. Putnam has opted to use the Kia LTS as its baseline
25 for pricing repair hours sold to customers to avoid the dilution to its calculated labor rate that would
26 result from the use of a multiplied time guide. If Putnam were using sold hours less than what Kia has
27 determined to be reasonable and set forth in the Kia LTS, this would create an inference the sold hours
28 were potentially unreasonable or fraudulent. However, this is not what is evidenced by the Putnam

1 Submission. The Submission evidences the use of sold hours that on average and in the aggregate are
2 greater than Kia's LTS times.

3 **D. Kia's argument based on other dealers' rates is irrelevant to the application of**
4 **Section 3065.2.**

5 Kia argues the rates of other dealers are relevant to the Board's determination in this protest.
6 [Kia's Brief, 16:12-18:6.] However, Kia fails to cite any provision of Section 3065.2 that might support
7 its position. This is because no such provision exists in Section 3065.2. Instead, Section 3065.2 sets
8 forth the proscribed formula to be used when determining a franchisee's retail labor rate. Section 3065.2
9 unambiguously requires the total charges to customers be divided by the "total number of hours that
10 generated those charges."

11 Respondent's argument pertaining to Putnam's calculated rate relative to other dealers should be
12 rejected because it is not relevant to the issues to be determined in this protest nor permitted under
13 Section 3065.2.

14 **E. Respondent incorrectly argues the inclusion of RO 10298 causes the Submission to**
15 **be materially inaccurate.**

16 Putnam conceded well before the filing of this protest that RO 10298 should not have been
17 included in the Submission. [Exh. J-7.009.] RO 10298 was for an afterhours tow in. [Exh. R-210.002;
18 RT Vol. IV, 724:23-725:14; RT Vol. V, 990:14-21.] No diagnostic work and no repair was performed
19 on this vehicle. Putnam acknowledged this error in its June 15, 2023, letter to Kia responding to the
20 Denial. [Exh. J-7.009]

21 **F. Respondent incorrectly claims Putnam failed to include at least two qualified**
22 **repairs.**

23 Respondent incorrectly claims RO 10246-B and RO 10152-B should have been included as
24 qualified repairs. RO 10246, Line B is contained in Exhibit R-271.001. RO 10152, Line B is contained
25 in Exhibit R-272.002. Kia had the option to include ROs 10152 and 10246 in the list of ROs it selected
26 to calculate a proposed adjusted retail labor rate, however, Kia decided not to include these repairs. [See
27 Exh. J-6.004.] Kia lacks justification to add ROs 10152 and 10246 to its proposed adjusted retail labor
28 rate because it was in possession of all the ROs, including ROs 10152 and 10246 at the time of the Denial

1 and chose not to include the ROs in Kia's calculation.

2 Moreover, RO 10246, Line B and RO 10152, Line B do not include any hours sold to the
3 customer or any resulting charges. [Exh. R-271.001 and R-272.002.] Vehicle Code section 3065.2
4 requires the calculation of a retail labor rate be based on "the total charges" divided by the "the total
5 number of hours that generated those charges." [Cal. Veh. Code, § 3065.2, subd. (a)(2).] Because ROs
6 RO 10246, Line B and RO 10152, Line B do not have any charges, there are no hours generating charges
7 on those repair lines. RO 10246, Line B and RO 10152, Line B were correctly excluded from Putnam's
8 Submission and are not qualified repairs.

9 **G. The parties mostly agree which ROs are "qualified repair orders" pursuant to**
10 **Vehicle Code section 3065.2, subdivision (j) and which are to be excluded pursuant**
11 **to subdivision (c).**

12 The majority of the ROs the parties disputed whether they should be considered qualified
13 concerned thirteen (13) ROs involving brake pad replacements, a fluid refill, and battery replacements
14 included by Kia in the Denial. [See Protestant's Post-Hearing Opening Brief, Part I.C.] Putnam always
15 maintained ROs 10168, 10181, 10263, 10271, 10334, 10468, 10474, 10527, 10590, 10592, 10638,
16 10646, and 10655 were routine maintenance repairs which should be excluded from the calculation
17 pursuant to Section 3065.2, subdivision (c). [Cal. Veh. Code, § 3065.2, subd. (c)(3) (excluding from the
18 calculation "[r]outine maintenance, including, but not limited to, the replacement of *bulbs*, fluids, filters,
19 *batteries*, and belts that are not provided in the course of, and related to, a repair") (emphasis added).]
20 Kia's Denial incorrectly argued the repairs should have been included in Putnam's calculation of a retail
21 labor rate. [Exh. J-6.002 and .004-.005.]

22 However, Kia now agrees with Putnam's position concerning these thirteen (13) ROs. During
23 the hearing, Kia stipulated certain ROs including ROs 10271, 10334, 10474, 10527, 10590 (second
24 entry), and 10592 were not qualified repairs. "Kia is now stipulating to the removal of these repairs from
25 the calculation for purposes of this case."⁵ [Kia's Brief, 23:19-20.]

26 _____
27 ⁵ Kia argues it had a reasonable basis for considering the repairs to be qualified repair orders for
28 purposes of its Denial. However, the repairs were always excluded by Section 3065.2, subdivision (c).
The repairs are not qualified repairs for all the reasons discussed in Protestant's Post-Hearing Opening
Brief, and Kia included the repairs in an effort to lower Kia's proposed adjusted retail labor rate.

As a result, the following chart updates the information in Putnam’s Exhibit 1 attached to Protestant’s Post-Hearing Opening Brief. The chart is in order of RO number as listed in Putnam’s Post-Hearing Opening Brief, Exhibit 1. Putnam includes a simplified description of the repair taken from Exhibit 1 in the second column, and the exhibit number from Kia’s Exhibit A attached to Kia’s Brief in the third column. Putnam includes cross outs for those entries the parties agree should no longer be considered qualified ROs based on Kia’s stipulations during the hearing, Kia’s stipulation in its Brief, and Putnam’s agreement concerning RO 10298.⁶

RO Number (listed in Putnam’s Exhibit 1)	Repair Description	Exhibit Number from Kia’s Exhibit A
RO 10133 (Line A)	Replacement of a knock sensor	R-247.001
RO 10148 (Line U)	Diagnostic associated with the airbag light	R-242.001;.005 and R-250.001
RO 10153 (Line A)	Diagnostic related to rear driver side window not rolling up or down	R-248.001 and R-271.001-002
RO 10158 (Line A)	Diagnostic related to the vehicle’s shifting lock	R-205.001 and R-253.001
RO 10165 (Line B)	Replacement of a front window regulator and switch	R-249.001
RO 10168 (Line A)	Brake service	
RO 10180 (Lines A & B)	Replacement of the driver side clock spring and replacement of both the front window switch and front passenger side regulator’s motor	R-250.001
RO 10181 (Line C)	Replacement of a bulb	
RO 10183 (Line A)	Installation of a fuel door switch	R-208.001 and R-272.001

⁶ One of the remaining differences between the ROs the parties contend are qualified ROs on which the Board should rely is based on the applicable date range of ROs. Kia’s Denial selected the modified date range of November 12, 2021, and ending February 10, 2022. [Exh. J-6.003.] this modified date range removed ROs 1033, 10148, and 10153 (highlighted in yellow below) from the calculation and added ROs 10679, 10680, and 10712 (highlighted in green below). The parties agree each of these ROs is a qualified RO, however, Kia attempts to withdraw its selection of the modified date range of November 12, 2021, and ending February 10, 2022, in its Brief. [Kia’s Brief, 5:7-12 and 25:15-19.] As discussed below, Kia should not be permitted to withdraw a statutory selection it made over two years ago. Only one set of the highlighted ROs (yellow or green) can be included for a 90-consecutive-day period of ROs described by Section 3065.2, subdivision (a)(1)(B).

1	RO 10191 (Line C)	Installation of a new starter motor	R-251.006
2	RO 10263 (Line B)	Replacement of brake pads and resurfacing of rotors	
3	RO 10271	Brake pad replacement and rotor resurfacing	
4	RO 10291 (Line F)	Replacement of the rear side valve cover gasket	R-252.004
5	RO 10298 (Line A)	Downpayment for diagnostic with parts on back order⁷	
6	RO 10300 (Line A)	BCM replacement	R-205.001 and R-253.001
7	RO 10320 (Line A)	Installation of a driver's side outside door handle	R-243.001
8	RO 10334	Brake pad replacement and rotor resurfacing	
9	RO 10346 (Line A)	A diagnosis related to a vehicle starting but shutting itself off in less than a minute	R-212.001
10	RO 10352 (Line A)	Diagnosis and replacement of a valve-purge control	R-254.001
11	RO 10404 (Line A)	Reseal of an oil pan assembly	R-255.001
12	RO 10415 (Line A)	Diagnosis and replacement of the vehicle's PCM	R-256.001
13	RO 10426 (Line D)	Replacement of a clock spring	R-257.001;.003
14	RO 10454 (Line A)	Diagnosis related to a hybrid warning light or check engine light	R-258.001
15	RO 10468 (Line A)	Replacement of the front brake pads and resurfacing of both front rotors	
16	RO 10474	Brake pad replacement	
17	RO 10486 (Line A)	Diagnosis and replacement of a fuel sending unit	R-259.001
18	RO 10527	Brake pad replacement and resurfacing of both rotors	
19	RO 10529 (Lines A & B)	Differential pinion oil seal repair and replacement and repair and replacement of a windshield washer fluid pump	R-260.001 and R-260.002
20			
21			
22			
23			
24			
25			
26			

⁷ In response to Kia's third reason for the denial, Putnam agreed in its June 15, 2022, letter that the RO should have been excluded from the labor rate calculation. [Exh. J-7.009; RT Vol. IV, 692:21-693:10 and 724:3-11; *see also* RT Vol. IX, 87:7-20.]

1	RO 10534 (Line B)	Replacement of the windshield washer fluid pump	R-261.002
2			
3	RO 10553 (Line A)	Diagnosis related to the tailgate door handle not operating	R-262.001 and R-264.001
4			
5	RO 10571 (Line A)	Replacement of a sunroof motor ⁸	R-244.001
6	RO 10581 (Line A)	Replacement of the downhill indicator light (bulb replacement)	R-263.001
7			
8	RO 10585 (Line A)	Replacement of a rear trunk latch assembly	R-262.001 and R-264.001
9	RO 10590 (Line E)	Reseal of the oil pan	R-265.004
10	RO 10591 (Line A)	Replacement of the VCMA (variable charge motion actuator)	R-266.001
11	RO 10592	Front brake pad Replacements	
12	RO 10617 (Line A)	Diagnosis related to the vehicle's check engine light	R-267.001
13			
14	RO 10631 (Line F)	Replacement of the front passenger side caliper assembly as well as a brake fluid service	R-214.003
15			
16	RO 10638 (Line A)	Transmission fluid refill	
17	RO 10646 (Line A)	Diagnosis and battery replacement	
18	RO 10655 (Line D)	Battery replacement	
	RO 10679 (Line A)	Installation of lamp assembly	

⁸ As discussed in Protestant's Post-Hearing Opening Brief, RO 10571 concerned an extended warranty repair that should have been excluded from the calculation. The repair in RO 10571, Line A concerns a Claim Number 2688461, Protective Asset Extended Warranty. [Exh. P-118.013; RT Vol. IX, 60:11-16.] Protective Life VSC provided authorization for payment for an extended warranty claim on RO 10571, Line A. [Exh. P-125; RT Vol. IX, 70:15-23.] Repairs for service contract providers or insurance carriers are excluded from the calculation of a retail labor rate under Section 3065.2. [Cal. Veh. Code, § 3065.2, subd. (c)(8) and (11).] Kia argues RO 10571 should be included in the calculation because it was a new position raised by Putnam to remove RO 10571 from the calculation as an extended warranty repair and because the RO itself does not show the RO to be an extended warranty repair. [Kia's Brief, 22:18-23:23:14.] The evidence provided during the merits hearing showed why there was a difference between the sold hours and LTS hours for RO 10571 of 1.1 hours—the RO was for an extended warranty repair different than other repairs examined as qualified ROs. However, including or excluding the RO does not materially change the overall calculation of Putnam's retail labor rate. Excluding the RO would change the calculated labor rate from \$436.51 to \$434.35 per hour as discussed below. As a result, Putnam is willing to include the RO for purposes of calculation even though extended warranty repairs would normally be excluded by Section 3065.2, subdivision (c). [See Cal. Veh. Code, § 3065.2, subd. (c)(8) and (11).]

RO 10680 (Line A)	Replacement of the driveshaft and clean up of grease residue	
RO 10712 (Line A)	Main driver side door switch repair	

As a result, the parties are in agreement the following ROs are qualified repair orders to be used in calculating Putnam’s retail labor rate: RO 10158, 10165, 10180 (Lines A & B), 10183, 10191, 10291, 10300, 10320, 10346, 10352, 10404, 10415, 10426, 10454, 10486, 10529 (Lines A & B), 10534, 10553, 10571⁹, 10581, 10585, 10590, 10591, 10617, and 10631. These are the same ROs as listed in the List of ROs provided by ALJ Woodward Hagle to the parties by email dated June 5, 2024.¹⁰

Putnam maintains ROs 10679, 10680, and 10712 (highlighted in green in the chart above) should be included in the set of ROs relied on to calculate Putnam’s labor rate. Kia selected the green highlighted ROs instead of the yellow highlighted ROs when Kia issued its Denial. [See Exh. J-6.003 and .004-.005.] Kia’s selection was pursuant to Vehicle Code section 3065.2, subdivision (d)(5). [See Cal. Veh. Code, § 3065.2, subd. (d)(5).] Kia cannot now unilaterally withdraw its selection in an effort to reduce Putnam’s labor rate from the \$268.90 per hour rate Kia granted in the Denial letter to a \$262.95 rate Kia has raised for the *first time* in its Post-Hearing Opening Brief. There is no statutory support for Kia’s attempt to withdraw a proposed adjusted retail labor rate Kia previously granted to Putnam or to withdraw a range of ROs Kia used to calculate a propose adjusted retail labor rate. Moreover, there is no justification to permit Kia to make this change after the close of the merits hearing. [See Cal. Veh. Code, § 3065.2, subd. (d) (prohibiting a franchisor from “add[ing] to, expand[ing], supplement[ing], or otherwise modify[ing] any element of that notification [Kia’s Denial], ... without justification.”)]

Replacing the entries for ROs 10133 A, 10148 U, and 10153 A in Kia’s Brief, Exhibit A with ROs 10679 A, 10680 A, and 10712 A removes \$954.00 labor charges replaced by \$356.55; removes 2.1 sold hours replaced by 0.8 hours; and removes 4.22 actual hours replaced by 1.45 hours. [See Exh. J-6.005 for the sold hours, actual hours, and labor charges for ROs 10679 A, 10680 A, and 10712 A (final

⁹ As noted in the prior footnote, Putnam is willing to include RO 10571 in the calculation because it was included in the original submission and Kia argues it should be included for that reason, however, it should be excluded under Section 3065.2 because it is an extended warranty repair.

