

TEXAS DEPARTMENT OF MOTOR VEHICLES

BOARD MEETING

8:02 a.m.
Thursday,
November 3, 2016

Lone Star Room
Building 1
4000 Jackson Avenue
Austin, Texas

BOARD MEMBERS:

Raymond Palacios, Chair
Robert "Barney" Barnwell, III
Luanne Caraway
Brett Graham
Kate Hardy
Blake Ingram
Gary Painter
Guillermo "Memo" Treviño
Johnny Walker

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13. The Board may enter into closed session under one or more of the following provisions of the Texas Open Meetings Act, Government Code, Chapter 551:

- Section 551.071
- Section 551.074
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14. ACTION ITEMS FROM EXECUTIVE SESSION --

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P R O C E E D I N G S

1
2 MR. PALACIOS: Good morning, everyone. It's a
3 great day in Austin, Texas. My name is Raymond Palacios,
4 and I'm pleased to open the Board meeting of the Texas
5 Department of Motor Vehicles. It is 8:02 a.m., and I am
6 now calling the Board meeting for November 3, 2016 to
7 order.

8 I want to note for the record that public
9 notice of this meeting, containing all items on the
10 agenda, was filed with the Office of Secretary of State on
11 October 26, 2016.

12 Before we begin today's meeting, please place
13 all cell phones and other communication devices in the
14 silent mode, and please, as a courtesy to others, do not
15 carry on side conversations or other activities in the
16 meeting room.

17 If you wish to address the Board or speak on an
18 agenda item during today's meeting, please complete a
19 speaker's sheet at the registration table. Please
20 identify on the sheet the specific item you are interested
21 in commenting on, and indicate if you wish to appear
22 before the board and present your comment or if you only
23 wish to have your written comment read into the record.
24 If your comment does not pertain to a specific agenda
25 item, we will take your comment during the general public

1 comment portion of the meeting.

2 Now let's move on. I would like to start by
3 recognizing our newest board member. On August 23, 2016,
4 the governor appointed new board member, Kate Hardy, to
5 replace Laura Ryan for a terms set to expire on February
6 1, 2021. I will say we've had an opportunity to work with
7 Kate and visit with her. She is going to be a great
8 addition to this board. She brings a wealth of experience
9 from General Motors, primarily on the vehicle sales and
10 service and marketing side, very knowledgeable of the
11 retail aspects of the auto industry, very hard-charging
12 person. I know she's going to be a great addition. And
13 if she seems particularly exuberant and excited today, it
14 could be because it's her first meeting, but I think it's
15 probably more that her Cubs won last night.

16 So welcome, Kate.

17 (Applause.)

18 MR. PALACIOS: Let's move on to item C now,
19 appointment of member to act in the absence of chair and
20 vice chair.

21 MR. INGRAM: No roll call?

22 MR. PALACIOS: Oh, yes. Roll call. Thank you,
23 Blake. Let's begin with roll call.

24 Start with Board Member Ingram?

25 MR. INGRAM: Here.

1 MR. PALACIOS: Board Member Graham?

2 MR. GRAHAM: Here.

3 MR. PALACIOS: Board Member Painter?

4 MR. PAINTER: Here.

5 MR. PALACIOS: Board Member Barnwell?

6 MR. BARNWELL: Here.

7 MR. PALACIOS: Board Member Hardy?

8 MS. HARDY: Here.

9 MR. PALACIOS: Board Member Treviño?

10 MR. TREVIÑO: Here.

11 MR. PALACIOS: Board Member Walker?

12 MR. WALKER: Here.

13 MR. PALACIOS: And Board Member Caraway?

14 MS. CARAWAY: Here.

15 MR. PALACIOS: And I am present. Let the
16 record reflect we have a quorum. It's great, this is, I
17 guess, one of the first times in a while where ever single
18 board member is present.

19 We'll now move to agenda item 2.B. Based on my
20 authority to appoint board advisory committee members, on
21 September 1, I appointed Board Member Walker to serve on
22 the Household Goods Rules Advisory Committee.

23 Also based on my authority under Transportation
24 Code 101.023(b) (8) to create subcommittees of the board
25 and appoint members to such committees, on September 8,

1 2016, I made the following appointments. To the Finance
2 and Audit Committee, I appointed Luanne Caraway as the
3 chair; the members of that committee are Brett Graham,
4 Kate Hardy, and Johnny Walker. On the Projects and
5 Operations Committee, I appointed Blake Ingram as chair;
6 members of that committee are Barney Barnwell, Luanne
7 Caraway, and Johnny Walker. On the Legislative and Public
8 Affairs Committee, I appointed Board Member Treviño as the
9 chair, with members Barney Barnwell, Blake Ingram and Gary
10 Painter as members of that committee as well.

11 To all our board members, I appreciate your
12 willingness to serve in this capacity and your dedication
13 to this board. I know you'll do a great job.

14 Moving on now, agenda item 2.C, appointment of
15 a member to act in the absence of chair and vice chair,
16 pursuant to Transportation Code 101.023, we will address
17 that a little bit later. We're going to move around the
18 agenda here after we address item 5 on the vice chair
19 election.

20 Now we will move on to item 2.D. We posted our
21 proposed meeting schedule for 2017. Essentially, the
22 board meetings will be held the first Thursday of the
23 month. If there is a change, we will notify everyone.
24 The agenda is in your books, so just look over them to be
25 aware. You'll see with the exception of October, the

1 meetings are currently, again, on the first Thursday of
2 every month.

3 And now let us move on to item 3 on the agenda,
4 and at this time I will turn it over to our executive
5 director, Ms. Whitney Brewster.

6 MS. BREWSTER: Thank you, Mr. Chairman, members
7 of the board. For the record, my name is Whitney
8 Brewster, I'm the executive director of the TxDMV. Thank
9 you for the opportunity to update you on some of the
10 activities occurring at the agency.

11 Mr. Chairman, if you'll indulge me, I would
12 like to take item 3 up last in my report and start with
13 item 3.B, performance measures.

14 MR. PALACIOS: Sure.

15 MS. BREWSTER: Thank you.

16 In your board books, starting on page 7, you'll
17 find the performance measures for the third quarter for
18 the agency which includes July, August and September. The
19 agency has over 55 different performance measures that it
20 consistently tracks over time. What you see in your board
21 books is the quarterly dashboards and those measures roll
22 up into that dashboard. The agency's performance measures
23 are based on the three strategic goals set by the TxDMV
24 Board, the first being performance-driven, the next,
25 optimizing services and innovation, and then the third

1 being customer centric.

2 I think it's important to note that these
3 performance measures are not the same performance measures
4 as those that we provide, as required by state law, to the
5 Legislative Budget Board. These are above and beyond
6 those performance metrics and these are what we
7 consistently track to gauge performance. There is no
8 requirement that we do this, this is just something that
9 the agency does to continue the culture of continuous
10 improvement. We have purposely set aggressive targets for
11 each of the performance measures to stretch. We are not
12 looking for always having a dashboard that shows the
13 agency always being in the green. We do believe that we
14 need to continue to strive to do better, and so that's
15 what you see reflected in the dashboard.

16 Overall, you will see an improvement in the key
17 performance indicators over this time last year. There is
18 a slight decrease in the performance measures for the
19 third quarter over the second quarter. I would like to
20 point out that some of the large enterprise-wide projects
21 of the agency inevitably impact the performance on some of
22 these key performance indicators because of the amount of
23 time that is devoted to those projects. You'll see that
24 in a lot of the more public-facing entities or divisions,
25 many of those folks in those divisions not only are

1 focused on operations but they're also heavily utilized
2 for the large scale projects, and so with that, you will
3 see a decrease in some of the performance metrics as a
4 result of some of the large scale enterprise projects
5 going on in the agency. It's a very heavy lift.

6 On the flip side of that, our customers are
7 very much utilizing the end product of those project
8 efforts in a way that we were hoping for and in fact has
9 exceeded our expectations in some areas. More people are
10 utilizing TxPROS for permitting, self-permitting,
11 electronic lien titling system, and we just hit the 40
12 percent mark for the number of titles that are issued
13 through the WebDealer program. Just this September, we
14 hit the 40 percent mark of all titles are now issued
15 through the WebDealer application, and we anticipate that
16 that will continue to grow. I think it's important to
17 note with that, that is even considering that obviously
18 not all dealers are on WebDealer and not all counties are
19 utilizing the application either. It's just showing that
20 the popularity is growing and it's growing quickly.

21 I really look forward to seeing how the new
22 E-Licensing application that's being rolled out in the
23 very near future will impact how the Motor Vehicle
24 Division, Enforcement, the Office of Administrative
25 Hearings, those three agencies, how their performance

1 metrics will be transformed as a result of the
2 efficiencies gained through that system.

3 And also, we track and part of our performance
4 metrics are based on the utilization of online
5 registration. As this board knows, you recently adopted
6 policy rule that allowed for an online discount for
7 registration renewals, so I'm looking forward to seeing
8 how that could potentially increase the utilization of
9 online registration.

10 The performance measures are obviously not an
11 exact science but they are a good tool for us to track our
12 performance, and over the next two months the agency will
13 be looking at the measures, its targets, as we prepare for
14 the next calendar year.

15 And with that, Mr. Chairman, members, I would
16 be happy to answer any questions on the performance
17 measures.

18 MR. PALACIOS: Any questions?

19 MR. WALKER: I do.

20 MS. BREWSTER: Yes, sir.

21 MR. WALKER: We have a downward trend in Motor
22 Vehicles on our performance indicators and it looks like
23 it's continually trending downward. Why is that and
24 what's causing that?

25 MS. BREWSTER: So the Motor Vehicle Division --

1 and when I referenced the large scale projects that are
2 occurring right now. There's a very heavy lift on the
3 Motor Vehicle Division specifically as it applies to
4 E-Licensing application and it's rollout. There are a lot
5 of employees that are working on that project and those
6 subject matter experts in that area are heavily utilized.

7 So we're hoping that once the E-Licensing application is
8 launched that things will start to stabilize there again.

9 I would like to point out, though, that the
10 Motor Vehicle Division, despite the metrics showing a
11 downward trend on the customer satisfaction side, has
12 maintained a pretty steady positive response rate.

13 MR. INGRAM: Member Walker, I can tell you that
14 from the dealer side we're hearing nothing but positive
15 things still from Motor Vehicle. And E-Licensing should
16 roll out fairly soon, so hopefully that trend will reverse
17 quickly.

18 MS. BREWSTER: And we will have an update on
19 E-Licensing by Ms. Sandberg.

20 MR. WALKER: Okay. Thank you.

21 MR. PALACIOS: Any other questions?

22 (No response.)

23 MR. PALACIOS: If not, let's move on to the
24 next item, the operational plan.

25 MS. BREWSTER: Thank you.

1 Operational plans began in FY15 and this marks
2 the third year of their use. Operational plans describe
3 the purpose and responsibilities of each of the divisions
4 and also assist the divisions in focusing on value-added
5 initiatives both externally for customers as well as our
6 internal staff. Initiatives are actions that are taken in
7 addition above and beyond the normal day-to-day operations
8 of the divisions, and again, this is an effort, this is
9 not a statutory requirement, this is something that the
10 agency does to help continually develop and improve.

11 So the purpose of this is just simply to update
12 the board on the FY16 operational plans that were just
13 completed and let you know that the FY17 plan is near
14 completion. Once there's the finishing touches on the
15 formatting, et cetera that are being done on that, we will
16 email the FY17 operational plan out to the board members
17 once it's completed.

18 Just a sampling of some of the highlights from
19 the FY16 operational plans. The Enforcement Division
20 developed and delivered training for household goods
21 movers. The Enterprise Project Management Office division
22 documented its standard operating procedures. The Finance
23 and Administrative Services Division established the TxDMV
24 Fund. The Government and Strategic Communications
25 Division catalogued all of the agency's publications and

1 compiled a list of required reports. The Information
2 Technology Services Division implemented a software called
3 Remedy Force which is a change management software. They
4 also developed system uptime reporting for our
5 applications, and certainly implemented video
6 teleconferencing across the agency and all of the regional
7 service centers and here at headquarters.

8 The Motor Carrier Division implemented
9 automated restriction violation notification to permit-
10 holders through TxPROS which eliminated a paper-based
11 process. They also implemented pretty significant changes
12 to the Motor carrier credentialing system. The Motor
13 Vehicle Division updated its salvage rules and streamlined
14 the criminal fitness review process for licensees. The
15 Office of Administrative Hearings streamlined its decision
16 writing process and created an FAQ section on the agency's
17 website.

18 And last but certainly not least, the Vehicle
19 Title and Registration Division updated its standard
20 operating procedures across the regional service centers
21 and went through pretty comprehensive review of its forms
22 and consolidated those and streamlined that process.

23 That's just a snapshot of some of the things
24 that were accomplished. In the upcoming FY17 operational
25 plans, there will be about 34 different initiatives that

1 the divisions are taking on, both internally and
2 externally, and many of those are cross-divisional to
3 increase the collaboration between the divisions.

4 And with that, Mr. Chairman, I'd be happy to
5 entertain any questions that the board has.

6 MR. PALACIOS: Are there any questions for our
7 director?

8 (No response.)

9 MR. PALACIOS: Let's move on to the next item,
10 the fiscal year 2017 interagency agreement between TxDOT
11 and TxDMV.

12 MS. BREWSTER: Mr. Chairman, I would like to
13 turn the time over to Mr. Duncan to give us a status
14 update on that, but before I do, for our new board
15 members, just want to give them a quick update. We enter
16 into interagency agreements on an annual basis with TxDOT
17 as we continue to separate the agencies. Although a great
18 deal has already gone into separation, we still continue
19 to rely on TxDOT primarily in the areas of facilities and
20 technology. We are also dependent upon one another, and
21 will likely continue to be regardless of our separation
22 activities, even once we're completely separated,
23 particularly in the area of routing and permitting of
24 motor carriers. Those things are laid out in the
25 interagency agreement.

1 And with that, Mr. Chairman, I know that David
2 has an update for us.

3 MR. DUNCAN: Good morning, members. David
4 Duncan, general counsel.

5 As Ms. Brewster was summarizing, the agreement
6 between us and TxDOT deals with facilities, information
7 technology, general shared infrastructure. We had brought
8 before the board in the last meeting what we thought was
9 the final version of that document, and the board gave Ms.
10 Brewster final authority to execute that document. There
11 was a higher level management review at TxDOT, and they
12 identified some other items that they requested that we
13 discuss, and we're in the process of doing that now. They
14 sent the redline just around noon yesterday. I've shared
15 it with Mr. Obermier and Ms. Flores, our CFO.

16 For the facilities issues, they are asking that
17 we revisit how we calculate the reimbursable costs for
18 facilities for things like utilities, pest control, that
19 sort of thing, and go back to what we had last year. We
20 had gone to a facility-by-facility breakdown, and they ask
21 that we go back to a flat rate, probably because of the
22 ease of calculation. Ms. Flores is looking at the numbers
23 to make sure that the numbers comport well with what we
24 think those costs should be.

25 Once we've completed that review, because the

1 delegation to Ms. Brewster was to finalize any last-minute
2 changes, from what I've seen in their redlines, it's
3 really not very significant. We do have some wording
4 changes that we want to discuss with them on the IT
5 issues, but we really don't see that they're changing
6 anything that's that dramatic, and their management
7 structure really wanted to see some changes. So we should
8 be able to finalize that, hopefully in the next week, and
9 get signatures from Ms. Brewster and Mr. Bass at TxDOT.
10 And I'm available for any questions that you have.

11 MS. BREWSTER: Mr. Chairman, if I may just add
12 one thing. Member Walker made a suggestion at the last
13 meeting, if you'd go into that a little bit, David.

14 MR. DUNCAN: Yes. I'm sorry.

15 MS. BREWSTER: Thank you.

16 MR. DUNCAN: One of the things that we were
17 going to negotiate after the last meeting, Member Walker
18 had requested that we place language into the agreement to
19 extend facility lease terminations by TxDOT until the next
20 legislative session so we could seek funding for that, and
21 TxDOT did agree to that. That's incorporate in the
22 document.

23 MR. PALACIOS: Thank you for the update, Mr.
24 Duncan.

25 Any other questions for Mr. Duncan?

1 (No response.)

2 MR. PALACIOS: Let's move on then to the public
3 comment portion of this meeting. Before we do the public
4 comment, we are going to recognize some very special
5 people, and at this point I'll turn it over to Ms.
6 Brewster.

7 MS. BREWSTER: Thank you.

8 I am very excited that we have expanded this
9 agenda item, employee recognition, to include a special
10 recognition of recent retirees and employees who have
11 reached a state service milestone. We celebrate these
12 employees as a show of our appreciation for their years of
13 service to the citizens of Texas. I want to welcome the
14 family and friends of our celebrants who have joined us
15 this morning, and we appreciate the support you have
16 provided over these years and for sharing your loved ones
17 with us.

18 Chairman Palacios and board members, would you
19 please join me at the front of the dais to congratulate
20 our recipients.

21 MS. YANCEY: Good morning. I'm Martha Yancey
22 and I work in Human Resources Division, and I am pleased
23 to announce the state service award recipients today.
24 Please join Ms. Brewster and our board members as your
25 name is called.

1 Our first employee is reaching a state service
2 milestone of 20 years, Bryan Wilson. Bryan is our
3 director of Automobile Burglary and Theft Prevention
4 Authority Division, also known as ABTPA. Bryan has been
5 with the agency for two years. When he is not doing the
6 work of the state, Bryan can be found at his ranch in
7 Burnet tending to his cattle, also known as ARBTC, at
8 ranch in Burnet tending cattle.

9 (General laughter.)

10 MS. YANCEY: Congratulations on your 20 years
11 of service, Bryan.

12 (Applause; pause for photos.)

13 MS. YANCEY: This employee is reaching a state
14 service employee milestone of 25 years, Tonie Knight. As
15 the licensing manager for the Motor Vehicle Division,
16 Tonie has not only increased the output of her area but
17 has also provided enthusiasm and energy that are reflected
18 in the attitude of her staff. What we are recognizing
19 today are not only the years of service but 25 years of
20 exceptional service to the State of Texas.

21 Congratulations, Tonie.

22 (Applause; pause for photos.)

23 MS. YANCEY: And the next employee is reaching
24 a state service milestone of 35 years, Jeff Kushaney.
25 Jeff is a purchaser in the Finance and Administrative

1 Services Division. Jeff began his career with the DMV on
2 November 1, 2009. Jeff has made significant contributions
3 to the agency, including activities related to the
4 transition of information to the agency, assisting with
5 the creation of the agency's first procurement system, and
6 testing the purchasing components of the centralized
7 accounting and payroll personnel system.

8 Congratulations, Jeff.

9 (Applause; pause for photos.

10 MS. YANCEY: The following employees have also
11 reached a state service milestone but were unable to join
12 us this morning. 20 years of service: Carol Birdow,
13 Vehicle Titles and Registration Division; Mary Acosta,
14 Motor Vehicle Division. 25 years: Diane Chavez,
15 Enforcement Division; Anne Lehnick, Enforcement Division;
16 Terry Stabeno, Consumer Relations Division. 35 years:
17 Barbara Johnston, Vehicle Titles and Registration
18 Division.

19 And finally, we want to take this time to
20 congratulate the following individuals who recently
21 retired from the agency: Allison Burgess, Irene Perez,
22 and Rhonda Snow.

