

NEW MOTOR VEHICLE BOARD
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CERTIFIED MAIL

STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of

KPAUTO, LLC, dba PUTNAM FORD OF SAN
MATEO,

Protestant,

v.

FORD MOTOR COMPANY,

Respondent.

Protest No. PR-2826-23

PROPOSED DECISION

PROCEDURAL BACKGROUND¹

Statement of the Case

1. On May 25, 2023, KPAuto, LLC, dba Putnam Ford of San Mateo (hereafter “Protestant” or “Putnam Ford”) filed with the New Motor Vehicle Board (hereafter “Board”) a Protest against Ford Motor Company (hereafter “Respondent” or “Ford”). Protestant alleged that Respondent conducted an audit (hereafter “Audit”) of Protestant’s warranty and parts operations in violation of Vehicle Code section 3065(e)(1).²

2. Protestant alleges that Respondent conducted the Audit in a punitive and retaliatory

¹ Citations throughout this Proposed Decision refer to oral testimony by reporter's transcript volume number (RT), page, and line, and by exhibit number (Ex.) and page(s). Other documents in the record are identified by their titles, as specifically denoted in the text.

² All statutory references are to the California Vehicle Code unless noted otherwise.

1 manner in response to a retail labor rate request made by Protestant pursuant to Section 3065.2 and
2 Protestant's previous Section 3065.4 retail labor rate protest filed with the Board in Protest No. PR-
3 2759-21. (Protest, § 6.)

4 3. Protestant further alleges that Respondent conducted the Audit in violation of Section
5 3065.2(i)(2)(G). (Protest, § 7.) Section 3065.2(i)(2)(G) provides that a franchisor shall not conduct or
6 threaten to conduct a nonroutine or nonrandom warranty audit in response to a franchisee seeking
7 compensation or exercising any right set forth in Section 3065.2.

8 4. A hearing on the merits was held via Zoom on August 6-8, 12-13, and 15-16, 2024,
9 before Administrative Law Judge Dwight V. Nelsen.

10 5. On August 9, 2024, Protestant filed a "Motion to Compel Respondent to make its Party
11 Witnesses Available for Testimony." On August 15, 2024, Respondent opposed this motion. After oral
12 arguments on August 16, 2024, Protestant's motion was denied but Protestant was allowed to file post-
13 hearing deposition designations.

14 6. Protestant filed its post-hearing deposition designations on August 26, 2024,
15 Respondent's counter-designations were filed on September 5, 2024, and Protestant's objections to
16 Respondent's counter-designations were filed on September 10, 2024. The initial hearing regarding
17 these deposition designations was held on September 13, 2024, and continued to November 7, 2024.
18 Protestant's Request for Post-Hearing Deposition Designations was granted in part and denied in part.

19 7. On November 7, 2024, the merits hearing resumed via Zoom, which concluded with the
20 admission of Protestant's post-hearing deposition designations (Exs. P-154 to P-161), Exhibit P-147,
21 and Respondent's counter-designations (Exs. R-349 to R-356).

22 8. This matter was submitted on May 19, 2025.

23 **Parties and Counsel**

24 9. Protestant operates a Ford dealership located at 885 North San Mateo Drive, San Mateo,

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26 ///

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28 ///

California.³ (Protest, ¶ 1.) It is a “franchisee” of Respondent within the meaning of Sections 331.1 and 3065.

10. Protestant is represented by the Law Offices of Gavin M. Hughes by Gavin M. Hughes, Esq., and Robert A. Mayville, Jr., Esq., 4360 Arden Way, Suite 1, Sacramento, California 95864.

11. Respondent is a “franchisor” of Protestant within the meaning of Sections 331.2 and 3065.

12. Respondent is represented by Greenberg Traurig, LLP⁴ by Steven M. Kelso, Esq., April C. Connally, Esq., and H. Camille Papini-Chapla, Esq., 1144 15th Street, Suite 3300, Denver, Colorado 80202.

ISSUES PRESENTED

13. Did Respondent comply with Vehicle Code section 3065 in making its determination to disapprove and chargeback 552 claims totaling \$502,821.56? (Protest, ¶ 5.)

14. Did Respondent select Protestant for the Audit, or perform the Audit in a punitive, retaliatory, or unfairly discriminatory manner in violation of Section 3065(e)(1)? Was Respondent’s Audit in response to Putnam Ford’s 2021 Retail Labor Rate request made pursuant to Section 3065.2 as well as Putnam Ford’s subsequent Section 3065.4 protest (PR-2759-21)? (Protest, ¶ 6.)

15. Was the Audit conducted in violation of Section 3065.2(i)(2)(G), which makes it unlawful for a franchisor to conduct a nonrandom audit in response to a franchisee seeking compensation or exercising a right pursuant to Section 3065.2? (Protest, ¶ 7.)

IDENTIFICATION OF WITNESSES

Respondent’s Witness⁵

16. Respondent called Jonathan L. Owens, Jr., Warranty Auditor, Ford Motor Company.

Protestant’s Witnesses

17. Protestant called the following witnesses:

³ When Protestant opened its Ford dealership, it was temporarily located at 790 North San Mateo Drive, San Mateo, California, and then relocated to another temporary location at 885 North San Mateo Drive. (Ex. P-102, p. 001)

⁴ Elayna M. Fiene, Esq. appeared on behalf of Respondent throughout the hearing but withdrew as counsel of record on August 23, 2024. (Motion to Withdraw Elayna M. Fiene as Counsel of Record.)

⁵ Respondent’s witnesses are noted first in order because it has the burden of proof.

- Al Vasquez, General Manager, Putnam Ford of San Mateo.
- Troy Davis, Fixed Operations Director, Putnam Ford of San Mateo.
- Colt DeFrees, Auto Technician, Putnam Ford of San Mateo.
- Andrey Kamenetsky, Group Operations Manager and Chief Financial Officer, Putnam Ford of San Mateo.
- Michael Gogolewski, former Market Representation Manager for San Francisco Region, Ford Motor Company.
- Melissa Hughes, Sales and Performance Manager, Ford Motor Company (Adverse witness pursuant to Evidence Code section 776).
- Robert Benke, Service Performance Manager, Ford Motor Company (Adverse witness pursuant to Evidence Code section 776).
- LaShawn Swann, San Francisco Regional Manager, Ford Motor Company (Adverse witness pursuant to Evidence Code section 776).

BURDEN OF PROOF

18. The franchisor has the burden of proof to show that it selected the franchisee for an audit and performed the audit in compliance with subdivision (e) of Section 3065. (Veh. Code § 3065(e)(6).)

19. The standard is preponderance of the evidence, which is met if the proposition is more likely to be true than not true---i.e., if there is greater than 50 percent chance that the proposition is true.

APPLICABLE LAWS

20. The Board's authority to hear protests is set forth in Section 3050(c) which provides:

The board shall do all of the following:
...

(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, 3065.3, 3065.4, 3070, 3072, 3074, 3075, or 3076. . . .
(Emphasis added.)

21. Section 3065 provides in part as follows:

(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.

...
(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. ...

...
(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. (Emphasis added.)
...

22. Pursuant to Section 3065.2, a franchisee may seek to establish or modify its retail labor rate. Subdivision (i) of Section 3065.2 precludes a franchisor from doing, in part, any of the following:

...
(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:

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

...
(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. (Emphasis added.)

23. Subdivision (a) of Section 3065.4 provides as follows:

(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 is materially inaccurate or fraudulent. (Emphasis added.)

24. Throughout the hearing, Respondent objected to any inquiry that raised the attorney-client privilege. In reviewing the evidence and formulating the Proposed Decision, Evidence Code section 913 was complied with at all times. Subdivision (a) of Evidence Code section 913 provides:

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

RESPONDENT'S CONTENTIONS⁶

25. In summary, Respondent contends that:

- A. Respondent complied with Section 3065(e) and properly charged back false warranty claims submitted by Protestant for repairs performed at an unauthorized location.
- B. In conducting the Audit, Respondent complied with all procedural and administrative requirements of Section 3065(e).
- C. The Audit was not retaliatory.
- D. Respondent acted in good faith in responding to Protestant's changing relocation requests.
- E. The Board cannot and should not consider Protestant's belated Section 3065.2 claim for bad faith in that the Board has narrow jurisdiction that does not encompass a Section 3065.2 claim presented in a Section 3065 protest.
- F. Protestant violated the Sales and Service Agreement and Warranty and Policy Manual.

PROTESTANT'S CONTENTIONS

26. In summary, Protestant contends that:

- A. Respondent failed to meet its burden to demonstrate it complied with the requirements of Section 3065(e).
- B. The proposed chargebacks are neither false nor fraudulent, but these findings are unnecessary because Respondent failed to demonstrate the Audit was not punitive and in retaliation for the filing of Protestant's retail labor rate request and protest.
- C. Respondent argues the Board should ignore whether the Audit was in retaliation to Protestant's labor rate request.
- D. Respondent's argument that the Audit must be viewed in isolation of the allegation and warranty study attempts to sidestep the issue of Respondent's intention behind the initiation of the allegation audit process.

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⁶ Respondent's contentions are placed first in order because Respondent has the burden of proof.

- 1 E. Respondent misrepresents the relevance of the facility issue in its Audit;
2 approximately 80% of the proposed chargebacks rely solely on the facility issue.

3 **FINDINGS OF FACT⁷**

4 **Timeline of Protestant's Retail Labor Rate Request and Protest No. PR-2759-21**

5 27. In the prior and separate protest, Protestant submitted a retail labor rate request with
6 Respondent. Respondent denied Protestant's request. Protestant filed Protest No. PR-2759-21
7 challenging Respondent's denial. The following timeline details Protestant's retail labor rate request
8 and Protest No. PR-2759-21:

- 9 ■ August 24, 2021: Protestant submitted a request to Respondent for an "adjusted labor retail
10 rate." (Protest No. PR-2759-21, ¶ 6.)
- 11 ■ October 26, 2021: Respondent denied Protestant's retail labor rate adjustment request.
12 (Protest No. PR-2759-21, ¶ 7.)
- 13 ■ December 30, 2021: Pursuant to Section 3065.4, Protestant filed Protest No. PR-2759-21 for
14 denial of its request for an adjusted retail labor rate. (Ex. R-336, p. 007.)
- 15 ■ December 14, 2022: Kent Putnam, Protestant's Dealer Principal, executed a declaration in
16 Protest No. PR-2759-21. (Ex. 305, p. 001)
- 17 ○ Respondent offered the declaration into evidence as Exhibit R-305 in the current
18 matter.
- 19 ○ Mr. Putnam declared that the "Ford franchise agreement authorizes Putnam Ford to
20 conduct service work at the address of 885 N. San Mateo Drive, San Mateo,
21 California. This location was not intended to be the permanent location for Putnam
22 Ford . . ." (Ex. R-305, ¶ 2.)
- 23 ○ Mr. Putnam declared that for the period of March 10, 2021, through July 7, 2021,
24 "all Ford service work was performed at the authorized Ford location." (Ex. R-305, ¶
25 ¶ 3, 5.)

26 _____

27 ⁷ References herein to testimony, exhibits or other parts of the record are examples of evidence relied upon to
28 reach a finding and are not intended to be all-inclusive. Findings of fact are organized under topical headings for
readability only and are not to be considered relative to only the topic under which they appear.

