STATE OF CALIFORNIA

DECISION COVER SHEET

[X] ACTION BY: Public Members Only **[ ] ACTION BY**: All Members

To : BOARD MEMBERS **Date:** July 17, 2025

From : ADMINISTRATIVE LAW JUDGE: Diana Woodward Hagle

CASE: KM3G INC., d/b/a PUTNAM KIA OF BURLINGAME v. KIA AMERICA INC.
Protest No. PR-2803-22

TYPE: Vehicle Code section 3065.4 Retail Labor Rate
Proposed Decision Following Remand

PROCEDURAL SUMMARY:

- FILED ON CALENDAR: September 15, 2022
- MOTIONS FILED:
    - Respondent's Motion for a Continuance of the September 11, 2023 Merits Hearing (granted)
    - Protestant's Motion to Strike Portions of Respondent's Post-Hearing Reply Brief (granted in part and denied in part)
- MERITS HEARING: October 9-13, 2023; February 12-15, 2024; June 13, 2024 telephonic hearing to admit Exhibit R-256 and identify and admit Exhibit P-126
- JUNE 28, 2024, SPECIAL MEETING: The Board remanded the Administrative Law Judge's Proposed Decision for additional briefing and/or to open the record for additional evidence or testimony for the purpose of making a determination pursuant to subdivision (a) of Vehicle Code section 3065.4 "for a declaration of the franchisee's retail labor rate." Additionally, for the Judge to reconsider paragraphs 161-174 in the subheading entitled "[t]he Consequences of Putnam's Failure to Conform its Submission to the Express Requirements of Section 3065.2" and paragraph 120.

- REMAND HEARING: May 12-14, 2025

- COUNSEL FOR PROTESTANT: Gavin M. Hughes, Esq.
  Robert A. Mayville, Jr., Esq.
  Law Offices of Gavin M. Hughes

- COUNSEL FOR RESPONDENT: John Sullivan, Esq., at hearing
  Lauren A. Deeb, Esq., at remand hearing
  Jonathan R. Stulberg, Esq.
  Hogan Lovells US LLP

EFFECT OF PROPOSED DECISION FOLLOWING REMAND:

The Proposed Decision Following Remand overrules Protestant's retail labor rate protest and proposes a Retail Labor Rate of $268.85/hour.

SUMMARY OF PROPOSED DECISION FOLLOWING REMAND:

The Hearing and Proposed Decision

- Section 3065.2(a)(2) describes, in part, the formula that the franchisee must follow in its calculation of its retail labor rate in its statutory submission to the franchisor. After assembling "qualified" repair orders, "[t]he franchisee shall calculate its retail labor rate by determining the total charges for labor from qualified repair orders submitted and dividing that amount by the total number of hours that generated those hours." (Emphasis added.) It is the word "hours" that is in contention here.

- In September 2021, Kent Putnam was awarded the Kia franchise in Burlingame becoming part of the approximately 15-dealership Putnam Automotive Group, of which Mr. Putnam is the CEO. Its initial warranty labor rate of $225.27/hour was set by Kia's market survey. Kent Putnam testified that, from the opening of the dealership, Putnam's service advisors were directed to price non-warranty (retail or "customer-pay") repairs using Kia's factory guide hours for warranty work multiplied by a labor rate of $440.00. Factory guide hours, such as Kia's LTS ("Labor Time Standards") are "time allowances." [Vehicle Code[1] section 3065(a)(1).] Kia's LTS hours are reasonable.

- On February 16, 2022, Putnam Kia contracted with FrogData, LLC, a company which performs "data analytics" for dealerships and uses the results to file franchisee warranty labor reimbursement requests.

- On March 22, 2022, pursuant to section 3065.2, Putnam Kia submitted to Kia a request for a labor rate increase to $447.52/hour, supported by a FrogData labor

[1] All statutory references are to the California Vehicle Code unless noted otherwise.

analysis spreadsheet. Robin Brantley, FrogData's "lead analyst" for Putnam Kia, was not called to testify, so there was no direct evidence presented of the actions taken by FrogData to collect, verify, and organize for submission the repair orders extracted from the dealership's dealer management system.

- Director of Implementation, Jeff Korenak, testified that FrogData uses in its calculations only the "Accounting" copies of a dealership's repair orders (detailing the completed transaction). Accounting copies display "A/HRS" (Actual Hours) and "S/HRS" (Sold Hours).

- Actual hours are "punch times" recorded by technicians as they work on a specific repair job, then totaled under A/HRS.

- Sold hours are the time allowances that Putnam Kia uses to price retail repairs, according to Andrey Kamenetsky, CFO and Group Operations Manager of the Putnam dealerships. Sold hours (S/HRS) determine customer pricing in advance of the work to be performed and before any particular technician is assigned to the job. Actual hours do not determine the charges the retail customers pay because they are unknown at the beginning of the job.

- FrogData only uses S/HRS (which FrogData calls "Labor Sale Hours") in its calculations for submission.

- The section 3065.2 process continued, with both parties meeting statutory time limits: Kia asked for additional repair orders and Putnam Kia provided them. Oscar Rodriguez, Warranty Manager for Kia America, acted for Kia in this process, but he was not called as a witness, so there is no evidence regarding Kia's review of the submission and actions taken by Kia subsequent to receiving the submission.

- By letter on May 26, 2022, Oscar Rodriquez advised Putnam Kia that the warranty labor rate increase from $225.30/hour to $447.52/hour was "materially inaccurate and potentially fraudulent," attaching a spreadsheet of Kia's calculation, showing a significantly lower retail labor rate than the FrogData spreadsheet.