23 Thank you very much.

24 (Applause.)

25 MR. PALACIOS: I'd just like to add, Tonie,

1 Jeff, and the others we're recognizing, I want to thank
2 you for your steadfast dedication to this agency through
3 the years. It's because of your service, your dedication
4 to the DMV, it's helped us reach the point to where we
5 are. I will say I've had a chance to meet with all the
6 board members here and know them very well, and to a
7 person they comment on the quality of staff here, on how
8 honored they are to serve on this board because they know
9 we have people here that we can rely on, people that are
10 true professionals. And again, I want to thank you for
11 the time you've served, 20 years, 25 years, 35 years,
12 outstanding. Thank you for the example that you've set
13 and for making our job much easier.

14 So with that, now we'll move on to the public
15 comment section of the agenda. We do not have any yellow
16 cards other than a few comments on specific agenda items,
17 so I guess we'll move on then.

18 MR. INGRAM: Really, nothing?

19 (General talking and laughter.)

20 MR. PALACIOS: So with that, we will move on
21 now to agenda item 5. Under action and committee items,
22 we'll begin with agenda item 5, the vice chair election.
23 With my recent appointment to chairman, we now need to
24 elect a vice chair, and I'll entertain a motion or I'm
25 hoping for discussion.

1 MS. CARAWAY: Chair, I would like to make a
2 motion to nominate Blake Ingram for that position of vice
3 chair.

4 MR. PALACIOS: There is a motion.

5 MR. TREVIÑO: Second.

6 MR. PALACIOS: Motion by Member Caraway, second
7 by Member Treviño. All in favor?

8 MR. INGRAM: Wait, wait. Is this a paid
9 position?

10 MR. PALACIOS: Yes. You're going to double
11 your salary.

12 (General laughter.)

13 MR. PALACIOS: All in favor?

14 (A chorus of ayes.)

15 MR. PALACIOS: It's unanimous.

16 Congratulations, Board Member Ingram.

17 Let's move on to item 2.C. The Transportation
18 Code requires the board chair appoint a member of the
19 board to act in the absence of the chair and vice chair.
20 Therefore, I'd like to appoint Member Barnwell to serve in
21 that capacity should that event occur.

22 MR. WALKER: Question. Is this a new law or
23 have we just been breaking the law?

24 MR. BARNWELL: We've been doing this for a
25 couple of years.

1 MR. WALKER: We've never had an alternate.

2 MR. BARNWELL: Yes. When you were chairman.

3 (General talking and laughter.)

4 MR. PALACIOS: At this time we will be moving
5 on to executive session. I want to note for the record
6 that it is 8:31 a.m., and we will convene approximately 45
7 minutes to an hour and we'll be back after that.

8 (Whereupon, at 8:31 a.m., the meeting was
9 recessed, to reconvene this same day, Thursday, November
10 3, 2016, following conclusion of the executive session.)

11 MR. PALACIOS: It is approximately 10:01 a.m.
12 on November 3, 2016, and the Board of the Texas Motor
13 Vehicles is now in open session. We want to note for the
14 record that no action was taken in closed session.

15 So in consideration of the time for many of you
16 that are here, traveling out of town, regarding our
17 contested case, we're going to move agenda item 10 up
18 forward. This is a matter concerning a franchised
19 dealer's complaint against distributor under Occupations
20 Code 2301.467, 2301.468, and 2301.478.

21 I'd like to call Mr. Daniel Avitia and Michelle
22 Lingo.

23 MR. DUNCAN: Actually, before they start, David
24 Duncan, general counsel. I just wanted to let the board
25 know that Mr. Avitia and Ms. Lingo are going to start, and

1 then the order of the presenters by the parties, the non-
2 prevailing party, which is World Car, will go first, and
3 Mr. Kaplan, who is going to argue for them, has requested
4 that his time -- each party will be given 15 minutes --
5 Mr. Kaplan is going to split his time eleven and four, so
6 he's going to do an initial presentation of eleven minutes
7 and reserve four minutes for rebuttal, and then in the
8 middle, Mr. Young for Hyundai just goes one block of 15
9 minutes, however much of that he uses.

10 MR. PALACIOS: Okay. Thank you.

11 Mr. Avitia.

12 MR. AVITIA: Chairman, Board members, Ms.
13 Brewster, good morning. For the record, my name is Daniel
14 Avitia. I have the pleasure of serving as the director of
15 the Motor Vehicle Division. Alongside me this morning is
16 Ms. Michelle Lingo. She is a staff attorney and the legal
17 subject matter expert that was assigned to review this
18 contested case.

19 Agenda item 10, which is found on page 107 of
20 your board books, is a franchise contested case regarding
21 World Car Hyundai and Hyundai Motor America. This item is
22 being presented for the board's consideration to adopt a
23 final order which aligns with the State Office of
24 Administrative Hearing Judge's proposal and
25 recommendations. This matter had a proceeding conducting

1 by a judge with the State Office of Administrative
2 Hearings. The complainant, a licensed franchised dealer,
3 filed a case against the respondent, a licensed
4 manufacturer, both parties being present today, alleging
5 violations of Texas Occupations Code.

6 Overall, the administrative law judge found
7 that World Car failed to meet its burden of proof to show
8 that Hyundai violated any part of the Occupations Code.
9 The administrative law judge recommended that the board
10 deny World Car's complaint.

11 By law, the board can change findings,
12 conclusions or orders issued by the State Office of
13 Administrative Hearings judge when change is justified
14 under Texas Occupations Code 2001.058(e). That is to say
15 change can be made if: (1) the judge misapplied or
16 misinterpreted applicable law, agency rules or prior
17 agency decisions; (2) the judge relied on a prior agency
18 decision that is incorrect or should be changed; or (3)
19 the judge made a technical error in a finding of fact.

20 The board's three options this morning in this
21 contested case matter are as follows: (1) adopt the PFD
22 as recommended by staff this morning; (2) amend the PFD
23 beyond staff's recommendation, including reversal of the
24 ALJ's conclusions; or (3) remand the PFD back to SOAH for
25 further consideration of the facts or legal concepts as

1 directed by the board.

2 After staff's review of the all the documents
3 that are before the board today, staff recommends the
4 board concur with the ALJ's recommendations and adopt the
5 ALJ's findings of fact and conclusions of law as modified.

6 Staff has prepared a final order for your consideration
7 which again aligns with the judge's proposal and
8 recommendations to the board.

9 This concludes my remarks. Ms. Lingo and I are
10 certainly happy to answer any questions that you may have
11 regarding this legal matter.

12 MR. PALACIOS: Are there any questions for Mr.
13 Avitia or Ms. Lingo?

14 (No response.)

15 MR. PALACIOS: If not, I know we have a few
16 people that would like to present on behalf of the
17 respective parties, and I'll start off with calling Mr.
18 Lee Kaplan.

19 MR. KAPLAN: Thank you, Mr. Palacios.

20 I have, before I start my presentation, three
21 things to hand out to members of the board. These are
22 blow-downs of our presentation, the timeline which was
23 plaintiff's exhibit 122 --

24 MR. PALACIOS: Mr. Kaplan, will you please
25 state your name for the record?

1 MR. KAPLAN: Yes. I'm Lee Kaplan, K-A-P-L-A-N,
2 representing the World Car entities.

3 If I may pass out to the board blow-downs of
4 our very short power point presentation.

5 MR. PALACIOS: Sure.

6 MR. KAPLAN: I also have a timeline which was
7 in evidence and it's in the record, plaintiff's exhibit
8 122, and I have a final order that we filed that we
9 proposed that has not been adopted, but our proposed final
10 order, and it's redlined in such a way that you can see
11 what we believe is a correct ruling. When everybody has a
12 copy and you're ready, I'll proceed. We have extra
13 copies.

14 MR. PALACIOS: Okay, proceed.

15 MR. KAPLAN: Thank you, Mr. Chairman. I will
16 speak quickly but I invite questions. I'll speak eleven
17 minutes now and four later.

18 The relevant statutes are set out on page 3 of
19 our power point, and these are statutes, two of which have
20 never been construed, that is, the one prohibiting
21 requiring adherence to unreasonable sales or service
22 standards, and unreasonable discrimination. The question
23 of good faith and fair dealing has sort of been
24 peripherally construed and in other places, but we think
25 in all three cases the ALJ made errors of law. We are

1 only going to talk about undisputed facts in our
2 presentation, undisputed facts from which the ALJ reached
3 the wrong conclusions.

4 If you turn to the next page, it's undisputed
5 that in order to avoid being considered in material
6 breach, World Car had to sell more vehicles than it was
7 allocated. That's impossible. You can't answer all the
8 questions on a 30-question test and be told that you have
9 ea failing grade of 30 because there were really 100
10 questions and you didn't get the other 70. That's exactly
11 what has happened here. Time and time again, World Car
12 sold all the cars it got, asked for more, but because
13 Hyundai had set a much higher standard for what it thought
14 the dealer should sell there, even though Hyundai hadn't
15 given them the cars, they said you're in material breach.

16 And the best proof of that is from the record,
17 it's Mr. Hetrick himself, page 7 of our blow-down, this is
18 a letter from the regional manager, plaintiff's exhibit
19 67, saying: Your sales efficiency measurement is 14.2
20 percent; in view of the foregoing and given these facts,
21 your dealership is in material breach of the dealer
22 agreement.

23 The mistake the ALJ made is saying if adherence
24 to a sales efficiency standard is not in the dealer
25 agreement, it's not a required standard. That's false,

1 it's just wrong, because the evidence is undisputed that
2 that is the metric used by Hyundai to measure whether a
3 manufacturer is adhering to its dealership agreement.
4 That's what Mr. Hetrick said: you're in material breach.

5 Now, this is near the end of the three-year
6 period in which these dealerships suffered. I'm going to
7 tell you about what happened near the beginning in 2010.
8 The regional manager almost immediately presented a letter
9 to World Car and said, I want you to authorize me to help
10 you sell your dealerships. Mr. Hetrick admitted, and I
11 have this in my brief at page 14, he did not know of a
12 single other dealer in Texas to whom he had ever presented
13 such a letter, nor anyone in the region. He came to this
14 dealer, a loyal dealer, who never gave back dealerships,
15 and said, I want you to authorize me to go out and sell
16 your dealerships. That's what got them off on a pretty
17 bad footing.

18 The next three years then consisted of
19 punishment and poor allocation. And remember, you can't
20 sell what you don't have, and you certainly can't be held
21 to account for not selling what you don't get. If you
22 look at page 6 of our slide, we were required to sell more
23 vehicles than allocated to achieve 100 percent. Can't do
24 that if you don't get the vehicles. Sales efficiency,
25 according to the ALJ, is not required because it's not in

1 the franchise agreement. That's an error of law.
2 Requiring somebody to meet an impossible standard and
3 using that as leverage to declare a breach of the
4 dealership agreement is simply not allowed under the
5 statute.

6 Now, in fact, the company had been asking for
7 more cars, and we can talk about that a little bit more,
8 but I want to turn to slide 9 because this is the
9 unreasonable discrimination we've been talking about. And
10 once again, we're only talking about undisputed facts in
11 which the ALJ reached the wrong conclusions. It is
12 undisputed that those two dealerships that Red McCombs
13 franchise still kept, and which were the nearest
14 competitors to our client, got in a three-year period
15 early on seven times as many, but in that three-year
16 period from June 2010 until World Car decided it had to
17 take action to enforce its rights, the McCombs dealerships
18 got almost 1,800 cars of discretionary allocation,
19 whereas, we got 621. That's a three-to-one offset,
20 despite the undisputed evidence in the record that a
21 regional manager has the discretion to help struggling
22 dealerships by giving them extra allocation.

23 And that mattered even more here because this
24 is the time when Hyundais were in high demand because of
25 the tsunami keeping Japanese manufacturers from really

1 shipping a lot of cars. So everybody is screaming for
2 product. Somehow the nearest competitor, the competitor
3 which had already given back a dealership -- they had once
4 had three and walked away from one of them -- is getting
5 three times as much. Hyundai is keeping one guy happy and
6 punishing the other. That's the dealer that didn't want
7 to sell his franchises, the loyal dealer who to this day
8 wants to be a Hyundai dealer. That's the discrimination
9 we're talking about.

10 Let's turn to the next slide. There are some
11 alibis that simply don't hold up. These are the alibis
12 that we have heard along the way for why that discretion
13 was not unreasonably exercised -- why the discrimination
14 was not unreasonable. They said, Well, World Car reduced
15 its inventory in 2008 and 2009. The fact is McCombs
16 reduced its inventory by walking away from a dealership.
17 We've got two equal franchises, one of them walks away
18 from a dealership, gives it back; the other one wants
19 product and during the recession, just like every other
20 dealer, somewhat reduced their inventory. But now we're
21 in 2010 to 2013 when these cars are hot, and suddenly this
22 dealer, our client, can't get cars.

23 The second excuse given is, well, the Red
24 McCombs dealers were promoting the \$60,000 Equus vehicle.
25 Leaving aside the question whether that's a good business

1 practice, that happened after the fact. One of the most
2 amusing moments in the hearing is when Mr. Hetrick trotted
3 out that explanation in direct examination, and in cross,
4 I said, I thought you'd say that. And we showed
5 undisputably that the request that people participate in
6 the Equus promotion and World Car's refusal to do so, came
7 after they were already being discriminated against on a
8 basis of at least seven to one early on in manual
9 allocations.

10 MR. INGRAM: I'm sorry. Can I just interject
11 real quick. You're saying after. Can you give me a
12 specific date?

13 MR. KAPLAN: I don't remember the exact date of
14 the Equus promotions, I think it was 2011 or '12, but we
15 were already -- and I frankly cannot say, I believe it's
16 in the briefing -- the testimony is clear that the
17 discrimination in allocations had started in 2010.

18 MR. INGRAM: Well, you're just saying you can't
19 be clear but I need a date to make it clear. So 2012?

20 MR. KAPLAN: 2012, yes. And we can supply that
21 to the board by letter. It's in the transcript, and Mr.
22 Hetrick claimed that, but we were already being
23 discriminated against long before then.

24 Then there was an argument about renovating a
25 dual facility. Well, if we go back to slide 9, you see at

1 the end here when World Car decided to enforce its rights,
2 the discrimination ended. They still had a dual facility
3 where they had Kias and Hyundais in one showroom or in one
4 building. You know, Mr. Zabihian didn't suddenly walk
5 into the Kia showroom and become a good dealer, walk over
6 the Hyundai showroom and become a bad dealer. He was
7 outselling -- and this is undisputed; in fact, Mr. Hetrick
8 pointed that out in his letter in 2013 -- he was
9 outselling Hyundai with his Kias six or seven to one,
10 ignoring the fact that the record is also clear that in
11 2012 Mr. Zabihian had expressly said -- and we can look at
12 page 11 of our slides -- I've got 98 Hyundais in stock and
13 I've got 700 Kias in stock.

14 Now, these are sister companies from Korea:
15 with one company he's getting allocations, with the other
16 he's not. And so it was as self-fulfilling prophecy that
17 his performance would not be as good. But that was used
18 as a metric to claim that you're not sales efficient,
19 you're not a loyal dealer. He sold what he had. He asked
20 for more discretionary allocations and he didn't get it.

21 The other alibi that was given -- and by the
22 way, when he renovated the north store, the evidence is
23 undisputed that he got no extra allocation, whereas, when
24 Red McCombs did an exclusive facility and renovated their
25 store, they got extra allocation. All that is undisputed

1 in the record.

2 So the last thing is this service loaner
3 program. Different companies do this in a different way,
4 but a service loaner, when you take it, it's counted as a
5 sale by Hyundai, and that means the warranty starts. Mr.
6 Zabihian, who gives a lifetime warranty to purchasers, did
7 not believe that it was right to sell a customer a car and
8 not tell them: By the way, your warranty didn't start the
9 day you bought it, it started earlier. He just didn't
10 think that was a good program, but he never changed that
11 feeling, and after he asserted his legal rights, somehow I
12 guess that excuse no longer mattered because the
13 discrimination that had occurred ended, ended.

14 But during that three-year period when these
15 Hyundais were hot cars and you could make thousands of
16 dollars on every sale, he lost gross profits from sales on
17 at least 1,200 vehicles. This is just the manual
18 allocations, because remember, the other allocations in
19 the computer are goosed upward if you sell more of the
20 things you do manually. The more sales you make, the
21 better off you are. So there's no question that he was
22 discriminated against and that it was unreasonable.

23 In fact, if we look at what happened after that
24 discrimination, that incredible mis-allocation stopped
25 after he began to assert his legal rights, we see that the

1 McCombs dealership sales started to decline and the World
2 Car dealership sales started to increase because once the
3 discrimination stopped, or slowed down at least, he could
4 sell more cars. He could also affect the computer
5 algorithm and get more cars. But the bottom line is you
6 can't sell what you don't get. They created a catch-22 by
7 using a metric to say you're in material breach of the
8 dealer agreement.

9 Now, why does this matter? Because if you
10 accept the recommendations of the ALJ, there's essentially
11 no such thing as requiring adherence to an unreasonable
12 standards, there's essentially no such things as
13 unreasonable discrimination, and this will be cited to
14 future boards as pretext for unfair actions.

15 If there are no questions.

16 MR. PALACIOS: Yes, Mr. Kaplan, I have a couple
17 of question for you. Back to the issue of material breach
18 of franchise agreement due to the fact that your client
19 wasn't sales efficient, were there any punitive actions
20 taken against your client because of the fact that they
21 were not sales efficient?

22 MR. KAPLAN: Well, we maintain that the
23 punitive actions were taken all along, but once World Car
24 resorted to legal action, the allocation issue is somewhat
25 eased. Now, it just so happens that the tsunami backlog

1 eased off, the Japanese manufacturers began to be able to
2 continue delivery, so allocation was not as critical an
3 issue. But still, assistance for facility renovation and
4 for building a new facility has never been given to World
5 Car while it was given to the McCombs dealership, so in
6 that way there has continued to be discrimination.

7 I'm answering your question. Some of this is
8 outside the record and I don't want to argue a point
9 that's not in the record the ALJ had, but during that time
10 there was discrimination, and in fact, sales efficiency
11 was used as this threat. And of course, if they walked in
12 and put a bull's-eye on your chest at the very beginning
13 and said we want you to agree we can help you sell your
14 dealerships, they never withdrew that request, they never
15 said we're satisfied with you. That's something that
16 presumably the regional manager, who is the incumbent,
17 still wants to do. Nobody else has ever gotten a letter
18 like that, apparently, at the outset of a relationship
19 with a new regional manager, certainly Mr. Hetrick hadn't
20 done it.

21 MR. PALACIOS: You're inferring then, I guess,
22 that this discrimination that you allege took place had to
23 do with the failure of your client to be sales efficient?
24 You're making an issue of the breach of franchise
25 agreement, and I'm just trying to understand how that

1 actually impacted your client.

2 MR. KAPLAN: Well, what I'm saying is that that
3 is a threat that's out there. They could try to terminate
4 him tomorrow, and we can't speculate on what's going to
5 happen if the board upholds the ALJ's recommendations.
6 But it is clear to us that that was used as a metric to
7 declare a breach of the dealership agreement way back in
8 July of 2013, I think is when that letter was issued.
9 Yes, it's plaintiff's exhibit 67, the first page of it is
10 on page 7. So they haven't given them the opportunity is
11 what I would say.