¹⁰ The total number of ROs is 25 because two of the ROs have two lines the parties agree are both qualified repairs (RO 10180, Lines A & B and RO 10529, Lines A & B).

1 three entries).] This changes the calculations in Kia's Exhibit A to total labor charges of \$8,728.57, sold
2 hours of 20.0 hours, and actual hours of 32.7 hours. Applying a calculation of a labor rate based on sold
3 hours results in \$436.43 per hour (compared to \$437.84 based on the set of ROs in Kia's Exhibit A).
4 Applying a calculation of a labor rate based on actual hours results in \$266.93 (compared to \$262.93
5 based on the set of ROs in Kia's Exhibit A).¹¹

6 II. KIA'S ALLEGED EXAMPLES OF ERRORS AND INCONSISTENCIES DOES NOT
7 WITHSTAND SCRUTINY.

8 A. **Kia incorrectly argues diagnostic charges that do not result in a repair cannot be**
9 **included in a labor rate submission per Section 3065.2**

10 Respondent notes Putnam withdrew consideration of RO 10298-A because it agreed there was
11 an error in this RO. [Kia's Brief, 18:12-18.] However, Respondent then incorrectly argues RO 10158-
12 A, RO 10454-A, and RO 10617-A should be excluded for the same reason. These ROs are
13 distinguishable from RO 10298-A and were properly included in the calculation provided with the
14 Submission.

15 RO 10158-A: This RO involves diagnostic labor time billed to the customer. [Exh. R-205.001-
16 .002.] The technician story details the diagnostic service performed and the ultimate repair
17 recommended. Putnam must charge customers for diagnostic time regardless of whether the customer
18 chooses to proceed with the repair identified. In this instance, the customer was charged for 0.5 sold
19 hours with actual hours of 3.29. [Exh. R-205.001.] This is not similar to RO 10298 because there was
20 no diagnosis nor repair in RO 10298-A.

21 RO 10454-A: This is not similar to RO 10298-A because there was no diagnosis nor repair in
22 RO 10298-A. In contrast, RO 10454-A involved a diagnosis. [Exh. R-258.001-.002.] The technician
23 story shows the technician ran a series of diagnostic tests and also swapped the ignition coils for cylinders
24 3 and 4 for 1 and 2. [Exh. R-258.001.] The customer charges were based on 0.2 hours and the actual
25 technician hours were 1.02. [*Id.*] The initial estimate to the customer was based upon 0.2 sold hours.

27 ¹¹ As these calculations show, the difference between calculating Putnam's retail labor rate using the
28 green compared to the yellow highlighted ROs is not a material inaccuracy. The calculation should be
done using the set of ROs Kia selected in its Denial.

1 [Id.] Presumably, the additional technician time was the result of the time the technician spent swapping
2 the coils. This was part of the diagnostic process and not a separate repair because the coils were not
3 replaced. The fact the service advisor did not contact the customer to seek approval for an increased
4 diagnostic charge does not change the fact the customer was charged for 0.2 labor hours for the
5 diagnostic service.

6 RO 10617-A: This is not similar to RO 10298 because there was no diagnosis nor repair in RO
7 10298. However, RO 10617-A involved a diagnosis that is documented in the technician story. [Exh.
8 R-267.001-.002.] The technician spent 0.37 actual hours performing a series of diagnostic tests to
9 identify the required repair. [Exh. R-267.001.] The customer was charged for 0.3 sold hours for the
10 expected diagnostic time. [Id.]

11 Kia asks the Board to determine a franchisee cannot use diagnostic repairs for purposes of
12 calculating a labor rate pursuant to Section 3065.2. There is no basis to conclude the language of Section
13 3065.2 was intended to be read this way. First, the Legislature could have excluded diagnostic services
14 from consideration in the same way it excluded routine maintenance from the calculation—it did not.
15 Second, the statute provides the discrete formula for calculating a retail labor rate to be the customer
16 charges divided by the total number of hours that generated those charges. [Cal. Veh. Code, § 3065.2,
17 subd. (a)(2).] Diagnostic hours sold to the customer are the hours that generate the charges to the
18 customer.

19 **B. Putnam’s diagnostic pricing is consistent.**

20 Kia argues Putnam did not follow its policy of pricing diagnostic repairs at 0.5 of an hour on five
21 of seven qualifying diagnostic repairs from the Submission. [Kia Brief 14:24-15:7.] While Kia includes
22 reference to the sold hours, it omits the fact the sold hours reflect the consistent application of an hourly
23 rate to the sold hours. In the five examples Kia cites, three show the application of an hourly rate of
24 \$440, one RO shows the application of an hourly rate of \$500, and one is for an RO the parties stipulated
25 should not be considered a qualified repair.

- 26 • RO 10148-U: This diagnostic repair included 0.2 sold hours and customer charges of
27 \$88 for an hourly rate of \$440. [Exh. R-242.002.]
28

- 1 • RO 10153-A: This diagnostic repair included sold hours of 0.3 and customer charges of
2 \$132 of an hourly rate of \$440. [Exh. R-248.001.]
- 3 • RO 10298-A: This is not a qualified repair because no diagnostic was performed nor was
4 any repair completed. Prior to filing this protest, Putnam advised Kia this RO should not
5 have been included with the Submission. [Exh. J-7.009.]
- 6 • RO 10454-A: This repair included 0.2 sold hours and \$100 in customer charges for an
7 hourly rate of \$500. The \$500 hourly rate for diagnostic repairs is consistent with
8 Putnam’s practice of charging \$500 per hour for diagnostics. [Exh. R-258.001.]
- 9 • RO 10617-A: This repair included 0.3 sold hours and customer charges of \$132 for an
10 hourly rate of \$440 per hour. [Exh. R-267.007.]

11 These examples confirm Putnam is charging customers \$500 an hour for diagnostic repairs in
12 half of the Submission’s diagnostic repairs. The other half were charged to customers using Putnam’s
13 hourly rate of \$440 per hour. This discrepancy is hardly evidence of material inaccuracy or fraud.
14 Putnam’s service advisors have some discretion in how they price repairs to customers. If anything, the
15 application of the lower rate of \$440 per hour in some of the diagnostic ROs shows Putnam is not
16 manipulating the data to derive a higher retail labor rate.

17 In this protest, the Board must decide what is the appropriate retail labor rate as calculated
18 pursuant to Section 3065.2. Any variation in how repairs are priced to customers on an individual
19 transaction by transaction basis is not relevant to the overall determination because the formula set forth
20 in Section 3065.2 requires a determination of the *average* retail labor rate base upon a set of qualified
21 repairs.

22 **C. Putnam’s exclusion of RO 10152-B was proper.**

23 As discussed above, RO 10152-B was not included with Putnam’s submission because the RO
24 did not include sold hours. Mr. Korenak testified the industry standard is to use sold hours in calculating
25 a retail labor rate.¹² RO 10152-B could not be used in the calculation as a qualified repair because it did

26
27 ¹² Kia also attempts to challenge Mr. Korenak’s expertise with respect to Section 3065.2 submissions
28 by questioning the inclusion of a 90-consecutive-day period of ROs in the submission based on the
“opened date” rather than the “closed date.” Kia points to the language in section 3065.2, subdivision
(1)(B) referencing the ROs being completed. [Kia’s Brief, 21:7-13; *see also* Cal. Veh. Code, § 3065.2,

1 not include sold hours. [RT Vol. VIII, 155:1-10.] Moreover, the customer was not even billed for this
2 diagnosis or repair. RO 10152-B shows this repair as “ISP” or Internal Shop Policy. [Exh. R-272.002.]
3 This repair was never intended to be charged to the customer. Without any customer charges and no
4 hours sold, there is no basis to include this repair in a Section 3065.2 calculation.

5 Kia claims the customer was subsequently charged for both the diagnostic and the actual repair
6 on RO 10183-A. [Kia’s Brief, 20:24-21:3.] This is false, the customer was charged for 0.3 labor hours
7 when it authorized Putnam to complete the replacement of the fuel door switch repair identified in RO
8 10152-B. [Exh. R-208.001; *see also* Exh. P-120.004 showing the applicable LTS hours for replacement
9 of a fuel filler door to be the 0.3 hours Putnam charged the customer for this repair.)] The customer was
10 never charged for diagnostic time.

11 Respondent also claims Mr. Korenak agreed that RO 10246-B should have been included in
12 FrogData’s calculations, but was not. [Kia’s Brief, 19:21-27.] However, Kia neglects to provide the
13 citation to Mr. Korenak’s subsequent testimony that RO 12046-B could not have been included in the
14 Submission because it did not include sold hours or customer charges. [RT Vol. VIII, 187:14-188:17.]
15 Respondent’s selective parsing of the record is misleading and inaccurate.

16
17
18
19 subd. (a)(1)(B).] The language in Section 3065.2, subdivision (a)(1)(B) requiring the ROs be
20 completed for a 90-consecutive-day period is intended to exclude ROs which are opened in the 90-
21 consecutive-day period but have not been completed at the time of submission. Any other reading
22 would irrationally and arbitrarily reorganize a set of ROs in a consecutive number order into some
23 other order based on how long certain repairs require compared to others. Moreover, Kia’s Denial
24 similarly organized ROs in order of opened date rather than closed date. [*See, e.g.*, Exh. J-6.004
25 (listing RO 10158 with a date of 11/12/2021; RO 10165 with a date of 11/15/2021; RO 10168 with a
26 date of 11/15/2021); Exh. R-205.001 shows RO 10158’s opened date is 11/12/2021 with a ready
27 (closed) date of 11/23/2021; Exh. R-249.001 shows RO 10165’s opened date is 11/15/2021 with a
28 ready (closed) date of 12/08/2021; Exh. R-206.001 shows RO 10168’s opened date is 11/15.2021 with
a ready (closed) date of 11/30/2021.] Further, Kia’s Denial failed to deny Putnam’s Submission on the
basis the Submission organized ROs in order of opened date. [Exh. J-6.001-.003.] Kia does not have
any justification to add this reason for denial when the organization of ROs based on open date was
obvious based on the ROs, and the letter and spreadsheet in Exhibit 3. [*See* Cal. Veh. Code, § 3065.2,
subd. (d)(1) (requiring “After submitting the notification, the franchisor shall not add to, expand,
supplement, or otherwise modify any element of that notification, including, but not limited to, its
grounds for contesting the retail labor rate, retail parts rate, or both, without justification.”)]

1 **D. Kia incorrectly argues the inclusion of ROs 10158-A and 10571-A shows Putnam’s**
2 **Submission to be unreliable.**

3 RO 10158-A: Kia misrepresents the testimony concerning this RO. Kia falsely alleges Mr.
4 Kamenetsky testified RO 10158-A is not a qualified repair. [Kia’s Brief, 22:11-17.] However, the record
5 reflects Mr. Kamenetsky testified the vehicle in question had been modified by the customer and this
6 may have caused Kia to reject a warranty claim, if it had been submitted as warranty repair. Mr.
7 Kamenetsky testified as follows:

8 I don’t have the expertise to definitively know whether or not Kia would have covered it
9 or not, but in -- when I’ve seen similar repair orders, both customer-pay or warranty,
10 regarding alteration of the vehicle, generally those are considered modified -- aftermarket
11 modified or not covered under warranty. In this case, I don't know if the modification of
the wheels and the tire pressure monitor system might have had an effect on damaging
the transmission shift lock or not. That would be pure speculation on my part.

12 [RT Vol. IX, 133:14-23.]

13 When asked if he would exclude RO 10158-A from the Submission calculation, Mr. Kamenetsky
14 replied: “I’m agnostic. I mean, I would be open to Kia making a determination on whether they believe
15 that’s a warranty-like repair or not.” [RT Vol. IX, 134:5-9.] At best, Mr. Kamenetsky testified this repair
16 might be considered a modification that would void a warranty claim. He did not testify RO 10158-A
17 should have been excluded from the Submission.¹³

18 RO 10158-A was properly included as a qualified repair in the Submission. The question of
19 whether or not a warranty claim might be denied on this repair is not relevant. There is no evidence in
20 the record to support finding this repair is not a warranty like repair. Further, this RO supports the
21 submission because it again demonstrates Putnam’s consistent practice of pricing diagnostic repairs
22 using the hourly rate of \$500 based on a time estimate the service advisor believes to be appropriate at
23 the time the work is authorized by the customer. The price quoted to the customer is the final price and
24 not influenced by how many hours the technician actually spends in performing the diagnosis.

25
26 _____
27 ¹³ Kia appears to rely on Mr. Kamenetsky’s testimony that “I would -- I believe if someone asked my
28 opinion, I would exclude it on that basis of modification.” However, this was preceded by his
testimony that he lacked the expertise to know whether Kia would deny this repair as a warranty claim
and his opinion would be speculation. [RT Vol. IX, 133:14-134:9.]

1 RO 10571-A: This RO lists 1.30 sold hours compared to the Kia LTS allowance of 2.4. [Exh.
2 R-244.001-.002; Exh. P-120.016.] This is one of the few anomalous occurrences where Putnam’s sold
3 hours were less than Kia’s LTS. It was not discovered until the hearing that this repair was done pursuant
4 to an extended warranty program. [See Exh. P-118.013; RT Vol. IX, 60:11-16; *see also* Exh. P-125; RT
5 Vol. IX, 70:15-23.] Extended warranty repairs are repairs performed for an insurance carrier or service
6 contract provider, which are expressly excluded from the Section 3065.2 calculation. [Cal. Veh. Code,
7 § 3065.2, subd. (c)(8) and (11).] This RO should not have been included in Putnam’s Submission.
8 However, this isolated incidence does not render the Submission materially inaccurate.

9 RO 10571-A provides no indication on its face that this repair was performed pursuant to
10 Protective Asset Extended Warranty. It was only discovered by Protestant upon examination of the
11 customer pay receipt for RO 10571-A. FrogData relies on the ROs themselves when determining what
12 qualified repairs should be included in the calculation. FrogData did not review the customer receipts
13 that were admitted into evidence at hearing. This was an isolated instance and review of the customer
14 pay receipts show every other qualified repair to be a true customer pay RO. [RT Vol. IX, 74:8-21 (Mr.
15 Kamenetsky testifying he did a comprehensive review of all the receipts for the ROs at issue and found
16 all the other receipts to be customer receipts).]

17 The discovery of the fact RO-10571-A should have been excluded from the Submission occurred
18 after Mr. Korenak testified. Mr. Korenak testified the corrected Putnam retail labor rate should be
19 \$436.51. Mr. Korenak divided total customer charges of \$8,817.56 by the total sold hours of 20.20.
20 Removing RO 10571-A reduces the total charges by \$608.31 to \$8,209.25 with sold hours reduced from
21 20.20 to 18.9. The exclusion of RO 10571-A would result in a revised calculation of \$434.35.