- Mr. Putnam further declared that “[e]ach repair order provided to Ford as part of our labor rate submission lists the address of where the repairs were completed. The address is 885 N. San Mateo Drive and is listed on every page of the repair order.” (Ex. R-305, ¶ 6.)
- September 25, 2023: Mr. Putnam testified during the merits hearing in Protest No. PR-2759-21.
 - Respondent offered into evidence excerpts of Mr. Putnam’s testimony as Exhibit R-327.
 - Mr. Putnam testified that the address on the repair orders cannot be relied upon to show where repair services were performed. (Ex. R-327, p. 019.)
 - Mr. Putnam testified that it is possible that the “Barn” had been used as early as May 2021. (Ex. R-327, p. 014) The “Barn” is a standalone building on the lot of Putnam’s Nissan facility. (Ex. R-325, p. 018.) The “Barn” is an approved facility under Putnam’s Nissan dealership agreement. (Exs. R-325, p. 020; R-326, p. 006; R-327, pp. 012-013.)
- June 28, 2024: the Board issued its Decision overruling Protest No. PR-2759-21.
 - Respondent offered into evidence the Board Decision as Exhibit R-336.
 - The Administrative Law Judge in Protest PR-2759-21 issued evidentiary sanctions against Protestant and entered the “finding of fact that some of the repairs in protestant’s warranty labor rate request submission were performed at a facility other than protestant’s authorized facility at 885 N. San Mateo Drive, San Mateo, California 94401.” (Ex. 336, p. 010.)

Franchise Agreement

28. On January 27, 2021, Protestant and Respondent executed a “Ford Sales and Service Agreement,” the franchise agreement (hereafter “SSA”). (Ex. J-01, p. 004.)

29. Upon executing the SSA, Respondent issued a “Letter of Understanding – Term Agreement” confirming that Protestant’s place of operation for providing Ford products and services was 790 N. San Mateo Drive, San Mateo, California. (Ex. P-101, pp. 001-003.)

30. SSA, paragraph 1(a)(3), provides: “‘COMPANY PRODUCTS’ shall mean . . . parts and accessories . . .” (Capitalization in original.) (Ex. J-01, p. 013.)

31. SSA, paragraph 1(k), provides: “‘DEALERSHIP LOCATION’ shall mean the place or places of business of the Dealer for carrying out this agreement which are approved by the Company as provided in paragraph 5 of this agreement.” (Capitalization in Original.) (Ex. J-01, p. 014.)

32. SSA, paragraph 1(l), provides: “‘DEALERSHIP FACILITIES’ shall mean the land areas, buildings and improvements established at the DEALERSHIP LOCATION in accordance with the provisions of paragraph 5 of this agreement.” (Capitalization in original.) (Ex. J-01, p. 014.)

33. SSA, paragraph 4, provides: “The Dealer shall develop, maintain and direct a trained, quality service organization and render at the DEALERSHIP FACILITIES prompt, workmanlike, courteous and willing service to owners and users of COMPANY PRODUCTS, in accordance with the standards and procedures set forth in the applicable COMPANY SERVICE BULLETIN, including without limitation all service to which a purchaser of a COMPANY PRODUCT from any authorized Ford dealer may be entitled.” (Capitalization in original.) (Ex. J-01, p. 019.)

34. SSA, paragraph 4(b)(1), provides: “The Dealer shall perform all warranty and policy service on each COMPANY PRODUCT it is certified to sell and service, presented by owners, in accordance with the warranty and policy applicable thereto and the applicable provisions of the Warranty Manual and CUSTOMER SERVICE BULLETIN.” (Capitalization in original.) (Ex. J-01, p. 019.)

35. SSA, paragraph 4(b)(4), provides: “The Dealer shall submit claims to the Company for reimbursement for the parts and labor used in performing warranty . . . work and the Company shall reimburse the Dealer therefor . . . The Dealer shall maintain adequate records and documents supporting such claims in accordance with the provisions of the Warranty Manual.” (Ex. J-01, p. 020.)

36. SSA, paragraph 5(a), provides: “***Locations and Facilities.*** The Dealer shall establish and maintain at the DEALERSHIP LOCATION approved by the Company DEALERSHIP FACILITIES of satisfactory appearance and conditions and adequate to meet the Dealer’s responsibilities under this agreement. The DEALERSHIP FACILITIES shall be substantially in accordance with the GUIDES therefor established by the Company from time to time.” (Bold, italics, and capitalization in original.)

1 (Ex. J-01-020.)

2 37. SSA, paragraph 5(b), provides: “**Dealership Facilities Supplement.** The Dealer and the
3 Company have executed, as a part of and simultaneously with this agreement, a Dealership Facilities
4 Supplement which includes a description of all of the DEALERSHIP LOCATION and FACILITIES,
5 the GUIDES therefor as of the date of this agreement and the purpose for which each shall be used.”
6 (Bold, italics, and capitalization in original.) (Ex. J-01, p. 020.)

7 38. Paragraph 5(c) of the SSA provides in part:

8 **Changes and Additions.** The Dealer shall not move or substantially modify or
9 change the usage of any of the DEALERSHIP LOCATION or FACILITIES for
10 COMPANY PRODUCTS, nor shall the Dealer . . . directly or indirectly establish
11 or operate in whole or in part any other locations or facilities for the sale or
12 service of COMPANY PRODUCTS or the sale of used vehicles without the prior
written consent of the Company. Any such change shall be evidenced by a new
Dealership Facilities Supplement executed by the Dealer and the Company. . . .
(Bold, italics, and capitalization in original.) (Ex. J-01, p. 020.)

13 39. SSA, paragraph 5(d), provides: “**Company Assistance.** To assist the Dealer in planning,
14 establishing and maintaining DEALERSHIP LOCATION and FACILITIES in accordance with his
15 responsibilities under this agreement, the Company will make available, at the request of the Dealer,
16 and at a mutually convenient time and place, personnel to provide counsel and advice regarding
17 location and facility planning, including layout and design.” (Bold, italics, and capitalization in
18 original.) (Ex. J-01, p. 020.)

19 40. SSA, paragraph 5(e), provides: “**Fulfillment of Responsibility.** The Dealer shall be
20 deemed to be fulfilling his responsibilities under this paragraph 5 when and as long as the
21 DEALERSHIP LOCATION is approved by the Company and the DEALERSHIP FACILITIES are
22 substantially in accordance with the current GUIDES therefor. The execution of this agreement or any
23 Dealership Facilities Supplement shall not of itself be construed as evidence of the fulfillment by the
24 Dealer of his responsibilities to provide adequate DEALERSHIP LOCATION and FACILITIES.”
25 (Bold, italics, and capitalization in original.) (Ex. J-01, p. 021.)

26 41. SSA, paragraph 12(b), provides: “**Inspection and Tests.** The Dealer shall allow persons
27 designated by the Company . . . to examine the DEALERSHIP FACILITIES and OPERATIONS, the
28 Dealer’s stocks of COMPANY PRODUCTS and used vehicles and vehicles at the DEALERSHIP

1 FACILITIES for service or repair, to test the Dealer's equipment, to check and instruct the Dealer and
2 his employees in the proper handling of warranty and other repairs and claims based thereon, and to
3 examine, copy and audit any and all of the Dealer's records and documents. The Company may charge
4 back to the Dealer all payments or credits made by the Company to the Dealer pursuant to such claims
5 or otherwise which were improperly claimed or paid." (Bold, italics, and capitalization in original.)
6 (Ex. J-01, p. 026.)

7 Ford's Warranty and Policy Manual

8 42. Protestant is obligated to comply with Ford's Warranty and Policy manual. (RT, Vol.
9 IV, p. 54:8-11; see paragraphs 34 and 35, *supra*.)

10 43. Paragraph 1.1.03 provides in part:

11 Owners of Ford/Lincoln vehicles are encouraged, but not required, to return to
12 their selling Dealer for warranty service. Warranty repairs must be performed at
13 an authorized Ford or Lincoln dealership. (Emphasis added.) (RT, Vol. I, 161:9-
13; 162:5-8; Ex. J-03, p. 006.)

14 44. Paragraph 1.1.04 requires the Dealer to submit a statement with its request for warranty
15 reimbursement in compliance with the following statement:

16 I certify that the information on this claim is accurate and, unless shown, the
17 services were performed at no charge to the owner. To my knowledge, this repair
18 contains no part repaired or replaced that are connected in any way with any
19 accident, negligence or abuse and is compliant with Ford Warranty & Policy.
(Without bold font; Ex. J-03, p. 006.)

20 45. Paragraph 7.3.01 provides:

21 Audits are regularly conducted by the Company on claims and claim-supporting
22 records in accordance with the Ford and/or Lincoln Sales and Service Agreement.

23 All improper claims and claims not supported by dealership records that have
24 been paid by the Company are subject to chargeback.

25 . . . Improper claims can include, but are not limited to reasons in the following
26 list:

- 27 • Lack of technician identification for the repair.
- 28 • Unauthorized replacement of assemblies or parts.
- Unauthorized use of non-Ford parts.
- Add-on, repeat, improper and ineffective repairs.
- Repairs not following the Workshop Manual (i.e. not replacing required OTUPs [One-Time use parts]).
- Unsupported labor time.
- Information showing work done in unrealistically short time.

- Overlapping or inflated labor time.
- Inadequate or lack of supporting documents.
- Repairs not covered by warranty.
- Repairs which are not Ford responsibility.
- Misuse of Transportation Assistance. (Emphasis added.) (Ex. R-J-03, pp. 019, 185-186.)

46. Paragraph 7.3.03 provides:

The submission of false claims to the Company violates your Sales and Service Agreement(s) and is a sufficiently substantial breach of faith between the Company and the dealer to warrant termination. In appropriate circumstances, where false claims are identified, termination will be pursued, regardless of whether it is a first time occurrence. All audits involving false findings will **require a Follow-up Audit 7-18 months** after the completion of the previous audit.

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

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

- The knowing submission of claims with omissions of material facts or substantial violations of program requirements.
- VIN or Owner name misrepresented.
- Repair date misrepresented.
- Mileage alteration.
- Work not performed as claimed.
- Multiple uses of same image for prior approval.
- Non-Ford part claimed as genuine.
- Circumventing technician competency requirements.
- Submitting repairs without required labor operations.
- Removing labor operations after a claim was rejected.
- Submitting a parts only claim when the technician is not certified.
- Technician misrepresentation.

Note: Any claim category that the Company determines to be false will be so categorized and charged back during a Warranty Audit. (Bold in original.) (Ex. J-03, p.186.)

Stipulation as to Location of Warranty Repairs

47. On November 6, 2023, counsel for the parties stipulated that: “Putnam Ford’s franchise agreement reflects as the authorized location 885 N. San Mateo Drive, San Mateo, CA 94401 (‘Authorized Location’). Since at least June 2021, Putnam Ford has performed repairs, including warranty repairs, at locations other than the Authorized Location. Putnam Ford stipulates that all the warranty repairs disallowed as a False Practice pursuant to 7.3.03 were performed at a location other than the Authorized Location.” (Ex. J-02, p. 001; see also Ex. J-1, p. 009.)

Protestant's Temporary Authorized Location

48. As Ford's Acting Regional Manager, Meghan Murphy-Austin signed some of the documents establishing Protestant as a Ford franchisee. Additionally, she was involved in consideration of different proposed relocation locations for Protestant's Ford dealership. (Ex. P-154, p. 006.)

49. Ms. Murphy-Austin visited Protestant's first location at least twice when the dealership was established. (Ex. P-154, pp. 007-008.) During this time, Ms. Murphy-Austin had conversations with Protestant about "potentially exploring off-site service locations." (Ex. P-154, pp. 012, 015-016.) Although, she does not recall discussing a specific location. (Ex. P-154, p. 013.)

50. Ms. Murphy-Austin told Protestant that Respondent was open to adding "Ford capacity as part of the facility conversation." Mr. Putnam provided Respondent with "a lot of different proposals that [Respondent] considered." (Ex. P-154, p. 013.)

51. Ms. Murphy-Austin felt that Protestant's service capacity was inadequate. (Ex. P-154, p. 013.)

52. On March 8, 2021, Respondent issued a "Conditional Letter of Approval - - Relocation" approving the relocation of Protestant's authorized dealership facilities located at 790 N. San Mateo Drive to 885 N. San Mateo Drive. (Ex. P-102, p. 001.) The letter provides in part, that:

The Proposed Dealership Facilities located at 885 N. San Mateo Drive, San Mateo CA will be used as a temporary facility. (Emphasis in original.) (RT, Vol. III, 72:10-73:10; Ex. P-102, p. 001.)