12 MR. INGRAM: When you indicate that it was a
13 metric, are you indicating that it's a metric that they
14 changed their discretionary allocation? Because I don't
15 see where it's a metric where it affected their actual
16 allocation that they're in breach.

17 MR. KAPLAN: Well, there are two kinds of
18 allocations: what the computer does and what the regional
19 manager does. And the regional manager generally has
20 about 15 percent discretion. That matters a lot because,
21 among other things, it has a multiplier effect in your
22 computer allocation ultimately. If you're getting more
23 cars manually and you sell them and you're cutting down
24 the supply -- once you sell them, you're cutting down the
25 balanced days supplies on the lot, or some companies call

1 it turn and earn, you can't turn them if you don't have
2 them so you can't earn more allocation in the computer,
3 and it takes a long time to overcome that.

4 MR. INGRAM: So just to be clear, I'm trying to
5 make sure I understand your point, and the point is that
6 because the idea is that you were in breach or your client
7 was in breach, therefore, the discretionary amounts were
8 lower than ordinarily would be.

9 MR. KAPLAN: Actually, it's the other way
10 around. The discretionary amounts were always lower, if
11 we go back to slide 9, and we were discriminated against
12 going back to the beginning of Mr. Hetrick's tenure as
13 regional manager, and because of that -- Hyundai sets an
14 amount of sales you're supposed to make in your region.
15 They say we know there's all these manufacturers here,
16 there's this kind of competition, you need to sell X
17 number of cars to be 100 percent sales efficient.

18 It's not a measurement of how many cars you
19 sell out of the ones you have on your lot because he sold
20 all those, it's a measure of how many cars you sell out of
21 what we think you ought to sell. And one way they can
22 test that is give us the cars, don't give me 200 cars and
23 say you didn't sell 877 cars and we think you should have.

24 They say, well, you didn't earn them in the computer.
25 You say, well, if you're giving other people the

1 discretionary allocation, among other things, you're
2 starving me.

3 And the testimony is also undisputed that the
4 closest dealers to you are the ones who can hurt you the
5 most in terms of competition. If all those extra cars had
6 gone out to El Paso and the Red McCombs dealerships were
7 getting hurt as badly or were getting as little
8 discretionary allocation as my clients, we'd have a
9 different situation. And the record is totally undisputed
10 on that, all the way up to Mr. Zuchowski, who is the
11 president of Hyundai Motor America and he testified to
12 that, that the nearby dealers, it will hurt you more.

13 Among other things, if people go on the
14 internet and they want to look -- you know, people browse
15 on the internet now, they don't just go to dealers,
16 they'll see who's got the biggest stock on the lot and if
17 one guy has 98 cars on the lot and the other has 700,
18 they'll go where there are more choices. That is
19 undisputed in the record by everybody who testified about
20 it.

21 MR. INGRAM: Mr. Kaplan, let me ask you a
22 followup question. So how do you respond to the point
23 that during the recession that World Car refused the
24 allocation to reduce their inventory while McCombs did
25 not?

1 MR. KAPLAN: Two points. Number one, the
2 evidence is undisputed that McCombs turned down more cars
3 during every period than did my client, but even more,
4 McCombs reduced its inventory and its exposure by walking
5 away from a dealership. Our client wanted another
6 dealership; McCombs surrendered a dealership. You want to
7 get your inventory down? Just make it easy on yourself.
8 I believe the other McCombs dealership was further to the
9 west; they walked away from that dealership. Now, I can
10 only speculate as to the motives for Mr. Hetrick
11 discriminating in favor of McCombs over World Car. We
12 think they were trying to lure McCombs back, make sure
13 that they kept their loyalty, they didn't walk away from
14 any more dealerships. That's not in the record, but the
15 truth is, they reduced their inventory in a real easy way,
16 they just gave up a dealership.

17 Now, which do you think hurts Hyundai more:
18 losing an entire dealership location, or somebody refusing
19 some inventory of cars at a time when Toyota -- this is
20 also totally in the record -- Toyota built a new store in
21 World Car's primary region or area of responsibility. And
22 World Card begged for assistance to deal with that and got
23 none. So the truth is you do have two equivalent
24 franchises: one reduced inventory by walking away and
25 showed less loyalty to Hyundai by walking away from a

1 dealership; one, to survive during 2008 and '09 reduced
2 its inventory some.

3 But that doesn't explain -- that might explain
4 some computer allocation issues, algorithms in the early
5 time, but it doesn't explain all of the manual
6 discrimination, the deliberate and unreasonable
7 discrimination just in the manual allocations. They
8 punished this dealer. They walked in in 2010 and said we
9 want you to agree that we can help sell your dealerships,
10 and they carried out a program designed to make that
11 happen -- hasn't happened yet.

12 But we really fear what will happen if the
13 board upholds this decision, which is wrong on the law,
14 even if you accept the facts that are not mixed questions
15 of law and fact, the facts are indisputable. And that's
16 why we've sent the board a proposed order which we filed,
17 I think, in May of this year, which we believe is correct
18 and reaches the correct result. This is a dealer whose
19 survival, like any dealer, depends on the beneficence of a
20 regional manager -- or at least its profitably -- and they
21 have hung on despite the three-year period.

22 MR. PALACIOS: Another question, Mr. Kaplan.
23 You stated that the disparity in the allocation ceased in
24 2013 when your client asserted his rights. So that's when
25 he filed a complaint?

1 MR. KAPLAN: Right. Well, actually, there's
2 some litigation and this formal complaint, but that
3 happened, the first action that was taken was in September
4 2013. And it really happened chronologically, Mr.
5 Hetrick's letter declaring a material breach is dated, I
6 think, July 10 -- that's on slide 7 -- July 10, if I'm
7 reading it right, of 2013. That's plaintiff's exhibit 67.

8 And then proving that those reasons that they claim as
9 reasons for the discrimination were not really reasons,
10 they're just alibis after the fact, they found a way to
11 make allocation available.

12 Now, the record beyond then is really outside
13 the record, what's happened since, but as soon as he
14 showed that he had some backbone and took action, the tune
15 changed. All the excuses they made still existed, they
16 didn't go away, but apparently those excuses didn't cause
17 them to discriminate once he asserted his rights.

18 MS. HARDY: So did the facility get renovated?

19 MR. KAPLAN: Which one? The north store had
20 been renovated, the south store, I believe, a new store is
21 being built across the street, it will be separate from
22 the Kia facility.

23 But I want to emphasize out of that supposedly
24 dilapidated store -- and I understand that manufacturers
25 do not care to have duals, although they're prohibited

1 from terminating people because of that, but to me one of
2 the best facts is that Mr. Hetrick himself recognized that
3 Kia is outselling Hyundai in the same facility six to one.

4 Now, unless Mr. Zabihian had it in for Hyundai and wanted
5 to lose money on one side, he did not walk across the
6 showroom and become a crappy Hyundai dealer while he was a
7 fabulous Kia dealer. That's not the case.

8 He's trying to sell cars, he sells what he has,
9 and as his letter showed, the letter he sent after two
10 years of this when he sent that complaint letter in
11 February of 2012, he said -- I'm on slide 11 -- compared
12 to the paltry 98 Hyundais I have in stock at two stores,
13 he listed the other vehicles, I have 700 Kias in stock.
14 So why would it be surprising that Kia is outselling
15 Hyundai six to one? You sell what you get, you can't sell
16 what they won't give you, and that's the essence of this.

17 He had a wonderful relationship with the prior
18 regional manager. Things changed, and for that three-year
19 period, and we implore the board not to let this conduct
20 just kind of go by because maybe it's not so bad now. We
21 don't know what's going to happen in the future, but this
22 will be used as precedent with respect to World Car and as
23 precedent with respect to how dealers are treated. If the
24 legislature wants to change the law, that's fine but the
25 ALJ got the law wrong on all three fronts.

1 Any other questions?

2 MR. WALKER: Mr. Kaplan, one of the things I
3 didn't understand is this computer allocation of cars.
4 Can you explain that a little bit to me?

5 MR. KAPLAN: And I don't want to pretend to be
6 the expert on this, I'm a social studies major, but in my
7 years -- and I know that there are at least two dealers on
8 the board and somebody from a manufacturer -- the phrase
9 I've always have heard is turn and earn from the days in
10 which is represented Chrysler and Ford, turn and earn, you
11 sell cars and you earn more allocation in the future.
12 There's a slightly different terminology at Hyundai, I
13 think it's called balanced days supply. In other words,
14 the speed with which you sell cars helps dictate which
15 cars are going to be on the ship and coming to you, but
16 it's essentially turn and earn, sell them, you get more.

17 And one way you sell them, particularly in the
18 time of tight supply on the hot cars, you get the manual
19 allocation and you sell that. When there's that big of a
20 disparity with your nearest competitor, frankly, to use
21 the vernacular, you're hosed. You can't get out of that
22 problem because normally regional managers use manual
23 discretionary allocations to help dealers that they think
24 need a boost. This is, again, totally in the record, but
25 Mr. Hetrick elected not to do that here, in contrast to

1 the normal practice.

2 And so if you'd gotten the manual
3 allocations -- all we know is his track record, he sold
4 what he go. Now, there's an argument about how fast he
5 reported sales, it's not really an alibi but it's sort of
6 an alibi, and that's what's called RDRs, and I think it's
7 fair to answer your question in part on this. Mr. Hetrick
8 wanted all the dealers to report their sales more quickly
9 so the region would have more cars allocated to it. But
10 Mr. Zabihian and World Car don't report as sales cars for
11 which the financing is not yet in place. Maybe other
12 dealers do, but he's the rules follower, he would not do
13 that, because if the financing falls through, you don't
14 have a sale.

15 But in their system -- and this, too, is
16 undisputed in the record -- in their system once you
17 report a sale you've got it in that 30-day period. If you
18 back it out somewhat later, there's no real enforcement
19 mechanism on that, and you've gotten the extra allocation
20 or you've gotten it earlier to sell more, on a sale that
21 didn't happen. And Mr. Zabihian knew, as all dealers
22 know, sometimes the financing doesn't go through, so he'd
23 wait a few days and make sure it went through. He never
24 reported sales for which the financing was not in place,
25 which he believes, and I think the record shows, is

1 Hyundai's actual policy and procedure, but the evidence is
2 also that they never did anything to enforce that. There
3 was some testimony we audited that and we didn't think it
4 happened very much.

5 MR. WALKER: So I'm kind of foggy on this whole
6 deal on this because I'm not a car dealer, I guess. I
7 would assume, as a business person, that if I ran a car
8 dealership, whether it's Chevrolet or Ford or Hyundai,
9 whatever it might be, that I would take and call the
10 manufacturer, put in an order, and it's my understanding
11 from dealing with truck dealers is that when they order
12 trucks they have so many days before they get there, the
13 dealer has to floor plan that and finance that inventory.

14 I don't know how it works at Hyundai; it sounds like it's
15 different.

16 MR. KAPLAN: Well, you are buying a car.

17 MR. WALKER: The dealer is buying the car.

18 MR. KAPLAN: Right, and then selling it.

19 MR. WALKER: But you were talking about
20 allotments now. An allotment says you can't buy the car,
21 this is how much you get.

22 MR. KAPLAN: That's right. You're buying the
23 cars they let you buy. Hyundai, in this time frame -- if
24 we go back to slide 12 -- I'm sorry, slide 9 -- that's
25 when they couldn't make them fast enough, and you had

1 dealers all over, not just World Car, but dealers all over
2 wanted more Hyundais because the Japanese cars, which
3 traditionally have sold very well in the U.S., were not
4 available because of the tsunami, and these were hot cars.

5 And one of the things that was happening is they'd say we
6 only have so many cars to sell, and as a result, they
7 would decide who was going to get these cars, and they
8 made the decision to give them somewhere else.

9 One other thing that's in the record --

10 MR. WALKER: So your argument today is that you
11 couldn't get enough cars because they were being impartial
12 to your dealership and giving them to somebody else.

13 MR. KAPLAN: Yes. They were being unreasonably
14 discriminatory and showing partiality to another dealer.

15 MR. WALKER: And how does the franchise
16 agreement address that?

17 MR. KAPLAN: Well, the truth is the dealer
18 agreement is a more standard agreement which is subject to
19 the laws of 49 states. I'm not sure, I think one state
20 may not have regulation. But the dealer agreement
21 basically says we can do what we want, we get to exercise
22 our discretion in selling you cars. That's subject,
23 though, to our laws, our legislative scheme that says you
24 cannot unreasonably discriminate between or among
25 franchisees in the sale of a motor vehicle.

1 MR. WALKER: So Ms. Lingo, you tell me on these
2 franchise laws of the State of Texas, because that's where
3 we're really getting to, I think, what is the law with
4 respect to allocating of inventories? Is there any
5 address in the law that says in a franchise agreement how
6 much they have to get or can't get.

7 MS. LINGO: Michelle Lingo, Motor Vehicle
8 Division.

9 So the specifics of that is not addressed in
10 the law, thus, the need for the hearing before the ALJ at
11 SOAH, who heard the testimony, examined the veracity, and
12 made a decision.

13 MR. WALKER: So that's the meat of this case is
14 whether or not -- there is a law, whether the law has been
15 broken or violated because they didn't get as many cars as
16 they should have gotten and there was partiality to a
17 different dealer. Is there or is there not a violation of
18 the law there?

19 MS. LINGO: The ALJ, taking the facts from both
20 parties, applying the law that's in place, made a
21 recommendation that there had not been a violation.

22 MR. WALKER: So there's not a violation because
23 there's not a rule, maybe, and your address to that.
24 You're saying the Occupations Code addresses that
25 differently.

1 MR. KAPLAN: What I would say is there's a
2 statute that hasn't been construed that sets the rule. It
3 is undisputed, and the ALJ agrees, everybody agrees, that
4 they did discriminate, no question about that, the
5 question is whether the discrimination was reasonable.
6 That's a question of law. And what we have said is that
7 the board, among other things, should simply set a
8 standard that you cannot set sales standards that are in
9 excess of what a dealer is given to sell. If they had
10 given him the cars and he didn't sell them, maybe they'd
11 be in a different position, but that's not what happened.

12 The dealer agreement cannot override Texas law;
13 this is the Texas law, it hasn't been construed
14 officially, but our point is we all know there was
15 discrimination. Every alibi offered, even if you accepted
16 that those are all true facts, show that there was no
17 meaningful difference between two sets of dealers and one
18 dealer was discriminated against. So those cannot be
19 reasonable bases for the discrimination.

20 MR. WALKER: Okay. So Michelle, let's go back
21 to you. If the law under the Occupations Code says that
22 you cannot discriminate unreasonably amongst
23 franchisees -- that is the law I assume to be correct.

24 MS. LINGO: Yes, sir, that is correct.

25 MR. WALKER: However, the administrative law

1 judge found that there was no discrimination but Red
2 McCombs got three times as many cars as the others. Tell
3 me why and how we interpret that there is or is not a
4 discrimination between the dealers.

5 MS. LINGO: In this administrative process that
6 we have, the law is written as is. There are, as you
7 know, instances where we might have rules in place to
8 implement law, but in this case, this is the law. The
9 complainant is World Car, and Mr. Kaplan made arguments on
10 behalf of World Car as to why he believes that there was
11 discrimination, or unreasonable discrimination between or
12 among the franchisees.

13 MR. WALKER: I get all that so far.

14 MS. LINGO: He made that argument.

15 MR. WALKER: So tell me how we found that there
16 was not a discrimination.

17 MS. LINGO: Because the ALJ, who is the trier
18 of fact, looked at the information, the exhibits, the
19 legal arguments and the veracity of the witnesses, and
20 made that recommendation. That's their responsibility.

21 MR. WALKER: But we're here today to find out
22 whether or not the law has been followed, whether or not
23 to overturn this case, send it back to SOAH to reevaluate
24 it, or rule in their favor.

25 David, I don't care, pipe in any time you want

1 to.

2 MR. DUNCAN: I just wanted to clarify,
3 especially since we have some newer members here, what Ms.
4 Lingo is struggling with is the staff does not participate
5 in these hearings, we don't go and watch the witnesses
6 testify, we don't cross-examine, we don't offer evidence,
7 and so we hesitate to say absolutely that the judge is
8 right or that the judge is wrong. The judge heard what
9 the judge heard and made a decision. We limit ourselves,
10 we read 2001.058 and advise the board if you're going to
11 change this, there are very limited reasons you can change
12 this. That's the directive of the legislature.

13 MR. WALKER: A misapplication of the law is a
14 way to overrule this.

15 MR. DUNCAN: Correct, however --

16 MR. WALKER: Here's an application of the law,
17 and my question is did we interpret it wrong. I'm asking
18 that question.

19 MR. DUNCAN: We haven't interpreted it. The
20 staff doesn't do that, and the board is charged with doing
21 that, however, keep in mind this is a mixed question of
22 law and fact. The judge looked at the facts and said it
23 doesn't meet that standard. So that's what you're looking
24 at is can you revisit, can you say that the judge was
25 absolutely wrong in the way the judge interpreted the

1 facts and applied the law to those facts.

2 MR. KAPLAN: I can respond to that, Mr. Walker.

3 MR. WALKER: Go ahead, Mr. Kaplan, I'll listen.

4 MR. KAPLAN: Well, we're not arguing
5 credibility of any witnesses. As I said, I'm only going
6 to talk about undisputed facts. We disagree with a lot of
7 the findings of the ALJ but we've put all that aside for
8 this appeal and stuck strictly to the legal question, and
9 you have put your finger on it. There's no question they
10 were treated differently, the question is were they
11 discriminated unreasonably, as the law prohibits. And we
12 have pointed out that every alibi which is offered is
13 vapor. It's not a credibility question, it's just vapor.
14 The record establishes what did and didn't happen.

15 The ALJ may not have made any findings on that
16 or may have ignored it in making these mistakes of law,
17 but everything I've told you I think is an undisputed
18 fact. It's not just that Mr. Zabihian said so, it's
19 things not contested. The numbers are not contested, the
20 fact that there were these shortages is not contested, the
21 letter that Hetrick sent that said I want you to let me
22 help you sell your dealerships not contested, the fact
23 that he didn't do the service loaners, he doesn't do that
24 now, he didn't do it then, he doesn't do it now. All
25 these things are not contested. The amount of assistance

1 he got, extra allocation for redoing the north store, that
2 is to say none, nothing is contested.

3 MR. WALKER: Let me stop you there for a
4 second. Let's go back to Mr. Hetrick trying to help you
5 sell your store. And I don't want to try this case today,
6 but what does selling the store have to do with it?

7 MR. KAPLAN: That means when you have a
8 dealership you've got good will and you have assets, and
9 what he's really saying is I want to get rid of you as a
10 dealer, so let me -- he may have had a buyer lined up.
11 Maybe, and we don't know, maybe the McCombs franchise
12 said, you know, we're now willing to get back in the
13 market if Hyundai treats us right, we don't know. But he
14 didn't want World Car as a dealer.

15 Now, there are other things --

16 MR. WALKER: He being Hetrick.

17 MR. KAPLAN: Mr. Hetrick, the regional manager.

18 MR. WALKER: Hetrick works for Hyundai.

19 MR. KAPLAN: Yes. He is -- let's just say that
20 he essentially is the most important person to a dealer in
21 a region. Your district sales people or zone sales
22 people, depending on the manufacturer, they're important,
23 they have a lot more contact, but the regional manager is
24 critical. The regional manager's recommendation for
25 assistance is critical. The regional manager handles all

1 that discretionary allocation, and maybe the CEO of
2 Hyundai wouldn't have done it this way, but this is the
3 person that makes the Hyundai decisions that we suffered
4 from.