22 **E. Kia’s argument concerning missing or incorrectly entered actual technician hours**
23 **fails to show the Submission is materially inaccurate.**

24 Actual technician hours play no role in how charges are generated to service customers. [See
25 Cal. Bus. & Prof. Code, § 9884.9, subd. (a) (requiring a written estimate prior to any service work being
26 performed); *see also* RT Vol. VII 134:21-135:9 (Mr. Putnam explaining it is not possible to charge
27 service customers based on actual hours); RT Vol. VI, 17:22-24 (Putnam Kia does not use actual hours
28 to charge a customer for a service repair—the charge is based on the sold hours).] The charges to the

1 customer are determined prior to any work being performed. [*Id.*] Actual hours are recorded when a
2 technician clocks on and off a specific repair. If a technician forgets to clock off one repair before
3 beginning a second repair, the time will be recorded for the first repair, but not the second. This is of no
4 consequence in this protest because actual technician time is used by the dealership to measure technician
5 efficiency and is *in no way related* to the charges generated to customers for repairs. [RT Vol. V, 927:21-
6 928:22; *see also* RT Vol. VI, 47:25-49:3.]

7 Mr. Reyes testified to different instances where a technician’s actual hours might not be accurate.
8 However, Mr. Reyes also explained the tracking of actual technician hours on customer pay repairs is
9 only for internal efficiency tracking purposes—it has no relationship to how technicians are paid or how
10 customers are charged for service work. [RT Vol. VI, 47:25-49:3] Putnam technicians are paid hourly
11 and their time is kept on a separate clock. [RT Vol. V, 927:21-928:22] Service charges are determined
12 prior to any actual technician hours being expended. [*See* Cal. Bus. & Prof. Code, § 9884.9, subd. (a)
13 (requiring a written estimate prior to any service work being performed); *see also* RT Vol. VII 134:21-
14 135:9; RT Vol. VI, 17:22-24.]

15 Respondent cites ALJ Woodward Hagle’s comment at hearing, “this is a variation that may lead
16 us to calculate these figures erroneously.” [Kia’s Brief, 22:1-2.] Her Honor’s comments were in regard
17 to actual technician hours appearing on the incorrect repair line. However, if the Board determines actual
18 technician hours cannot be considered the “hours generating those charges,” the accuracy of Putnam’s
19 actual technician hours is not relevant to the Board’s determinations in this protest. Actual technician
20 hours listed on a customer pay RO are for internal dealership purposes only and unrelated to customer
21 charges.

22 III. KIA’S ARGUMENTS THE LEGISLATURE INTENDED THE PHRASE “TOTAL NUMBER
23 OF HOURS THAT GENERATED THOSE CHARGES” TO MEAN ACTUAL TECHNICIAN
24 HOURS FAILS.

25 As Putnam supported in its Post-Hearing Opening Brief, Kia’s interpretation of Section 3065.2
26 to require the use of actual technician hours is contrary to, among other points, (1) California Business
27 and Professions Code section 9884.9 (a) requiring upfront pricing, (2) Kia permitting Putnam to price
28 customer-pay repairs using Kia’s LTS, (3) Putnam never pricing repairs based on actual hours, (4) the
plain language of Section 3065.2 not being based on actual hours, and (5) Kia never using actual hours

1 to calculate retail labor rates except for Putnam’s Submission. [See Protestant’s Post-Hearing Opening
2 Brief at Part I.A and I.B.] Kia’s Brief only reinforces the point the phrase “total number of hours that
3 generated those charges” does not mean actual technician hours.

4 Kia repeatedly asserts Putnam’s reliance on sold hours does not rely on “the actual hours that
5 generated those charges” or “the actual number of hours that generated the charges.” [Kia’s Brief, 1:5-
6 6, 2:14-15, 1:17-19.] Kia’s heading under its argument section states, “the statute says “hours,” not “sold
7 hours.” However, in making its argument, Kia only highlights its argument is inconsistent with the plain
8 language of Section 3065.2.

9 The statute says “total number of hours that generated those charges” **not** actual hours. [Cal.
10 Veh. Code, § 3065.2, subd. (a)(2).] The statute could have said, but does **not** say, total number of actual
11 hours that generated the charges. In selecting the hours described by the statute, the legislature intended
12 the selection to be based on the hours “that generate those charges.” Actual hours do not generate the
13 charges to Putnam’s customers. [RT Vol. V, 950:21-951:5 (Mr. Reyes testifying the training and
14 efficiency of the assigned technician does not impact the price of a repair to Putnam Kia’s customers);
15 *see also* RT Vol. V, 946:18-949:7 and 950:15-20 (Mr. Reyes describing the different levels of training
16 for Kia technicians and confirming not all technicians are equally capable and not all technicians could
17 complete the same job in the same amount of time); RT Vol. VI, 17:22-24 and 18:7-21; RT Vol. VII,
18 134:21-135:9; RT Vol. IX, 82:14-83:10 (Mr. Kamenetsky testified Putnam does not use actual time to
19 generate charges because Putnam could not know the actual hours when quoting a price to a customer
20 and customers do not participate in the repair taking more or less time).] Sold hours generate the charges
21 to Putnam’s customers because those are the labor hours which Putnam sells to the customer as part of
22 the estimate for the customer’s repair.

23 Kia argues the use of sold hours to price customer pay repairs “adds language that is not in the
24 statute, provides no objective standard by which to evaluate a dealer’s request, and is contrary to
25 established principles of statutory construction.” [Kia’s Brief, 31:19-22.] However, Putnam’s sold hours
26 are based on Kia’s LTS; Putnam sold hours are not unreasonably low compared to the same hours Kia
27 would pay Putnam for similar warranty repairs. [See Putnam’s Opening Brief at IV.B (showing
28 Putnam’s sold hours to exceed applicable LTS hours on average).] Moreover, Putnam’s use of sold

1 hours is consistent with the plain meaning of the statutory language because sold hours are sold to
2 Putnam’s customers and thereby generate the charges.

3 In contrast, Kia’s argument repeatedly adds the word “actual.” For example, Kia’s statement of
4 the issues presented states, “May a franchisor rebut a franchisee’s requested labor rate by dividing the
5 total charges on its qualified repair orders by the number of ‘sold hours’ that it assigns to the particular
6 repairs regardless of *the number of actual hours that generated the charges.*” [Kia’s Brief, 1:16-19
7 (citing Vehicle Code section 3065.2(a)(2)) (emphasis added); *see also* Cal. Veh. Code, § 3065.2, subd.
8 (a)(2) (stating the “the total number of hours that generated those charges” and omitting the word
9 “actual”).] As a result, Kia’s proposed interpretation is the one attempting to add “language that is not
10 in the statute” and “is contrary to established principles of statutory construction.” [Kia’s Brief, 31:19-
11 22.]

12 **A. Kia’s reliance on the dictionary definition of hours and the use of the word “hour”**
13 **in other parts of the Vehicle Code seeks to take the word “hours” out of context in**
14 **Section 3065.2.**

15 Kia argues the plain meaning of the total number of hours that generated those charges “is the
16 hours that generated those charges – not some other unit of time that the dealership decides to ‘sell’ to
17 the customer.” [Kia’s Brief, 32:12-14.] Putnam *does* sell labor in terms of hours. Putnam uses hours
18 which reasonably estimate how long a repair will require, in terms of hours, to provide customers upfront
19 pricing. Putnam uses Kia’s LTS to price customer pay repairs. [RT Vol. VI, 74:19-75:9; RT Vol. VII,
20 134:8-12; *see also* RT Vol. IX, 25:21-26:13 (Mr. Kamenetsky testifying Putnam does not use a multiplier
21 in pricing customer-pay service work and Putnam Kia started operations using the factory guide).] Mr.
22 Nardini admitted Kia’s LTS hours are a reasonable number of hours to allocate to a repair. [RT Vol. II,
23 336: 1-7 and 337:14-17.]

24 Kia’s argument the Board should rely specifically on the word “hours” to interpret the statute
25 ignores the plain language of Section 3065.2. Kia directs the Board to the dictionary definition of
26 “hours” and other uses of the word “hours” in the Vehicle Code. [Kia’s Brief, 32:11-15 and 33:15-34:2.]
27 Section 3065.2 does **not** say the total charges should be divided by the “hours the repairs required,” “the
28 actual technician hours,” or “the hours of the repair”—it says, “the total number of hours *that generated*
those charges.” [Cal. Veh. Code, § 3065.2, subd. (a)(2) (emphasis added).] The phrase, “that generated

1 those charges” modifies the word “hours” and makes its use in Section 3065.2 different than its use in
2 the other code sections cited by Kia.

3 **B. The use of the word “hours” instead of “time allowances” in Section 3065.2 allows a**
4 **dealer to choose which time guide it will use in pricing customer pay repairs.**

5 Kia argues Putnam is seeking to override Governor Brown’s veto of a prior version of Section
6 3065.2 and replace the word hours with “time allowances” by using Kia’s LTS to generate charges to its
7 customers. [Kia’s Brief, 33:7-35:2.] However, Kia’s argument is unpersuasive and not supported by
8 the actual language of Section 3065.2.

9 As Kia’s cites, the language in the bill vetoed by Governor Brown stated the retail labor rate
10 would be calculated by “determining the total charges for labor from the qualified orders submitted and
11 dividing that amount by the total number of hours allowed pursuant to the franchisor’s time allowances
12 that would be used to compensate the franchisee for the same work, had it been performed under
13 warranty.” [Kia’s Brief, 34:7-13 (citing Assem. Bill No. 2107 (2017-2018 Reg. Sess.) sec. 12 §
14 3065.2(a)(2)(A)).] This language would have allowed dealers to charge retail customers based on a
15 third-party time guide—charging a lower hourly rate but charging the retail customer for more hours for
16 a repair than provided in the LTS—and calculate a warranty labor reimbursement rate based on the
17 franchisor’s factory guide.

18 As enacted, Section 3065.2 instead requires the franchisee to use the same hours it used to
19 generate its charges when dividing the total charges for purposes of calculating a warranty labor
20 reimbursement rate. [Cal. Veh. Code, § 3065.2, subd. (a)(2).] As enacted, a dealer can choose how to
21 price its labor charges—it can use a third-party time guide to price repairs, the manufacturer’s factory
22 guide, or some combination—however, when calculating a retail labor rate, the hours the dealer uses to
23 generate its prices are the same hours used to divide the total charges. [*See id.*]

24 This is consistent with Kia’s choice to not exercise any control over what Kia dealers charge for
25 retail or customer-pay repairs. [RT Vol. I, 81:16-20; RT Vol. III, 387:6-22.] Kia does not restrict what
26 time guides a dealer may use for pricing customer-pay repairs. [RT Vol. I, 81:21-24; RT Vol. II, 337:8-
27 13; RT Vol. III, 387:23-25.] Moreover, Kia does not require a dealer use the same guide hours for all
28 the times it submits in support of a labor rate request. [RT Vol. III, 457:14-18.]

1 In addition and as discussed in Protestant’s Post-Hearing Opening Brief, Governor Brown’s veto
2 of Assembly Bill 2107 was not directed toward the “total number of hours allowed pursuant to the
3 franchisor’s time allowances that would be used to compensate the franchisee for the same work had it
4 been performed under warranty” but was instead directed at the bill more generally in that it replaced a
5 reasonableness determination in the first place. Governor Brown’s veto of Assembly Bill 2107 does not
6 assist the statutory interpretation of Section 3065.2 as enacted and signed by Governor Newsom. [See
7 Protestant’s Post-Hearing Opening Brief at Part IV.D.]

8 IV. IF THE BOARD CALCULATES A RETAIL LABOR RATE PURSUANT TO SECTION
9 3065.2, THE RATE SHOULD BE \$434.35 PER HOUR.

10 As discussed in Protestant’s Post-Hearing Opening Brief, Mr. Korenak prepared an analysis
11 comparing the original Putnam Submission to Kia’s responsive calculation included with the Denial.
12 Using the expanded universe of ROs Kia selected upon receipt of the additional 30-days of ROs, Mr.
13 Korenak calculated a retail labor rate pursuant to the requirements of Section 3065.2. [Exh. P-108.010
14 (Tab 4); RT Vol. VIII, 83:5-85:20 and 95:7-97:17.] Mr. Korenak determined the retail labor rate of
15 \$436.51. [RT Vol. VIII, 98:18-21, 110:20-111:17 and 116:6-17.]

16 As discussed above, if the Board excludes from this calculation RO 10571, Line A (the extended
17 warranty repair), removing the RO reduces the total charges by \$608.31 to \$8,209.25 with sold hours
18 reduced from 20.20 to 18.9. The exclusion of RO 10571, Line A would result in a revised calculation
19 of \$434.35 per hour. If the Board instead includes RO 10571, Line A, in the calculation, Putnam’s retail
20 labor rate is \$2.26 per hour higher—\$436.51 per hour.

21 Moreover, even if the Board accepts the list of ROs offered by Kia in Kia’s Brief, Exhibit A,
22 applying the sold hours listed in Kia’s Exhibit A to the total labor charges supports a \$437.84 per hour
23 retail labor rate. [Kia’s Brief, Exhibit A (last page) (based on dividing \$9,326.02 by 21.3 sold hours
24 instead of 35.47 actual hours).] The rate as calculated based on the ROs in Kia’s Exhibit A is higher
25 than the rate Mr. Korenak calculated in Exhibit P-108.010 (Tab 4).

26 ///

27 ///

28 ///

1 **CONCLUSION**

2 The plain language of Section 3065.2 should be given its intended effect. Kia’s refusal to
3 calculate Putnam’s Retail Labor Rate as set forth therein is irrebuttable. Kia withdrew its attempt to
4 dilute Putnam’s retail labor rate by including routine maintenance items. Kia’s attempt to calculate
5 Putnam’s retail labor rate using actual hours is inconsistent with it never using actual hours to calculate
6 retail labor rates for any other dealers. Kia’s proposed interpretation of Section 3065.2 would create a
7 direct conflict with Business and Professions Code, section 9884.9, subdivision (a) that could not have
8 been intended.


9 Protestant respectfully requests the Board issue its decision finding Kia failed to comply with the
10 statutory mandate set forth in Section 3065.2; Kia failed to satisfy its burden to show Putnam’s requested
11 rate of \$447.52 to be materially inaccurate or fraudulent; and Putnam’s submission be deemed approved
12 retroactive to April 23, 2022.

13 In the alternative, if the Board seeks to determine a retail labor rate based upon the universe of
14 qualified repairs selected by Kia in its Denial, Protestant requests the Board find the rate of \$434.35 to
15 be the rate properly calculated pursuant to Section 3065.2.

16
17
18 By the signature below and pursuant to the Order Establishing Post-Hearing Briefing Schedule
19 paragraph 3(c), counsel for Protestant attests to the factual accuracy and legal sufficiency of the
20 foregoing brief.

21
22
23 Dated: June 25, 2024

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17 KM3G, INC. d/b/a PUTNAM KIA OF
BURLINGAME,

18 Protestant,

19 vs.