Respondent required Protestant to have a minimum of 12 Service stalls. Protestant only had three. (RT, Vol. III, 74:11-13; Ex. P-102, p. 1.)

53. Michael Gogolewski, former Market Representation Manager for the San Francisco Region, Ford Motor Company, told Al Vasquez, General Manager for Protestant, that Respondent would be flexible and willing to work with Protestant concerning service capacity. (RT, Vol. III, 78:20-79:2.)

54. Mr. Vasquez discussed the shortfall in service capacity with Meghan Murphy-Austin and Mr. Gogolewski. (RT, Vol., IV, 87:1-13.)

55. Kent Putnam, Protestant's Dealer Principal, had a separate dealership agreement with Nissan North America ("Nissan"). Pursuant to the agreement with Nissan, Mr. Putnam operated Nissan

1 of Burlingame at 101 California Drive, Burlingame, California (“Nissan Facility”). (Ex. R-326, p. 006.)

2 56. The dealer agreement with Nissan required that Putnam’s Nissan Facility be “exclusive”
3 to Nissan. The Nissan Facility includes a structure called the “Barn,” that contains service stalls. The
4 Barn is not an authorized facility under Putnam Ford’s franchise agreement with Ford. (Exs. R-325, pp.
5 019-020; R-326, p. 006; R-327, pp. 012-013.)

6 **Respondent’s Visits to the Barn Prior to October 2022**

7 57. Pursuant to the SSA, a dealer can only provide service, including warranty repair work,
8 and sales where they are approved to do so. (Exs. R-350, pp. 005-006; J-01, p. 020.)

9 58. After moving to 885 N. San Mateo Drive, Protestant was not approved to do service
10 work anywhere else. Protestant was not approved to do any customer-pay work at any location other
11 than the authorized 885 N. San Mateo Drive location. (Ex. R-350, p. 004.)

12 59. For a dealer to provide service at another location, there must be approval from Ford’s
13 Assistant Secretary in the franchising department in Dearborn, Michigan. (Exs. R-350, p. 22; J-01, p.
14 020.)

15 60. Protestant’s general manager, Al Vasquez, and Mr. Putnam made the decision to use the
16 Barn for servicing Ford vehicles. (RT, Vol. III, 81:5-10.)

17 61. Starting in May or June of 2021, Protestant performed Ford warranty services,
18 approximately a block away, at the separate Nissan Facility owned by Mr. Putnam. (Exs. R-325, pp.
19 014, 017-018; R-327, pp. 011-012; RT, Vol. V, 153:15-20.)

20 62. The Barn was equipped for all Ford repairs. (RT, Vol. III, 83:10-14.)

21 63. Putnam Ford’s main authorized service facility was not sufficient to perform its
22 obligations. (Exs. P-151, p. 008; P-143, p. 004.) The Authorized Location was always intended to be a
23 temporary location as its service capacity was deficient. It would not accommodate the number of
24 customers seeking service. (RT, Vol. V, 184:24-185:5, 1185:17-22, 186:22-24.) Additionally, it did not
25 have the same equipment as the Barn. The Barn was better equipped to handle any Ford service work.
26 (Ex. P-143, p. 007.) In addition to quicker repairs, the “big jobs” and heavy duty work such as
27 transmissions and engine pulls were done at the Barn. (Ex. P-143, pp. 012-
28 013; RT, Vol. IV, 151:7-18.)

64. For some Ford vehicles, the height of the ceiling in the workspace matters. Working on full-size transits, the bigger Ford vans, ambulances, and trucks that have aftermarket roof racks or contractor trucks is difficult at the Authorized Location. (RT, Vol. IV, 202:8-203:1.)

65. Protestant is not able to timely complete all warranty work at the Authorized Location. (RT, Vol. IV, 147:3-12.)

66. As noted above, Respondent required Putnam Ford have 12 service stalls, but it only has three service stalls. (RT, Vol. III, 74:7-13; Ex. P-102, p. 001.) Protestant has enough Ford service business to employ more than nine technicians but has not hired more technicians because there is no place to put them. (RT, Vol. IV, 116:13-18, 121:20-122:1.)

67. When Vincent D'Amico, a Field Service Engineer for Respondent, trained his successor, Mike Sweis, Mr. D'Amico took Mr. Sweis to the Barn. On the way to the Barn, Mr. D'Amico warned Mr. Sweis for the first time that "[t]hey [Protestant] have an off-site facility." (Ex. P-143, pp. 002-003; Ex. P-151, pp. 002-003.)

68. According to Jonathan Owens, the Warranty Auditor, a Field Service Engineer does not have authority to approve facilities. (RT, Vol. I, 70:23-25.)

69. Almost all of Mr. Sweis' visits to Putnam Ford were to the Barn. He only visited Protestant's main facility once or twice. (Ex. P-151, pp. 004, 013.) Mr. Sweis never asked anyone about Protestant's use of the Barn, why it was being used, or whether such use was permitted. To do so was not his business. Mr. Sweis did not discuss Putnam Ford's use of the Barn with other Ford personnel. (Ex. P-151, pp. 004-005.)

70. In April of 2022, Mike Gogolewski met with Mr. Vasquez at Protestant's facility. They discussed the struggles of Putnam Ford's service capacity and complaints from customers regarding the time it took to service their cars. While going to lunch, Mr. Gogolewski and Mr. Vasquez stopped at the Barn and walked inside. Ford vehicles were being serviced in the Barn. (RT, Vol. III, 84:14-85:15, 88:5-8.) Mr. Vasquez said that using the Barn is helping with capacity but did not specify to Mr. Gogolewski that the work in the Barn was Ford warranty work. (RT, Vol. IV, 57:15-23.) Nor did Mr. Vasquez show Mr. Gogolewski that Protestant was using the service bays in the main building of the Nissan Facility. (RT, Vol. IV, 56:19-57:1.)

1 71. Mr. Vasquez did not know if Mr. Gogolewski knew whether the Barn was approved or
2 not. (RT, Vol. IV, 58:10-14.) Mr. Gogolewski did not advise Mr. Vasquez that Protestant would need
3 to request authorization to add the Barn location to the Ford franchise agreement. (RT, Vol. III, 88:9-
4 12.) Their conversation was mainly about the necessity to move the Ford franchise to Mr. Putnam's
5 then current GMC showroom. The issue of adding the Barn location to the franchise agreement was
6 never brought up. (RT, Vol. III, 88:9-17.)

7 **Respondent's Reaction to Protestant's Labor Rate Request**

8 72. By email dated September 1, 2021, Ms. Murphy-Austin wrote to Mr. Gogolewski
9 addressing her response to Protestant's labor rate submission. In part, she wrote: "If they continue to
10 pursue this twice the market average type rate, they won't see a lick of support from [Ms. Murphy-
11 Austin] moving forward." (Ex. P-154, pp. 019-020, 022.) This email expressed her shock after hearing
12 the retail labor rate requested by Protestant. The requested rate sounded "outrageously high" to Ms.
13 Murphy-Austin. (Ex. P-154, p. 019.) The type of "support" Ms. Murphy-Austin referenced was "above-
14 and-beyond type favors that [Ms. Murphy-Austin] would do for dealers that are good partners to Ford
15 Motor Company" and its customers. (Ex. P-154, pp. 020, 022.)

16 73. After sending the email, Ms. Murphy-Austin does not recall any specific support
17 withheld. She did not withhold or limit product allocations to Protestant. (Ex. P-154, pp. 021-022.)

18 74. Ms. Murphy-Austin's responsibilities did not include reviewing labor rate request
19 materials. She did not review any of Protestant's labor rate request materials and had no ability to
20 influence anyone at Ford to deny a labor rate request. (Ex. R-350, pp. 008-009.)

21 **Ford's Discovery of Protestant's Unauthorized Service Location**

22 75. During her time in the San Francisco Region, Ms. Murphy-Austin was not aware that
23 there were Ford dealers using non-customer facing service locations that had not been approved by
24 Ford. These unapproved service locations violated the dealer's franchise, and according to Ms.
25 Murphy-Austin this was not okay. (Ex. R-351, p. 014.) She did not know that Protestant was
26 performing service at the Barn. (Ex. 351. pp. 005-006.)

27 76. LaShawn Swann became the Ford Regional Manager for the San Francisco region after
28 Ms. Murphy-Austin. (RT, Vol. VII, 83:12-15)

1 77. Ms. Swann’s responsibilities include sales, service, parts, franchising, and customer
2 experience for the San Francisco region and the 69 dealers that are within that region. Ms. Swann’s
3 responsibilities do not include being involved in a dealer’s labor rate request. It is not part of her job
4 description. (RT, Vol. VII, 83:12-84:7.)

5 78. The first time that Ms. Swann met with Putnam Ford personnel was in October 2022.
6 (RT, Vol. VII, 95:23-25.) Accompanying Mr. Putnam, Ms. Swann took a tour of several different
7 facilities including Putnam’s Nissan Facility. (RT, Vol. VII, 96:2-12; Ex. R-332, p. 014.) On this
8 occasion, Mr. Putnam did not show Ms. Swann the Barn. (RT, Vol. VII, 96:16-18.)

9 79. During this visit, Mr. Putnam mentioned to Ms. Swann that Protestant was performing
10 service work at the Barn. (RT, Vol. VII, 97:10-14, 23-25.) Ms. Swann responded to Mr. Putnam that he
11 would need to submit a written request to add the Barn location to the dealer agreement. (RT, Vol. VII,
12 98:3-11) Ms. Swann told Mr. Putnam that he is not allowed to service Ford vehicles outside of the
13 primary service facility. To do so is a violation of the SSA. (RT, Vol. VI, 210:8-14.)

14 80. The Ford Regional Manager for the San Francisco region does not have the authority to
15 approve another location for Putnam Ford to conduct business. Approval of the assistant secretary in
16 the franchising department in Dearborn would be required. (Ex. R-350, pp. 022-023.)

17 81. After Ms. Swann’s October 2022 visit, Protestant sent a letter to Ford’s Regional Office
18 requesting authorization to use the Barn for overflow service work. Pending a response, Protestant did
19 not cease using the “Nissan Facility for service” work. (RT, Vol. IV, 30:6-15; Ex. P-104, p. 001.)

20 82. On October 25, 2022, Protestant requested formal authorization from Ford’s Regional
21 Office to use 100 Highland Avenue (this is the address to the back of the Barn) as an additional Ford
22 service location when Ford service work cannot be accommodated at Protestant’s main facility.
23 Protestant’s request was not addressed to Respondent’s assistant secretary in the franchising department
24 in Dearborn. (RT, Vol. IV, 30:6-9; Ex. P-104, p. 001.)

25 83. Ms. Swann’s “market rep. manager,” Melissa Hughes, forwarded Protestant’s request to
26 Ford’s headquarters in Dearborn. (RT, Vol. VII, 99:7-100:10, 108:22-109:4.)

27 84. On December 9, 2022, Gavin Hughes, Esq., Protestant’s attorney, in an email to Steven
28 M. Kelso, Esq., Respondent’s counsel, wrote regarding Protestant’s use of the Nissan Facility:

1 “[m]oreover, it is my understanding Putnam has ceased performing work at this location pending
2 Ford’s approval, which was requested in October.” (Ex. R-303, p. 001.)

3 85. Mr. Hughes’ statement was without a factual basis. Protestant was servicing Ford
4 vehicles at the Nissan Facility when Mr. Owens conducted the Warranty Study on April 3, 2023. (RT,
5 Vol. I, 122:14-21; Ex. R-312, p. 001.)

6 86. During October 2022 through the Audit closing meeting on May 24, 2023, Protestant
7 had not ceased using the Nissan Facility for service work. (RT, Vol. IV, 30:11-15; Ex. R-352, p. 049.)