5 And all we're asking here is the declaration
6 that these actions violated the statute. And the real
7 question is whether or not people are allowed to set a
8 sales standard and judge you by that sales standard when
9 you don't get the cars that that sales standard demands
10 that you sell, and whether that discrimination was
11 reasonable or unreasonable.

12 As Mr. Duncan says, those are mixed questions
13 of law and fact. There really aren't any disputed facts
14 that we've brought to you, we're only appealing the
15 decisions of the ALJ based on the undisputed facts which
16 we think are legally wrong. And frankly, you're setting a
17 precedent here. No matter what people think, this is the
18 first time the statutes -- I think that's slide 3 -- have
19 come up really for review. We haven't talked as much
20 about good faith and fair dealing, but however you define
21 that, that kind of unreasonable discrimination is not good
22 faith and fair dealing. And we know what their motive
23 was, but this is just what's happened.

24 I really appreciate all this time. Are there
25 any other questions?

1 MR. PALACIOS: I have one last question, Mr.
2 Kaplan. From your submission and testimony, you said the
3 disparity in allocations ceased in 2013, so I assume from
4 that point forward now the disparity is up to date, is it
5 evened out?

6 MR. KAPLAN: I'm very hesitant to talk outside
7 the record, but manual allocation and discretionary
8 allocation ceased to become very important after the
9 tsunami because you can more or less get cars that you
10 want.

11 MR. PALACIOS: Okay.

12 MR. KAPLAN: But please don't validate this
13 kind of practice because then we're setting a precedent,
14 not just for this dealer but all dealers and manufacturers
15 in the state and we'd be really upending the legislature's
16 mandate.

17 MR. PALACIOS: My question: What remedy is it
18 that you are seeking?

19 MR. KAPLAN: Here it's to declare these things
20 to have violated the statutes. Now, what's going to
21 happen in the interim, World Car still wants to be a
22 Hyundai dealer, they haven't walked away, they have
23 acceded to the request that they try to sell their
24 dealerships. So what remedies they may seek in state
25 court, whether the parties talk later is something

1 completely outside the record and I don't want to
2 speculate about this. As a trial lawyer and somebody who
3 has been in many adverse proceedings, rulings from boards
4 or judges or courts often have the effect of concentrating
5 people's minds and forcing them to a resolution.

6 MR. INGRAM: I have a couple of questions. I'm
7 sorry to keep going on this.

8 MR. KAPLAN: Look, we appreciate the
9 opportunity to hear this with the board.

10 MR. INGRAM: So I heard your explanation on the
11 Equus line. The McCombs store that are your competitors,
12 are they Hyundai only stores?

13 MR. KAPLAN: No. They are owned by the McCombs
14 organization.

15 MR. INGRAM: Right. But are they single point
16 stores?

17 MR. KAPLAN: I believe they're now both single
18 point stores. Yes.

19 MR. INGRAM: Now, being that they weren't at
20 some point.

21 MR. KAPLAN: I think they were throughout that
22 time frame, 2010 to 2013. One of them became exclusive
23 during that time frame, it wasn't earlier. And now --

24 MR. INGRAM: So wait a minute, let me stop
25 there. So one of them during this time frame became an

1 exclusive Hyundai store. Would that not perhaps justify
2 the difference in allocation?

3 MR. KAPLAN: No. Why would it? You can't
4 require somebody to be exclusive, and there's no
5 justification -- if people are selling cars, they're
6 selling cars, and there's no justification for that
7 particularly when it's in the record, once again, that
8 World Car requested an opportunity to move its south
9 store, the one that was dual, to another location on a
10 huge amount of acreage right on Loop 410 and was declined
11 that opportunity. Hyundai decided, exercised its
12 discretion to say no, you can't do that. And in fact,
13 now -- and by the way, Red McCombs got assistance when it
14 did that extra allocation, whereas, with the north store
15 which was always exclusive, when it was upgraded, they got
16 no assistance from Hyundai. So that's just more
17 discriminatory treatment that we haven't really talked
18 about. If they want to give help to somebody who agrees
19 to be exclusive --

20 MR. INGRAM: Well, I mean, discriminatory is
21 okay. Right?

22 MR. KAPLAN: If it's not unreasonable.

23 MR. INGRAM: So it just depends on your
24 terminology of unreasonable.

25 MR. KAPLAN: Well, that's up to the board. We

1 have an exclusive store on the north side. When it was
2 renovated, World Car got no extra allocation or
3 assistance.

4 MR. INGRAM: And that remodeling was when?

5 MR. KAPLAN: That remodeling was in 2012 or
6 '13, I believe.

7 MR. INGRAM: So relatively recently towards the
8 end of this.

9 MR. KAPLAN: Right, but it was always in the
10 works. And with the south store -- and he record again is
11 full of this -- there was an effort made to make it
12 exclusive and move to a new property and Hyundai --

13 MR. INGRAM: When was that, what's the date on
14 that?

15 MR. KAPLAN: 2010 -- Hyundai declined -- well,
16 that was through Mr. Hetrick and the organization declined
17 that. Now World Car has found a different site -- I
18 believe it's a different site -- and is building an
19 exclusive store basically across the street from the Kia
20 store.

21 MR. INGRAM: And then the last question I have,
22 we didn't talk much about the service loaners, and so
23 explain to me the service loaners concept and why World
24 Car did not choose to do that. Tell me about the basis of
25 that being discriminatory.

1 MR. KAPLAN: What I'm saying is they used that
2 as one of their fig leaves after the fact. If you look at
3 the slide of the differential treatment which is on page
4 12 -- I'm sorry -- slide 9, he still doesn't do the
5 service loaner program because he personally doesn't
6 believe it's a good thing for consumers. You put in a car
7 in service loaner, and it's a little deceptive on sales.
8 There are manufacturers that have gotten in trouble for
9 reporting things as sales that maybe aren't sales -- I
10 think there's an investigation of Chrysler right now. If
11 you put a car in service loaner status, it counts as a
12 sale and you theoretically are goosing your sales numbers
13 to that the region can argue for more cars.

14 MR. INGRAM: But obviously Hyundai wanted you
15 to increase the --

16 MR. KAPLAN: They wanted him to be in that
17 program. He believes, and I think objective people
18 outside this room might agree, it's a little bit unfair
19 and there's no effort by Hyundai to make dealers tell a
20 customer: Now, you bought this car, we have a -- whatever
21 it is, say it's a three-year warranty, say it's a seven-
22 year warranty -- you've got a seven-year warranty but you
23 should know the warranty started running on this X months
24 ago.

25 MR. INGRAM: Let me stop you there because

1 that's almost like a separate issue, so the issue here
2 really is Hyundai wants this and World Car made a decision
3 that they didn't want to do it.

4 MR. KAPLAN: They did want it, but the reason
5 we know that's not a real excuse is before this
6 discrimination began he wasn't in the service loaner
7 program, afterwards he wasn't in the service loaner
8 program, he's still not I the service loaner program. So
9 you can come up with any alibi you want, he was mean to
10 me, he was rude at the meeting, I don't think Mr.
11 Zabihian's personality has changed much, neither has his
12 business practices, he's a rules follower. He honestly
13 believes, and the testimony is clear about this, that's
14 not something you should do to customers. That's just how
15 he is.

16 Now, discriminating against him on that basis
17 not only is not reasonable but that's not a true excuse
18 because he kept not being in the service loaner program
19 and the discrimination didn't go on. If it were really an
20 excuse or a reason, then that discrimination might have
21 continued. That's just a fig leaf that they came up with
22 after the fact. The record also shows that Mr. Hetrick
23 agreed at a regional dealers meeting that this service
24 loaner issue has a way of goosing sales, was a problem.

25 But you could argue these are credibility

1 issues, and we haven't really talked about them much. All
2 we know is what the facts show: he never did the service
3 loaner program and they didn't discriminate against him
4 before and not after, but during this time frame when it
5 really mattered, they did. So every alibi is a fig leaf.

6 MR. INGRAM: Thank you very much.

7 MR. WALKER: Mr. Kaplan, I have two questions.

8 MR. KAPLAN: Yes, sir.

9 MR. WALKER: Number one, for the record, you
10 have referred to your right there, I guess, to somebody at
11 the table here that is giving you some information. Would
12 you please tell me for the record who this is.

13 MR. KAPLAN: He's one of my partners, Jarod
14 Stewart, S-T-E-W-A-R-T. He was at the hearing, did most
15 of the briefing work, and I would have to say I rely
16 heavily on him.

17 MR. WALKER: And that's fine. I just wanted
18 the record to reflect.

19 MR. KAPLAN: Thank you.

20 MR. WALKER: And is the dealer here?

21 MR. KAPLAN: Mr. Nader Zabihian is present in
22 the room.

23 MR. WALKER: So the dealer is present.

24 MR. KAPLAN: He's been the person who's
25 probably been nodding vigorously.

1 MR. WALKER: I haven't seen him.

2 MR. KAPLAN: I'll tell him not to shake his
3 head vigorously when Mr. Young has his turn.

4 MR. WALKER: Thank you. I just wanted to know
5 that he was present because he had an interest.

6 And the other thing is that what kind of relief
7 are you looking for in your original petition?

8 MR. KAPLAN: The relief is in the order we've
9 submitted, it's just a declaration by the board. The
10 board doesn't award money damages; it could enjoin
11 something but we haven't sought injunctive relief. We
12 might come back some day if the practice reasserts itself.
13 But what the remedy is for this here is just declarations
14 that are in the order we've submitted to the board. We
15 haven't argued to the ALJ that this has some monetary
16 value. It may have a monetary value somewhere else, but
17 as I say, I can't really speculate on what might happen
18 after the board issues its ruling and this process is
19 completed.

20 MR. WALKER: I guess my question goes back,
21 again what is your relief, but what is -- I know why we
22 are here today because we want to either find that there
23 was an error in the finding or a misinterpretation,
24 whatever, but what was the original intent of how we got
25 here today. Is it just strictly this allotment?

1 MR. KAPLAN: I hate to start speculating about
2 personalities and all, but I think the intent is this is a
3 dealer who's been a loyal dealer, he's a successful
4 dealer, he's a successful dealer for Kia right next door.

5 Suddenly his life changed with somebody saying we want to
6 run you off, and he doesn't want to be run off. I'm
7 sorry, he's stubborn man, he's a rules follower, he will
8 not be run off by this kind of behavior, and it violates
9 the law. I don't know if it's an isolated incident or not
10 among other Hyundai dealers, I'm only representing him and
11 what he knows happened to him and what we have shown
12 indisputably from the record happened, those are the
13 events. Getting into people's hearts and minds is a
14 little harder. I can talk about his because he's talked
15 to me.

16 But he wants to be a dealer, continue as a
17 dealer, but he wants these practices that were engaged
18 declared to have violated these statutes, and that's what
19 in the order we presented. It's very important to him and
20 not just as a matter of principle, I think there's a
21 legitimate concern that these rulings could be used by
22 Hyundai at some later date. We need to put an end to
23 this, and that's what the board is here for.

24 MR. WALKER: Thank you.

25 MR. PALACIOS: Any other questions for Mr.

1 Kaplan before we move on?

2 (No response.)

3 MR. KAPLAN: Thank you very much.

4 MR. PALACIOS: Thank you, Mr. Kaplan.

5 Next we have, on behalf of Hyundai Motor
6 Company, Mr. Kevin Young. Would you please come forward?

7 MR. YOUNG: Thank you, Chairman Palacios and
8 Board members, and Ms. Brewster. Thank you for listening
9 to all of this today.

10 I am Kevin Young. I am representing Hyundai
11 Motor America, and I'm proud that with me her today is
12 Rosemary McDonald. She's a senior counsel with Hyundai
13 Motor America in Fountain Valley, California, she's here
14 today. Also with me is an associate from my law firm,
15 Mark Wolfe. So the three of us are here today to address
16 these matters.

17 Let me say right from the beginning, because
18 listening to your questions, I'm sure you'll have some for
19 me and I'll be happy to address them, but let me just be
20 really clear, there is no violation of the Occupations
21 Code, none. There has never been, and the ALJ accordingly
22 found that, and she made the recommendation that she made,
23 knowing these statutes and applying these statutes.

24 These arguments that you've just heard from Mr.
25 Kaplan, I have been listening to them for three years.

1 There's nothing new, it's the same retread argument. This
2 case involved Hyundai Motor America producing thousands of
3 documents, electronic information about every Hyundai
4 vehicle sold in America over a certain number of years,
5 information regarding dealer contacts with all dealers in
6 the South Central Region which covers eight states,
7 thousands and thousands of documents. Hyundai put up
8 personnel for deposition after deposition after
9 deposition, the same things were trotted out over and over
10 and over, it's nothing new.

11 These lawyers have a perspective on how they
12 think things went down. They attempted to present
13 evidence and they were given every opportunity to present
14 evidence in support of those theories. The ALJ, who was
15 very thorough -- and I don't think anybody would disagree
16 with that -- she was a hardworking extremely thorough
17 judge, she listened to everything, she reviewed all the
18 documents, she listened to all the depositions, and then
19 she made her reasoned decision.

20 Her decision can be reviewed by this board and
21 can be modified or vacated under very limited
22 circumstances, and I want to go over those in detail just
23 so everyone is clear, and I know you know but just to be
24 clear about it. But to start, the legislature has set up
25 a pretty thorough system to handle complaints like this.

1 The complaint gets filed with the DMV, the DMV then refers
2 it over to the State Office of Administrative Hearings,
3 and then the State Office assigns an ALJ or more than one
4 ALJ, as it was in this case, to resolve discovery
5 disputes, to make preliminary rulings on what you can get
6 into and what you cannot get into, and that process went
7 on for two years, and just as the statute prescribes that
8 it should happen.

9 And then the case was presented to the ALJ over
10 a week's time, witnesses gave their testimony, and then
11 after several months, after considering further briefing
12 by the parties, after we presented all of our evidence,
13 after that week was done, then the parties did briefs and
14 then the parties responded to each other's briefs. And
15 the ALJ had all of this at her disposal. So when she
16 comes to this board with a recommended decision, it is a
17 reasoned decision based on a lot, it's not a whimsical
18 thing.

19 And so even though Mr. Kaplan -- and he's a
20 great lawyer and I've come to really respect him over this
21 process, I kind of like him, actually -- he's pretty
22 crafty with his words, and although he says this is a
23 misapplication of law, what he's really doing is saying I
24 want you to see the facts differently than what Judge
25 Harvel saw. Because all the facts that he says were

1 undisputed, it's not true. There was a dispute about most
2 of them. Most of the things he just told you were
3 undisputed, most of those things were disputed, and it's
4 all in the ALJ's briefs. And I know you've had and I know
5 most of you have probably looked at it, but it's all
6 there.

7 So what I would just say briefly is that if you
8 pull up plaintiff's exhibit 15 and go to the second page,
9 if you would, I know it's difficult to read, I didn't make
10 copies, but this is a document that was created June 24,
11 2010, you can see it right there near the top, June 24,
12 2010. That's right after Mr. Hetrick took over his job in
13 this region as the Hyundai regional general manager. This
14 is his first visit to World Car, this is his first meeting
15 with Mr. Zabihian.

16 And what you can see, again, this comes from
17 the record, this is plaintiff's or World Car's exhibit
18 number 15. One of the very first things that Mr. Zabihian
19 tells Mr. Hetrick: Hi, nice to meet you, hey, by the way,
20 if you think you're going to put a Hyundai dealership in
21 here, I'll sue you. This was like one of the very first
22 things. So when Mr. Kaplan tells you he's a hardworking
23 guy, really wants to cooperate, really wants to be a
24 Hyundai guy, well, that's how the relationship started:
25 If you try to do this, I'll sue you. And Mr. Hetrick

1 explained: I'm not looking to do that at all; in fact,
2 we're now getting into pretty high demand for Hyundai
3 vehicles, we're not going to be opening dealerships here
4 or elsewhere.

5 If you read on down, you can see that Mr.
6 Zabihiian said, I want more money in co-op. And that is
7 addressed in here. And then in this same meeting, Mr.
8 Zabihiian said, I want the Equus, I want to sell Equus
9 cars, I want that dealership. And Mr. Hetrick explained:
10 Well, okay, but that requires an investment in your
11 facility and that requires that you purchase our
12 architectural package and design package, and that's going
13 to require some up-front investment from you if you want
14 to do that. And Mr. Zabihiian tells him: You need to
15 change your requirements for that.

16 That's how this relationship started, and so I
17 just want to be clear that we need to put it in context,
18 and the ALJ had all of this in context, she heard all of
19 this.

20 What this is really a story about, it even
21 starts before 2010, it starts at the end of 2008 and in
22 2009, this is the evidence that was presented at the
23 hearing that the ALJ heard. In 2008, the United States
24 was undergoing a recession, and for legitimate business
25 reasons, Mr. Zabihiian said, You know, I don't think I want

1 as many of your Hyundai cars, I think I'll take less of
2 your Hyundai cars. That's his right to do that, he's not
3 penalized for that. But when you take less cars, then
4 it's going to lead to lower sales.

5 And then when 2010 rolls around and the Toyota
6 ignition problem begins and Hyundais are all of a sudden
7 more popular, in the fall of 2010 Mr. Zabihiian said, I
8 want back in now. And Hyundai explains to him: Sell what
9 you've got, the formula is a replenishment formula, if you
10 sell cars then you'll be replenished and they'll continue
11 to come, but I can't just give you a bunch of cars, I've
12 got dealers everywhere, not just in San Antonio but I've
13 got dealers everywhere and they're all calling me, I want
14 cars, I want cars, I want cars. And so I'm sorry, but you
15 asked to pull back, and so I'll give you some cars but I
16 have other dealers, including Red McCombs, who in 2010
17 said I'll take one of my stores and make it an exclusive
18 Hyundai store, and in 2010 said I'm going to commit to
19 remodel one of my stores, and in 2011 said I'm going to
20 purchase this Equus package and I want to sell the Equus
21 cars. All of those things happened. And so yes, Red
22 McCombs was selling more cars, and yes, Red McCombs got
23 more discretionary allocations.

24 So that's the context. Yes, there was a
25 difference in treatment and if you want to call that

1 discrimination, the statute says it only has to be
2 unreasonable discrimination, unreasonable discrimination
3 is prohibited. You know, someone might say that you've
4 got discriminating taste. Well, that's not a bad thing,
5 that just means you are able to make choices, and in fact,
6 that's a compliment. And so the idea that someone makes
7 different decisions between one dealer and the next,
8 that's not prohibited. The idea that Hyundai wants to
9 protect the rest of its dealers who are performing and
10 doing well and say please continue, and then tell Mr.
11 Zabihian: I'll give you some vehicles but I can't do
12 everything you want because these people have been
13 performing for a long time and they want more cars too and
14 they're selling more cars, by the way. That's the
15 context.

16 When Mr. Kaplan flashes up the letter from 2013
17 that he showed you in his power point, and it's slide
18 number 7 and 8, when he flashes that up, he then
19 highlights and he tells you that Hyundai said because you
20 don't meet the sales efficiency, you're in breach of your
21 contract. Well, if you read the letter, and if you're
22 like me, you've got to take off your glasses, but you can
23 read it, that's part of it, but part of it is, hey, you're
24 just selling less vehicles. You sold this many in 2010
25 and you're selling this many in 2011 and you're selling

1 less than that now. That doesn't have anything to do with
2 a sales efficiency standard, it has to do with you're just
3 not selling any more, why is that.