20 KIA AMERICA, INC.,

21 Respondent.
22

PROTEST NO. PR-2803-22

23
24 **RESPONDENT'S POST-HEARING REPLY BRIEF**
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1 **INTRODUCTION**

2 Respondent Kia America, Inc. (“Kia”) respectfully submits this brief in reply to the “Post-
3 Hearing Opening Brief” (“Putnam Br.”) of Protestant KM3G, Inc. d/b/a Putnam Kia of Burlingame
4 (“Putnam Kia”). Terms defined and abbreviations used in Respondent’s Post-Hearing Brief (“Kia
5 Br.”) and Respondent’s Proposed Decision (“Kia PD”) are used herein.

6 Putnam Kia’s Protest should be overruled. Its request for an increase from \$225.30 to
7 \$447.52 was materially inaccurate and, in light of the plain words of Section 3065.2(a)(2) and the
8 large discrepancy between the actual hours and sold hours on the repair orders submitted by Putnam
9 Kia, the Board should calculate Putnam Kia’s retail labor rate by dividing the charges on qualified
10 repair orders in Putnam Kia’s original Submission by the actual technician work hours that
11 generated those charges, resulting in a rate of \$262.93 per hour. (Point I).

12 In the alternative, the Board may find it unnecessary to reach the question whether Section
13 3065.2(a)(2) “requires” the use of actual hours or sold hours by adopting the reasoning of the
14 Proposed Decision issued on May 30, 2024, in KPAAuto, LLC dba Putnam Ford of San Mateo v.
15 Ford Motor Co., Protest No. PR-2759-21, DOAH Case No. 2023050701 (“Putnam Ford”). A copy
16 of the Proposed Decision in Putnam Ford is annexed hereto as Exhibit C (the “Putnam Ford PD”).
17 In that case, the ALJ has recommended a finding of material inaccuracy because of
18 “inconsistencies, irregularities and discrepancies” in the repair orders submitted by Putnam Ford,
19 including “the large discrepancies between actual hours and sold hours” in Putnam Ford’s repair
20 orders. Putnam Ford PD p. 45, ¶ 11. As shown in Point II below, the evidence demonstrates that
21 the very same “inconsistencies, irregularities and discrepancies” – and many more – exist in the
22 repair orders submitted to Kia by Putnam Kia.

23 Finally, in Point III, Kia (i) responds to ALJ Woodward-Hagle’s question concerning which
24 repair orders should be considered “qualified” and (ii) provides revised charts with the repair orders
25 presented in the same order as in Putnam Kia’s charts, as Her Honor has requested.

26 **I. The Rate Should Be Calculated Using Actual Hours**

27 Putnam Kia’s opposition to the use of actual hours rests on two propositions: (1) that the
28 plain, ordinary meaning of the statutory term “hours” is “sold hours,” Putnam Br. at 5, 36, 41; and

1 (2) that “reasonableness” has no place in the Board’s consideration or resolution of this case,
2 Putnam Br. at 24. Neither of these propositions can withstand analysis.

3 **A. The Plain Meaning of “Hours” Is Not “Sold Hours”**

4 The California Supreme Court has instructed that, under its “plain meaning” rule, courts are
5 to “giv[e] the words of the statute their usual and ordinary meaning.” *Satele v. Super. Ct.* (2019) 7
6 Cal.5th 852, 858 [249 Cal.Rptr.3d 562]; *Day v. City of Fontana* (2001) 25 Cal.4th 268, 272 [105
7 Cal.Rptr.2d 457].

8 It is preposterous to suggest that the “usual and ordinary” meaning of the word “hours” is
9 “sold hours.” In usual and ordinary communications, no one would take the word “hours” to mean
10 anything other than 60-minute time intervals. And certainly no ordinary person would think that the
11 word “hour” refers to a time allowance rather than an hour. The plain meaning of a word is
12 typically determined by reference to dictionary definitions, and there is no dictionary that defines
13 the word “hours” as “sold hours.”

14 Putnam Kia is in fact urging the Board to adopt a non-ordinary meaning of the word
15 “hours.” But even if the word were ambiguous (which it is not), Putnam Kia’s argument runs
16 counter to fundamental principles of statutory construction.

17 Two of those fundamental principles are that (i) the words of the statute “should be
18 construed in their statutory context” and “should be given the same meaning throughout a code
19 unless the Legislature has indicated otherwise,” *Hassan v. Mercury Am. River Hosp.* (2003) 31
20 Cal.4th 709, 715 [3 Cal.Rptr.3d 623]; and (ii) “[w]here the same word or phrase might have been
21 used in the same connection in different portions of a statute but a different word or phrase having
22 different meaning is used instead, the construction employing that different meaning is to be
23 favored.” *Playboy Enters., Inc. v. Super. Ct.* (1984) 154 Cal.App.3d 14, 21 [201 Cal.Rptr. 207],
24 cited with approval in *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106,
25 1117 [81 Cal.Rptr.2d 471]. These are sometimes referred to as the presumptions of “consistent
26 usage” and “meaningful variation” of statutory terms.

27 Kia has demonstrated that the word “hours” is used throughout the Vehicle Code to mean 60
28 minutes, unless the Legislature has expressly indicated otherwise. Kia Br. at 32. Moreover, in

1 nearby Section 3065(a), which deals with the same subject matter as Section 3065.2 (i.e., warranty
2 reimbursement), the Legislature repeatedly refers to “time allowance[s]” or “time allowed” when it
3 is referring to the same concept as “sold hours.” Moreover, the presumptions of consistent usage
4 and meaningful variation apply with particular force here because the two references to a “time
5 allowance” in the second sentence of Section 3065(a)(1) were added to the statute in the same bill
6 that enacted Section 3065.2. See Putnam Br., Ex. 3, Assemb. Bill No. 179, p. 6/25 (showing in
7 italics the language added to Section 3065(a)(1)). The Legislature would presumably have also
8 used the words “time allowances” in section 3065.2(a)(2) if it intended to mean time allowances in
9 that section.

10 Thus, Putnam Kia’s interpretation of Section 3065.2(a)(2) violates the presumptions of
11 consistent usage and meaningful variation. And instead of pointing to anything in the Vehicle Code
12 that supports its interpretation, Putnam Kia argues that “it is impossible to legally use actual hours
13 to generate customer charges to service customers” because Business and Professions Code §
14 9884.9 requires dealers to provide “upfront pricing.” Putnam Br. at 5. This argument is a red
15 herring. Section 3065.2(a)(2) is not concerned with dealer “pricing”; it is concerned with
16 determining a dealer’s actual retail rate by dividing charges by hours. It is not “impossible” to
17 divide the total charges on the qualified repair orders by the actual hours that generated those
18 charges, as the statute directs. Indeed, if dealer “pricing” determined the statutory rate, there would
19 be little need for a statutory formula: Putnam Kia would effectively be entitled to \$440 an hour by
20 simply adopting a pricing policy of \$440 times sold hours. The statutory formula is needed to
21 determine the dealer’s actual hourly rate.

22 Moreover, the rules of statutory construction call for consistent usage and meaningful
23 variation within the Vehicle Code. The terms of the Business and Professions Code shed no light
24 on how to interpret the word “hours” in Veh. Code § 3065.2(a)(2). In fact, Business and
25 Professions Code § 9884.9 does not refer to “hours” at all and does not require a dealer to price a
26 repair by using hours; it simply requires the dealer to give the customer an “estimated price.”

27 Putnam Kia also argues that “hours” should be construed as “sold hours” because it is
28 industry practice for dealers to price retail repairs, and for manufacturers to pay for warranty

1 repairs, by using time allowances (with notable exceptions, such as XTT, where manufacturers will
2 pay for straight time). But since the Legislature was familiar with time allowances and had used
3 that very term in another section of the same bill that enacted Section 3065.2, it obviously would
4 have used the term “time allowances” in the statute if that’s what was intended. Moreover, Putnam
5 Kia witness Korenak admitted that Kia is not alone in pointing out that the statute refers to hours,
6 not “sold hours.” [VIII 167:6-15].

7 Putnam Kia argues that sold hours “generate” the charges because that is the way that the
8 dealership prices the repairs. But the usual and ordinary meaning of the word “generate” is to
9 “cause” or “produce” something. Oxford English Dictionary, s.v. “generate (v.),” June 2024,
10 <https://doi.org/10.1093/OED/2425174275>. It is the work of the technicians that generates the
11 charges, not Putnam Kia’s pricing methodology. Putnam Kia’s reading is not a natural reading of
12 the statutory language: any reference to hours of labor is naturally read to mean the actual number
13 of hours worked. Moreover, Putnam Kia’s argument completely collapses when applied to “flat
14 rate” jobs, such as the dealership’s practice of charging a flat rate of \$250 for diagnostic work. [V
15 951:22-952:7; VI 98:24-99:1]. If the flat rate is \$250, then the sold hours are irrelevant and are
16 obviously not “generating” the charges in the manner claimed by Putnam Kia.

17 Putnam Kia mischaracterizes Kia’s point when it claims that Kia has “relied on the language
18 from the initial proposed version of 3065.2 from AB 179 to argue the Legislature intended to
19 prohibit the use of Kia’s LTS.” Putnam Br. at 35. Kia has not made and is making no such
20 argument. Kia’s point is much simpler: the original (but never adopted) language in the prior bill’s
21 version of Section 3065.2(a)(2) – providing that the total charges would be divided by “the total
22 number of hours allowed pursuant to the franchisor’s time allowances” – is further proof that the
23 Legislature knew how to use the term “time allowances” when it meant time allowances. It did not
24 use that language for Section 3065.2(a)(2) in the final bill.

25 Putnam Kia contends that “Kia failed to present any compelling evidence that would justify
26 finding the Legislature intended actual technician hours to be those generating the charges for
27 purposes of Section 3065.2.” Putnam Br. at 6. Kia believes that it has presented compelling
28 evidence. See Section I.B below. But as the party challenging the plain meaning of the word

1 “hours,” it is up to Putnam Kia to demonstrate that “the Legislature has indicated otherwise,”
2 *Hassan v. Mercury Am. River Hosp.*, 31 Cal.4th at 715.

3 Putnam Kia does not cite a single precedent that supports a departure from the plain
4 meaning of the word “hours” in this case. While it quotes case law reminding that one must take
5 into account the “context, object, and history of the legislation” (Putnam Br. at 22-23), it points to
6 nothing in the statutory context, purpose, or legislative history that indicates that the Legislature
7 was thinking “sold hours” when it wrote “hours.” Indeed, there is nothing in any of these sources
8 that indicates that the Legislature was even familiar with the term “sold hours.” It was, however,
9 familiar with payment based on the same concept as sold hours through the use of “time
10 allowances,” but it did not use that term in Section 3065.2(a)(1).

11 The one sentence Putnam Kia quotes from the Committee on Transportation Comment
12 indicates that the Legislature intended to remedy the pre-existing situation in which the
13 manufacturer could “dictate” the rate without any established formula. See Putnam Br. at 23
14 (quoting 2019 Cal. Assemb. Bill No. 179, Cal. 2019-2020 Reg. Sess., Assemb. Comm. on Transp. –
15 April 18, 2019, at p. 7 (the “**Transp. Comm. Comment**”)). It does not indicate that the Legislature
16 intended to permit the dealer to dictate the rate by using time allowances or “sold hours” that are far
17 less than the actual technician hours that are generating the charges to the customer.

18 **B. Statutes Should Be Interpreted Reasonably and to Avoid Absurd Results**

19 Another principle of statutory construction that supports Kia’s position is that statutes
20 should be interpreted reasonably and to avoid absurd results. This principle is typically invoked
21 when the “literal meaning” of a statute “would result in absurd consequences which the Legislature
22 did not intend.” *People v. Broussard* (1993) 5 Cal.4th 1067, 1071 [22 Cal. Rptr. 2d 278] (internal
23 quotation marks and citations omitted). The “literal meaning” of Section 3065.2(a)(2) supports
24 Kia’s position, but in any event the Board must consider the consequences of adopting Putnam
25 Kia’s position in determining how to interpret the statute. After all, the “principal task” in
26 construing a statute “is to ascertain the intent of the Legislature.” *Id.* at 1071. Here, the Legislature
27 announced its intent in the first sentence of the statute: to enable a franchisee “to determine a
28 **reasonable** warranty compensation schedule.” Veh. Code § 3065.2 (emphasis added).

1 Kia has produced compelling evidence that the labor rate that results from Putnam Kia's
2 interpretation and application of the statute is absurd. It is more than \$200 higher than the highest
3 rate that Kia is paying to any other Kia dealer in California. [Ex. P-111.003; II 300:7-24; see II
4 110:14-24]. It is approximately \$250 more than, and more than double, the *average* rate being paid
5 to Kia dealers in Putnam Kia's District in California. [II 109:5-8].

6 Putnam Kia contends that the Board cannot even consider this evidence because: (i) when
7 the Legislature enacted Section 3065.2, it eliminated the provision from Section 3065(a) that "[t]he
8 reasonableness of the warranty reimbursement schedule or formula shall be determined by the board
9 if a franchisee files a protest with the board"; and (ii) the Transportation Committee Comment
10 contains the statement that Section 3065.2 "reverses the existing power dynamic between dealers
11 and manufacturers by allowing dealers to set the labor and parts rate through an established formula
12 outlined in this bill instead of having those rates dictated by the manufacturers and judged on a
13 'reasonableness' standard by NMVB." Putnam Br. at 23 (citation and internal quotation marks
14 omitted).

15 Kia, however, is not asking the Board to judge Putnam Kia's requested rate on a
16 "reasonableness standard" or to calculate the rate based on other dealers' rates. It is asking the
17 Board to interpret the "formula outlined in the bill" reasonably (and consistently with its plain
18 language) to avoid consequences that the Legislature obviously did not intend – i.e., to allow a
19 dealer to manipulate an "[un]reasonable warranty compensation schedule," contrary to the language
20 and intent of section 3065(a), through the use of "sold hours" that are far less than the actual hours
21 that generate the charges.

22 Putnam Kia claims that the Board must accept whatever number of sold hours a dealer
23 places on a repair order and use that number in the statutory calculation, no matter how much that
24 number deviates from the hours spent on a repair. [See, e.g., VII 148:5-19, 150:11-18, 150:22-
25 151:19]. The logical consequence of adopting its position is that the Board must uphold a rate of
26 \$450 per hour – or \$500, \$750, or \$1000 per hour – regardless of how divorced that rate is from the
27 dealership's actual effective hourly rate (i.e., charges divided by actual technician hours) or from
28 the hourly retail rates being charged by similarly situated dealers.

1 As Putnam Kia has acknowledged, Section 3065.2 does not require the dealer to use any
2 particular time guide or any time guide at all. [See VII 147:20-22]. Accordingly, if Putnam Kia’s
3 interpretation of the statute were accepted, there is nothing that would prevent a dealer from
4 adopting its own “sold hours” schedule, using smaller numbers of “sold hours” to increase the
5 hourly rate it demands from the manufacturer.