8 87. By declaration dated December 14, 2022, filed in PR-2759-21, Kent Putnam declared in
9 part that the “Ford franchise agreement authorizes Putnam Ford to conduct service work at the address
10 of 885 N. San Mateo Drive, San Mateo, California. This location is not intended to be the permanent
11 location for Putnam Ford . . .” and that for the period of March 10, 2021, through July 7, 2021, “all
12 Ford service work was performed at the authorized Ford location.” (Ex. R-305, ¶¶ 2, 3, and 5.)

13 88. By letter dated December 13, 2022, Mr. Putnam stated: “[w]e agree with Ford’s
14 previous recommendation to move Putnam Ford two blocks away from its current location to 101
15 California Drive, Burlingame, CA (which is currently Nissan of Burlingame).” (Ex. P-106, p. 001.) In
16 his letter, without withdrawing the October 2022 request to use the Barn for off-site service capacity,
17 Mr. Putman requested approval for additional non-customer facing service maintenance and repair
18 capacity “at 925 Bayswater Avenue, Burlingame, CA, to support Ford’s current and growing service
19 [units in operation] in this market.” (Ex. P-106, p. 001; RT, Vol. VII, 13:4-6.)

20 89. On January 19, 2023, Ms. Swann and Ms. Hughes met with Mr. Putnam, and Andrey
21 Kamenetsky, Group Operations Manager and CFO for Protestant, to do a walkthrough of the proposed
22 relocation site. (RT Vol. IV, 229:12-14; 248:16-249:20; Vol. VI, 134:22-135:18; Exs. P-108, p. 001; R-
23 327, p. 007.) This visit was in response to the December 13, 2022, letter from Protestant. If approved,
24 the Nissan location would alleviate the need for any secondary service location. (RT, Vol. VII, 118:11-
25 14, 131:8-15; Ex. P-106.)

26 90. Prior to this visit, Ms. Swann did not know that Protestant was continuing to do Ford
27 service work at the Barn. (RT, Vol. VII, 118:4-19.) However, there was a general concern that
28 Protestant might be doing service work at an unauthorized facility. (RT, Vol. VI, 136:22-137:7.)

1 91. During the visit, Ms. Swann and Ms. Hughes were not trying to gather information
2 associated with the labor rate case nor were they trying to make a warranty audit happen. (RT, Vol. VII,
3 211:2-10.) The “primary purpose” of the visit was to evaluate the Nissan Facility. Taking photos of
4 Ford vehicles at the unauthorized location was incidental. (RT, Vol. VI, 231:3-23; Vol. VII, 118:20-
5 119:2, 119:20-120:1.)

6 92. Relocating Putnam Ford and servicing Ford vehicles at an unauthorized location are two
7 completely different issues. (RT, Vol. VII, 129:22-130:14; Exs. J-01, p. 020, J-03, p. 006.)

8 93. During the walkthrough, Ms. Swann and Ms. Hughes saw several Ford vehicles. Ms.
9 Swann started taking photos, but because she was conversing with Mr. Putnam, she asked Ms. Hughes
10 to take photos of Ford vehicles being serviced in the unauthorized facility. (RT, Vol. I, 92:5-9; Vol.
11 VII, 119:3-9; Vol. VI, 142:3-6; Ex. P-110, p. 001.) Ms. Hughes took the photos of Ford vehicles
12 observed in the Barn. (RT, Vol. VI, 137:17-22, 143:10-13, 144:13-19; Ex. P-107, pp. 001-004.) The
13 purpose of taking pictures was based on the concern that Protestant was doing service in an
14 unauthorized location. (RT, Vol. VI, 139:5-9.)

15 94. Upon observing Ford vehicles in the Barn, Ms. Swann stated to Mr. Putnam, “you know,
16 you can’t service vehicles here. We already had that discussion.” Mr. Putnam replied: “Oh, no. These
17 are Nissan customers.” (RT, Vol. VI, 141:18-142:2; Vol. VII, 118:24-119:19, 120:15-121:10, 133:12-
18 19, 134:4-9; Ex. J-01, p. 020.)

19 95. Ms. Hughes remembered that Mr. Putnam either said to them that the vehicles observed
20 in the Barn were “customer pay” or that they were “retail.” (RT, Vol. VI, 142:13-22.)

21 96. Ms. Swann then gestured to Ms. Hughes to specifically make sure that she got a photo of
22 what they were seeing. (RT, Vol. VII, 119:16-19.)

23 97. By email dated January 19, 2023, Ms. Hughes sent Ms. Swann three photos of Ford
24 vehicles in the Barn. (Ex. P-107.) Ms. Hughes did not send the photos to anyone else until someone
25 requested them. (RT, Vol. VI, 147:13-24.) Ms. Swann asked for the photos so that she could review
26 them and also send them to the franchising team in Dearborn. Ms. Swann was aware of the labor rate
27 litigation. (RT, Vol. VII, 145:8-23.) Repairs being performed at an unauthorized location is against
28 Respondent’s rules and is unacceptable. (RT, Vol. VI, 139:15-22.)

98. Ms. Swann discussed her visit with Ms. Hughes and with Wade Simmons, her boss at franchising. (RT, Vol. VII, 141:5-142:5.)

99. As the regional manager, Ms. Swann did not have authority to initiate an audit and had no role in selecting dealers for audits. (RT, Vol. II, 205:1-6.) She never did anything to punish Protestant. (RT, Vol. VII, 205:14-16.)

The Allegation Tracker

100. The selection of Protestant for the allegation investigation was not random. (RT, Vol. II, 136:25-137:3.)

101. Respondent's allegation process follows three-steps. First, upon receiving an allegation of false practices, an entry is made in the allegation tracker and is assigned to an auditor for investigation. (RT, Vol. I, pp. 81:19-82:1, 83:24-84:8.) The allegation process may stop at this point or Ford may proceed to a warranty study to acquire more information. Again, the warranty study may stop at this point where the facts do not indicate further work is necessary. Alternatively, based upon the facts and information acquired during the warranty study Ford may choose to proceed to a warranty audit. (RT, Vol. I, pp. 84:16-25, 86:13-17.)

102. The allegation begins with someone reporting to Ford improper warranty practices at a dealership. When Respondent receives an allegation, the first thing it does is enter the allegation into Ford's allegation tracker. The allegation is then assigned to a warranty auditor. (RT, Vol. I, 81:19-82:1.)

103. Mr. Owens testified that “[a]n allegation can be reported from a customer typically through the customer relations center. It could come from a dealership employee. It could be a technician, a service advisor, a general manager, or somebody at the dealership, which could be a current or former employee of the dealership. It could also come from a Ford corporate employee.” (RT, Vol. I, 82:20-83:4.)

104. The allegation tracker for Putnam Ford identifies the “source” of the allegation as “Greenberg Traurig, LLP,” the firm representing Ford in the then retail labor rate protest. (Ex. P-110, p. 001.)

105. On March 3, 2023, Steven Kelso, Esq., Respondent's attorney from the law firm of

Greenberg Traurig, sent an email to Mark Robinson, Respondent's Global Warranty Systems Manager. The subject line of the email is: "Legal Request – Putnam Ford in San Mateo – Servicing Ford Vehicles at Nissan Facility." (Exs. P-111, p. 003; P-161, p. 006.)

106. Mr. Robinson is part of Ford's Global Warranty Operations. He is Sharita Crawford's supervisor. (RT, Vol. II, 18:9-18; Ex. P-157, p. 008.)

107. On March 10, 2023, Mr. Putnam was deposed in the labor rate protest. In his deposition, Mr. Putnam testified that Protestant used the Barn as an unapproved repair facility for Ford service repairs. (Ex. R-325, pp. 017-018.) Mr. Putnam acknowledged that the Barn is not part of the Ford SSA and the Barn is not an authorized Ford service location. (Ex. R-325, p. 019.) The Barn is an approved facility under Putnam's Nissan dealer agreement. (Ex. R-325, p. 020.) Mr. Putnam further testified that the Barn was the only building on the Nissan property in which Ford vehicles were being repaired. (Ex. R-325, p. 018.) Mr. Putnam acknowledged that he understood that to be qualified for a warranty claim, Ford vehicle repairs are required to take place at an approved facility. (Ex. R-325, p. 023.)

108. On March 13, 2023, Mr. Kelso sent a second email to Mr. Robinson with the subject line: "FW: Legal Request – Putnam Ford in San Mateo – Servicing Ford Vehicles at Nissan Facility." (Ex. P-111, p. 002.)

109. On March 27, 2023, at 9:47 a.m., Mr. Robinson sent an email to Sharita Crawford, NA Warranty Consulting/Audit, Training & Field Operations Manager for Respondent. The subject line of the email is: "FW: Legal Request – Putnam Ford in San Mateo – Servicing Ford Vehicles at Nissan Facility." (Ex. P-111, p. 002.)

110. Ms. Crawford was responsible for assigning allegations for investigations to Ford's auditors. (RT, Vol. I, 83:24-84:8.)

111. Mr. Owens testified that the allegation tracker identifying Greenberg Traurig, LLP as the source of the allegation is a "mistake" because he knew "the source of the allegation was the region." (RT, Vol. II, 52:2-11.) Mr. Owens did not further explain or describe the source of his knowledge.

112. The allegation tracker entry was made on March 3, 2023. The first email from Ms. Crawford regarding the allegation is dated March 27, 2023. (Exs. P-110, p. 001; P-111, p. 001.)

113. The allegation entry provides:

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

6 [LaShawn] snapped a few pictures of Ford vehicles being serviced in this non-
7 approved facility.

8 At the time, Mr. Putnam waived away any concern and said all of the vehicles
9 were customer pay. Is there a way from the pictures you can tell if Putman
10 submitted any warranty claims associated with these vehicles for repairs that were
11 being [done] around the time of [LaShawn’s] visit? (Ex P-110, p. 001.)

12 114. Once Ms. Crawford received the allegation, the Warranty Study commenced. Ms.
13 Crawford denied that she received the allegation from Greenberg Traurig, LLP. (Ex. P-157, pp. 041-
14 042.)

15 115. On March 27, 2023, at 10:23 a.m., Ms. Crawford emailed Connie Airington and
16 Jonathan Owens. The subject line of the email is: “FW: Legal Request – Putnam Ford in San Mateo –
17 Servicing Ford Vehicles at Nissan Facility.” Ms. Crawford instructs Mr. Owens to “please upload in the
18 allegation tracker. I’m going to assign this to you once it’s uploaded. We have an urgent request to
19 proceed. . . .” (Ex. P-111, p. 001.)

20 116. Mr. Owens has been employed by Ford since 2001. (RT, Vol. I, 65:3-9.) He has been a
21 warranty auditor for 6-7 years. (RT, Vol. I, 72:8-9) Warranty auditors are in the Global Warranty
22 Operations group. (RT, Vol. I, 73:8-14.)

23 117. As a warranty auditor, Mr. Owens reviews a dealership’s paperwork, repair orders, and
24 supporting documents to determine if the repair was done properly and performed in accordance with
25 the requirements of the Warranty and Policy Manual, service publications, shop manuals, and technical
26 service bulletins. (Vol. I, 72:10-23.)

27 118. On March 27, 2023, at 11:11 a.m., Ms. Crawford sent an email to Ms. Airington. The
28 subject line of the email is: “FW: Legal Request – Putnam Ford in San Mateo – Servicing Ford
Vehicles at Nissan Facility.” Ms. Crawford requested that the information in the email be added to the
allegation tracker. (Ex. P-111, pp. 001-002.)

119. On March 27, 2023, at 12:24 p.m., Ms. Crawford emailed Mr. Owens with the subject
line: “RE: Legal Request – Putnam Ford in San Mateo – Servicing Ford Vehicles at Nissan Facility.”

Ms. Crawford instructed Mr. Owens to “[c]lick on new item and add the applicable information including uploading the photos that were attached.” (Ex. P-111, p. 001.)