4 And so it's not just a sales efficiency
5 standard, and in fact, that same argument was presented at
6 the hearing, and Judge Harvel made a specific finding of
7 fact that it was not a requirement by Hyundai Motor
8 America that you be 100 percent sales efficient, just not
9 a requirement. And I know some of you know this because
10 you're in the business, but it's a generic standard that's
11 applied to all dealers around the country, it uses common
12 data and market data and it treats everyone the same, and
13 so the number you get, you may not like it but the same
14 rules are being applied to you that are being applied to
15 people everywhere else.

16 And if you look closely in that same letter
17 that we just referred to that Mr. Kaplan gave you on
18 slides 7 and 8, the letter is telling Mr. Zabihian that
19 your store on the south side, we have 824 dealers in
20 America and your store on the south side ranks 821st.
21 Well, okay, I think that's a fair criticism. You're one
22 of the lowest of the low. And this is in 2013, by the
23 way.

24 When Mr. Kaplan flashes up his bar graph to
25 say, well, look, they got more cars in 2013, and he says

1 it's because we filed a lawsuit. Well, the evidence
2 shows, and what he even admitted, that that's when the
3 World Car North store decided to renovate its facility.
4 And once it made its commitment to do that, it received
5 some more cars. And this testimony about how World Car
6 never got money or co-op or extra allocations because it
7 did its renovation in 2014, well, you know, that's not
8 what the testimony in front of the ALJ was either. It's
9 in the record. In the record you had testimony and
10 documentation showing that while the litigation was going
11 on, Hyundai was calling Mr. Zabihiyan to meet about these
12 very issues. That's what the evidence was. But Mr.
13 Zabihiyan didn't come meet, and that's the understandable
14 too because the parties were clashing.

15 But this is not a one-handed sort of give you
16 the back of my hand treatment. This is a business and
17 Hyundai Motor America would love for World Car to be a
18 more successful dealership. That's why they have these
19 programs, like the service loaner program, which World Car
20 has been encouraged to participate in. What the evidence
21 showed at the hearing was not that the service loaner idea
22 is a bad idea, the evidence showed that World Car chooses
23 to use Nissan's program, Nissan's. Well, okay. So maybe
24 he's getting some better benefit from Nissan for doing
25 that. Well, good, that's his business decision. But

1 don't then come complain and say, well, guys that are
2 doing the Hyundai program, they shouldn't get these
3 things.

4 So I guess all this to say -- and I'm wrapping
5 up here -- all this to say that this is a really complex
6 set of facts that go into this. There is a lot of
7 information, a lot of exhibits, a lot of testimony, and
8 the ALJ heard all of it. And she's a bright judge, and
9 what she said was there is no violation, and she stated it
10 clearly for all these reasons.

11 So we're asking you to support and confirm the
12 ALJ's proposed order. There have been some slight
13 modifications that have been proposed by Mr. Avitia and
14 counsel, Ms. Lingo, and there are three and they're all
15 kind of typographical in nature. We also agree with those
16 edits that she is proposing, those are correct.

17 Yes, sir.

18 MR. WALKER: Let's go back to the floor
19 planning deal again that I asked over here, and I just
20 heard you say earlier that you said that he doesn't want
21 any more cars, he doesn't take any cars, but then he wants
22 more cars and you say, well, sell what you have and we'll
23 send you some more cars. My question to you is: Who pays
24 for those cars when he says send me some more cars? Are
25 you responsible for those car payments and floor plan, or

1 is it at his expense?

2 MR. YOUNG: Those become his responsibility
3 once he takes the cars. The way the system works,
4 generically is there's a formula allocation and it applies
5 to all Hyundai dealers in the U.S. And I think every
6 other manufacturer has something really similar. In fact,
7 the testimony in this case was that the woman who kind of
8 designed this system had come over from Toyota and she
9 basically took some Toyota tweaks and made it part of
10 Hyundai. But it's a replenishment system, so if you sell
11 certain cars, it goes in and it's kind of automatic, and
12 so then at the next time there's a shipment and there's
13 going to be an allocation of vehicles --

14 MR. WALKER: So if Mr. Zabihian, if things are
15 slow and I ran your dealership or was your franchisee, I
16 would want to cut back my inventory also because I have to
17 pay for that. If things turn around, I would want more of
18 your cars and ask for them so that I could take and
19 improve my profitability, but what I'm seeing is that --
20 and you just said, I heard you say, sell what you've got
21 and we'll sell you some more. So you kind of restricted
22 what you allowed him to get and you based that upon some
23 formulation that you have internally at Hyundai, I guess,
24 that says -- there's a conflict here, because you're
25 saying at one point in time you're using some formula of

1 sales, but then you just made a statement that you said
2 sell what you have and we'll send you some more. So why
3 is there a conflict between what you speak on one side of
4 your mouth and out on the other side?

5 MR. YOUNG: I hope that's not the case.

6 MR. WALKER: That's what I'm hearing.

7 MR. YOUNG: Okay. Thank you. Let me try to
8 explain. When I make the statement sell what you've got
9 and you'll get some more, what I'm talking about is this
10 automatic program, you sell what you have and then the
11 program is going to get you some more. That takes care of
12 about 85 percent of all allocations or more, 85-90 percent
13 of all allocations, this automatic program. So if you
14 sell what you've got, then you will be replenished
15 according to the formula, based on what's available, based
16 on the way other dealers in America are performing. So
17 it's all a formula.

18 There is this discretionary piece that is
19 separate and apart from the allocation that's formulaic,
20 and that is at the discretion of the general manager, and
21 so that's where all of these other things came in about
22 why he was awarding who which cars.

23 MR. WALKER: So during this hearing that was
24 presented, was there evidence -- and I guess I need to go
25 to our stuff here and ask if there was any evidence

1 presented that said that the formula that was used at Red
2 McCombs stores was adhered to the same way it was
3 performed over here at World Car? Was there any findings
4 of those facts? Or did they discriminate against one
5 dealer over the other? I didn't read those facts, so I
6 don't know.

7 MS. LINGO: Michelle Lingo, Motor Vehicle
8 Division staff attorney.

9 Yes, Board Member Walker, those issues were
10 considered, developed, looked at, and recorded both in the
11 findings of fact and in the PFD discussion.

12 MR. WALKER: That the formula was fair and it
13 was exactly used over here at Red McCombs the same way it
14 was used over at World Car?

15 MS. LINGO: To my recollection --

16 MR. WALKER: I want a yes or no answer, either
17 it was or it wasn't. We need specifics.

18 MS. LINGO: The finding was that the use of the
19 allocation was not discriminatory, that the allocations
20 were being used across the board the same for everyone.
21 That isn't exactly the question that you asked, but that's
22 what the answer the ALJ addressed.

23 MR. INGRAM: Member Walker, that's how I
24 remember reading it was that the allocation system itself
25 was found to be followed for all dealers equally, it was

1 the discretionary portion, the manual.

2 MR. PALACIOS: Exactly. The allocation system,
3 the 85 percent you refer to, is pretty standard across the
4 board for all dealers.

5 Do you have any other questions, Mr. Walker? I
6 want to follow up with a question Mr. Walker had, I guess,
7 regarding the allocation. And you made a statement pretty
8 much in my judgment that kind of summarizes this whole
9 case here, and that is you acknowledge that there was
10 discrimination, however, was it unreasonable. I guess I
11 have a question. You had mentioned that there's some
12 disputes with the facts that Mr. Kaplan presented earlier.
13 Do you dispute the allocation on this chart that he
14 presented that shows 1,635 discretionary units allocated
15 to McCombs and 600 to his dealership?

16 MR. YOUNG: No, I don't dispute that number.
17 That's a number of allocations that were -- vehicles that
18 were allocated and accepted. So what that doesn't take
19 into account is that people may have turned down vehicles
20 for one reason or another.

21 MR. PALACIOS: Are you inferring that World Car
22 turned cars down?

23 MR. YOUNG: They definitely turned cars down.

24 MR. PALACIOS: During the three-year period, so
25 they could have had more than 600 but they deliberately --

1 so on one hand they're asking for more but then they
2 really didn't want them. Is that what you're saying?

3 MR. YOUNG: That's absolutely the evidence and
4 that's exactly what I'm saying. But to be fair, every
5 dealer turns down some cars, even in this time period.
6 When cars were really tight in this 2010 through end of
7 2012 time, the turn-downs were really minimal, but the
8 evidence was that you could always find turn-downs from
9 just about every dealer, you know, they didn't like the
10 green model of something.

11 MR. PALACIOS: Okay. I'm just trying to
12 ascertain that they weren't allocated 1,635 vehicles and
13 turned them down. I mean, they weren't allocated the same
14 level that McCombs was and they just chose to walk away.

15 MR. YOUNG: We definitely agree with that,
16 that's true.

17 MR. PALACIOS: I guess another question, early
18 on, I'm just kind of looking at the pattern here, when the
19 new region manager came on, I think you said it was late
20 June, from the submissions it shows that he then for the
21 six months after he was on board in 2010, he allocated 134
22 discretionary units to Red McCombs and 20 units to World
23 Car, and I guess is that in dispute as well?

24 MR. YOUNG: Not disputing that.

25 MR. PALACIOS: Just looking for the basis for

1 that, again, I understand discretion is literally just
2 based on the judgment of whoever is in the field, but what
3 was the basis? I guess it seems like right off the bat
4 that this regional manager, for whatever reason, allocated
5 units disproportionately to World Car's competitor.

6 MR. YOUNG: The testimony was that some of the
7 manual allocations are reflective of the sales, so if
8 you're selling more, I'll allocate you more of my
9 discretion. The testimony also was that it was in 2010
10 that Red McCombs said I will take one of my dealerships
11 and I'll go exclusive, and so the general manager rewarded
12 them with some extra cars because they were going to go to
13 be an exclusive dealership. Those are the two primary
14 reasons that were given at trial.

15 MR. PALACIOS: Just by the statement that I
16 plan to build a facility then it's automatically okay,
17 great, you get more product because you say you're going
18 to, they didn't wait until they actually built the
19 facility?

20 MR. YOUNG: Well, they already had an existing
21 facility and it was a combined facility with General
22 Motors, GMC and Hyundai, and so what McCombs people said
23 was we're going to take GMC out of there, we're going to
24 make this a full Hyundai thing, and they began that
25 process in 2010.

1 MR. PALACIOS: Any other questions for Mr.
2 Young?

3 MR. INGRAM: Yes, I have one. Mr. Young, and
4 again, I don't want to create new facts so I only want to
5 talk about this if it's a finding of fact, but Mr. Kaplan
6 mentioned that in 2010 World got declined a move to become
7 an exclusive Hyundai store. Was that a finding of fact or
8 was that talked about in the case?

9 MR. YOUNG: That is not a finding of fact. It
10 was, I think, talked about a little bit during the case.
11 I would just say that that's in the record. The reasons,
12 I don't think I could articulate all of them accurately
13 right now. There was some reason why --

14 MR. INGRAM: It doesn't sound like it's fleshed
15 out enough for me to talk about it then, so we'll skip it.
16 Go ahead, Brett.

17 MR. GRAHAM: I think this might be a question
18 for David. I think we've worked through a lot of the
19 substantive issues here. The question I would have would
20 be on the determination that there was actually not, at
21 the end of the day, a violation based on the Code. Does
22 that have to do with how the Code is written, whether the
23 Code clearly defines what those expectations are? Do you
24 see where I'm going? I'm just kind of wondering what
25 basis would that be.

1 MR. DUNCAN: Is there enough clarity. As Ms.
2 Lingo noted, they don't have a rule that further
3 delineates unreasonable discrimination. We don't go and
4 give examples, there's no numeric breakdown of, you know,
5 you can't deviate by more than X percent. So that's
6 actually a very good question.

7 MR. GRAHAM: Because if we're being asked to
8 stand behind a decision by a judge who said I'm rolling
9 this way because there's nothing in this Code that clearly
10 defines this, then that could be an issue.

11 MR. DUNCAN: It could be, and something I would
12 point the board to and I would urge, and especially based
13 on there's a recent attorney general opinion about
14 deference to agency actions that Mr. Paxton released a
15 couple of weeks ago, and it has to do with how boards and
16 commissions interpret and apply the statutes that are
17 given to them by the legislature.

18 For many years there has been a concept
19 discussed by administrative law professors -- there's one
20 at Baylor, Professor Beal at Baylor -- others that are
21 academics and longtime practitioners in this area that
22 some boards and commissions have a practice of essentially
23 setting policy or deciding policy case-by-case-by-case and
24 over time to cite the cases to understand the law, and the
25 AG's office and many of those papers and arguments say

1 that's ad-hoc rulemaking, that you're making rules by
2 deciding cases.

3 Now, I'm not saying anything like that, that
4 the board is headed that direction or that your decision
5 on this case will or won't be that. But if it's the
6 board's desire to be more specific about that, the best
7 way to do it is notice and comment rulemaking, is for us
8 to do a rule under the board's rulemaking authority and
9 set that expectation once and for all and say when we see
10 the words "unreasonable discrimination" here's what we
11 think that means. That gives all the parties an
12 opportunity to comment on that. It's difficult and
13 somewhat disfavored to set policy by contested case
14 decision. On the other hand, I understand we have to
15 decide this case, it's in front of you, so it's a
16 difficult struggle.

17 MR. GRAHAM: All right. Thank you.

18 I would like to ask one other question in
19 regards to. I mean, I think you've made it clear that --
20 and I don't know if discrimination would be the most
21 appropriate word, I'm going to use the word allocation,
22 that allocation to this dealer was refused because of
23 their lack of involvement in the plans and programs that
24 your company had laid out. Correct?

25 MR. YOUNG: That was most of it. Part of it

1 was they also didn't sell cars, they sold less and less
2 and less.

3 MR. GRAHAM: Well, but to their defense, I
4 think their point is valid that when you get less and less
5 and less, you're going to sell less and less and less.
6 But the way you get more and more and more is allocation,
7 and if the allocation is refused based on their
8 involvement in these programs, then that's understandable.

9 So my question would be was it clearly defined in the
10 franchise agreements that if you don't do this you will
11 not get this? Was that defined? Because when you come
12 down to it, I think we just walked through it, the only
13 way for them to get back ahead of the curve was to get in
14 the game, but if they didn't know what the allocation was
15 going to be, then I'm not sure that would be fair to them.

16 So that would be my question.

17 MR. YOUNG: I understand your question. The
18 dealer agreement and then the other communications that go
19 between Hyundai Motor America and the dealers spell out in
20 great detail how the systematic allocation works. As for
21 the discretionary allocation, there is no specific detail
22 as to how that works, but they are encouraged, as the
23 evidence showed and what we talked about today, that to
24 participate in these other things will help you get your
25 vehicle sales up, will also show our commitment to the

1 Hyundai brand. And so discretionary really is
2 discretionary but it's a small portion for the overall
3 vehicles.

4 And just to clarify what I was saying a minute
5 ago, when I say that they weren't selling as many cars,
6 your point is correct, that if they're not given as much,
7 they can't sell as much. But what the evidence showed was
8 they weren't selling what they had, and so it wasn't a
9 question of they needed more to sell more, anyone could
10 say that, I guess, but they weren't selling what they had.

11 And then in this time of what everyone agrees,
12 stipulates was a time of short supply, essentially what
13 Mr. Zabihian was saying was: Hey, treat me differently
14 than you're treating your other dealers; you're giving
15 your other dealers who are performing well this limited
16 supply, I want more of it for me. Without justification.

17 And so to do what he wanted to have happen would be to
18 take away from some other Hyundai dealers that are
19 performing well, and Mr. Hetrick, in his discretion,
20 declined to do that for the most part. It did allocate
21 some vehicles but just didn't allocate as many as Mr.
22 Zabihian wanted.

23 First of all, are there any more questions?
24 I'm happy to answer.

25 MR. PALACIOS: I just want to follow up on what

1 you just stated. So am I understanding that the, I guess,
2 declination of World Car's request for additional
3 inventory had more to do with their sales rate than all
4 these other factors that you presented, the lack of
5 facility, the lack of participating in programs? Because
6 that's something that I guess you didn't show, you didn't
7 show the sales of their competitor, Red McCombs. Is that
8 what the basis was?

9 MR. YOUNG: It's all of those things, Chairman.
10 That's what the testimony was is that your sales rate
11 matters, your commitment to the brand matters, your
12 participation in the loaner program matters because by
13 that you will get more allocations because you want some
14 allocated to your loaner program. It's the commitment to
15 have a single point dealership. It was all of those
16 things kind of presented in context of this hearing that
17 Mr. Hetrick said, These are the reasons for my decisions,
18 it's all of these things, it's not just one or the other.

19 MR. INGRAM: So Mr. Young, just to follow up
20 with that, and I see where we talk an awful lot in the
21 documents about the sales efficiency, but the efficiency
22 as it relates to the documents talks more or less about
23 what is potentially possible in the market, not so much
24 about how many of his cars he actually sells per month.
25 And so is that in here somewhere that I'm not seeing where

1 we're talking about how well is he selling his cars, not
2 related to what's possible in the entire market because
3 there's other factors that influence that. Partly one of
4 the things that influences it is how much cars he has.
5 Right? But I'm just curious, how is he turning his
6 current inventory?

7 MR. YOUNG: Well, the evidence at the trial
8 showed that they can compute that in a couple of different
9 ways, and one is average days to retail. In other words,
10 how long does it take you from the time you get a car to
11 the time it's sold, and the Zabihiyan World Car dealerships
12 were some of the worst in the district. They had longer
13 time periods than everyone else. And maybe that's one
14 metric of that.

15 But at the hearing there was evidence about the
16 sales each year, and I believe the ALJ even had a chart of
17 that in her proposal for decision, but certainly that was
18 discussed at the hearing and gone over in detail.

19 If you have the ALJ's proposal, if you look on
20 page 3 of her proposal, what she shows is a chart about
21 sales for the four dealerships leading up to 2010, and it
22 illustrates the point that we were talking about earlier
23 that the World Car stores dropped off the map in 2009 and
24 then continued in 2010. So that is one measure of sales
25 that I can just find in her proposal. But she certainly

1 dealt with that issue and she considered the sales that
2 were being made year over year by each of the dealerships.

3 MR. WALKER: Mr. Young.

4 MR. YOUNG: Yes, sir.

5 MR. WALKER: So why does Hyundai care if your
6 dealer says, hey, send me a thousand cars, I want to sell
7 your cars, he's paying for them, you're not paying for
8 them. Why do you care if he's buying a thousand of your
9 cars, why would you make a statement to him and say:
10 Well, sell what you have and we'll ship you some more.
11 That's like me saying, well, pay for the bills you've got
12 right now on the trucking that I've done for you before I
13 do any more trucking for you. I'm going to do all the
14 trucking I can for somebody. Why would you not give him
15 cars if he's paying for them?

16 MR. YOUNG: That's a great question. So in the
17 time period that we're talking about, the 2010 through
18 2013, that is what we've been talking about as this was
19 the time of short supply, so there weren't enough Hyundai
20 vehicles. So you've got ten people wanting cars, I've got
21 100 cars to give you, and you say I want 40 of them. And
22 I say, I can't give you 40 because I'm going to give him
23 10, and he's been doing really well, I'm going to give him
24 15, and it comes down to it, I've got nine for you.