6 The ALJ in *Putnam Ford* found it unnecessary to reach “the question of whether the statute
7 requires the use of actual or sold hours in its calculation.” Putnam Ford PD., p. 48, ¶ 17.
8 Nevertheless, the ALJ pointed to, and relied on, the large discrepancies between Putnam Ford’s
9 actual hours and its sold hours in making his determination of material inaccuracy. See *id.*, p. 22, ¶
10 17; *id.*, pp. 32-33; *id.*, p. 45, ¶ 11; *id.*, pp. 46-47, ¶ 15; *id.*, p. 49, ¶ 19; see also *id.*, p. 50, ¶ 20 (the
11 “core issue” was “the unreliability of [Putnam Ford’s] sold hours”). Among other things, he
12 credited the testimony of a forensic accountant who questioned Putnam Ford’s similar use of sold
13 hours in an analysis that is relevant to a reasonable interpretation of the statute:

14 There is not a lot of credibility to sale hours if they don’t relate to or are even close
15 to on balance the amount of actual time the dealership is spending to repair vehicles.

16 *****

17 Frankly [a sold hour] is just one of two inputs – algebraic inputs to total charges,
18 right? So total charges are whatever sale hours are times whatever rate. And it
19 seems to me that – I have concerns about the manipulability of sale hours as well [as]
20 the manipulability of the rate if, at the end of the day, **the only information that we
21 know to be totally accurate is the amount the customer paid and, where it is
22 logged, the technician hours on the vehicle.**

23 Putnam Ford PD at 32-33 (emphasis added). In adopting Section 3065.2, the Committee on
24 Transportation expressed similar concerns that the statute “could result in dealerships manipulating
25 the system by increasing the cost of non-warranty repairs in order to increase their warranty
26 reimbursement rates.” Putnam Br., Ex. 2, Transp. Comm. Comment, p. 10. It was obviously not
27 the intent of the Legislature to allow the statutory formula to be manipulated to yield unreasonable
28 rates. Accordingly, the statute should be interpreted reasonably (and in accordance with its plain
language) to calculate the hourly rate based on actual hours, especially where, as here, there is a
large discrepancy between the actual hours and the sold hours.

1 Apparently recognizing that reasonableness must come into the equation somewhere,
2 Putnam Kia attempts to show that it is being reasonable by repeatedly asserting that it uses the
3 factory’s own time allowances for sold hours. See, e.g., Putnam Br. at 5, 12. But the evidence in
4 this case demonstrates that Putnam Kia did not in fact use a Kia LTS time allowance on
5 approximately 75% of the repair orders on which it based its requested rate. Putnam Br. at 29 n. 11
6 (acknowledging that only 8 of the 31 entries in Putnam Kia submission match LTS times); see Kia
7 PD ¶¶ 129-133. So Putnam Kia’s implicit attempt to demonstrate reasonableness through its
8 alleged use of LTS is refuted by the evidence.¹

9 Putnam Kia argues that the Board should ignore the fact that it did not use an LTS time on
10 three out of every four repair orders because the aggregate number of sold hours on the qualified
11 repairs that had corresponding Kia LTS times was 1.6 hours more than the aggregate LTS times for
12 those repairs. Putnam Br. at 34. This “it all comes out in the wash” argument misses the point:
13 Putnam Kia’s use of sold hours is arbitrary and capricious and not a reliable way to calculate a labor
14 rate. It also ignores the discrepancies on Putnam Kia’s repair orders between the sold hours
15 assigned and the work performed. [See, e.g., II 221:21-222:24, 223:9-14, 224:5-24; II 234:17-235:1;
16 III 471:4-472:18; III 473:20-475:25; III 525:23-527:19; III 531:14-532:19; III 535:25-536:24].

17 Putnam Kia apparently agrees – as any reasonable person must – that if a dealer put .10 sold
18 hour on every repair regardless of the hours spent on the repair or the price of the repair, neither the
19 Board nor the franchisor would have to accept the resulting rate. [See I 31:5-14 (Opening
20 Statement)]. So it is incontrovertible that, at some point, the Board must examine the number of
21 hours that the dealer is inserting into the denominator of the statutory equation to ensure that the
22 resulting rate is consistent with the statutory purpose to “determine a reasonable warranty
23 reimbursement schedule.” Veh. Code § 3065(a)(1). Kia submits that that point has been reached in
24 this case, where Putnam Kia is requesting the absurd rate of \$447.52 per hour.

26 ¹ In addition, Putnam Kia’s argument that using LTS time would result in its uniformly receiving
27 the same compensation for retail and warranty repairs is refuted by the evidence concerning XTT
28 time. While Putnam Kia points out that there are procedural requirements to claim XTT time
(Putnam Br. at 25-26), it has presented nothing to refute Mr. Nardini’s testimony concerning the
repair orders submitted by Putnam Kia that would have qualified for XTT time had they been
warranty repairs. See Kia PD ¶¶ 137-142.

1 Accordingly, and especially in light of the large discrepancy between the sold hours used by
2 Putnam Kia and the actual hours that generated the charges, Putnam Kia’s retail labor rate should be
3 calculated by dividing the total charges on the qualified repair orders by the actual hours that
4 generated the charges, as set forth on Exhibit A to Kia’s Post-Hearing Brief, Kia Br. at 35-38, and
5 revised Exhibit A (re-ordered by RO number) annexed hereto.

6 **II. Alternatively, the Proposed Decision in *Putnam Ford* Should Be Followed**

7 As shown below, the facts and issues in *Putnam Ford* are very similar to those in this case.
8 This is not surprising, given Kent Putnam’s ownership of both dealerships and his testimony that he
9 adopted the same customer-pay pricing policies for all of his dealerships in response to the
10 enactment of Section 3065.2. [VII 134:8-17, 135:14-136:19, 137:10-23, 141:3-14].

11 Under the persuasive reasoning of the Proposed Decision in *Putnam Ford*, the Board need
12 not decide whether Section 3065.2(a)(2) “requires” the use of actual or sold hours. Instead, the
13 Board can (and should) find that Putnam Kia’s requested labor rate is materially inaccurate due to
14 the numerous inconsistencies, discrepancies, and irregularities in the repair orders it submitted to
15 support its request, including the large discrepancy between the actual hours and the sold hours.

16 In *Putnam Ford*, Kent Putnam testified, as he did in this case, that he instructed the
17 dealership to use the factory time allowances and multiply by \$440. Putnam Ford PD, p. 27, ¶ 26.
18 Assisted by FrogData, Putnam Ford requested an increase in its warranty labor rate from \$177 to
19 \$436.76, based on a set of repair orders opened during a 90-day period. *Id.*, pp. 10-11, ¶¶ 4-6.
20 Putnam Ford identified 41 qualified repair lines on 25 repair orders and divided (i) the total labor
21 charges of \$20,440.55 for those repairs by (ii) the sold hours of 46.8. *Id.*, p. 11, ¶ 6.

22 Ford turned down the request on the ground that the submission was materially inaccurate or
23 fraudulent. *Id.*, p. 14, ¶ 11. Similar to Kia’s Notification, Ford’s letter referred to repair orders in
24 which the actual technician hours were much greater than the sold hours. *See id.*, pp. 14-17. Ford
25 also pointed out that Putnam Ford’s rate of “approximately \$440 per hour” was “generally around
26 double the rate being charged in the market by other dealers of any other brand.” *Id.*, pp. 17-18.

27 Ford took the position that “the inconsistencies and excessive customer charges in the ROs
28 [Putnam Ford] provided” made it “unreasonable, if not effectively impossible,” for Ford to use the

1 repair orders and the statutory formula to calculate an alternative labor rate, as normally required by
2 the statute. *Id.*, p. 18. Accordingly, Ford did not provide a calculation but proposed an adjusted
3 rate of \$220, “which seems to be the most common customer pay rate your documentation shows in
4 repairs where we see what appears to be valid documentation.” *Id.*

5 Based on the contents of the repair orders submitted by Putnam Ford, the ALJ determined
6 that the submission was “materially inaccurate” because of the “numerous inconsistencies,
7 discrepancies, and irregularities” in the repair orders. *Id.*, p. 45, ¶ 11. “Those include the
8 impossible hourly rates that could not plausibly be entered into the repair order system; the large
9 discrepancies between actual hours and sold hours; customer labor charges associated with zero
10 sold or actual hours; and the presence of flat rate charges.” *Id.* The ALJ also pointed to the facts
11 that (i) while Putnam Ford claimed to use the factory time guide, the “the sold hours in the
12 Submission did not always match respondent’s factory time guide,” and (ii) the service advisors had
13 discretion not to use the factory time guide. *Id.*, p. 46, ¶ 13; see *id.* p. 28, ¶¶ 27, 29.

14 The evidence in our case establishes all of the same types of inconsistencies, discrepancies,
15 and irregularities in Putnam Kia’s submission, and more. As shown below, the reasons why the
16 ALJ found Putnam Ford’s submission to be materially inaccurate apply to this case *a fortiori*.

17 **A. “Large Discrepancies Between Actual Hours and Sold Hours”**

18 In *Putnam Ford*, the ALJ listed nine (9) repair orders in which there were large
19 discrepancies between the number of actual hours and sold hours. Putnam Ford PD, pp. 22-23, ¶
20 17.² Kia presented similar evidence in this case. For example:

- 21 • RO 10165-B: Actual hours .80, sold hours .40 (200%) [Exh. R-249.001].
- 22 • RO 10346-A: Actual hours 3.42, sold hours 1.5 (228%) [Exh. R-212.001].
- 23 • RO 10145-A: Actual hours 2.92, sold hours 1.00 (292%) [Exh. R-256.001].
- 24 • RO 10154-A: Actual hours 1.02, sold hours .20 (510%) [Exh. R-258.001].
- 25 • RO 10571-A: Actual hours 2.87, sold hours 1.30 (220%) [Exh. R-244.001].

27
28 ² While the ALJ set forth percentages which he characterized as the “difference” between the actual
hours in the sold hours, his percentages represent the actual hours divided by the sold hours. *See id.*
Kia has calculated the percentages here in the same manner.

- 1 • RO 10148-U and RO 10180-A (split diagnosis/repair): Actual hours 1.27, sold
2 hours .40 (317%) [Exhs. R-242.001, .005, R-250.001].
- 3 • RO 10183-A and RO 10152-B (split diagnosis/repair): Actual hours .71, sold
4 hours .30 (236%) [Exhs. R-208.001 and R-272.001].
- 5 • RO 10153-A and RO 10246-B (split diagnosis/repair): Actual hours 1.53, sold
6 hours .30 (510%) [Exhs. R-248.001 and R-271.001-.002]
- 7 • RO 10158-A and RO 10300-A (split diagnosis/repair) Actual hours 5.85, sold
8 hours 1.50 (390%) [Exhs. 205.001 and R-253.001].

9 While the Putnam Ford PD does not set forth the total discrepancy between actual hours and
10 sold hours, here the discrepancy was 35.47 actual hours vs. 21.30 sold hours. Kia Br. p. 38. The
11 actual hours are 166% of the sold hours, and dividing by the sold hours results in a labor rate of
12 \$437.84, rather than \$262.93 when using the actual hours, which artificially raises the labor rate by
13 approximately \$175 per hour. For purposes of the statutory formula, that is a huge discrepancy.

14 The *Putnam Ford* ALJ placed significant weight on the discrepancies between Putnam
15 Ford's actual hours and sold hours in making his determination of material inaccuracy. See Putnam
16 Ford PD p. 22, ¶ 17; *id.*, pp. 32-33; *id.*, p. 45, ¶ 11; *id.*, pp. 46-47, ¶ 15; *id.*, p. 49, ¶ 19; *id.*, p. 50, ¶
17 20 (the "core issue" was "the unreliability of [Putnam Ford's] sold hours"). The ALJ credited the
18 testimony of Ford's witnesses that sold hours and actual hours are typically "close together," and
19 that dealerships usually aim for actual hours to be lower than sold hours and to achieve efficiency of
20 at least 100%, if not 110% to 120%. Putnam Ford PD, p. 23, ¶ 18; *id.*, p. 46 ¶ 15. (This testimony
21 is, of course, similar to the testimony of James Nardini in our case that, in his experience, technician
22 efficiency on warranty repairs is usually between 110% and 120% – i.e., actual hours are typically
23 80%-90% of the factory time allowances – not 166%). [I 84:16-23, III 388:4-389:9.] The ALJ
24 rejected Putnam Ford's position that the differences between actual and sold hours in its submission
25 were "normal and should be expected." Putnam Ford PD, p. 46, ¶ 15.

26 **B. "Customer Labor Charges Associated with Zero Sold or Actual Hours"**

27 The ALJ also supported his finding of material inaccuracy in *Putnam Ford* by pointing to (i)
28 two repair orders on which two technicians worked but as to which there were labor charges but no
sold hours with respect to one of the technicians, and (ii) five repair orders on which there were

1 labor charges but no actual hours. Putnam Ford PD pp. 24-27, ¶¶ 20, 22. Similarly, there were zero
2 or near-zero time entries in the repair orders that Putnam Kia submitted to Kia and instances where
3 no time was recorded for one of the technicians who worked on the car. For example:

- 4 • RO 10152-B: Zero sold hours but .28 actual hours. [Exh. R-272.002].
- 5 • RO 10148-U: .20 sold hours but zero actual hours recorded for diagnosis of
6 airbag issue. [Exh. R-242.002]. The only actual hours recorded on this on this
7 six-page, six repair line repair order are “ISP 0.42” on line Z, supposedly for the
8 complimentary air pressure test. [Exh. 242.005-.006]. Rad Reyes testified that
9 the test usually takes no time or a “very, very minimal amount” of time. [VII
10 76:8-10].
- 11 • RO 10300-A: 1.00 sold hours but zero actual hours to replace “BCM.” [Ex. R-
12 253.001.] On Line B, the technician recorded actual hours of “ISP 2.56” for the
13 complimentary air pressure test. [*Id.*] In the time summary at the end of the RO,
14 the 2.56 hours is attributable to Lines “B A” but no breakdown is provided
15 between lines B and A. [Exh. R-253.002].
- 16 • RO 10320-A: .30 sold hours but zero actual hours to replace driver’s side door
17 handle. [Ex. R-243.001].
- 18 • RO 10180-B: Line B lists 1.10 sold hours but only .02 actual hours (72 seconds)
19 to “REPLACE BOTH FRONT WINDOW SWITCH AND FRT PASSENGER
20 SIDE REGULATOR’S MOTOR.” [Exh. R-250.001]. In contrast to this near-
21 zero actual time entry for a repair, the RO lists “ISP 0.44” hours to do an oil and
22 filter change. [Ex. R-250.002, Line E].
- 23 • RO 10191-C: .60 sold hours but only .02 actual hours (72 seconds) for a new
24 starter installation performed on December 15, 2021. [Ex. R-251.006-.007].
25 Notably, the technician spent 8.20 hours working on the vehicle that day, but
26 attributed only .02 of the time spent to replacing the starter. [Exh. 251.009].
- 27 • RO 10426-D: .40 sold hours and .10 actual hours to diagnose and replace a clock
28 spring. [Exh. 257.003]. However, the .10 actual hours are for the diagnosis
only. Line D, Version 1 indicates that the diagnosis occurred on December 30,
while Line 3, dated January 6, 2022, reports the repair occurring at a later date
[*Id.*] The technician, however, attributed all of his time on January 5 to other
repair lines. [See Exh. 257.005, entries for “01-05-22”].
- RO 10180-A: Line A lists .85 actual hours and .20 sold hours to “REPLACE
AIRBAG MODULE AS DIAGNOSED LAST VISIT” (a reference to RO
10148-U). [Exh. 250.001; see Exh. R-242.002]. However, Line A also states
“REPLACED DRIVER-SIDE CLOCK SPRING AS PER REC.” [Exh. R-
250.001]. There are no separate actual or sold hours for the clock spring
replacement. [*See id.*].