120. On March 27, 2023, at 1:01 p.m., Mr. Owens emailed LaShawn Swann with a subject line: “Putnam Ford in San Mateo (00022).” Mr. Owens wrote in his email: “I’m working on the allegation at Putnam Ford. I have the 3 pictures you took at the Nissan building. Do you have any other pictures, license plates, or VINs [Vehicle Identification Number]? I’m available if you would like to discuss any details.” (Ex. P-112.) Ms. Swann responded by emailing that the photos were actually taken by Melissa Hughes. (Ex. P-112.)

121. On March 27, 2023, at 2:18 p.m., Mr. Owens emailed Ms. Crawford with the subject line: “Re: Legal Request – Putnam Ford in San Mateo – Servicing Ford Vehicles at Nissan Facility.” Mr. Owens asks: “What exactly do you want me to upload?” (Ex. P-111, p. 001.) After further clarification, on March 27, 2023, at 6:29 p.m., Mr. Owens emailed Ms. Crawford with the same subject line: “Got it. I’ll add the dealership to the GWO Allegations section on SharePoint.” (RT, Vol. II, 29:4-15; Ex. P-111, p. 001.)

122. Mr. Owens did not have any discussions as to why the request to proceed was urgent. (RT, Vol. II, 29:16-30:2.)

123. When first asked, Mr. Owens testified that on March 27, 2023, by a separate email, Ms. Crawford assigned the allegation regarding Protestant’s warranty operations. (RT, Vol. II, 28:2-17.) However, when asked again, Mr. Owens testified that the typical way an allegation assignment is received is in a separate email that has a particular format. Mr. Owens did not know if that was the case on the allegation in this matter. (RT, Vol. II, 37:11-38:4.) At first, Mr. Owens did not remember if Ms. Crawford sent a separate e-mail. (RT, Vol. II, 38:13-19.) However, after further inquiry, Mr. Owens testified that he was certain that Ms. Crawford did not send him a separate email. (RT, Vol. II, 54:14-55:25.)

124. On March 29, 2023, Mr. Owens sent an email to Arunothayam Devendiran. In his email, Mr. Owens wrote: “[p]lease add Putnam Ford P&A 00022 GWCP. We have a TOP Priority Warranty Allegation to conduct next week. . . .” (Capitalization in original.) (Ex. P-113.) Mr. Owens used capital letters for “TOP” only for emphasis. (RT, Vol. II, 47:21-24.)

125. Respondent's Global Warranty Operations is not connected with Respondent's team that handles labor rate requests. (RT, Vol. I, 73:6-17.)

126. Upon receiving the allegation of false practices being done by Protestant, Ms. Crawford followed Ford's normal process. Ms. Crawford was not aware of Protestant's labor rate litigation. (Ex. R-352, p. 008.) Once an allegation is received, it is uploaded in Respondent's tracker system and Ms. Crawford reviews it. The allegation is then assigned to an auditor. (Ex. R-352, p. 019.)

127. Notwithstanding the March 3, 2023, entry in the allegation tracker, Ms. Crawford and Mr. Owens both testified that the source of the allegation is from the "region." The "region" is where Ms. Swann is the manager. (RT, Vol. I, 92:3-4; Ex P-157, pp. 042-043)

The Allegation Investigation

128. As previously stated, on March 27, 2023, Ms. Crawford assigned the allegation regarding Protestant's use of non-authorized facilities for Ford warranty claims to Mr. Owens. (RT, Vol. I, 87:13-15, 87:20-88:1, 88:13-15.)

129. According to Mr. Owens, false claims should never happen. When Respondent receives reports of a false claim, they are taken very seriously. Accordingly, allegations always have the highest priority, top priority, because of the nature of the potential for those false claims. (RT, Vol. I, 83:5-17.)

130. The allegation of Protestant servicing Ford Vehicles at a non-authorized location is a "TOP Priority Warranty Allegation." (Ex. P-113, p.001.)

131. Respondent has three types of audits one of which is described as an audit that "comes from an allegation or a warranty study." (RT, Vol. I, 75:16-20.)

132. Allegation audits are routine. (RT, Vol. I, 81:17-18.) An allegation audit begins with someone reporting to Ford improper warranty practices at a dealership. When Ford receives an allegation, it is entered into a tracker system, and it then is assigned to an auditor to do the investigation. (RT, Vol. I, 81:19-82:1.)

133. An allegation investigation is a preliminary investigation. It is not an "audit." (RT, Vol. I, 85:2-8.) If there is indication of any false practices, the next step is to conduct a warranty study. (RT, Vol. I, 84:16-20.)

134. Ms. Hughes provided Mr. Owens photographs depicting Ford vehicles being serviced at

Putnam’s Nissan Facility. (RT, Vol. I, 89:15-90:7; 92:5-9; Exs. R-322, pp. 1-3; Ex. P-112, p. 1.)

135. With the aid of the photos, Mr. Owens obtained the license plate numbers to access the VINs. He then searched warranty claims for those vehicles and confirmed that the vehicles depicted in the photographs had been at the Barn. (RT, Vol. I, 94:14-23, 95:22-96:11, 117:8-25.)

136. Protestant submitted warranty claims for work performed on three of the four vehicles depicted in the photographs. (RT, Vol. I, 95:22-97:17.)

137. A dealer’s submission of false claims is a serious violation of the SSA. Pursuant to the SSA, paragraph 17(b)(2), the submission of false claims by a dealer may be considered as a basis for termination of the SSA. (Ex. J-01, p. 027.)

138. Upon confirmation of the allegation, Mr. Owens had sufficient information to believe that there were false claims that had to be confirmed so he recommended to Ms. Crawford that a Warranty Study be conducted. (RT, Vol. I, 97:2-17, 98:7-16.)

139. Ms. Crawford always speaks with the assigned auditor when they find false claims to make sure they both agree that the claims were indeed false. The claims were false because Putnam Ford’s claims were for work performed at an unauthorized facility. (Ex. R-352, p. 031.)

The Warranty Study

140. A “warranty study” is not an “Audit.” (RT, Vol. I, 86:8-9.)

141. The warranty auditor sets up a Warranty Study at the dealership and examines actual repair orders which have been identified as potentially having false claims. (RT, Vol. I, 85:13-21.) According to Mr. Owens, if false claims are found, then the Warranty Study will be upgraded to “a full actual warranty audit.” (RT, Vol. I, 86:12-17.)

142. By letter dated March 28, 2023, Ms. Swann advised Putnam Ford that a warranty study was scheduled for April 3, 2023, through approximately April 14, 2023. Ford “received allegations of improper warranty practices.” Ms. Swann advised Mr. Putnam that, if the study uncovered “false practices, [Respondent] may then elect to upgrade the study action to a Warranty Audit.” (RT, Vol. I, 101:18-102:3; Ex. R-309, p. 001.)

143. The scope of the Warranty Study was for the period of June 2022, through February 2023. (Ex. R-311, p. 001.)

1 144. Ms. Swann did not “have any input into what audit people did with or at Putnam Ford.”
2 (RT, Vol. VII, 204:20-25.)

3 145. Mr. Owens was assigned to do the Warranty Study. (RT, Vol. I, 98:17-18.)

4 146. On April 3, 2023, Mr. Owens visited Protestant’s facility to commence the Warranty
5 Study. (Ex. R-311, p. 001.) He requested a list of repair orders for review. (RT, Vol. I, 116:16-21.)

6 147. On April 3, 2023, Mr. Owens noted two Ford vehicles in the Nissan Facility. On April 4,
7 2023, five Ford vehicles were at the Barn. In addition, eight Ford vehicles were either outside or in a
8 main Nissan stall. (RT, Vol. I, 122:14-21; Ex. R-312, p. 001.)

9 148. The main Nissan building has Nissan logos, and a Nissan service department with
10 service bays. Yet, Ford technicians are working on Ford products there. (RT, Vol. I, 118:4-15.)

11 149. On April 3, 2023, two Putnam Ford service technicians worked at the main Ford
12 building, three were assigned to the main Nissan facility, and three were assigned to the Barn. (RT,
13 Vol. I, 118:16-22; Exs. R-321 p. 001; R-328, p. 014.) Protestant’s shop foreman worked out of the main
14 Nissan building. (RT, Vol. I, 119:16-18.)

15 150. Upon determining that six Ford technicians were working at the Nissan Facility, Mr.
16 Owens asked for the warranty repair orders associated with the identified Ford technicians. He
17 confirmed that the technicians had been working at the Nissan Facility for a period longer than the
18 scope of the audit. (RT, Vol. I, 119:22-120:19; Vol. II, 139:7-16.)

19 **The Warranty Audit**

20 151. On May 2, 2023, Mr. Putnam was deposed by Ford in the labor rate matter. The
21 attorney for Respondent pursued a line of examination relevant to Respondent’s Audit in this protest.
22 Mr. Putnam testified that when Nissan approved the 101 California facility for Nissan of Burlingame,
23 the Barn was part of the service area approved by Nissan. (Ex. R-326, p. 006.) Mr. Putnam testified that
24 it was possible that Ford vehicles were serviced in the 13 bays that are connected to the building along
25 Bayswater separate from the Barn. Ford technicians would service Ford vehicles in the Nissan building.
26 (Ex. R-326, p. 007.)

27 152. “Due to the extensive amount and quantity of claims shown to be false,” Mr. Owens
28 recommended that the Warranty Study be upgraded to a Warranty Audit. (RT, Vol. I, 127:9-22.)

1 153. By letter dated May 8, 2023, Ms. Swann notified Putnam Ford that Respondent elected
2 to upgrade the Warranty Study to a Warranty Audit. (Ex. R-313, p. 001.) The letter provided, in part,
3 that: “Because of the serious nature of the findings uncovered during the current Warranty Study at
4 Putnam Ford, Ford Customer Service Division has elected to upgrade the study to a warranty
5 audit. . . .” The Audit began on May 8, 2023. (Ex. R-313, p. 001.)

6 154. Mr. Owens initiated the Warranty Audit. Mr. Owens did not select Protestant for a
7 Warranty Audit to punish Protestant. (RT, Vol. I, 129:22-130:2.) The decision to audit Protestant was a
8 response to the false claims that Mr. Owens identified in his Warranty Study. (RT, Vol. I, 131:17-22.)
9 Mr. Owen’s decision to select Protestant for a Warranty Audit was fair and reasonable. (RT Vol. I,
10 130:6-10.) Mr. Owens’ decision to conduct the Audit was not made to leverage Protestant to do
11 something to impact the labor rate case. His decision to conduct the Audit was not made to get
12 Protestant to “drop or change its labor rate request.” (RT, Vol. I, 130:19-131:1.) Mr. Owens’ decision
13 to conduct the Audit was not made in response to Protestant’s labor rate protest. (RT, Vol. I, 131:6-8.)
14 Protestant’s labor rate request was not a factor in Mr. Owen’s decision to conduct the audit. (RT, Vol. I,
15 131:13-17.)

16 155. The key factor in upgrading the Warranty Study to the Warranty Audit was the presence
17 of false warranty claims. The prior labor rate request had nothing to do with this. (RT, Vol. I, 131:23-
18 132:4-6.)

19 156. The Warranty and Policy Manual provides as an example of a false practice: “[t]he
20 knowing submission of claims with omissions of material facts or substantial violations of the program
21 requirements.” (RT, Vol. I, 159:22-160:10; Ex. J-3, p. 186.)

22 157. During the Audit, Mr. Owens focused on the repairs performed by the six Ford
23 technicians that he had identified working in a non-authorized facility. (RT, Vol. I, 136:2-14.)

24 158. Similar to the Warranty Study, Mr. Owens requested repair service orders to review. He
25 took each individual repair order and evaluated it to ensure it was done properly, the technician
26 followed service publications like a workshop manual or technical service bulletin, and it was in
27 accordance with the Warranty and Policy Manual requirements. (RT, Vol. I, 133:16-134:3.)

28 159. Mr. Owens did not conduct the Audit in a manner to punish or retaliate against

Protestant. (RT, Vol. I, 135:6-11.)