25 MR. WALKER: Yeah, but maybe I went to A&M and

1 he went to Texas and you went to Texas.

2 MR. YOUNG: Didn't go to Texas, I'm more of an
3 Aggie.

4 (General laughter.)

5 MR. WALKER: But I just want to make sure -- I
6 can see all kinds of problems with, hey, who do I like,
7 and we've got to make sure that every dealer out here is
8 protected and has the ability to have access to the
9 product he sells. And you make the product, so he needs
10 your product to get around, and if he doesn't sell your
11 product, he's going to go broke and you're not going to go
12 pick up his bills, I know that. So it seems to me like
13 that didn't happen here.

14 But I have a question, Daniel, for you. So
15 Daniel, the SOAH judge that heard this case, was this one
16 of our SOAH judges that is working through the DMV, or was
17 this prior to us having our ALJs?

18 MR. AVITIA: Daniel Avitia, for the record
19 again.

20 This case is several years old. This case went
21 to SOAH prior to the mediation program even beginning, so
22 this case was not mediated by the DMV.

23 MR. WALKER: So I guess some of the new board
24 members on here may be wondering what I'm asking. And so
25 today in the agency we have -- David.

1 MR. DUNCAN: I was just going to clarify for
2 the members. Sorry to interrupt.

3 MR. WALKER: Do you want to do it?

4 MR. DUNCAN: Yes. The legislature gave the
5 agency the authority to have OAH, the Office of
6 Administrative Hearings, which is run by Edward
7 Sandoval -- who, I'm sure, is traveling today -- and they
8 hear Lemon Law and warranty cases only. The dealership
9 disputes, whether it's dealership location disputes or
10 disputes like this over compliance with the Code, are and
11 remain the sole purview of the State Office of
12 Administrative Hearings. We have to refer those to SOAH.

13 MR. WALKER: So those aren't heard by our staff
14 which knows the dealer laws.

15 MR. DUNCAN: Right.

16 MR. WALKER: This could be somebody that's
17 never heard a dealer case before.

18 MR. DUNCAN: Quite possible.

19 MR. YOUNG: If I could address that real
20 quickly, Mr. Walker.

21 MR. WALKER: Go ahead.

22 MR. YOUNG: I don't know her entire resume, but
23 I do know that she's quite famous for rendering a proposed
24 decision which was then adopted involving Mercedes Benz
25 and a dealership in South Texas.

1 MR. WALKER: So she did the Star Motor case?

2 MR. YOUNG: She did. And found in favor of the
3 dealer, I believe, in that case.

4 MR. WALKER: I think we overturned that case.

5 MR. YOUNG: In large part.

6 MR. WALKER: We overturned that case.

7 MR. YOUNG: I don't know how that ended up, but
8 I do know that she was the one that kind of worked on
9 that.

10 MS. HARDY: Just a quick question. When a
11 dealer turns down inventory, and they all do, like you
12 said, what happens to that allocation? I assume these
13 vehicles are built. Are other dealers taking those or
14 being asked to take what other dealers turn down?

15 MR. YOUNG: Absolutely. The terminology that
16 you used is the correct terminology, they're called turn-
17 downs. And so when someone is offered vehicles and they
18 don't want them, it goes to a turn-down list that people
19 can pick from. Another dealer might say, hey, I want some
20 of those turn-downs. So they become available again to
21 the pool.

22 MR. INGRAM: Mr. Young, there was some mention
23 about Toyota, I guess, building a factory in the area.

24 MR. YOUNG: Correct.

25 MR. INGRAM: When was that?

1 MR. YOUNG: I believe that was 2009, I believe
2 is correct. They build light trucks out of San Antonio.

3 MR. INGRAM: And was that near the World Car
4 South dealership?

5 MR. YOUNG: Relatively. They're both in the
6 south part of town. The Toyota dealership is -- they're
7 not neighbors but they're in the same general area.

8 MR. INGRAM: So looking at the chart that you
9 pointed out and I'm basically taking the 2010 and
10 annualizing the sales, and really, their sales didn't drop
11 off with the exception of World Car South. World Car
12 South did drop off and so I was trying to figure out if
13 maybe perhaps that had an impact. But in terms of World
14 Car North, it looks like for the sales volume it doesn't
15 look that far off.

16 MR. YOUNG: 2009 to 2010?

17 MR. INGRAM: I mean, obviously there's a slight
18 dip in 2009, but '10 was trending up. That's all the
19 question I had was Toyota. Thanks.

20 MR. TREVIÑO: Mr. Young, was there anything in
21 the record about Hyundai's desire to terminate World Car?
22 Was there ever any sort of background on that?

23 MR. YOUNG: Yes, there was testimony about
24 that, and the testimony from Hyundai is we're not trying
25 to terminate this dealer, we're trying to get this dealer

1 to improve its performance and these are standard type
2 letters that would go out to someone. So they still exist
3 as Hyundai dealerships today, even having received these
4 letters.

5 MR. GRAHAM: I'm sorry to interrupt you, but
6 just to confirm, you just said that by trying to improve
7 the performance of the dealers you send them a letter that
8 they need to sell?

9 MR. YOUNG: No. They to get them to improve
10 their performance by a variety of ways, but then yes, in
11 that one letter that we looked at, in the end he said, It
12 doesn't look like you really want to be a Hyundai dealer,
13 and if that's the case, let me know and I'll help you sell
14 it. So that was in the 2013 letter.

15 MR. INGRAM: And I'm sorry. Are both World Car
16 stores combination stores, are they both Hyundai-Kia?

17 MR. YOUNG: Word Car North is an exclusive.
18 It's next to, I believe, a Mazda but it's its own separate
19 dealership.

20 MR. INGRAM: Okay. And so then the south is a
21 combo Kia-Hyundai store.

22 MR. YOUNG: You're correct.

23 MR. INGRAM: And that's where you're referring
24 at one point, I guess in the letter it was like six to one
25 Kia to Hyundai.

1 MR. YOUNG: Yes, that's right.

2 MR. PALACIOS: Any other questions for Mr.
3 Young?

4 (No response.)

5 MR. PALACIOS: Thank you very much, Mr. Young.
6 Appreciate your time.

7 We'll call Mr. Kaplan back. You have four
8 minutes for rebuttal.

9 MR. KAPLAN: I'll try to make these points very
10 briefly. In response to the question about the board's
11 authority, you are the decider. The ALJ is not the final
12 decider, you are the decider, you decide what these
13 standards mean in the context of these facts, and so
14 that's what we're looking to you for. And there are no
15 real standards for discretion. The record is replete with
16 testimony that there are no standards for the regional
17 manager's exercise of discretion on manual allocation.

18 I want to talk about a number of things that
19 were just discussed, because this is truly rebuttal, and
20 that is, first of all, who turned down more cars. The
21 record is undisputed that when Mr. Hetrick showed up in
22 mid 2010, in those first six months of 2010, Red McCombs,
23 which had already surrendered a dealership, also turned
24 down 598 vehicles offered to it versus 205 turn-downs from
25 World Car. They turned down almost three times as many

1 cars. Now, does that justify giving them more manual
2 discretionary allocation? Not in my book. And that's in
3 defendant's trial exhibits 46 and 47, it's from their own
4 information.

5 Let me talk about the discovery process, which
6 I wasn't going to get into. It took us two years because
7 we had to fight them to get depositions. First, we had to
8 fight them for documents. Then Mr. Hetrick got deposed
9 and kept saying ask Mr. Zuchowski, ask Mr. Zuchowski. And
10 we had to fight to get his deposition and had to get an
11 extremely starchy order from the ALJs ordering that
12 deposition. That's why the process took a long time.

13 Let me turn next to the issue of the dealer
14 contact report. I don't have it in front of me, but it
15 was written by Mr. Thompson, who accompanied Mr. Hetrick.
16 He did not even know -- he had been the district manager
17 for, I think, two years, he did not even know he was
18 talking to Mr. Deltang, not Mr. Zabihian. Mr. Zabihian
19 wasn't even in that meeting, and what caused the blowup
20 there is because Mr. Hetrick didn't know that the previous
21 regional sales manager had given World Car a right of
22 first refusal on an extra dealership in a certain extra,
23 and Mr. Hetrick apparently was outraged that his authority
24 was being challenged because he was bound by something.
25 That undoubted spurred the letter in December 2010, we'll

1 help you sell your dealership, if he could get rid of that
2 dealer, that right of first refusal wouldn't be a problem.

3 That's what happened.

4 That report, dealer contact report, identifies
5 as Mr. Zabihiyan somebody who they had admitted on the
6 record undisputably that wasn't even Mr. Zabihiyan. They
7 didn't even know who they were talking to; they wrote down
8 that it was Mr. Zabihiyan, but it was Hamid Deltang. And
9 that's the dealer contact report which is plaintiff's
10 exhibit 15. We put it in evidence because it showed how
11 little they knew about their own dealer who had been there
12 for years. And yes, they had a legal right, a right of
13 first refusal. Mr. Deltang said, We'll have to sue if you
14 do that.

15 Then let me turn to the question of assistance.

16 We know the north store was updated, no assistance given.

17 We know Red McCombs was promised assistance even before
18 the renovation. Again, it's in the record. And there's
19 never been assistance given. On the south store they
20 tried to move the location right next to a Walmart.
21 Hyundai exercised its discretion to say no, we don't want
22 you to do that. And now they're complaining that we
23 didn't update the store soon enough and do enough to
24 satisfy them? That is shocking.

25 Sales efficiency. They set a standard, however

1 unrealistic, and that's how they measure you, and they
2 can't deny it's a metric for whether you're a failure or
3 not, and they use it to say you're in breach of the dealer
4 agreement.

5 And then finally, let me turn to the question
6 of manual discretion. Even Mr. Zuchowski, along with Mr.
7 Hetrick, explicitly admitted sometimes dealers need a
8 boost, that's what we use, the manual allocations for. He
9 didn't get it. He needed the boost, not Red McCombs, but
10 he didn't get it. And that's why we need your assistance
11 to rectify this wrong.

12 Are there any questions that I need to answer
13 for the board?

14 MR. INGRAM: Mr. Kaplan, there was a mention by
15 Mr. Young that World was performing at the bottom of the
16 market in basically days to turn. Do we have that
17 information anywhere?

18 MR. KAPLAN: I don't believe it's in the
19 record. That's what they said.

20 MR. INGRAM: Okay. That's not in the record?

21 MR. KAPLAN: But I can show you slide 12.

22 MR. STEWART: May I speak?

23 MR. INGRAM: Sure.

24 MR. STEWART: Jarod Stewart, also for World
25 Car.

1 And it's days to turn for each dealership. In
2 terms of the measurement for that, obviously when you're
3 starting in 2009 at similar positions in World Car sales
4 at that time you had a smaller inventory and selection,
5 and the was the testimony from multiple witnesses. But
6 the numbers there, the ALJ did not base the decision on
7 days to turn.

8 MR. INGRAM: I understand they didn't base the
9 decision on it, but I'm just curious because it's
10 important to me to understand how well they were selling
11 their existing inventory.

12 MR. KAPLAN: Let's look at slide 12, if we can,
13 and I can answer that question. There's a chart in the
14 ALJ's decision but I thought this is an easier way to
15 visualize it. If you look, these are the two World Car
16 dealerships, these are the Red McCombs dealerships. They
17 were pretty much equal up until 2010. The south store, as
18 you pointed out, really had great difficulty. That's when
19 Toyota put in a facility, offered promotions, were selling
20 like crazy. The record is clear, no assistance, no extra
21 assistance given at all to the south store when they were
22 pleading for help because Toyota had a massive presence
23 there.

24 Then we get into the time when cars are hot,
25 and during this time when World Car South store is still

1 limping along, limping along, they are nonetheless at the
2 same location selling Kias six or seven to one over
3 Hyundais. Why is that? Because Mr. Zabihian only puts on
4 his working hard dealer that in this part of the showroom.
5 There's no explanation for that other than their
6 allocation process, and they admitted, it's on the record
7 from Zuchowski and Hetrick, you're supposed to use that to
8 help dealers who need help, you don't use it to help
9 dealers who don't need help, and this is what they did.
10 And that's unreasonable. We know it's discrimination;
11 it's clearly unreasonable.

12 MR. INGRAM: I would slightly take exception
13 just to the comment of if you have a hot dealership that's
14 selling a lot of cars, I'd definitely want to keep them
15 funded with as many discretionary units as I can.

16 MR. KAPLAN: That makes sense, except for the
17 fact that the president of Hyundai Motor America
18 explicitly contradicted that. I mean, listen, there's no
19 question, you sell what you get. Mr. Zuchowski said, The
20 manual system, we use that to help a dealer who may be
21 struggling. Maybe, for example, if they did reduce
22 inventory or had fewer sales, that's who we want to help.
23 That's what it's supposed to be used for. But there are
24 no standards for that anywhere within Hyundai, and Mr.
25 Hetrick is the one who controlled it.

1 And when you look at -- you hear 15 percent,
2 but that's 15 percent total of total allocations around
3 the country or total in the region, but a regional manager
4 has the ability to put that 15 percent on just a couple of
5 dealers. If you look at the total sales by the McCombs
6 dealerships in 2010 -- and really, we only have half of
7 2010 and half of 2013 -- we're looking about 6,000-7,000
8 cars.

9 When they get 1,800 cars just purely through
10 the discretionary allocation and the other dealer gets
11 only 600, you can see that makes a huge difference. It's
12 not just 15 percent of Red McCombs' total allocation, it's
13 a much higher percentage, 1,800 cars out of 7,000 is 25
14 percent, I haven't done the math exactly, but it's 25 or
15 30 percent. And they're goosing the dealer who didn't
16 need the help as badly as the dealer who, according to the
17 president of Hyundai Motor America, normally would get
18 help through a manual allocation. Just throw your hands
19 up, there's nothing else you can do when you're fighting
20 against that current.

21 And particularly when this is the dealer who is
22 turning down 598 cars and you're turning down 205. They
23 turned down three times as many cars in the first half of
24 2010. That's the history that Mr. Hetrick had the day he
25 walked in as regional manager, the day he first met with

1 actually Mr. Deltang and they thought they were meeting
2 with Mr. Zabihian. They didn't even know who they were
3 meeting.

4 MR. BARNWELL: Did Mr. Deltang identify
5 himself, or did they just assume his name was Zabihian.

6 MR. KAPLAN: Well, he knew Mr. Thompson.

7 MR. BARNWELL: But did he identify himself?

8 MR. KAPLAN: I don't know.

9 MR. BARNWELL: I'm not going to blame somebody
10 for that assumption if they thought they were meeting with
11 the dealer and the fellow they were meeting with deceived
12 them.

13 MR. KAPLAN: Well, Mr. Deltang said that he had
14 met Mr. Thompson many times and there would be no
15 confusion about that, but Mr. Thompson admitted -- I think
16 what he said was I mis-spoke or I mis-typed it, I honestly
17 don't remember what he said in the letter.

18 MR. BARNWELL: Okay.

19 MR. KAPLAN: But the point is that went to the
20 regional manager too, so one way or another, they thought
21 they were talking to Mr. Zabihian and they weren't even
22 talking to him. That comment came from Mr. Deltang, and
23 it was a response to somebody saying we're going to do
24 something that was contrary to the legal rights of the
25 dealer who had a written right of first refusal from the

1 regional manager who preceded Mr. Hetrick. They didn't
2 know their own business, they hadn't even looked in their
3 own files, and they didn't want to be bothered to do that,
4 apparently, with this dealer. They treated Red McCombs
5 differently all the way through. Extra turn-downs from
6 Red McCombs don't matter, but they're used as an alibi
7 here.

8 I want to say one thing about service loaners,
9 if you want to hear about it. My time is expired.

10 MR. PALACIOS: Yes, your time is expired.

11 MR. KAPLAN: Fine. Thank you very much for
12 your time. Unless there's any other questions, we really
13 appreciate your patience and your questions.

14 MR. PALACIOS: Is there any other discussion on
15 this matter?

16 MR. INGRAM: Discussion?

17 MR. PALACIOS: Hearing no other discussion --

18 MR. INGRAM: There's none? There's got to be
19 some discussion.

20 MR. PALACIOS: Is there a motion?

21 MR. INGRAM: Brett, you look like you're just
22 dying to say something.

23 MR. GRAHAM: I just need to be clear, this is
24 my first one. Can we walk back through what those
25 alternatives are? I know we discussed them back there.

1 MR. AVITIA: Member Graham, that's a great
2 question. The board's three options in this contested
3 case matter are as follows: (1) adopt the PFD as
4 recommended by staff; (2) amend the PFD beyond staff's
5 recommendation, including reversal of the ALJ's
6 conclusion; or (3) remand the PFD back to SOAH for further
7 consideration of facts or legal concepts as directed by
8 the board.

9 MR. INGRAM: I find this to be very difficult,
10 truly, and I find that there are a lot of decisions that
11 World made that were business decisions that certainly I
12 feel impacted his allocation on the discretionary, whether
13 it be that he didn't use the service loaners, he didn't
14 report the sales quickly as Hyundai suggested, or perhaps
15 that even though he requested in 2010 about the Equus
16 line, he didn't do much about it. So there's a lot of
17 business decisions in here that World made that would have
18 affected that discretionary amount. While on the other
19 hand, I can see some of the other points that World made.

20 MR. WALKER: So would you read number 2 to me
21 again.

22 MR. AVITIA: Certainly. Option 2 was amend the
23 PFD beyond staff's recommendation, including reversal of
24 the ALJ's conclusion.

25 MR. WALKER: Amend or reverse. So tell me how

1 we would do that.

2 MR. AVITIA: I'll defer to Mr. Duncan as that
3 gets into board authority.

4 MR. DUNCAN: In order to do that and comply
5 with .058(e), you'd have to specifically identify which
6 findings of fact and conclusions of law you were changing
7 and what your basis for that was, and you would need to
8 specifically state we're changing this one because.

9 MR. INGRAM: I'm sorry. Member Treviño
10 actually found this for me. It's actually on page 214 of
11 your books. We talked about days supply on dealer's
12 stock, and when you look at that, you can see that during
13 the time periods of 2012 and 2013, definitely that number
14 for World Car South got quite high, so from a performance
15 side, that gets concerning. Certainly they were not
16 selling the vehicles as quickly as they were getting them.

17 Is that something you can pull up, or you can
18 navigate to it.

19 MR. WALKER: So why couldn't we conclude that
20 under Texas Occupations Code 2301.468 that Red McCombs and
21 World Car were both selling in 2010 -- we looked at the
22 graph and I assume the graph is accurate here, that in
23 2010 both dealerships were selling roughly the exact same
24 amount of cars. Move forward when the market changed, so
25 to speak, and everybody wants more cars to sell, that the

1 Red McCombs dealers actually got more cars
2 disproportionate even prior to -- if they were both
3 selling the same amount in 2010, why wouldn't they both be
4 getting the same allocation going forward in 2011 and
5 2012? The formulation should have matched up that they
6 were both selling the same amount of cars, and it says
7 right here under Occupations Code 2301.468 that a
8 manufacturer, distributor or representative may not
9 discriminate unreasonably between or among franchisees in
10 the sale of a motor vehicle owned by the manufacturer or
11 distributor.