- 1 • RO 10165-B: Repair order opened on November 15 and the car was ready on
2 December 8, 2021. [Exh. R-249.001.] Line B lists .80 actual hours and .40 sold
3 hours for window repair. [Exh. R-249.001-.002]. The .80 actual hours were
4 recorded by Tech #400011 on November 15. However, the repair order reflects
5 that the window motor was replaced by Tech #400030 on November 29 “AS
6 PER RECOMMENDATION FROM LAST TECH.” [Ex. R-249.002, “Version
7 4,” bottom of page]. There are no actual hours reported anywhere on the repair
8 order by Tech #400030 for the November 29 replacement work; the only hours
9 recorded are by Tech #400011 on November 15, two weeks before the actual
10 repair work was done by Tech #400030. [See Exh. R-249.005].

11 **C. “The Presence of Flat Rate Charges”**

12 The ALJ further supported his finding of material inaccuracy by pointing to seven repair
13 orders on which Putnam Ford charged a “flat fee” of \$440 and “typically documented one sold hour
14 corresponding to the diagnosis regardless of the actual time spent diagnosing the issue.” Putnam
15 Ford PD, pp. 26-27, ¶ 23. The ALJ’s point was that, if a flat fee is being charged, the dealer’s claim
16 that the “sold hours” are generating the charge is obviously false.

17 Similarly, Rad Reyes testified that it was the dealership’s practice to charge a flat fee of
18 \$250 and enter one-half of a “sold hour” for a diagnosis. [V 951:25-952:7; VI 98:24-99:1]. While
19 the evidence showed that Putnam Kia varied from this practice on a number of diagnostic repair
20 orders, the evidence included examples of the \$250 flat fee:

- 21 • RO 10158-A: 3.29 actual hours, .50 “sold” hours, \$250 associated labor charge
22 [Exh. R-205.001].
- 23 • RO 10553-A: .72 actual hours, .50 sold hours, \$250 associated labor charge
24 [Exh. R-262.001].
- 25 • RO 10298-A: zero actual hours, .10 sold hours, \$250 associated labor charge
26 [Exh. R-211.001].

27 Moreover, when Putnam Kia departed from its .50 sold hour, \$250 flat fee policy for a
28 diagnosis, it typically entered even fewer sold hours that had even less relationship to the actual
29 technician time. For example:

- 30 • RO 10153-A: Sold hours .30, actual hours .98 [Exh. 248.001].
- 31 • RO 10454-A: Sold hours .20, actual hours 1.02 [Exh. 258.001].

- 1 • RO 10148-U: Sold hours .20, no actual hours recorded on Line U [Exh. R-
2 242.002].

3 **D. “Impossible Hourly Rates”**

4 The ALJ also supported his determination of material inaccuracy based on “impossible
5 hourly rates that could not plausibly be entered into the repair order system.” Putnam Ford PD p.
6 45, ¶ 11. The ALJ illustrated this point by dividing the charges on six of Putnam Ford’s qualified
7 repair orders by the associated number of sold hours. *Id.*, pp 20-21, ¶ 14. The quotient in each of
8 the six divisions was “an hourly rate extending past dollars and cents, often with infinitely repeating
9 decimals.” *Id.*, p. 20, ¶ 14. Because “it is impossible to enter an hourly rate that has fractions of a
10 cent into that computer software system,” the ALJ agreed with Ford’s contention that the sold hours
11 on these repair lines “could not have generated the associated customer labor charges.” *Id.*, p. 21, ¶
12 15.

13 These “impossible rates” are akin to flat rate fees: *i.e.*, they refute Putnam Kia’s description
14 of how sold hours supposedly generate the charges. It defies credulity to assert that such charges
15 are “generated” by multiplying the sold hours by a rate with infinitely repeating decimals.

16 While Kia did not bring up this issue during the hearing, simple arithmetic demonstrates that
17 the same issue exists with six of Putnam Kia’s ROs admitted into evidence:

- 18 • RO 10133-A: The sold hours are 1.40 and the customer labor charge is \$646,
19 resulting in an hourly rate of \$461.428571 infinitely repeating [Exh. R-204.001].
20 • RO 10183A: The sold hours are .30 and the customer labor charge is \$176,
21 resulting in an hourly rate of \$586.666667 infinitely repeating [Exh. R-208.001].
22 • RO 10320-A: The sold hours are .30 and the customer labor charge is \$125,
23 resulting in an hourly rate of \$416.666667 infinitely repeating [Exh. R-244.001].
24 • RO 10352-A: The sold hours are 1.30 and the customer charge is \$382, resulting
25 in an hourly rate of \$293.846154 infinitely repeating [Exh. R-254.001]
26 • RO 10404-A: The sold hours are .80 and the customer charge is \$401.19,
27 resulting in an hourly rate of \$501.4875 [Exh. R-255.001].
28 • RO 10571-A: The sold hours are 1.30 and the customer charge is \$608.31,
 resulting in an hourly rate of \$467.930769 infinitely repeating [Exh. 244.001].

1 Obviously, none of the charges on the six repair orders listed above resulted from
2 multiplying the sold hours by an hourly rate. In *Putnam Ford*, Mr. Kamenetsky suggested that the
3 “impossible” hourly rates could have resulted from discounts, but the ALJ did not credit his
4 explanation because it was speculation and because Mr. Kamenetsky has never worked as a
5 technician, service advisor, or service manager. Putnam Ford PD p. 29, ¶ 30. That explanation
6 could not explain the hourly rates for the six repair orders listed above, because the spreadsheet that
7 Putnam Kia submitted with its request expressly recorded where a labor rate had been discounted,
8 and there are no discounts indicated on the spreadsheet for any of these six repair orders. [See Exh.
9 J-3.002 (compare Count 16, recording discount, with Counts 1, 7, 12, 14, 15, and 23, not recording
10 any discount)]. Moreover, the discount recorded on Count 16 of that spreadsheet is also recorded
11 on the repair order itself, RO 10415-A. [Exh. 256.001]. There is no discount recorded on any of
12 the six Putnam Kia repair orders listed above.

13 **E. Inconsistent Use of Factory Time Guides and Service Advisor Discretion**

14 The ALJ supported his finding of material inaccuracy by pointing out that Putnam Ford did
15 not always use the factory time guide and that the service advisors had discretion not to use the
16 guide. Putnam Ford PD p. 46, ¶ 13. Here, the evidence shows that Putnam Kia did not use an
17 applicable Kia LTS time allowance on approximately 75% of the repair orders it submitted.
18 Putnam Br. at 29 n. 11 (acknowledging that only 8 of the 31 entries in Putnam Kia’s Submission
19 match LTS times); see Kia PD ¶¶ 129-133. In addition, Putnam Kia’s witnesses admitted that: there
20 is no written policy requiring the use of the factory time guide and that it is only a “guideline” [IX
21 127:7-14-18]; the service advisors who create the repair orders have discretion to charge a number
22 of sold hours different from the Kia LTS time allowance [IX 128:7-15; VI 185:18-20, 210:6-9; see
23 VI 176:11-14]; and there are many instances where the Putnam Kia service advisors do not use the
24 LTS time allowance in assigning “sold” hours to a repair order [VI 165:10-15; VII 82:2-5].

25 **F. Additional Inconsistencies, Discrepancies, and Irregularities**

26 The record in this case contains evidence of numerous additional inconsistencies,
27 discrepancies and irregularities that were not found in *Putnam Ford*. Because these matters have
28

1 been set forth previously in Respondent’s Post-Hearing Brief and Respondent’s Proposed Decision,
2 they will not be repeated at length here. However, they include:

- 3 • Rad Reyes’ admission that, in creating repair orders, Putnam Kia’s service
4 advisors made serious errors. [See, e.g., VI 55:24 (“a gross mistake”); VI 57:15
5 (“another mistake”); VI 101:05-06 (“not following directions at all”).
- 6 • FrogData’s inclusion of RO 10298-A, where Putnam Kia charged a customer
7 \$250 for ordering parts and booked .10 sold hours, resulting in a claimed hourly
8 rate of \$2,500. [Exh. J-3.002, Count 10]. This repair order illustrates Putnam
9 Kia’s arbitrary use of sold hours, notwithstanding Petitioner’s agreement to
10 withdraw it from the calculations.³
- 11 • FrogData’s failure to include two obviously qualified repair orders, RO 10246-B
12 and 10152-B, in the Submission [Kia PD ¶¶ 162-167].
- 13 • Putnam Kia’s and FrogData’s changing and inconsistent positions on whether
14 diagnostic-only repair orders should be included as qualified repairs. [Kia PD ¶¶
15 158, 159, 167].
- 16 • Putnam Kia’s last-minute search for and discovery of information to support its
17 change of position, on the last day of the hearing, on whether RO 10571-A
18 should have been included in its Submission. [Kia PD ¶ 174]. As the ALJ
19 observed when Putnam Kia presented its new evidence concerning RO 10571-A,
20 the evidence “really goes to the issue – or the conclusion, not the issue, that the
21 information contained on repair orders upon which FrogData relies can be
22 erroneous, because it’s misleading or incomplete and needs backup documents. .
23 . . . And that is the limitation and – of the information that FrogData relies on, and
24 makes the ultimate calculations suspect.” [IX 76:6-16].
- 25 • Rad Reyes’ testimony that the dealership’s technicians sometimes incorrectly
26 placed actual hours spent on qualified repairs as an internal “ISP” amount on a
27 repair order line used to record time for the complimentary, routine “tire
28 pressure” check [VI 47:10-12; see Kia PD, ¶ 170]. As the ALJ observed during
the hearing, “this is a variation that may lead us to calculate these figures
erroneously.” [VII 75:4-5].

Mr. Reyes testified that the actual technician time spent on the tire pressure check was
“usually none or a very, very minimal amount.” [VII 76:8-10]. His testimony is confirmed by the
fact that there are zero actual hours recorded for the tire pressure check on the majority of the repair

³ Its inclusion in the Submission also illustrates the lack of credibility of Mr. Korenak, who contradicted his sworn September 2023 deposition testimony defending the inclusion of RO 10298-A by testifying at the hearing that he had agreed with the decision in Mr. Kamenetsky’s June 15, 2022 letter to exclude this repair order. [See Kia PD ¶¶ 158-161].

1 orders listed on the spreadsheet in Putnam Kia’s Submission.⁴ However, there are several repair
2 orders on which the actual hours recorded for the time pressure check is inconsistent with the
3 amount of time that check should take. For example:

- 4 • RO 10148-Z, tire pressure check ISP hours 0.42 [Exh. R-242.005].
- 5 • RO 10181-D, tire pressure check ISP hours 0.10 [Exh. R-207.003].
- 6 • RO 10246-C, tire pressure check ISP hours 0.55 [Exh. R-271.002].
- 7 • RO 10300-B, tire pressure check ISP hours 2.56 [Exh. R-253.001].
- 8 • RO 10320-B, tire pressure check ISP hours 0.27 [Exh. R-243.001].
- 9 • RO 10352-C, tire pressure check ISP hours 0.24 [Exh. R-254.002].
- 10 • RO 10534-C, tire pressure check ISP hours 0.20 [Exh. R-261.002].
- 11 • RO 10617-C, tire pressure check ISP hours 0.13 [Exh. R-267.002].

12
13 It is a fair inference that these actual hours were not for time spent on the tire pressure
14 check.

15 Accordingly, the evidence in this case demonstrates (i) all of the same “inconsistencies,
16 discrepancies, and irregularities” that resulted in a finding of material inaccuracy in *Putnam Ford*,
17 and (ii) additional inconsistencies, discrepancies and irregularities that strongly support a finding of
18 material inaccuracy. While Kia recognizes that the Putnam Ford PD has not yet been reviewed by
19 the Board, Kia submits that the Putnam Ford PD correctly determines that there was material
20 inaccuracy and that the same conclusion should be reached here.

21 **G. Additional Relevant Rulings from *Putnam Ford***

22 Putnam Kia argues that Kia should be barred from presenting any evidence of
23 inconsistencies, discrepancies and irregularities, or making any arguments, that were not
24

25
26 ⁴ See Exhs.: R-204.001-.002 (Line B); R-205.002 (Line C); R-212.003 (Line F); R-214.004 (Line
27 G); R-244.003 (Line C); R-248.001-.002 (Line B); R-249.004-.005 (Line F); R-250.001-.002 (Line
28 D); R-252.002-.003 (Line E); R-254.002 (Line C); R-255.002 (Line B); R-256.003 (Line B); R-
259.002 (Line B); R-260.003-.004 (Line C); R-262.001-.002 (Line B); R-265.003-.004 (Line D); R-
266.002-.003 (Line C). Others had “very, very minimal time” of less than .10. See Exhs. R-
208.001 (Line B - .05); R-251.006 (Line B - .08); R-258.004 (Line D - .02); R-264.001 (Line B -
.02).

1 specifically set forth in its Notification. The ALJ rejected Putnam’s Ford similar argument that
2 Ford should not have been permitted to go beyond the specifics in its notification letter (which the
3 ALJ referred to as Ford’s “contest”), in reasoning that is equally applicable here:

4 To the extent that respondent later supplemented its contest with additional rationale
5 and evidence, respondent had adequate justification. Respondent had a relatively
6 short period of time to manually review and respond to 1,673 total repair lines in
7 protestant’s Submission.⁵ As discussed above, the Submission contains numerous
8 inconsistencies, discrepancies, and irregularities that require time and thorough
9 analysis to detect. In any event, the supplemental rationale and evidence all derive
10 from *protestant’s own repair orders* and merely bolster the core issue raised in
11 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.

12 Putnam Ford PD pp. 49-50, ¶ 20 (emphasis in original). For a similar holding in an analogous
13 context, see *Mall Chevrolet, Inc. v. General Motors LLC*, 2021 WL 426193, at *8 (D.N.J. Feb. 8,
14 2021), *aff’d*, 99 F. 4th 622, 634-35 (3d Cir. 2024).