- According to Kia, Putnam Kia's submission was "materially inaccurate" in three respects: it used "book times" (sold hours) in its calculations instead of actual hours; it failed to include certain repairs involving brakes, batteries and bulbs; and it included a transaction which did not involve a repair and was not "fair and reasonable" at a labor rate of $2,500/hour.

- Putnam Kia rejected Kia's proposed labor rate.

- On September 15, 2022, Putnam Kia filed the instant protest alleging that Kia failed to comply with section 3065.2 by denying Putnam Kia's request for an increased labor rate because of its reliance on "sold hours" in making its calculations.

- The Proposed Decision finds that "actual hours" comport with legislative intent. The entire legislative focus is on "closed" and "completed" transactions, which is exactly when technician hours are totaled and entered under A/HRS. But for the labor of technicians, the charges would not have been "generated." Moreover, the accuracy of the number of actual hours may be verified by other entries in the repair orders themselves (not only the technicians' "punch clock" times and notes, but also descriptions of the repairs performed).

- Putnam Kia's primary argument for "sold hours" as a time allowance is that since upfront pricing is required for retail customers, actual hours cannot be used since they are unknown at the time that estimates are given to customers. The argument is a logical fallacy, a *non sequitur*, because their conclusion [actual hours cannot be used in section 3065.2(a)(2)] cannot be inferred from the premise (actual hours cannot be used to estimate prices). Moreover, the statute is focused exclusively on "completed" transactions, not initial pricing estimates. Finally, unlike "actual hours," "sold hours" may not be easily verified by the franchisor.

- The Proposed Decision also found that Putnam Kia's submission on March 22, 2022, failed to comply with section 3065.2 for reasons other than its reliance on "sold hours." Many submitted repair orders failed to meet the statutory definition of "qualified," such as diagnostic-only jobs without repairs, which would have not been covered by warranty. Several of the repair orders could not have been known by Kia to be ineligible for inclusion in the submission because of undisclosed documents in Putnam Kia's exclusive possession. Kia did not receive accurate information enabling it to go forward to complete the steps that the statute requires for the parties to achieve the statutory goal of determining "a reasonable warranty reimbursement schedule."

- The statute is silent on consequences where, as here, the legislative intent was frustrated. However, case law supports the conclusion that Putnam Kia cannot claim any advantage here.

- Section 3065.4 gives the Board discretion to calculate and declare an appropriate retail labor rate under section 3065.2. In the Proposed Decision, the Administrative Law Judge did not declare a Retail Labor Rate due to the material inaccuracy of the submission's data.

The Remand Hearing

- The scope of the Board's November 5th, 2024, Order of Remand was limited, as follows:

> "[The matter is remanded] to the Administrative Law Judge ("ALJ") for additional briefing and/or to open the record for additional evidence or testimony for the purpose of making a determination pursuant to subdivision (a) of Vehicle Code section 3065.4 'for a declaration of the franchisee's retail labor rate'.

Additionally, the ALJ is to reconsider paragraph 120 on page 29, lines 23-25 and paragraphs 161-174 in the subheading entitled '[t]he Consequences of Putnam's Failure to Conform its Submission to the Express Requirements of Section 3065.2' on page 40, line 13 through page 43, line 20."

- ALJ Diana Woodward Hagle presided over the remand hearing (May 12-14, 2025). The parties were represented by the counsel listed above.

- Expert witnesses who testified in regard to a determination pursuant to Vehicle Code section 3065.4(a) "for a declaration of the franchisee's retail labor rate" were Suzanne Heinemann (forensic accountant) for respondent Kia America and Michael Volkman (automotive professional) for protestant Putnam Kia.

- The experts looked at repair orders within a stated 90-day period, concurring on 18 transactions and differing on 7 of them. Ms. Heinemann's opinion was followed in all disputed items; her calculation of Putnam's retail labor rate of $268.85/hour is proposed.

- The ALJ reconsidered the paragraphs identified in the remand order by deleting paragraph 120 on page 29, lines 23-25 and re-wording or deleting language formerly under the subheading entitled '[t]he Consequences of Putnam's Failure to Conform its Submission to the Express Requirements of Section 3065.2'. That subheading, with changes, now is found in paragraphs 164-173 of the Proposed Decision Following Remand.

Addendum to Proposed Decision Following Remand;
Amendments to Proposed Decision

- This document is attached to the Proposed Decision Following Remand and is incorporated as part of it. The Addendum covers the evidence introduced at the remand hearing (the testimony of the expert witnesses and their charts, and repair orders), and analyses of the evidence by the ALJ, with the Conclusion a proposed retail labor rate of $268.85/hour.

- The Amendments identify the changes made in the Proposed Decision by the Proposed Decision Following Remand.

- **RELATED MATTERS:**

- Related Case Law:

  - *Lundgren v. Deukmejian* (1988) 45 Cal.3d 727, 735;
  - *Larry Menke, Inc. v. DaimlerChrysler Motors Co., LLC* (2009) 171 Cal.App.4th 1088, 1093;
  - *Mazda Motor of America, Inc. v. California New Motor Vehicle Board* (2003) 110 Cal.App.4th 1451, 1456;

- *Wilcox* v. *Birtwhistle* (1999) 21 Cal.4th 973, 977-978; *Malek* v. *Blue Cross of California* (2004) 121 Cal.App.4th 44, 64;
- *Malek v. Blue Cross of California* (2004) 121 Cal.App.4th 44, 48, 64, 71-72;

- Applicable Statutes and Regulations:

  - Business & Professions Code sections 9880.1, 9884.8, 9884.9(a)(1), 9884.9(e), 9884.11.
  - Vehicle Code sections 331.1, 331.2, 3065, 3065.2, 3065.25, 3065.4.
  - Title 16, California Code of Regulations sections 3352(a), 3353(a), 3356.