12 In my mind, there is clear and plain evidence
13 that there was discrimination between the two dealers as
14 to -- and there may have been personal disputes, there
15 could have been any reason that we don't know because
16 we're not trying this case today, that the facts show that
17 they were both selling the same amount of cars, the facts
18 show that he got more cars when things turned around, the
19 facts show that somebody came in and said, hey, why don't
20 you sell your dealership, which throws suspicion on to me
21 that maybe the manufacturer says maybe we don't like this
22 guy and we want a different guy in here doing this, and so
23 this is how we retaliate against him.

24 So I don't think the administrative law judge
25 was correct in her findings.

1 MR. INGRAM: Well, I think the thing that
2 concerns me -- and I don't really disagree with you,
3 Member Walker -- the thing that concerns me is that we've
4 just spent an hour, hour and a half, looking at a case
5 that's spent years, and as much as we've asked questions
6 and dove as deep as we could in this limited amount of
7 time, I just don't think that we can accurately understand
8 all the facts in this case. And so I don't think,
9 honestly, that personally finding that there was -- I can
10 see probably sending it back to SOAH.

11 MR. WALKER: And I thought about that, and I
12 don't know that I would disagree with you on that.
13 However, when we send that back, we're going to go back
14 down the same old road we just went down and we're going
15 to delay this for another year, two years, David? We have
16 sent cases back -- Star Motors is a good example of
17 that -- and it never comes back to us again because they
18 mediate and work things out on their own somewhere down
19 the way.

20 MR. INGRAM: That's a good thing.

21 I would rather take the extra year and get it
22 right versus get it wrong.

23 MR. WALKER: And we have overturned some of
24 these SOAH cases in the past.

25 MR. PALACIOS: I have a concern with that,

1 Member Ingram. To Board Member Walker's point regarding
2 2301.468, as I stated earlier, this hinges on this term
3 whether or not Hyundai discriminated unreasonably. If you
4 remit this back to SOAH, this is the opinion or finding of
5 one ALJ, and I, quite frankly, don't see how this changes
6 much. I mean, the facts don't change, it gets back to the
7 term unreasonable, what is unreasonable. We have the
8 facts in front of us, and that, in my assessment, is for
9 us to determine what is unreasonable. We can send it back
10 to SOAH, but I really don't see how this changes anything
11 from the ALJ's perspective. I think this is a decision
12 that was charged to us, and unless there's, I guess, some
13 specific facts that we can point to that perhaps the ALJ
14 failed to take into consideration, failed to look at, I
15 don't see the reason for remanding this back to SOAH.

16 MR. KAPLAN: (Speaking from the audience.) Mr.
17 Chairman, if I could make a suggestion.

18 MR. WALKER: I can't see you.

19 MR. INGRAM: If you're going to say anything,
20 you're going to have to come to the mic.

21 MR. KAPLAN: I'm always worried that in an oral
22 argument both sides are just talking, and we're doing the
23 best we can, both sides, but the briefs are the results of
24 fairly lengthy review of the record and consideration of
25 the issues and what's in the ALJ's proposal for decision.

1 And I'm sure that everyone has read those briefs, but I
2 don't know whether it might be helpful if the board took
3 the opportunity to read them and make a decision at the
4 next meeting or ask for additional argument or ask for
5 additional briefing if there's something else the board
6 wants.

7 MR. PALACIOS: Thank you, Mr. Kaplan.

8 MR. KAPLAN: Thank you.

9 MR. PALACIOS: In deference, would you like any
10 time, Mr. Young?

11 Do we know how long Mr. Kaplan spoke?

12 MR. WALKER: Thirty seconds.

13 MR. YOUNG: I can be brief. I would simply say
14 that yes, the briefs do have all of the information but
15 the administrative law judge also has a really reasoned
16 decision considering all of that, and I just believe the
17 way the legislature has set this up to allow someone to do
18 all of the fact-finding and the legwork and to present a
19 reasoned decision, unless there's some reason based on
20 what you've read that you think she's misapplied the law,
21 I just don't think it meets one of these three exceptions.

22 So I would urge that I don't think additional
23 briefing is needed and I don't think this needs to be
24 overturned.

25 MR. PALACIOS: Thank you.

1 MR. GRAHAM: And I'll just add my two cents. I
2 think we may be looking at more of a gap in the way that
3 it's written than anything. It's clear both parties
4 haven't really argued against the fact that there was
5 some -- again, I hate to use that word "discrimination" --
6 the manufacturer made a conscious decision to not allocate
7 units to that dealer, and that dealer has made the point
8 that they believe that was wrong, and I don't think
9 anybody is arguing those facts. So I don't know.

10 MR. WALKER: We need to be careful with respect
11 to setting precedent. Raymond is a dealer, okay and his
12 whole investment that he's put into in life is to build
13 that dealership and put all of his earnings and capital
14 into that, and that if a manufacturer were to be able to
15 change the way he allocates cars to Raymond, basically he
16 holds this big stick over Raymond's head and could put him
17 out of business. And we need to be careful that we don't
18 allow manufacturers to be able to come in and hold a big
19 heavy stick and say, If you don't do it my way, then I'm
20 just not going to give you cars. Because if Raymond don't
21 have cars to sell at Bravo Chevrolet, he's out of
22 business.

23 Am I not right, Raymond?

24 MR. PALACIOS: You are correct.

25 MR. WALKER: So there's a balance, but in Texas

1 we have decided that we use franchises as a means of
2 selling cars -- the Tesla location would like to turn that
3 over -- but in Texas we use franchises, and when we use
4 franchises there has to be a cooperation between the
5 manufacturer and between the dealer so that they work
6 together so that they both benefit from that. Because the
7 car manufacturer wants to sell cars, obviously, and make
8 as many cars as he can, and the dealer wants to make sure
9 that he has access to cars so that he can sell as many
10 cars as he possibly can too. They need each other,
11 absolutely need each other, and we need to make sure that
12 at all times there's a balance between the two.

13 Am I not right?

14 MR. PALACIOS: You are spot on.

15 Do I hear a motion?

16 MR. WALKER: My recommendation would be that we
17 overturn the SOAH judge's ruling on this case and we find
18 that they erred in the interpretation of the Occupation
19 Code 2301.468, and that -- I'm not sure, David, whether we
20 need to take and send it back to SOAH to take and rewrite
21 it, or rather our staff rewrites the rule -- the
22 determination. We've done this in the past, we've
23 overturned two since I've been on this board since its
24 inception, and we sent it back to our staff lawyers in
25 order to rewrite.

1 MR. DUNCAN: No. We don't rewrite the PFD, we
2 don't send it back to them to rewrite the PFD. Your
3 motion is going to be what it incorporates.

4 MR. PALACIOS: We have a motion from Board
5 Member Walker to reverse the ALJ's decision regarding the
6 Hyundai Motor America and World Car case. Is there a
7 second?

8 MR. GRAHAM: I'll second.

9 MR. PALACIOS: We have a second from Board
10 Member Graham. All in favor please signify by raising
11 your right hand.

12 (A show of hands.)

13 MR. PALACIOS: We have Board Member Walker,
14 Board Member Treviño, Board Member Barnwell, Board Member
15 Graham, Board Member Ingram, and myself.

16 All opposed?

17 (A show of hands.)

18 MR. PALACIOS: Board Member Painter, Board
19 Member Hardy and Board Member Caraway.

20 Motion passes.

21 Can we take a short recess? Five minutes.

22 (Whereupon, at 12:06 p.m., a brief recess was
23 taken.)

24 MR. PALACIOS: It's 12:15, we're going to go
25 ahead and resume with our agenda items. Next we're going

1 to move to our Legislative and Public Affairs report, and
2 I'll turn it over to Committee Chair Treviño.

3 MR. TREVIÑO: Thank you, Chairman Palacios.
4 Today we will receive a briefing under item 6.A from TxDMV
5 staff on the process they will follow through the upcoming
6 84th Legislative Session, as it relates to providing
7 information as requested by lawmakers and their staffs and
8 analyzing the operational and fiscal impacts of
9 legislation.

10 Next we will hear from staff on item 6.B
11 regarding recommendations for our consideration for
12 improvements to statute during the session. Staff has
13 worked with stakeholder groups to review these concepts
14 and provide us with additional information and details.

15 At this time I will recognize Matthew Miller,
16 senior government relations analyst with the Government
17 and Strategic Communications Division to provide the
18 briefing in item 6.A and the recommendations in item 6.B.

19 Mr. Miller.

20 MR. PALACIOS: Thank you.

21 Before that, I'd like to acknowledge for the
22 record that Board Member Graham has left; he left at
23 approximately 12:05. And Board Member Walker has
24 temporarily stepped out.

25 MR. TREVIÑO: But we do have a quorum.

1 Correct?

2 MR. PALACIOS: Yes, we have a quorum.

3 MR. MILLER: Thank you. I'm Matthew Miller
4 with the Government and Strategic Communications Division.

5 I'm going to give a real brief overview of the
6 process we're going to follow this session for analyzing
7 legislation. It starts with GSC reviewing all legislation
8 that's filed in the legislature to determine if it should
9 be monitored further by the department. Once that
10 determination has been made, the bill gets referred to a
11 subject matter division who will then analyze that bill
12 for both its operational and fiscal impacts upon the
13 agency. Once that analysis has occurred, the analysis
14 comes back to GSC, we will then input any fiscal estimates
15 that are required by the LBB into their system so that
16 part is handled, and the bill analysis is kept for our use
17 in case our agency is ever called upon to testify, provide
18 any resource work on that bill.

19 MS. BREWSTER: Mr. Chairman, if I may?

20 MR. PALACIOS: Yes.

21 MS. BREWSTER: LBB is the Legislative Budget
22 Board.

23 MR. MILLER: Legislative Budget Board.

24 All bills by the legislature are required to go
25 through the committee process before they can become law,

1 so GSC monitors all committee activities on all the bills
2 that we have on our watch list. We coordinate with
3 divisions to ensure that if the agency needs to have a
4 resource witness available at a hearing or for a member
5 who has any questions about that bill from our
6 perspective, we can provide that resource witness as
7 needed. In addition, we ensure that all those witnesses
8 are fully briefed on what the agency has determined the
9 impacts of the bill would be and what the most recent
10 version of that bill may be.

11 A few key dates to keep in mind for the
12 upcoming session. Bill filing begins Monday, November 14,
13 so a little less than two weeks from now, and in that
14 first week, historically, several hundred bills are filed
15 in that one week alone. The 85th Legislature convenes
16 January 10, on Tuesday. Committee assignments usually
17 come out at the end of January, beginning of February. At
18 that time there's another big push of bills as people are
19 holding off until they find out which member is going to
20 be on which committee, and then they go and have those
21 members file those bills at that point. General bill
22 filing ends on the 60th day of the session which is March
23 10, and then May 29 is the last day of session, and it's
24 all over at that point, except --

25 MR. PALACIOS: I'd like to reflect for the

1 record that Board Member Walker has returned.

2 MR. MILLER: -- except that the governor has
3 20 days after that to veto any legislation, and the
4 deadline for that this year is June 18.

5 So if there's no questions on our internal
6 processes, I'm going to move on to the agency's proposed
7 legislative agenda for the 85th session.

8 Section 1001.025 of the Transportation Code
9 charges the Texas Department of Motor Vehicles Board with
10 considering opportunities to improve the operations of the
11 department and recommending statutory changes to the Texas
12 Legislature. To assist in that function, GSC has worked
13 with all the department's divisions and offices to
14 identify statutory changes the board could recommend. As
15 Member Treviño stated, those changes have also been vetted
16 with all the relevant stakeholders that work with the
17 agency. The results of that process are now in front of
18 the board today for possible approval to become official
19 recommendations to the legislature. Upon your approval,
20 those items will be brought to the legislature for their
21 consideration to file as individual bills.

22 I'm going to give just a brief highlight of
23 some of the elements in that proposed agenda, a little bit
24 of history. Last session the board's agenda that was
25 adopted resulted in two omnibus bills being filed, one in

1 the House, one in the Senate. Due to timing issues
2 towards the end of session, neither one of those bills
3 became law, so many of the items in this year's agenda are
4 repeats from the agenda from last session.

5 Some of the notable repeats are making the
6 token trailer license plate permanent so that it becomes
7 more attractive and more competitive with other states,
8 hopefully to lure some of that token plate business back
9 to Texas. Also in the motor carrier realm, changing the
10 fleet fee from the current per vehicle per year fee to a
11 one time per vehicle fee, again, in the hopes of
12 incentivizing more participation in the fleet registration
13 program, since that program provides greater efficiencies
14 for both the department and the customers.

15 And another repeat worth mentioning is changing
16 the rules about certified copies of titles so that the
17 most recently issued certified copy of title supersedes
18 any previously issued certified copy or an existing title,
19 so it's clear which title is the valid instrument. Many
20 states have this model currently and it's believed this
21 will help prevent fraud in the title world.

22 Moving on to some of the new items, several of
23 them are relating to conforming state law to federal law,
24 mainly in the area over oversize/overweight. For example,
25 an extra 150 pounds is now mandated for idle reduction

1 technology, heavier weights are now required for emergency
2 vehicles and some extra length allowances are now required
3 for automobile transporters. In addition, our odometer
4 statements sections and law are being updated to more
5 closely reflect federal requirements.

6 Some more notable items that are new this year
7 is streamlining the Lemon Law sections of code so that the
8 timing of the repair attempts that were necessary for a
9 person to qualify to file a Lemon Law complaint are easier
10 for customers to understand. This was the result of a
11 hearing that was held in the interim by the House Judicial
12 and Civil Jurisprudence Committee, and one of their goals
13 was to make the Lemon Law process easier for customers to
14 understand. The change in front of you is an attempt to
15 do that by making timing events clear for everyone.

16 Another item which is very pro-customer is to
17 allow the online registration renewal receipt to serve as
18 valid proof of registration for 30 days after that receipt
19 is issued by the system. That allows time for the sticker
20 to be mailed and received but the individual still have
21 valid proof of registration. It's another way to
22 encourage use of our online renewal system and try to get
23 the lines in the county offices down lower.

24 Additionally, the way that transactions can be
25 processed when a county office is closed for any reason

1 are being proposed to be streamlined so that the
2 distinction between natural disaster versus any other type
3 of closure, it's just closed for an extended period of
4 time, there would be ability for another county to
5 volunteer to accept those transactions so the customers
6 can still get their work done.

7 And lastly, there are a few revenue redirects
8 into the TxDMV Fund. The first one is trying to establish
9 a fixed percentage of oversize/overweight permit fee money
10 that will be dedicated to the DMV Fund to ensure we have
11 money to pay for issuance of any new permits that come
12 out. It will also retroactively apply to four permits
13 where we do not currently get any allocation from the
14 permit fee.

15 MR. WALKER: Can I ask a question about that?
16 On this permitting for the DMV fund on oversize/overweight
17 and getting it a dedicated fee, I didn't understand that.

18 What are we doing right now under the dedicated fund?
19 How much of the actual permit fee goes to the dedicated
20 fund and how much is going to the Highway Fund?

21 MR. MILLER: Generally speak, 10 percent of the
22 permit fees are going to our fund. There are a few
23 exceptions where it's a little bit different. But there
24 are four existing permits right now where we receive no
25 money from the permit fee.

1 MR. WALKER: So what is it the agency wants to
2 adjust on this?

3 MR. MILLER: This would establish for those
4 existing permits where there's not a current allocation,
5 the same basic standard 10 percent allocation.

6 MR. WALKER: So we just want to go to 10
7 percent across the board on all permits.

8 MR. MILLER: All permits. And then looking
9 forward, if any other permit gets created and it doesn't
10 have an express allocation to us in its statute, this 10
11 percent will apply for any future purpose.

12 MR. WALKER: And these four permits that we do
13 not get an allocation on, what are those permits today?

14 MR. MILLER: It is the ready-mix concrete, the
15 annual timber, the annual utility pole over-length, and
16 the annual manufactured housing.

17 MR. WALKER: And so what is the gross revenue
18 on those four that we're missing out 10 percent on?

19 MR. MILLER: I don't know exactly off the top
20 of my head, but I believe it's in the realm of \$700,000 a
21 year total -- I'm sorry -- not what we would get, I
22 believe. I'll have to double check

23 MR. WALKER: So \$70,000 to the agency. Is that
24 right, Linda? Thank you. Go ahead. I'm sorry.

25 MR. MILLER: And then two other redirection of

1 fees involve redirecting the salvage dealer licensing fees
2 and the motor carrier registration and credentialing fees
3 to the DMV Fund. Respectively, those would be about \$1.4
4 million a year and \$7.3 million a year additional to the
5 DMV Fund.

6 And that is all I have as far as the
7 highlights. Sorry if I went too fast. I know the last
8 thing ran long so I wanted to get you all out of here as
9 soon as I could.

10 MR. PALACIOS: Thank you. Are there any
11 further questions?

12 (No response.)

13 MR. TREVIÑO: Thank you, Mr. Miller.

14 MR. PALACIOS: Memo, do we have a motion?

15 MR. INGRAM: I can do the motion. This is the
16 motion on the legislative package. Correct?

17 MR. PALACIOS: Yes.

18 MR. INGRAM: I move that the board approve the
19 proposed legislation for the 85th Legislative Session as
20 presented by the staff. Knowing that there will also be
21 changes that need to be made, I further move that the
22 chairman is authorized to finalize the report, making any
23 necessary changes that are in the best interest to the
24 department, and to submit the report to the Govern, the
25 lieutenant governor and appropriate members of the

1 legislature on behalf of the board.

2 MR. WALKER: I second that.

3 MR. PALACIOS: Motion by Member Ingram, second
4 by Member Walker. All in favor please signify by raising
5 your right hand.

6 (A show of hands.)

7 MR. PALACIOS: Motion passes unanimously.

8 Thank you. Member Treviño, thank you.

9 Note for the record, our illustrious member,
10 Mr. Treviño, will be departing, 12:27.

11 MR. INGRAM: I didn't know that this is
12 optional, we can just leave?

13 MR. PALACIOS: You can't leave now.

14 MR. INGRAM: Memo, I'm going to get ahead of
15 you next time, I'm just going to tell you.

16 (General laughter.)

17 MR. PALACIOS: We'll move on to the specialty
18 plate design that will be presented by Mr. Jeremiah Kuntz.

19 MR. KUNTZ: Good afternoon. For the record,
20 Jeremiah Kuntz, director of the Vehicle Titles and
21 Registration Division.

22 Before you is a plate design. It is named the
23 Texas Tough Black license plate. This license plate is
24 being proposed by MyPlates, our specialty plates vendor,
25 to b considered to be added to the available license

1 plates that they sell. Currently in our offerings we have
2 119 MyPlates specialty plates that are available. That is
3 out to the total of 417 license plates that we currently
4 have designs for. 183 of those are military or qualifying
5 plates, and there are 121 other state specialty plates
6 that are available.

7 We received no negative comments during the
8 e-view of this license plate design, and it is for your
9 consideration.

10 MR. WALKER: I make a motion that we accept the
11 current proposed design.

12 MR. PALACIOS: We have a second?

13 MR. PAINTER: Second.

14 MR. PALACIOS: Motion by Board Member Walker,
15 second by Member Painter.

16 MR. INGRAM: I have a question. So Mr. Kuntz,
17 the current plate that we have now that's very similar,
18 the black plate, I forgot the name of it, Classic Black,
19 is that what it is?