15 In addition, the ALJ found that Ford had complied with its obligation to contest Putnam
16 Ford’s submission under Veh. Code § 3065.2(d) by timely providing its response and notifying
17 Putnam Ford of its “concerns about the Submission’s underlying data, including that many of the
18 sold hours did not seem appropriate for the associated repairs and were highly inconsistent with the
19 actual hours clocked by the technicians.” Putnam Ford PD p. 49, ¶ 19. Here, Kia did the same and
20 more, as Kia complied with the requirement that it calculate an adjusted retail rate based on the
21 statutory formula and provided its calculations to Putnam Kia, something that Ford did not do, see
22 Putnam Ford PDF p. 50, ¶ 22.

23
24
25 ⁵ The “1673 total repair lines” refers to the 1006 repair lines contained on the 250 repair orders in
26 Putnam Ford’s initial submission and the additional 667 repair lines on 168 repair orders in its
27 supplemental submission. See Putnam Ford PD p. 11, ¶ 6 and p. 13, ¶ 10. While Kia has not
28 counted the number of repair lines, Kia had to review hundreds more repair orders than Ford did.
Putnam Kia submitted repair order range 10099 through 10636 with its initial submission (538
ROs) and repair order range 10637 through 10845 in its supplemental submission (209 ROs), for a
grand total of 847 repair orders. See Ex. J-7.002 (although note that Mr. Kamenetsky calculates the
total number of repair orders incorrectly).

1 Putnam Kia argues that Kia “violated” the statute by including brakes, bulbs and batteries in
2 its proposed calculation. Putnam Br. at 39. But if Kia’s inclusion in its calculation of items that
3 should arguably be excluded violates Section 3065.2(d), then by the same token Putnam Kia’s
4 inclusion of items that it now says should have been excluded (*e.g.*, RO 10298-A and RO 10571-A)
5 would violate Section 3065.2(a)(1). Good-faith differences concerning the interpretation of a newly
6 enacted statute should not be considered “violations.”

7 Finally, the ALJ in *Putnam Ford* has recommended that the Board (i) decline to exercise its
8 discretion to declare a rate because the inconsistencies, discrepancies and irregularities in Putnam
9 Ford’s repair orders made such a calculation difficult, and (ii) determine that Ford is required to
10 continue paying the \$220 adjusted rate set forth in its contest letter because “if [Putnam Ford] had
11 not filed the Protest, [Ford’s] proposed adjusted retail labor rate of \$220 would have become
12 effective.” *Id.* pp. 51-52, ¶ 25.

13 Thus, if the Board were to adopt the rationale of the Putnam Ford PD in this case, (1) it
14 should rule that Kia has satisfied its burden of proving material inaccuracy by a preponderance of
15 the evidence, and (2) it has the option of declaring a rate or of maintaining the *status quo*, under
16 which Kia is paying Putnam Kia \$268.90 per hour, the highest labor rate of any Kia dealer in
17 California.

18 **III. Any Calculation Should Use Actual Hours**

19 If the Board exercises its discretion to determine Putnam Kia’s labor rate, actual hours
20 should be used for all of the reasons previously discussed by Kia.

21 Via an email from the Board’s Chief Counsel Robin Parker dated June 5, 2024, ALJ
22 Woodward-Hagle has transmitted a list of 26 repair orders and asked the parties to confirm that they
23 were properly admitted as qualified repair orders in accordance with Veh. Code § 3065.2.

24 Kia confirms that, for purposes of this case, it stipulates that the 26 repair orders were
25 properly admitted as qualified repair orders. Kia notes that there are specific alphabetical repair
26 lines on each of the repair orders that contain the qualified repairs, as set forth on Exhibit J-3.002-
27 .003 and that, generally speaking, the repair order lines not identified on that Exhibit are not
28 qualified repairs. Kia further notes that while the list correctly identifies that there are two qualified

1 repair lines on RO 10529 (Lines A and B), it fails to note that there are also two qualified repair
2 lines on RO 10180, *i.e.*, Lines A and B.

3 Notwithstanding this confirmation, Kia reserves the right to argue (as it has) that there are
4 material inaccuracies in the qualified repair orders. In addition, Kia’s stipulation is for purposes of
5 this case: Kia reserves the right to challenge similar repair orders in other submissions made by
6 dealers, for example in light of future Board and/or judicial interpretations of the statute.

7 In presenting its calculation on Exhibit A, pages 35-38 of its opening post-hearing brief, Kia
8 used the original set of repair orders submitted by Putnam Kia under cover of its letter of March 22,
9 2022, as reflected on Exh. J-3.002-003, except for RO 10298-A, which both parties agree is not
10 qualified. That explains the first three repair orders listed in Her Honor’s list under the heading
11 “KIA AMERICA ADDS”: ROs 10133A, 10148U and 10153A were the first three repair orders on
12 the spreadsheet in Putnam Kia’s original March 22, 2022 submission. See Exh. J-3.002, Counts 1,
13 2, and 3. Since Putnam Kia presented these as qualified repair orders in its original submission, it
14 presumably agrees that they are qualified repair orders. See also Putnam Br., Ex. 1, first three
15 entries.

16 The other two repair orders under the KIA AMERICA ADDS heading are (i) RO 10246-B,
17 which Jeff Korenak conceded was a qualified repair order and should have been included in
18 FrogData’s original calculations but was “missed” by FrogData [VIII 152:17-19, 153:2-12; see Kia
19 PD ¶ 163]; and (ii) RO 10152-B, which Mr. Korenak conceded was the diagnosis of a qualified
20 repair in RO 10183-A [VIII 153:17-25; see Kia PD ¶ 164]. Therefore, it should have been included
21 as a qualified repair order, just as FrogData and Putnam Kia included many other diagnoses of
22 qualified repairs in the Submission. [See list of such repair orders included in the Submission in
23 Kia PD ¶ 167].

24 Mr. Korenak took the position that RO 10152-B was not a qualified repair for the sole
25 reason that it did not contain any “sold hours,” even though it contained actual technician hours of
26 .26. [VIII 115:1-14, 156:10-23; see Exh. R-272.002]. For the reasons that Kia has previously
27 argued, this does not take the repair order out of the definition of a qualified repair order, which is
28 “a repair order, closed at the time of submission, for work that was performed outside of the period

1 of the manufacturer’s warranty and paid for by the customer, but which would have been covered
2 by a manufacturer’s warranty if the work had been required and performed during the period of
3 warranty.” Veh. Code § 3065.2(j).; see Kia PD ¶¶ 166-67. There is no dispute that RO 10152-B is
4 diagnostic work that would have been covered by the warranty.

5 In presenting its calculation on Exhibit A to its opening post-hearing brief, Kia used the
6 repair orders in Putnam Kia’s original Submission, covering the original 90-Day Period used by
7 Putnam Kia (rather than Kia’s Adjusted 90-Day Period) because (1) Putnam Kia had taken the
8 position in its Submission that these repair orders were qualified; (2) the focus of the proof at the
9 hearing was on the repair orders in the original Submission and whether or not the requested rate
10 based on those repair orders was materially inaccurate; and (3) Kia had stipulated to remove the
11 brakes, bulbs and batteries in the Adjusted 90-Day period it used for its calculation in its May 26,
12 2022 Notification, Ex. J-6.001-005, and so there appeared to be little reason to use the Adjusted 90-
13 Day Period rather than Putnam Kia’s own original 90-Day Period.

14 In contrast, Putnam Kia’s calculation (prepared by Mr. Korenak) uses the set of repair orders
15 in the Adjusted 90-Day Period. That explains the three repair orders listed under “PUTNAM
16 ADDS”: i.e., ROs 10679, 10680, and 10712. Kia did include these three as qualified repair orders
17 in its calculation of the proposed adjusted labor rate in its Notification. [See Exh. J-6.005, last three
18 items]. However, none of these three repair orders has been identified in the Record or offered or
19 admitted into evidence. Accordingly, Kia submits the original set of 29 repair orders (except for
20 RO 10298-A) should be used in any calculation performed by the Board.

21 Exhibit A hereto is a revised version of the chart that was annexed as Exhibit A to Kia’s
22 opening post-hearing brief. We have reorganized the chart by repair order number, so that it is
23 presented in the same order as Putnam Kia’s chart. One exception is that we have continued to
24 present pairs of repair orders that contain the diagnosis and repair of the same vehicle for the same
25 issue as a unit because the actual time on both repair orders must be included in determining the
26 number of hours that generated the charge. These are presented in order of the earlier (diagnostic)
27 repair order.

28 In response to Putnam Kia’s position that the Adjusted 90-Day Period (November 12, 2021

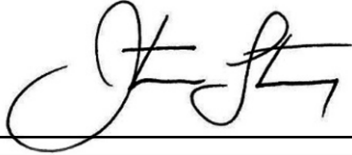
1 through February 10, 2022) should be used for the calculation, Kia is also attaching Exhibit B,
2 which calculates the rate for that period using actual hours. Note, however, that Kia has included
3 two repair orders (RO 10148-U and RO 10153-A) that were opened on November 11, 2021 for two
4 reasons: (i) each of these repair orders is a diagnosis for an associated repair that was performed
5 within the Adjusted 90-Day Period, and the actual hours for both the diagnosis and repair need to be
6 considered in determining total actual hours; and (ii) these two repair orders are themselves within
7 the Adjusted 90-Day Period. The statute requires the inclusion of “[a]ll repair orders *completed* in
8 any 90-consecutive-day-period.” Veh. Code § 3065.2(a)(1)(B)(emphasis added). Each of these
9 repair orders states that the vehicle was ready on November 12, 2021, which is also the invoice
10 date. [See Exh. R-242.001; Exh R-248.001]. So these repair orders were not completed until
11 November 12, 2021, the first day of the Adjusted 90-Day Period.

12 As Exhibit B shows, the hourly retail rate for the Adjusted 90-Day Period is \$254.55.

13 **CONCLUSION**

14 For all of the foregoing reasons and the reasons stated in Kia’s opening post-hearing
15 submissions, Kia respectfully submits that the Board should overrule Putnam Kia’s protest and
16 determine that Putnam Kia’s retail labor rate is either \$262.93, based on the original 90-Day Period,
17 or \$254.55, based on the Adjusted 90-Day Period. In the alternative, the Board should adopt the
18 approach taken in *Putnam Ford*, find that Putnam Kia’s Submission was materially inaccurate, and
19 maintain the *status quo*, with Kia paying Putnam Kia \$268.90 per hour for warranty labor, the
20 highest rate being paid to any Kia dealer in California.

21 Dated: June 25, 2024

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24 _____
25 Jonathan R. Stulberg
26 John J. Sullivan
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ATTESTATION

Counsel for Respondent hereby attests to the factual accuracy and legal sufficiency of the matters set forth above.

Dated: June 25, 2024



Jonathan R. Stulberg
John J. Sullivan

Attorneys for Respondent
KIA AMERICA, Inc.

EXHIBIT A

Exhibit A

RO # Line #	VIN	Repair Count	Labor Charges	Sold Hours	Actual Hours	Actual Hours Labor Rate	Ex. No.
10133 A	KNDJX3A56F7125922	1	\$ 646.00	1.4	1.42	\$ 454.93	R-247.001
10148 U + (10180 A)	KNDPC3A21C7248762	1	\$ 176.00	0.4	1.27	\$ 138.58	R-242.001;.005 R-250.001
10153 A + (10246 B)	5XXGR4A68FG491097	1	\$ 132.00	0.3	1.53	\$ 86.27	R-248.001 R-271.001-002
10158 A + (10300 A)	5XYPK4A50GG034387	1	\$ 690.00	1.5	5.85	\$ 117.95	R-205.001 R-253.001
10165 B	KNDPB3A20B7097690	1	\$ 176.00	0.4	0.8	\$ 220.00	R-249.001
10180 B	KNDPC3A21C7248762	1	\$ 484.00	1.1	1.1	\$ 440.00	R-250.001
10183 A + (10152 B)	5XYKWDA29DG377151	1	\$ 176.00	0.3	0.71	\$ 247.89	R-208.001 R-272.001
10191 C	KNAGM4A71B5137845	1	\$ 264.00	0.6	0.6	\$ 440.00	R-251.006

Exhibit A

RO # Line #	VIN	Repair Count	Labor Charges	Sold Hours	Actual Hours	Actual Hours Labor Rate	Ex. No.
10291 F	5XYKT3A10CG263287	1	\$ 264.00	0.6	0.81	\$ 325.93	R-252.004
10320 A	KNDJE723567240747	1	\$ 125.00	0.3	0.3	\$ 416.67	R-243.001
10346 A	KNAGM4AD0D5047482	1	\$ 660.00	1.5	3.42	\$ 192.98	R-212.001
10352 A	KNDJT2A22A7050267	1	\$ 382.00	1.3	1.23	\$ 310.57	R-254.001
10404 A	KNDJP3A54H7441824	1	\$ 401.19	0.8	0.97	\$ 413.60	R-255.001
10415 A	5XYPK4A57GG063434	1	\$ 395.00	1	2.92	\$ 135.27	R-256.001
10426 D	KNAGM4AD0F5087578	1	\$ 220.00	0.4	0.22	\$ 1,000.00	R-257.001;.003
10454 A	KNDCE3LC5H5052552	1	\$ 100.00	0.2	1.02	\$ 98.04	R-258.001
10486 A	KNALN4D70E5145107	1	\$ 660.00	1.5	0.65	\$ 1,015.38	R-259.001

Exhibit A

RO # Line #	VIN	Repair Count	Labor Charges	Sold Hours	Actual Hours	Actual Hours Labor Rate	Ex. No.
10529 A	5XYPGDA3XGG060527	1	\$ 440.00	1	1.84	\$ 239.13	R-260.001
10529 B	5XYPGDA3XGG060527	1	\$ 200.00	0.4	0.61	\$ 327.87	R-260.002
10534 B	KNDPN3AC5H7229321	1	\$ 220.00	0.5	0.5	\$ 440.00	R-261.002
10553 A + (10585 A)	KNDMG4C7XC6446414	1	\$ 382.00	0.8	0.98	\$ 389.80	R-262.001 R-264.001
10571 A	KNDJX3AEXG7016476	1	\$ 608.31	1.3	2.87	\$ 211.95	R-244.001
10581 A	KNDPB3AC3F7756943	1	\$ 125.00	0.5	0.92	\$ 135.87	R-263.001
10590 E	5XYPGDA50GG145202	1	\$ 431.52	1	0.99	\$ 435.88	R-265.004
10591 A	KNAFU4A21A5103838	1	\$ 264.00	0.6	1.14	\$ 231.58	R-266.001

Exhibit A

RO # Line #	VIN	Repair Count	Labor Charges	Sold Hours	Actual Hours	Actual Hours Labor Rate	Ex. No.
10617 A	KNDJX3A57E7737268	1	\$ 132.00	0.3	0.37	\$ 356.76	R-267.001
10631 F	KNAFW4A37D5656730	1	\$ 572.00	1.3	0.43	\$ 1,330.23	R-214.003
Totals		27	\$9,326.02	21.3	35.47	\$ 262.93	