160. The Warranty and Policy Manual, Section 1.1.03, at page 6, provides: “Warranty repairs must be performed at an authorized Ford or Lincoln dealership.” (RT, Vol. I, 160:24-161:13, 162:5-8; Ex. J-03, p. 006.)

161. When Protestant submits warranty claims to Respondent, Protestant is confirming that the repairs were made in accordance with all Warranty and Policy Manual requirements. Protestant’s warranty claims reviewed by Mr. Owens are believed to be false claims because the repairs were performed at an unauthorized facility, which is not allowed by the Warranty and Policy Manual and the SSA. (RT, Vol. I, 129:4-11.)

162. When Protestant submitted warranty claims to Respondent, Protestant was agreeing that Protestant was in compliance with all Warranty and Policy Manual requirements. Mr. Owens analyzed Protestant’s submitted warranty claims. Protestant’s warranty claims were not in compliance with the Warranty and Policy Manual requirements because Protestant misstated material facts. (RT, Vol. II, 105:2-14.)

163. Mr. Owens used the audit code D61.07 for “Service supervision repair not performed.” (Ex. P-157, p. 033.) Ms. Crawford explained that this audit code does not necessarily mean that the repair was not performed. It means that the repair was not performed at an authorized facility. That is why Respondent’s audit exceptions fall into this category. (Ex. P-157, p. 034.) Respondent’s only concern was whether the repairs were done at an authorized facility. Respondent knew that they were not. (Ex. P-157, p. 036.)

Respondent’s Audit Findings

164. Of the 552 warranty claims examined, 551 claims were disallowed as false claims for a total disallowance amount of \$502,821.56. (RT, Vol. I, 143:25-144:14; Exs. J-04, J-05.)

165. Consistent with the allegation investigation and Warranty Study, Respondent’s chargebacks are for warranty repairs performed at Putnam’s unauthorized Nissan Facility, which included the Barn. (Ex. R-332, p. 018.) Mr. Owens compiled the disallowances in a 583-page document which contains an explanation for every chargeback on the disallowed claim. (RT, Vol. I, 143:25-144:13; Ex. J-04.) Where the disallowance is based on having performed the repair at an unauthorized

location, the disallowance is coded as “work not performed as claimed.” (RT, Vol. II, 75:17-76:1.)

166. Putnam Ford’s repair orders have the 885 N. San Mateo Drive “address for the” repairs reflecting “an address that is not where the repair was performed.” (Exs. R-332. pp. 019-020; J-05.)

167. For each chargeback for warranty work performed at the unapproved Nissan Facility, or the Barn, Mr. Owens wrote: “Performing repairs at an unauthorized repair facility is a false practice. Disallow entire repair.” (Ex. J-04.) The basis for each chargeback for a false claim indicated:

7.3.03 FALSE PRACTICES

The submission of false claims to the Company violates your Sales and Service Agreement(s) and is a sufficiently substantial breach of faith between the Company and the dealer to warrant termination.

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

- The knowing submission of claims with omissions of material facts or substantial violations of program requirements.
- Work not performed as claimed.

Note: Any claim category that the Company determines to be false will be so categorized and charged back during a Warranty Audit.

FORD SALES AND SERVICE AGREEMENT:

5. (c) The Dealer shall not move or substantially modify or change the usage of any of the DEALERSHIP LOCATION or FACILITIES for COMPANY PRODUCTS, nor shall the Dealer or any person named in subparagraphs F(i) or F(ii) hereof directly or indirectly establish or operate in whole or in part any other locations or facilities for the sale or service of COMPANY PRODUCTS or the sale of used vehicles without the prior written consent of the Company. (Emphasis in7original.) (Ex. J-04.)

168. Included within the 551 disallowed warranty claims, are 74 warranty claims disallowed for reasons in addition to the repairs were performed at an unauthorized location. (Ex. J-04.)

169. During the May 24, 2023, closing meeting, Mr. Owens presented his audit findings to Putnam Ford. The Audit findings resulted in chargebacks of \$502,821.56 of which \$501,263.53 was disallowed based upon false submissions. (RT, Vol. II, 78:2-80:10; Exs. P-127; R-316, p. 002-003.)

170. On June 12, 2023, Respondent issued its Audit closing letter informing Protestant that “a chargeback in the amount of \$502,821.56 will be offset against other payments in one-month end Dealer Payment check. If the total chargeback cannot be collected in one Dealer Payment check, the uncollected portion will be transferred to the Dealership Parts Account.” (Ex. R-317, p. 002.)

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ANALYSIS

Whether the Audit was Conducted in Violation of Section 3065.2(i)(2)(G)?

171. Whether the Audit was conducted in violation of Section 3065.2(i)(2)(G) concerns the two distinct protests filed by Putnam Ford: (1) the current Section 3065 protest challenging Respondent's Audit of Protestant's warranty operations; and (2) Protestant's prior Section 3065.4 protest which contested the denial of Protestant's labor rate request. Each of the two protests contest different legal issues and elements.

172. Section 3065(e)(6) provides the "procedure" for Protestant to seek from the Board a determination of whether Respondent selected Protestant for the Audit, or performed the Audit, in a punitive, retaliatory, or unfairly discriminatory manner.

173. Section 3065.4 provides the "procedure" for a protest where failure of compliance with Section 3065.2 requirements is alleged.

174. Section 3065.2 provides the procedure for a franchisee to seek to establish or modify its retail labor rate.

175. While Putnam Ford alleges that Respondent conducted the Audit in violation of Section 3065.2(i)(2)(G), the Board is without jurisdiction to consider this in a Section 3065 warranty protest.

176. Respondent cites to the opinion in *Howitson v. Evan Hotels, LLC* (2022) 81 Cal. App.5th 475, 486, for the proposition that if a matter to be litigated is "within the scope of the [prior] action to the subject-matter and relevant to the issues, so that it could have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged." There are three elements to claim preclusion:

First, the second lawsuit must involve the same "cause of action" as the first lawsuit. Second, there must have been a final judgment on the merits in the prior litigation. Third, the parties in the second lawsuit must be the same (or in privity with) the parties to the first lawsuit. (*Howitson*, 81 Cal. App.5th at 486.)

177. In Protestant's Section 3065.4 Protest, the issues presented before the Board were:

(a) Is protestant's determination of its retail labor rate materially inaccurate or fraudulent?

(b) Did respondent otherwise comply with Section 3065.2 requirements?

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(c) If the answer to the foregoing questions is yes, should an appropriate retail labor rate under Section 3065.2 be declared.? (Emphasis added.) (R-336, p. 11.)

178. In the 3065.4 protest, the Office of Administrative Hearings (“OAH”) presided over the merits hearing including pre-hearing motions. One of Ford’s pre-hearing motions sought to exclude evidence and argument that it “engaged in adverse conduct towards [Putnam Ford] for requesting a retail labor rate increase in violation of” subdivision (i) of Section 3065.2 (herein “Adverse Conduct Motion”). Ford’s exclusion request included evidence and argument that it hindered Putnam Ford’s “request to relocate its dealership” and “performed a warranty audit of [Putnam Ford’s] repair orders from June 2022 through February 2023.” (Ex. R-336, p. 009; Protestant’s Post-Hearing Brief, Ex. 4 [Order Resolving Motions Argued at Prehearing Conference, p. 5].)

179. In ruling on the Adverse Conduct Motion, the assigned OAH Administrative Law Judge (“ALJ”) determined that:

Contrary to protestant’s argument, the Protest does not broadly allege failure to comply with all of Vehicle Code section 3065.2’s requirements. It specifically alleges that respondent failed to comply with Vehicle Code section 3065.2’s requirements to contest protestant’s calculation of the retail labor rate and propose an adjusted retail labor rate. Even liberally construed, the Protest does not plead any retaliatory adverse conduct. Although such conduct allegedly occurred after the Protest’s filing, protestant did not timely seek leave to amend the Protest. Permitting an amendment broadening the scope of issues approximately a month prior to hearing would be unfair and unduly prejudicial to respondent.

Because the Protest does not raise the issue of retaliatory adverse conduct, any evidence or argument concerning such alleged conduct is irrelevant as a matter of law. Additionally, the alleged retaliatory adverse conduct involves distinct factual subject matter that would involve undue consumption of hearing time. For example, the warranty audit involves a completely different set of repair orders than those involved in protestant’s retail labor rate calculation. For these reasons, respondent’s Adverse Conduct Motion is granted. (Protestant’s Post-Hearing Brief, Ex. 4 [Order Resolving Motions Argued at Prehearing Conference, pp. 6-7].)

180. By order dated August 15, 2023, “Respondent’s motion in limine regarding evidence and argument that respondent engaged in adverse conduct towards protestant is GRANTED. Protestant is precluded from offering any evidence or presenting argument at hearing that respondent violated Vehicle Code section 3065.2, subdivision (i), by hindering protestant’s relocation request, conducting a warranty audit of protestant, or engaging in other retaliatory adverse conduct in connection with protestant’s request to increase its retail labor rate.” (Uppercase in original) (Protestant’s Post-Hearing

Brief, Ex. 4 [Order Resolving Motions Argued at Prehearing Conference, p. 10.]

181. The Decision in the Section 3065.4 protest acknowledged the warranty protest alleging retaliatory adverse conduct as follows:

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. (Emphasis added.) (Ex. R-336, p. 009.)

182. Furthermore, the Decision determined in the heading entitled "Did Respondent Otherwise Comply with section 3065.2's Requirements" that:

Beyond showing material inaccuracy, respondent also demonstrated by a preponderance of the evidence that it otherwise complied with section 3065.2's requirements. . . . (Emphasis added) (Ex. R-336, p. 052.)

. . .

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 3065.2. Thus, the only remaining question is whether an appropriate retail labor rate under section 3065.2 should be declared. (Emphasis added.) (Ex. R-336, p. 054.)

183. As indicated above, the Board concluded that Respondent "otherwise complied with 3065.2." (Ex. R-336, p. 054.)

184. Protestant now seeks to litigate Section 3065.2(i) provisions in this Section 3065 protest.

185. But for Protestant narrowly alleging non-compliance with Section 3065.2 requirements, in addition to being untimely in its request to amend the prior Protest, the Board, could have considered the issue of whether Respondent acted in other than good faith or in contravention of the prohibition of adverse conduct. The OAH ALJ's denial of Protestant's request to introduce evidence of "adverse action" by Respondent does not give leave to Protestant to pursue the alleged Section 3065.2(i) violations in this Protest.

186. Protestant is precluded from arguing in the current Protest the issue of whether Respondent acted in other than "good faith" when Protestant pursued a modification of its retail labor

1 rate.

2 187. For the foregoing reasons, the Board does not have the authority in a Section 3065
3 protest to consider Protestant's Section 3065.2(i) allegations.

4 **Whether Ford Selected Putnam Ford for the Audit, or Performed**
5 **the Audit in a Punitive, Retaliatory, or Unfairly Discriminatory Manner**
6 **in Violation of Section 3065(e)(1)?**

7 188. In pertinent part, Section 3065(e)(1) provides that:

8 A franchisor shall not select a franchisee for an audit, or perform
9 an audit, in a punitive, retaliatory, or unfairly discriminatory manner.
(Emphasis added.)

10 Section 3065(e)(1) is written in the disjunctive. Pursuant to Section 3065(e)(1), even if an audit is
11 properly performed, the audit may still be defective if the franchisee was selected for the audit in a
12 punitive, retaliatory, or unfairly discriminatory manner.

13 189. As indicated above, Ford has the burden of proof. Protestant does not have the burden.

14 190. Respondent cites *Cummings v. Stanley* (2009) 177 Cal.App.4th 493, 507-508, for the
15 proposition that the words of Section 3065(e)(1) are to be given their ordinary, everyday meaning.
16 (Ford Motor Company's Post-Hearing Opening Brief, p. 26.) Respondent adds that in considering what
17 constitutes the meaning of the term "retaliatory" audit, Black's Law Dictionary (12th ed. 2024) defines
18 "retaliation" as "[t]he act of doing someone harm in return for actual or perceived injuries or wrongs;
19 an instance of reprisal, requital, or revenge." (Ford Motor Company's Post-Hearing Opening Brief, p.
20 35.)