EXHIBIT B

Exhibit B

RO # Line #	VIN	Repair Count	Labor Charges	Sold Hours	Actual Hours	Actual Hours Labor Rate	Ex. No.
10158 A + (10300 A)	5XYPK4A50GG034387	1	\$ 690.00	1.5	5.85	\$ 117.95	R-205.001 R-253.001
10165 B	KNDPB3A20B7097690	1	\$ 176.00	0.4	0.8	\$ 220.00	R-249.001
10180 A + (10148 U)	KNDPC3A21C7248762	1	\$ 176.00	0.4	1.27	\$ 138.58	R-242.001;.005 R-250.001
10180 B	KNDPC3A21C7248762	1	\$ 484.00	1.1	1.1	\$ 440.00	R-250.001
10183 A + (10152 B)	5XYKWDA29DG377151	1	\$ 176.00	0.3	0.71	\$ 247.89	R-208.001 R-272.001
10191 C	KNAGM4A71B5137845	1	\$ 264.00	0.6	0.6	\$ 440.00	R-251.006
10246 B + (10153 A)	5XXGR4A68FG491097	1	\$ 132.00	0.3	1.53	\$ 86.27	R-248.001 R-271.001-002
10291 F	5XYKT3A10CG263287	1	\$ 264.00	0.6	0.81	\$ 325.93	R-252.004

Exhibit B

RO # Line #	VIN	Repair Count	Labor Charges	Sold Hours	Actual Hours	Actual Hours Labor Rate	Ex. No.
10320 A	KNDJE723567240747	1	\$ 125.00	0.3	0.3	\$ 416.67	R-243.001
10346 A	KNAGM4AD0D5047482	1	\$ 660.00	1.5	3.42	\$ 192.98	R-212.001
10352 A	KNDJT2A22A7050267	1	\$ 382.00	1.3	1.23	\$ 310.57	R-254.001
10404 A	KNDJP3A54H7441824	1	\$ 401.19	0.8	0.97	\$ 413.60	R-255.001
10415 A	5XYPK4A57GG063434	1	\$ 395.00	1	2.92	\$ 135.27	R-256.001
10426 D	KNAGM4AD0F5087578	1	\$ 220.00	0.4	0.22	\$ 1,000.00	R-257.001;.003
10454 A	KNDCE3LC5H5052552	1	\$ 100.00	0.2	1.02	\$ 98.04	R-258.001
10486 A	KNALN4D70E5145107	1	\$ 660.00	1.5	0.65	\$ 1,015.38	R-259.001
10529 A	5XYPGDA3XGG060527	1	\$ 440.00	1	1.84	\$ 239.13	R-260.001

Exhibit B

RO # Line #	VIN	Repair Count	Labor Charges	Sold Hours	Actual Hours	Actual Hours Labor Rate	Ex. No.
10529 B	5XYPGDA3XGG060527	1	\$ 200.00	0.4	0.61	\$ 327.87	R-260.002
10534 B	KNDPN3AC5H7229321	1	\$ 220.00	0.5	0.5	\$ 440.00	R-261.002
10553 A + (10585 A)	KNDMG4C7XC6446414	1	\$ 382.00	0.8	0.98	\$ 389.80	R-262.001 R-264.001
10571 A	KNDJX3AEXG7016476	1	\$ 608.31	1.3	2.87	\$ 211.95	R-244.001
10581 A	KNDPB3AC3F7756943	1	\$ 125.00	0.5	0.92	\$ 135.87	R-263.001
10590 E	5XYPGDA50GG145202	1	\$ 431.52	1	0.99	\$ 435.88	R-265.004
10591 A	KNAFU4A21A5103838	1	\$ 264.00	0.6	1.14	\$ 231.58	R-266.001
10617 A	KNDJX3A57E7737268	1	\$ 132.00	0.3	0.37	\$ 356.76	R-267.001

Exhibit B

RO # Line #	VIN	Repair Count	Labor Charges	Sold Hours	Actual Hours	Actual Hours Labor Rate	Ex. No.
10631 F	KNAFW4A37D5656730	1	\$ 572.00	1.3	0.43	\$ 1,330.23	R-214.003
10679 A	KNDMB133X86267050	1	\$ 95.00	0.2	0.15	\$ 633.33	J-6.005 (Count 38) Actual RO Not in Record
10680 A	KNDMG4C7XC6446414	1	\$ 161.55	0.4	0.57	\$ 283.42	J-6.005 (Count 39) Actual RO Not in Record
10712 A	KNDP63ACXM7852876	1	\$ 100.00	0.2	0.73	\$ 136.99	J-6.005 (Count 37 - Last Item) Actual RO Not in Record
Totals		29	\$9,036.57	20.7	35.5	\$ 254.55	

EXHIBIT C

**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

1 **PROOF OF SERVICE**

2 I am a citizen of the United States and employed in Los Angeles County, California. I am
3 over the age of eighteen years and not a party to the within-entitled action. My business address is
4 Hogan Lovells US LLP, 1999 Avenue of the Stars, Suite 1400, Los Angeles, California 90067. On
5 June 25, 2024, I served a copy of the within document(s):

7 **RESPONDENT’S POST-HEARING REPLY BRIEF**

- 8 by placing the document(s) listed above in a sealed envelope with postage thereon fully
9 prepaid, the United States mail at Los Angeles, California addressed as set forth below.
- 10 by personally delivering the document(s) listed above to the person(s) at the address(es) set
11 forth below.
- 12 by transmitting via e-mail or electronic transmission the document(s) listed above to the
13 person(s) at the e-mail address(es) set forth below.

13 Gavin M. Hughes
14 Robert A. Mayville, Jr
15 LAW OFFICES OF GAVIN M. HUGHES
16 3436 American River Drive, Suite 10
17 Sacramento, CA 95864
18 Telephone: (916) 900-8022
19 gavin@hughesdealerlaw.com
20 mayville@hughesdealerlaw.com

Attorneys for Protestant
KM3G, INC. d/b/a PUTNAM KIA
OF BURLINGAME

18 New Motor Vehicle Board
19 1507 – 21st Street, Suite 330
20 Sacramento, CA 95811
21 Telephone: (916) 445-1888
22 Email: nmvb@nmvb.ca.gov

23 I declare under penalty of perjury under the laws of the State of California that the foregoing
24 is true and correct. I declare that I am employed in the office of a member of the bar of this court at
25 whose direction the service was made. Executed on June 25, 2024, at Los Angeles, California.

26 */s/ Jonathan Stulberg*
27 Jonathan Stulberg

1 NEW MOTOR VEHICLE BOARD
2415 1st Avenue, MS L242
2 Sacramento, California 95818
Telephone: (916) 445-1888
3
4
5
6
7

8 STATE OF CALIFORNIA
9 NEW MOTOR VEHICLE BOARD
10

11 In the Matter of the Protest of
12 KM3G INC., d/b/a PUTNAM KIA OF
13 BURLINGAME,
14 Protestant,
15 v.
16 KIA AMERICA INC.,
17 Respondent.

Protest No. PR-2803-22

**ORDER GRANTING IN PART AND
DENYING IN PART “PROTESTANT’S
MOTION TO STRIKE PORTIONS OF
RESPONDENT’S POST-HEARING
REPLY BRIEF”**

**ORDER ADOPTING THE TENTATIVE
RULING DATED JULY 31, 2024**

18 To: Gavin M. Hughes, Esq.
19 Robert A. Mayville Jr., Esq.
20 Attorneys for Protestant
LAW OFFICES OF GAVIN M. HUGHES
4360 Arden Way, Suite 1
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21 Jonathan R. Stulberg, Esq.
22 Reed T. Zaiss, Esq.
23 Attorneys for Respondent
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24 Los Angeles, California 90067

25 John J. Sullivan, Esq.
26 Attorney for Respondent
HOGAN LOVELLS US LLP
390 Madison Avenue
27 New York, New York 10017

28 ///

1 This matter came on regularly for telephonic hearing on Monday, August 5, 2024, before Diana
2 Woodward Hagle, Administrative Law Judge for the New Motor Vehicle Board. Gavin M. Hughes, Esq.
3 and Robert A. Mayville, Jr., Esq. of The Law Offices of Gavin M. Hughes represented Protestant. John J.
4 Sullivan, Esq. and Jonathan R. Stulberg, Esq. of Hogan Lovells US LLP represented Respondent.

5 After consideration of the pleadings and oral arguments of counsel, IT IS HEREBY ORDERED
6 that "Protestant's Motion to Strike Portions of Respondent's Post-Hearing Brief" is granted in part and
7 denied in part. Respondent's Post-Hearing Reply Brief dated June 25, 2024, is stricken as follows:

- 8 1. Page 7, lines 6-11 ending with "the unreliability of [Putnam Ford's] sold hours".
- 9 2. Page 9, line 11 through page 11, line 7.
- 10 3. Page 11, lines 13-19 ending with "Putnam Ford PD, p. 23, ¶ 18; *id.*, p. 46 ¶ 15."
- 11 4. Page 11, line 22 beginning with "The ALJ . . ." through page 12, line 1 ending with
12 "Putnam Ford PD pp. 24-27, ¶¶ 20, 22."
- 13 5. Page 15, line 25 through page 16, line 2 ending with "they will not be repeated at length
14 here."
- 15 6. Page 17, lines 15 through page 18, line 1 ending with "specifically set forth in its
16 Notification."
- 17 7. Page 19, lines 7-12.

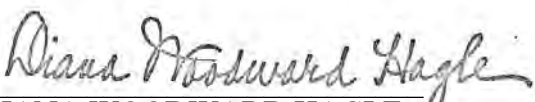
18 SO ORDERED.

19
20 The [Tentative] Ruling re: Infinitely Repeating Decimals dated July 31, 2024, is HEREBY
21 ADOPTED as the final order. Section D. "Impossible Hourly Rates" of Respondent's Post-Hearing Reply
22 Brief is stricken at page 14, line 3 though page 15, line 12.

23 SO ORDERED.

24
25 DATED: August 6, 2024

NEW MOTOR VEHICLE BOARD

26
27 By 
28 DIANA WOODWARD HAGLE
Administrative Law Judge

VIA EMAIL

LAW OFFICES OF GAVIN M. HUGHES
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New Motor Vehicle Board

Received
9-15-22

FILED

New Motor Vehicle Board

Date: 9-15-22

By: am

ATTORNEYS FOR PROTESTANT

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of:

KM3G INC., d/b/a PUTNAM KIA OF
BURLINGAME,

Protestant,

v.

KIA AMERICA INC.,

Respondent.

PROTEST NO: PR-2803-22

PROTEST
[Vehicle Code Section 3065.4]

Protestant, KM3G, Inc., d/b/a Putnam Kia of Burlingame, a California corporation, qualified to do business in California, through its attorneys, files this Protest under provisions of California Vehicle Code Section 3065.4 and alleges as follows:

1. Protestant is a new motor vehicle dealer selling Kia vehicles and parts, is duly licensed as a vehicle dealer by the State of California, and is located at 2 California Dr., Burlingame, CA 94010; Protestant's telephone number is (650) 732-3099.

2. Respondent, KIA America Inc., ("KUS"), distributes Kia products and is the franchisor of Protestant.

3. Protestant is represented in this matter by the Law Offices of Gavin M. Hughes, whose

1 address and telephone number are 3436 American River Drive, Suite 10, Sacramento, California
2 95864; (916) 900-8022.

3 4. The terms of Protestant's Kia franchise obligate Protestant to provide warranty service
4 on eligible Kia vehicles, for which Protestant is reimbursed in an amount determined by Respondent.

5 5. Protestant's current warranty labor reimbursement rate is significantly below
6 Protestant's effective labor rate charged to retail customers.

7 6. Protestant submitted to Respondent a request for adjusted labor retail rate in compliance
8 with the requirements of Vehicle Code section 3065.2 ("Request") on or about March 22, 2022.

9 7. On April 20, 2022, pursuant to Vehicle Code section 3065.2, subdivision (d)(4), KUS
10 requested supplemental repair orders closed 30 days immediately following the repair orders submitted
11 with the Request.

12 8. Protestant provided the 30 days of supplemental repair orders on or about April 27,
13 2022.

14 9. By letter dated May 26, 2022, KUS advised Protestant it was denying the Request
15 ("Denial"). In the Denial, KUS alleged Protestant's requested labor rate to be materially inaccurate and
16 potentially fraudulent. Respondent claimed Section 3065.2 requires the labor retail rate be calculated
17 using actual technician hours expended on each job as opposed to the hours sold to service customers,
18 used by Protestant.

19 10. Industry standard is to use guide hours for customer repair jobs as well as for warranty
20 reimbursement. Respondent does not determine warranty reimbursement based on actual technician
21 hours expended on each warranty repair nor does Protestant charge service customers by actual service
22 technician hours.

23 11. The language from Section 3065.2 (h) is unambiguous regarding the franchisor's
24 obligation to calculate rates as set forth therein: "When a franchisee submits for the establishment or
25 modification of a retail labor rate, retail parts rate, or both, pursuant to this section, a franchisee's retail
26 labor rate or retail parts rate shall be calculated only using the method prescribed in this section. When
27 a franchisee submits for the establishment or modification of a retail labor rate, retail parts rate, or
28 both, pursuant to this section, a franchisor shall not use, or require a franchisee to use, any other

1 method, including, but not limited to, any of the following[.]” (Cal. Veh. Code § 3065.2, subd. (h)
2 (emphasis added.))

3 12. By letter to Respondent dated June 15, 2022, Protestant advised Respondent its denial
4 of the Request did not comply with the requirements of Section 3065.2. Protestant also endeavored to
5 provide further clarification concerning the method used to calculate the warranty labor rate set forth in
6 the Request.

7 13. Protestant continued efforts to informally resolve the dispute. However, these efforts
8 have been unsuccessful.

9 14. KUS’s conduct demonstrates willful disregard for the explicit requirements of Section
10 3065.2.

11 Protestant and its attorneys desire to appear before the Board and/or its designated hearing
12 officer for the purpose of presenting oral and documentary evidence concerning the matters herein
13 alleged. Protestant estimates the hearing in this matter will take seven (7) days to complete.

14 WHEREFORE, Protestant prays as follows:

15 1. That the Board sustain this protest and order Respondent to immediately begin
16 providing Protestant the warranty labor reimbursement rate requested.

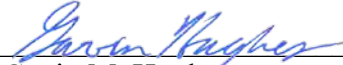
17 2. That the Board order Respondent compensate Protestant for the difference between the
18 requested labor reimbursement rate and the current rate, effective 30 days from Protestant’s Request
19 dated March 22, 2022.

20 3. That a pre-hearing conference be set and the parties notified thereof.

21 4. That Protestant be awarded such other and further relief as the Board deems just and
22 proper.

23
24 Dated: September 15, 2022

LAW OFFICES OF
GAVIN M. HUGHES

25
26 By:  _____
27 Gavin M. Hughes
28 Robert A. Mayville, Jr.
Attorneys for Protestant