21 191. Giving the language of Section 3065(e)(1) its ordinary meaning, there are two separate
22 issues: (1) has Respondent proven by a preponderance of the evidence that Respondent did not "select"
23 Protestant for the Audit in a punitive, retaliatory, or unfairly discriminatory manner? and (2), has
24 Respondent proven by a preponderance of the evidence that Respondent did not "perform" the Audit in
25 a punitive, retaliatory, or unfairly discriminatory manner; i.e., that Respondent "performed" the Audit
26 in other than a "punitive, retaliatory, or unfairly discriminatory manner"? Respondent's failure to prove
27 either issue results in this protest being sustained.

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Whether Respondent has Proven by a Preponderance of the Evidence that it did not Perform the Audit in a Punitive, Retaliatory, or Unfairly Discriminatory Manner?

192. Respondent's authority to "perform" audits resides in Section 3065, the SSA, and Respondent's Warranty and Policy Manual. The SSA and the Warranty and Policy Manual provide Respondent with contractual authority to perform an audit for alleged violations.

193. As previously mentioned, paragraph 12(b) of the SSA allows Respondent to examine Putnam Ford's dealership facilities and operations to check "the proper handling of warranty records and other repairs and claims based thereon, and to examine, copy and audit any and all of the Dealer's records and documents." Accordingly, Respondent may chargeback to the Protestant all payments which were improperly claimed or paid. (Ex. J-01, p. 26.)

194. Pursuant to paragraph 7.3.03 of Ford's Warranty and Policy Manual, Respondent may elect to conduct an audit when allegations of improper warranty practices have been made. (Ex. J-03, p. 186.)

195. As indicated above, paragraph 1.1.03 of Ford's Warranty and Policy Manual provides in part:

Owners of Ford/Lincoln vehicles are encouraged, but not required, to return to their selling Dealer for warranty service. Warranty repairs must be performed at an authorized Ford or Lincoln dealership. (Emphasis added.) (RT, Vol. I, p. 161:9-13; p. 162:5-8; Ex. J-03, p. 006.)

196. When warranty repairs are performed at a non-authorized Ford or Lincoln dealership in violation of Paragraph 1.1.03 of Respondent's Warranty and Policy Manual, the violation is not subject to being corrected by Protestant. The violation is not an error in the submission of the paperwork in support of the claim which, where appropriate, could be corrected.

197. In the allegation investigation, the Warranty Study, and the Warranty Audit, Mr. Owens performed his work with due diligence. The evidence establishes that after he conducted the allegation investigation and Warranty Study, Mr. Owen's decision to proceed with the Warranty Audit was fair and reasonable.

198. The parties submitted the repair orders reviewed by Mr. Owens during the audit in Exhibit J-05, which is composed of 10 separate volumes. (Ex. J-05, Vols. 1-10.)

1 199. Mr. Owens devoted four weeks to reviewing the repair orders. (RT, Vol. I, 213:24-
2 214:1.) As referenced above, the audit findings were presented to Putnam Ford during the closing
3 meeting on May 24, 2023. (R-316, p. 002-003)

4 200. Protestant offered the testimony of Mr. Vasquez in support of its claim that the Audit
5 was retaliatory. Mr. Vasquez is the general manager of Putnam Ford and has an ownership interest in
6 Protestant. (RT, Vol. III, 66:24-67:16.)

7 201. Mr. Vasquez felt that the Audit was “100 percent” punitive or retaliatory. (RT, Vol. III,
8 105:20-23.)

9 202. When Respondent conducted the Audit closing meeting, Ms. Swann and Ms. Crawford,
10 the head of Respondent’s audits unit, were in attendance. Mr. Vasquez thought that “it was bizarre that
11 someone of that level would come in for a simple audit.” (RT, Vol. III, 94:6-12.) Mr. Vasquez
12 explained the basis of his feeling as follows:

13 . . . I have been in this business for a very long time, and I have never, ever, ever
14 seen a - - especially at the size of the company that motor company - - Ford Motor
15 Company is, the head of a warranty of an audit team fly in, a regional manager fly
16 in or come in. I mean, it is just - - and -- the extent of . . . the questioning of our
employees, I mean, it is - - has become 100 percent obvious to me that this is
retaliatory. (RT, Vol. III, p. 106:1-15.)

17 203. Prior to the hearing, in his deposition, Mr. Vasquez testified that he did not know if
18 he had “an opinion as to whether [the Audit] was retaliatory.” (RT, Vol. IV, p. 16:2-17:7)

19 204. Mr. Vasquez’ assertion that the Audit was a “simple audit” stretches credulity.
20 Furthermore, his testimony in the hearing is inconsistent with his deposition testimony.

21 205. On April 3, 2023, the very first day of Mr. Owens’ site visit for the Warranty Study, the
22 actions of Protestant’s attorney, Mr. Hughes, made it necessary for Ford management to closely
23 monitor the Warranty Study and Audit by attending important meetings with Protestant at pivotal
24 stages of the Audit process. (RT, Vol. III, p. 113:5-116:4; Ex. R-311)

25 206. Prior to the Opening Meeting for the Warranty Study, when Mr. Owens was waiting,
26 Mr. Hughes introduced himself to Mr. Owens. They chatted for a few minutes before the meeting
27 commenced. (RT, Vol I, p. 114:2-15.)

28 207. Mr. Owens did not realize that Mr. Hughes was an attorney until Mr. Hughes

1 introduced himself again after the Warranty Study meeting commenced. At that point, Mr. Hughes
2 essentially took over the meeting. Mr. Hughes told Mr. Owens that “the warranty study, the warranty
3 actions were retaliatory” and “that they were going to sue Ford Motor Company for the warranty study
4 and/or warranty audit and that [Mr. Owens] should be expected to be deposed and called as a witness in
5 that lawsuit.” (RT, Vol I, p. 115:11-25.) Mr. Hughes’ tone was aggressive. Mr. Owens felt “ambushed
6 and was prevented from going through [his] normal opening meeting.” (RT, Vol. I, 116:1-4.)

7 208. It is Ford policy for a regional representative to be present at the closing meeting. (Ex.
8 P-157, p. 028.) Ms. Crawford wanted to attend the closing meeting because of the volume of false
9 claims that were found due to the services being performed at an unauthorized facility. (Ex. P-157, pp.
10 030-031.)

11 209. The attendance of Ms. Swann and Ms. Crawford at the closing meeting was not
12 indicative that the Audit was performed in a punitive, retaliatory, or unfairly discriminatory manner.
13 Respondent had sound and proper business reasons for their appearance. (Ex. P-157, p. 031.)

14 210. Mr. Owens’ audit findings are supported by 10 volumes of documents gathered from
15 Protestant. Furthermore, Protestant stipulated that Protestant performed the warranty service repairs
16 identified by Exhibit J-05 at the non-authorized Nissan Facility.

17 211. Respondent established, by a preponderance of the evidence, that, after being assigned
18 the allegation investigation on March 27, 2023, Mr. Owens then performed the process of gathering
19 documents and gathering information from Protestant’s personnel in a non-retaliatory, non-punitive,
20 and non-discriminatory manner. The Audit was not performed in a punitive, retaliatory, or unfairly
21 discriminatory matter.

22 212. However, as discussed below, Mr. Owens’ performance of the Audit does not overcome
23 Respondent’s inability to prove that the selection of Protestant for the Audit in the first instance was not
24 done in a punitive, retaliatory, or unfairly discriminatory matter.

25 **Whether Respondent has Proven by a Preponderance of the Evidence**
26 **that Putnam Ford was not Selected for the Audit in a Punitive, Retaliatory,**
or Unfairly Discriminatory Manner?

27 213. When Respondent authorized Protestant’s temporary location at 885 N. San Mateo
28 Drive, Respondent required Protestant have a minimum of 12 service stalls. (RT, Vol. III, 74:11-13;

Ex. P-102, p. 001.) Protestant only had three. (RT, Vol. III, 74:11-13; Ex. P-102, p. 001.) Respondent required Protestant have at least four times the service capacity than was available. Protestant was out of compliance with Respondent's requirements from the very first day of operation at the inadequate, temporary location. Respondent knew it. Yet, Respondent took no adverse action against Protestant for being out of compliance.

214. The 885 N. San Mateo Drive location being temporary, Protestant actively sought a permanent authorized location. The Nissan Facility was a potential location.

215. While Protestant was in the process of securing a permanent authorized location, it was confronted with a service workload that far exceeded the capacity of the three service stalls available. Just given the quantity of Protestant's warranty claims submitted to Respondent, it is reasonable to conclude that Respondent had sufficient information to realize that Protestant must be performing warranty services at some location other than its Ford service facility. Yet, Respondent did not take an adverse action against Protestant until Greenberg Traurig, LLP sent its March 3, 2023, email to Ford.

216. During Ms. Swann's first visit to Putnam Ford in October 2022, she toured several different facilities including Putnam's Nissan Facility. (RT, Vol. VII, 96:2-12; Ex. R-332, p. 014.) On this occasion, Mr. Putnam did not show Ms. Swann the Barn. (RT, Vol. VII, 96:16-18.) However, Mr. Putnam, without prompting, mentioned to Ms. Swann that Protestant was performing service work at the Barn. (RT, Vol. VII, 97:10-14, 23-25.) Putnam Ford and Mr. Putnam were not keeping Putnam Ford's use of the Barn a secret from Respondent during Ms. Swann's visit. Mr. Putnam brought Putnam Ford's use of the Barn to Ms. Swann's attention without her knowing about the Barn. Ms. Swann responded to Mr. Putnam that he would need to submit a written request to add the Barn location to the dealer agreement. (RT, Vol. VII, 98:3-11; Ex. R-352, pp. 045-046.)

217. Mr. Putnam's spontaneous statement to Ms. Swann was an admission that Protestant was not in compliance with the SSA and the Warranty and Policy Manual. This type of violation is so important to Respondent that it could have terminated the SSA, even though it might only be a first occasion. However, even with this knowledge, neither Ms. Swann nor any other Ford personnel submitted an allegation for entry into Respondent's allegation tracker system to commence an allegation investigation.

1 218. During Ms. Swann's January 19, 2023 visit, Protestant was still servicing Ford vehicles
2 at the unauthorized location in spite of Ms. Swann's prior admonition. Nonetheless, Ms. Swann did not
3 submit an allegation for entry into Respondent's allegation tracker after her visit.

4 219. Ms. Swann first acquired knowledge of Protestant's use of the unauthorized Barn in
5 October 2022. Approximately five months later, on March 3, 2023, Respondent entered an allegation
6 into Respondent's allegation tracker and identified Respondent's attorney in the labor rate protest as the
7 source of the allegation, not Ms. Swann.

8 220. Even though Respondent may have had the facts and the authority to commence an
9 adverse action prior to March 3, 2023, Respondent did not do so. There is no evidence that Respondent
10 sought an adverse action against Protestant at any time for any reason. Why then did Respondent select
11 Protestant for the Audit and who started the selection process? The difference appears to be the urgency
12 created by the emails from Greenberg Traurig, LLP dated March 3, 2023, and March 13, 2023, to Mr.
13 Robinson.

14 221. There appears to have been no urgency after Ms. Swann's October 2022 visit, or after
15 her January 19, 2023 visit, to commence an adverse action against Protestant. Ms. Swann did not start
16 the audit process by submitting an allegation for entry in Ford's allegation tracker. Ms. Swann does not
17 have any role in selecting dealers for audits. (RT, Vol. VII, 205:4-6.)

18 222. The only documentary evidence of Ford's allegation submission is the March 3, 2023,
19 email chain started by Respondent's attorney in the labor rate litigation.

20 223. On the same date of the March 3, 2023 email from Greenberg Traurig, LLP,
21 Respondent entered the allegation into its allegation tracker and identified Greenberg Traurig, LLP as
22 the source of the allegation entry. (Exs. P-110, p. 001; P-111, p. 003.)

23 224. The "source column" on Respondent's allegation tracker usually indicates from where
24 or whom Respondent receives the information. In this matter, it is Respondent's law firm, Greenberg
25 Traurig, LLP, that Respondent identified as the source. (Ex. P-157, pp. 022-023.)

26 225. On May 28, 2024, Mr. Robinson was deposed in this protest. Mr. Robinson testified that
27 he does not know where the allegation against Protestant originated. He explained that the allegation
28 was communicated to Ms. Crawford and that she was going to be working on it. (Ex. P-161, p. 022.)

1 Furthermore, he testified that, if Respondent’s legal counsel informed Respondent of a potential
2 allegation, Respondent would then validate its accuracy. However, Mr. Robinson had never seen that
3 being done before, (Ex. P-161, p. 017.) He was probably advised that Respondent was going to perform
4 an audit of Protestant, but he did not have a role in it. (Ex. P-161, p. 021.)

5 226. Mr. Robinson’s deposition testimony contradicts both the Greenberg Traurig, LLP email
6 chain and Respondent’s allegation tracker. The allegation originated from Greenberg Traurig, LLP and
7 was entered into the allegation tracker three weeks before Mr. Robinson forwarded the matter to Ms.
8 Crawford.

9 227. On March 27, 2023, approximately three weeks after the first email from Greenberg
10 Traurig, LLP, Mr. Robinson, as Ms. Crawford’s supervisor, forwarded the allegation to Ms. Crawford.
11 (Exs. P-157, p. 008; P-161, p. 008.) Ms. Crawford described the email that she received as being “an
12 urgent request to proceed.” (Ex. P-111, p. 001.) The delay of a little over three weeks before forwarding
13 the email allegation to Ms. Crawford suggests that Mr. Robinson was not treating the allegation as an
14 “urgent request.”

15 228. Respondent’s “urgency” to process the allegation appears to have as its source
16 Greenberg Traurig, LLP. There appears to have been no genuine urgency to commence the Audit
17 process. There is no showing that Ms. Swann requested that the allegation process be treated with an
18 “urgency.”

19 229. Ms. Crawford remembered that the allegation came in an email and started the allegation
20 process. (Ex. P-157, p. 014.) Ms. Crawford did not remember who sent her the email allegation. She
21 did not remember if it was an employee of Respondent who sent the email. (Ex. P-157, pp. 012-013.)
22 Ms. Crawford testified that it was the allegation itself, and not Mr. Robinson, that asked her to initiate
23 the allegation audit against Protestant. (Ex. P-157, p. 011.) After the allegation is received by
24 Respondent, there is no one that requests that the allegation process move forward. (Ex. P-157, pp. 028-
25 029.)

26 230. Ms. Crawford testified in her deposition that she did not receive the allegation from
27 Greenberg Traurig, LLP but that she received the allegation from the “region.” (Ex. P-157, pp. 041-
28 042.) However, the email chain started by Greenberg Traurig, LLP very clearly shows that Ms.

1 Crawford did not receive the allegation from the “region.” Ms. Crawford may not have received the
2 allegation directly from Greenberg Traurig, LLP but she did receive the emailed allegation as it was
3 forwarded to her from Mr. Robinson, her supervisor, who had received it from Greenberg Traurig,
4 LLP.

5 231. Ms. Crawford had never received an allegation from Respondent’s legal counsel or
6 outside legal counsel in the past. (Ex. P-157, p. 016.)

7 232. The March 3, 2023, allegation submitted to Respondent is unique and unusual. It was
8 Respondent’s attorney in then ongoing labor rate litigation that emailed Mr. Robinson causing the
9 allegation process to commence. The unusual circumstances pertaining to the submission of the
10 allegation is suggestive of, and consistent with, Respondent selecting Protestant for the Audit in a
11 punitive, retaliatory, or unfairly discriminatory manner in response to labor rate litigation. It is not
12 consistent with Respondent selecting Protestant for the Audit in other than a “punitive, retaliatory, or
13 unfairly discriminatory manner.”

14 233. The email allegation was not forwarded to Ms. Crawford until March 27, 2023. On the
15 same day, Ms. Crawford assigned the matter to Mr. Owens. In forwarding the email allegation to Mr.
16 Owens, Ms. Crawford wrote: “I’m going to assign this to you once it’s uploaded. We have an urgent
17 request to proceed. . . .” (Emphasis added.) (Ex. P-111, p. 001.) Ms. Crawford did not remember why
18 she wrote in her email that they had “an urgent request.” (Ex. P-157, p. 019.) There is no evidence that
19 either Ms. Swann or Ms. Hughes made “an urgent request to proceed.” Mr. Robinson was not aware of
20 any reason for why there was an urgent request to proceed. (Ex. P-161, p. 015.)

21 234. When asked from whom at the “region” did she receive the allegation, Ms. Crawford
22 responded: “Well, LaShawn Swann is the regional manager.” (Ex. P-157, p. 042.) Ms. Crawford
23 equivocated; her response was evasive. Ms. Crawford avoided answering the question that was asked.
24 When pressed to confirm whether it was Ms. Swann who was the person who emailed the allegation,
25 Ms. Crawford responded: “[t]here were multiple people at the region. It was LaShawn Swann and
26 Melissa Hughes.” (Ex. P-157, p. 042.) Again, Ms. Crawford equivocated. She gave another evasive
27 response. Ms. Crawford avoided directly answering the question that was asked of her.

28 235. Upon further examination, Ms. Crawford testified that she was “not sure who the email

1 came from . . .” (Ex. P-157, p. 043.)

2 236. Casting more doubt on who or how Respondent selected Protestant for the Audit, Ms.
3 Crawford finally testified that she did not know if either Ms. Swann or Ms. Hughes had sent the email.
4 (Ex. P-157, p. 044.)

5 237. By her deposition testimony, Ms. Crawford denied the obvious fact that Respondent’s
6 allegation tracker shows that the allegation was entered on the allegation tracker on March 3, 2023, and
7 that the source of the allegation is identified as Greenberg Traurig, LLP. (Ex. P-110, p. 001)

8 238. Ms. Crawford did not have knowledge of the matter until 24 days after the March 3,
9 2023, email from Greenberg Traurig, LLP and the entry of the allegation into Respondent’s allegation
10 tracker.

11 239. Ms. Hughes did not submit the allegation to Respondent. Furthermore, there is no
12 reliable direct evidence that Ms. Swann submitted the allegation to Respondent.

13 240. There is no testimony from Ms. Swann, or documentary evidence authored by her, to the
14 effect that Ms. Swann is the person who submitted the allegation to Respondent. Ms. Crawford’s
15 deposition testimony is not reliable.

16 241. Mr. Owens testified that Exhibit P-110 identifying Greenberg Traurig, LLP as the source
17 of the allegation is a “mistake.” He testified that he knows that the source of the allegation was the
18 “region.” (RT, Vol. II, 52:2-11.) He also testified that Ms. Swann was the source of the allegation. (RT,
19 Vol. II, 163:4-8.) Mr. Owens did not explain how he knew that Ms. Swann was the source of the
20 allegation. Ms. Crawford, his supervisor, who had given him the allegation assignment, did not know
21 who the source was.

22 242. Mr. Owens did not become involved in the allegation process until March 27, 2023. He
23 was not assigned to work on the allegation against Protestant until 24 days after the initial entry of the
24 allegation into the allegation tracker. Furthermore, when he first received the email from Ms. Crawford
25 regarding the allegation assignment, he had to ask Ms. Crawford “what exactly do you want me to
26 upload?” (Ex. P-111, p. 001.) Even Mr. Owens recognized that there was something unusual as to how
27 Respondent selected Protestant for the allegation.

28 243. Mr. Owens’ testimony that he knew that the source of the allegation was the “region,” or

1 Ms. Swann, is contradicted by Ford’s allegation tracker. (Exs. P-110; P-111.) Mr. Owens did not
2 receive the allegation assignment until the passage of over two months from Ms. Swann’s last visit to
3 the Barn. There is no evidence to show that Mr. Owens had direct knowledge of the person who
4 sourced the allegation.

5 244. Prior to March 27, 2023, Ms. Hughes did not know that there was an allegation made
6 against Protestant. (RT, Vol. VI, 148:18-21.) On March 30, 2023, at the request of Mr. Owens, Ms.
7 Hughes sent to him the photos that she had taken of the Nissan Facility. (Ex. P-112.) Ms. Hughes
8 obviously did not submit the allegation of false practices to Respondent. Furthermore, if Ms. Swann
9 had submitted the allegation, it is likely that Ms. Hughes would have known that Ms. Swann had done
10 so.

11 245. As previously mentioned, on March 29, 2023, Mr. Owens sent an email to Arunothayam
12 Devendiran and requested certain action on the allegation. Mr. Owens wrote: “[w]e have a TOP Priority
13 Warranty Allegation . . .” (Ex. P-113, p. 001.) Mr. Owens testified that he capitalized the word “top”
14 because “it is an allegation” and that “[a]ll allegations are top priority.” Mr. Owens testified that he
15 capitalized the word for emphasis. (RT, Vol. II, 47:4-24.)

16 246. Mr. Owens’ suggestion that there is nothing unusual in the treatment given to the
17 allegation in this matter is belied by Ms. Crawford’s email where she wrote “[w]e have an urgent
18 request to proceed.” (Ex. P-111, p. 001.) The “urgent request” clearly emanated from the email chain
19 started by Greenberg Traurig, LLP on March 3, 2023.

20 247. For its case in chief, Respondent had only one witness, Mr. Owens. As discussed above,
21 Mr. Owens was not aware of the email allegation until March 27, 2023. The email allegation was
22 originally received by Mr. Robinson on March 3, 2023. Mr. Robinson emailed the allegation to Ms.
23 Crawford who then forwarded the email and assignment to Mr. Owens. Prior to receiving the allegation
24 assignment, Mr. Owens did not have direct knowledge of why Greenberg Traurig, LLP made the
25 decision to send to Mr. Robinson the email regarding a legal request dated March 3, 2023.

26 248. The two employees mentioned in the “region” are Ms. Swann and Ms. Hughes. The
27 record is clear that Ms. Hughes did not submit the allegation. Moreover, in the past, Ms. Swann did not
28 submit an allegation when Protestant was out of compliance with the SSA and/or Warranty and Policy

Manual. Furthermore, Ms. Swann testified that she has nothing to do with audits. In any event, there is no documentary evidence that she was the one who made the allegation submission. There is no statement in Ms. Swann’s testimony that she submitted the allegation.

CONCLUSION

1. Mr. Owens performed the Audit in a professional manner. The performance the Audit itself was not done in a punitive, retaliatory, or unfairly discriminatory manner. The audit is supported by extensive documentation. However, the punitive, retaliatory, or unfairly discriminatory manner of selecting Protestant for the Audit made the Audit defective *ab initio* and violated Section 3065(e)(1).

2. The foregoing compels the conclusion that Respondent has not shown by a preponderance of the evidence that it did not “select” Protestant for the Audit “in a punitive, retaliatory, or unfairly discriminatory manner.” The failure of Respondent to establish that it did not “select” Protestant for the Audit “in a punitive, retaliatory, or unfairly discriminatory manner” negates the performance of the Audit that followed. The punitive or retaliatory manner of Respondent’s selection of Protestant for the Audit is not cured by Mr. Owens’ performance of the Audit. Therefore, Putnam Ford’s Protest is sustained. Ford is precluded from charging back the 551 disallowed warranty claims totaling \$502,821.56.

3. Protestant is precluded from pursuing Section 3065.2(i)(2)(G) claims in this warranty protest.

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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.

By: Dwight V. Nelson
DWIGHT V. NELSEN
Administrative Law Judge

Steve Gordon, Director, DMV
Kimberly Matthews, Branch Chief,
Industry Services Branch, DMV