20 MR. KUNTZ: We actually have two plate designs
21 that this is very similar to. We have a Classic Black
22 plate that is an all black plate. It actually has the
23 Lone Star in the upper left-hand corner, the silhouette of
24 Texas in the right-hand corner, and in the legend it says
25 The Lone Star State.

1 MR. INGRAM: Is that a MyPlates?

2 MR. KUNTZ: That is a MyPlates plate.

3 We also have as an offering a Texas Tough plate
4 which is a diamond plate pattern that is silver across the
5 entire face of the plate. That plate has a silhouette of
6 Texas in the upper right-hand corner and in the legend
7 says Texas Tough. This is somewhere between the two in
8 that it offers that diamond plate with a black background
9 with just the silver at the bottom.

10 MR. INGRAM: Okay. That's it.

11 MR. KUNTZ: All of these are MyPlates plate
12 designs.

13 MR. BARNWELL: Are you all done?

14 MR. INGRAM: I'm done.

15 MR. BARNWELL: I'm thinking about having a
16 custom color put on my car. Is it possible to have
17 MyPlates come out with a custom color for a plate that
18 would match, because I hate to clash.

19 MR. WALKER: If you pre-sell 250, they'll do
20 the deal.

21 MR. BARNWELL: I just wanted to know where the
22 limit was, so 250 might get me there.

23 MR. KUNTZ: There's a minimum order of 200
24 plate orders that must come in before that plate is
25 actually offered for sale.

1 MR. BARNWELL: If I order all 200, can I just
2 put one on my car?

3 MR. KUNTZ: Yes, sir, you can.

4 (General laughter.)

5 MR. PALACIOS: We have a second by Painter.
6 All in favor signify by raising your right hand.

7 (A show of hands.)

8 MR. PALACIOS: Members Walker, Hardy, Barnwell,
9 Painter, Ingram and Caraway.

10 All opposed?

11 (A show of hands.)

12 MR. PALACIOS: Member Palacios.

13 Let's move on now to item number 12. We're
14 going to kind of move around here on the agenda, which is
15 now the Texas Administrative Code, Chapter 218, update on
16 motor carriers.

17 MR. DUNCAN: I apologize. I was off doing
18 other work. Which item did we jump to?

19 MR. PALACIOS: Twelve.

20 MR. HARBESON: My name is Bill Harbeson. I'm
21 the director of the Enforcement Division at the
22 department.

23 The agenda item 12, which is found at page 458
24 of your board book, is to present to the board for
25 approval to post for public comment certain rule changes

1 in Chapter 218 Administrative Code regarding motor carrier
2 household good operations. Let me explain how we got
3 here. The statute provides that the department will
4 establish an advisory committee made up of public members,
5 industry members, we had law enforcement, and Member
6 Walker actually participated in these meetings, and they
7 would then make recommendations to the staff, who in turn
8 would bring in front of you certain changes to the
9 statutes in an effort to both protect consumers and help
10 streamline the process of household goods moves in Texas.
11 So the committee met on four occasions in the past year
12 and came up with a number of recommendations which is the
13 product you have in front of you.

14 And in the interest of time, I'm not going to
15 go through all the committee members' names, but I'd like
16 to particularly commend Chairman Jim French from Scobey
17 Moving in San Antonio, and of course, Chairman Walker also
18 served on the last meeting and helped get us over the
19 finish line which we are now at. And we will at a later
20 date hopefully recognize each of the members on the
21 committee, but they worked very hard throughout.

22 I was just told that John Esparza from the
23 Southwest Movers would like to make a comment about the
24 committee.

25 But I will go ahead and conclude here with a

1 brief summary, and I mean very brief, that the amendments
2 before you strengthen the rules governing the advertising
3 in this area of our industry. They make it easier for
4 consumers to understand what exactly they're getting into
5 when they negotiate or contact a mover to move their
6 household goods, and this is particularly important in
7 this business because literally in a lot of occasions
8 everything you own is going on that truck, so you want to
9 know what the deal is before that happens.

10 We also modernized a number of the rules to
11 allow for changes in communication, use of the internet.
12 Some of the rules had not been made compatible with
13 internet advertising, and also the use of your handheld
14 device to both contract with the consumer and also to
15 demonstrate your licensure if law enforcement should
16 become involved.

17 And finally, there was a move by the committee
18 to change our rules regarding licensure of household goods
19 movers. We used to have something called interim
20 licensing where you could submit some of your paperwork
21 but not all of it but start the business. It was decided
22 that that was really not in the best interests of the
23 industry and consumers for these people to actually get
24 engaged until we had the entire package and could rule on
25 that entire package to license them.

1 So again, that's a brief summary of the
2 changes. When you look at the package, you can see the
3 things that are underlined or highlighted and that will
4 show you all the changes that were made. So I'll be glad
5 to answer any questions, and Chairman, would you like to
6 hear from Mr. Esparza?

7 MR. PALACIOS: Yes. Mr. Esparza, would you
8 like to come up?

9 MR. ESPARZA: Chairman, members. My name is
10 John Esparza. I serve as the executive director of the
11 Southwest Movers Association. We're one of the largest
12 moving associations in the country. And I'm also in a
13 unique position, I also serve as the president of the
14 Texas Trucking Association.

15 I will be very brief and I just merely wanted
16 to pass not just my gratitude on but to share with the
17 board how it was an intensive process, most certainly, as
18 Bill had mentioned, over the course of the last year, we
19 met a number of times, took up a number of issues, but I
20 have to applaud the staff, Mr. Harbeson, David, Mr.
21 Archer, also Mr. Walker, and there's so many that deserve
22 credit for this. And I would be remiss, and certainly on
23 behalf of Mr. French, who is not here today, if we didn't
24 mention that.

25 It was certainly a collaborative effort and to

1 us it was an example of what a working group should work
2 like, and all in the spirit of consumer protection. We
3 were very pleased with the outcome. We worked through
4 lots of challenges and we learned a lot together, but more
5 importantly, what we did and what we are presenting in
6 terms of the final product, we are very proud of as well,
7 and want to thank you for the work that you have done and
8 staff as well.

9 MR. PALACIOS: Thank you for your kind
10 comments.

11 MR. HARBESON: Do any of the board members have
12 any other questions? If not, I would ask that you approve
13 the package before you for publication for public comment.

14 MR. PALACIOS: Do we have a motion?

15 MS. HARDY: I move the board approve the
16 proposed amendments to Chapter 218 for publication in the
17 Texas Register for public comment.

18 MR. PAINTER: I second.

19 MR. PALACIOS: We have a motion for Board
20 Member Hardy and a second from Board Member Painter. All
21 in favor please signify by raising your right hand.

22 (A show of hands.)

23 MR. PALACIOS: The motion passes unanimously.
24 Thank you very much, Mr. Harbeson.

25 MR. HARBESON: Thank you.

1 MR. WALKER: So I have a question. Since this
2 concludes this, does this committee dissolve now and go
3 away, or does it still stay existing?

4 MR. PALACIOS: It was an ad-hoc committee,
5 unless there's any other items that are outstanding.

6 MR. DUNCAN: Members, David Duncan, general
7 counsel.

8 This was actually a statutory committee that
9 upon request the committee is formed. It is one that
10 would meet presumably at the call of either the chair or
11 the chair of the committee if there was a need, but for
12 this purpose, the purpose of reviewing these rules,
13 there's really no need for them to meet again.

14 MR. WALKER: Are you sure it's a statutory
15 requirement that it be a household goods committee?

16 MR. DUNCAN: Yes. It is reflected in rule that
17 we will create one upon request. We created upon request,
18 and it was to review the rules. We do our rule reviews
19 every four years, so it would be logical that about every
20 four years that they would get back together. I see John
21 nodding his head, which makes me happy. So there would be
22 reason for them to revisit these at some point but
23 probably not in the very near future.

24 MR. WALKER: Thank you.

25 MR. PALACIOS: Thank you, Mr. Duncan.

1 We're going to move on now to agenda item 9,
2 Projects and Operations, item B. We have a Registration
3 an Titling System update from Mr. Eric Obermier, and I
4 believe we have a couple of people that also would like to
5 add comment. Good afternoon.

6 MR. OBERMIER: Good afternoon, chairman,
7 members of the board. For the record, my name is Eric
8 Obermier, CIO for the DMV. With me today I have Eric
9 Reeder from Deloitte. He and I will be actually
10 presenting some slid material to you. And we also have
11 Dale Richardson, to my right, of the Department of
12 Information Resources. And Harold Gilchrist of Atos, who
13 is one of the vendors that manages the infrastructure
14 inside of the data centers for the state.

15 Today we will be providing you with an
16 operational update for the refactored RTS system. No
17 action is being requested of the board today, this is a
18 briefing only. The information we are presenting can be
19 found starting on page 79 of your board books.

20 So the last operational update that we provided
21 to the board was done back in April. We also provided the
22 same report to the Projects and Operations Committee. The
23 information on the first three slides will look very
24 familiar to the board members who were here then.
25 Hopefully it will provide a good refresher for them and

1 hopefully it will also be a good context for the newer
2 board members that have recently joined as well.

3 So as a reminder, the RTS system is currently
4 supported by multiple teams within multiple organizations.

5 We, of course, have the TxDMV IT staff as part of that.
6 We have the Deloitte project team, who was the primary
7 vendor for the refactoring effort where we modernized and
8 moved the RTS legacy system to a more modern technology
9 stack. They are currently still engaged with Workstream 4
10 of that project effort which is not just the maintenance
11 and operations of keeping RTS up but also they have the
12 lead role in the application development for the
13 enhancement set we've been rolling out. And of course, we
14 have the Department of Information Resources who manages
15 the Data Center services program, using third party
16 vendors like Atos to manage the infrastructure within
17 those data centers. So all of the RTS infrastructure for
18 the servers and the storage is actually located within
19 those statewide data centers.

20 This next slide is exactly the same as the last
21 update. I'm not going to go through each one of these
22 bullet items in detail, but I did want to hit a couple of
23 them. The first one there being that we did the actual
24 refactoring of the RTS system in multiple phases. We
25 rolled out the point of sale client to the counties and

1 the regions, as well as the Cognos reporting platform from
2 May 2015 through October 2015.

3 Jumping ahead a couple of bullets, we actually
4 refactored the core of RTS, which was running on a
5 mainframe, over Thanksgiving weekend in 2015. It was a
6 long weekend but also a very productive weekend that was
7 probably the riskiest milestone of this entire project.
8 This is where you may see news reports from across the
9 nation of other organizations, governments and whatnot,
10 trying to modernize their systems, this is typically where
11 they fail and get hangup. We made it past that.

12 We had our first update to the refactored RTS
13 core that was deployed on December 7. It included some
14 key items such as the renewal notice updates for the
15 second year of the Single Sticker program, and also a
16 search by customer name feature which was the first
17 function that really rolled out to make RTS more customer-
18 centric as opposed to vehicle-centric. Unfortunately,
19 that search feature had very negative impact on the system
20 performance, was backed out that same day. Skipping to
21 the next slide, you'll see it was actually redesigned,
22 retested and redeployed in June and it has been
23 functioning properly since then.

24 I'll jump straight to the last bullet here so
25 we can get into the rest of the meat of the presentation

1 as well. The most recent release we did was release 8.7
2 to implement the processing and handling rules that were
3 recently adopted by the board, as well as the centralized
4 print and mail for the online renewals.

5 You happen to be looking at customer number one
6 that actually went through that process. I was the only
7 one in the batch last night because I was the only one who
8 was there to renew my registration between midnight and
9 3:00 a.m., to see how this process would work for
10 customers. I identified one little bug that's been
11 addressed. I now see the status of my sticker as already
12 in the printing phase. So really neat stuff.

13 This release was actually scheduled to go out
14 on 10/24, but due to a date conflict with HEB, they have a
15 direct integration with our RTS system where HEBs in
16 several counties across the state -- actually more than
17 several, I don't know the number -- process registration
18 renewals for some of the counties. It was clear that
19 unless they did their release the same day we did -- which
20 we had already told them the 24th, they thought it just
21 needed to be in place by the 1st -- that they would not be
22 able to process registrations as soon as we went live
23 unless they went live with us. So we talked with the
24 HEBs, we talked with the counties that use the HEBs, we
25 talked with the Tax Assessor-Collector Association

1 leadership that is there to help represent the counties as
2 well, decided that the best thing to do was just to move
3 that release date back to the 31st so that HEB would not
4 be out of commission for processing their renewals any
5 more than just the one day on October 31.

6 Since going live, it's gone very well. We've
7 had a couple of minor issues that have been reported to
8 us, minor in such a way that they in no way affect the
9 counties' or the regions' abilities to process any
10 transactions for the customers that are walking in. Most
11 of these are behind the scenes as well, a couple of them
12 were on some of the report aspects. But again, they're
13 being addressed, some of them have already been rolled
14 out. We've already sent out a communication to the
15 counties detailing what they are, what's already been
16 fixed, and when the other items will be fixed.

17 Jumping into kind of the meat of the
18 presentation here now, the RTS availability slide here, it
19 looks different than this was presented, we went to a bar
20 chart instead of a line graph, I think it shows the
21 information better here. You may recall from our
22 presentation back in April that I gave information
23 indicating that we were going through a time of extreme
24 change, in fact, we were just coming out of it, where at
25 one point in that window of December to April, we had made

1 changes to the system 48 times in just over a two-month
2 period at one point. And as I mentioned as well, the more
3 you make changes to a system, the more likely you are to
4 have some unintended consequence with it.

5 We saw some of that in the root causes of the
6 issues that we had. As I mentioned, we saw opportunities
7 to improve some of the people, the process and the
8 technology -- not improve the people but improve the
9 processes that the people use, and after a strong focus on
10 that coming out of that April meeting, you'll see a very
11 positive trend we observed in May, June and July where we
12 were very close to 100 percent, in May being 99.6, June
13 99.9, and in July eventually got to 100 percent of the
14 time.

15 Just for reference for the board members that
16 were not here before, we measure RTS point of sale uptime
17 from 7:00 a.m. to 6:00 p.m., Monday through Friday,
18 because that's when it really matters to the customers.
19 What that means is every 15 minutes of downtime we have
20 equates to .1 percent of our possible uptime, so looking
21 backwards there at June, we had 15 minutes of downtime.

22 Fast forward to August, we'd observed several
23 issues that happened that caused some outages. Some of
24 those issues weren't as easily identified for the root
25 cause, and as such, working with the other teams that I

1 mentioned on the first slide, mainly Deloitte first, asked
2 them to help us look into this, what was causing these
3 issues so we could get back to the happier times we were
4 experiencing, that May through July time frame.

5 In response, Deloitte in early September
6 assembled what they call a Tiger Team which is a team of
7 experts, some that had already been part of the project
8 but also some that were not part of the original RTS
9 project, to provide a fresh set of eyes to look at the
10 system from top to bottom and what's been causing some of
11 the more recent outages and make some recommendations.
12 Which again, I don't want to steal too much of Eric
13 Reeder's thunder, he's going to give an update on that,
14 but talk about some of the initial recommendations that
15 have already been done, some of the things that can be
16 done in the short-term still, and other items that will be
17 a little longer focused.

18 MR. WALKER: Question. How did you come up
19 with this 98, 97, 95? The system was down this past month
20 for almost an entire day, was it not?

21 MR. OBERMIER: Yes, sir. In October.

22 MR. WALKER: So if you're down a day, one out
23 of 33 takes you below that 98 percent factor. And know
24 this was almost down for 24 hours, wasn't it?

25 MR. OBERMIER: No, sir, it was not.

1 MR. WALKER: How long was it down?

2 MR. OBERMIER: It was not down that long. So
3 October 5 was the most recent high impact outage that we
4 had. November 5, during the hours of 7:00 to 6:00 when it
5 would impact the customers, it was four hours and 45
6 minutes because it started at 1:15 in the afternoon. So
7 by the time 6:00 p.m. rolls around, our staff are still
8 engaged, working on the issue and the system did not come
9 back online until about 11:00 p.m. when we finished
10 validating everything.

11 MR. WALKER: But then some offices were open
12 and some weren't. Is that not correct also?

13 MR. OBERMIER: On some of the other issues, we
14 have experienced that, and on those instances when it's
15 only affecting a small number of counties, we don't call
16 that a statewide outage.

17 MR. WALKER: So this percentage factor, this
18 98, 97, 95, that's a statewide outage?

19 MR. OBERMIER: Yes, sir.

20 MR. WALKER: Not intermittent problems in
21 Galveston County and Brewster County.

22 MR. OBERMIER: Exactly. There are many things
23 that can cause RTS to not be available within any one
24 given office. It might be the local network that's there
25 that we manage, it could be the circuits, whatever.

1 MR. WALKER: In Galveston I know that's been a
2 problem. When Cheryl was on the board, she complained
3 constantly about the internet service they had down there
4 to one of her remote offices on Bolivar, I think.

5 MR. OBERMIER: Galveston happens to be one of
6 the more reliable areas now anyway. I honestly can't
7 recall the last time we've had any issues there. One of
8 the more problematic areas that we've seen actually has
9 been the Dallas area, get a lot of thunderstorms through
10 there.

11 MR. WALKER: But we don't count those as
12 downtime.

13 MR. OBERMIER: We don't count those as downtime
14 because it's affecting a localized office, and in some
15 cases, as few as one or two PCs.

16 So I was not going to go into great detail on
17 this slide as well, I just provided it for your reference.

18 I will be talking in more detail to the outage that
19 occurred on August 15 and again the outage that occurred
20 on October 5 since those were the most impactful outages
21 over the last three months.

22 So again, working with the Tiger Team, which
23 has now been expanded to include members from all
24 organizations, including TxDMV, Atos, as well as DIR,
25 looked at the issues that have occurred over the last

1 three months and kind of broke then down into these three
2 categories: technology, process gaps, and performance and
3 unknown issues.

4 So the technology issue that I was just talking
5 about on the October 5, of the seven hours in the last
6 three months, almost five of that was that one single
7 incident. The root cause of that was actually a bug in
8 the server operating system that's running the RTS
9 database that's within the DCS program. DCS manages all
10 the infrastructure. As soon as we had the issue, we got
11 on a conference bridge, it was identified that the
12 database was down and it did not come right back up. We
13 engaged third party IBM support, since they wrote the
14 database software, found that there was a bug with the
15 server operating system, ultimately got the system back up
16 and have changed the configuration such that that bug will
17 not be able to affect us going forward.

18 That bug has probably been out there since the
19 system was originally installed, so extremely unlikely to
20 impact, and in this case the planets aligned in the right
21 way or the wrong way, depending on how you want to look at
22 it, and it finally caused an issue.

23 MR. INGRAM: So Eric, the bug has been out
24 there so we just finally maxed out the system enough to
25 cause the bug to create a problem?

1 MR. OBERMIER: So in response to that, Member
2 Ingram, it was not necessarily load that would have caused
3 that, it could just be a certain set of conditions that
4 were finally in the right place that caused that. And
5 just to make sure everybody understands, there are bugs in
6 basically all software out there, whether it's a server
7 operating system or whether it's an application that's
8 written, and when patches are actually released, they
9 aren't necessarily applied. And I'll let Harold go into
10 more detail on this, since they manage the infrastructure,
11 if you guys want any more information.

12 But the standard is not as soon as a patch is
13 released you just apply it, because what's observed more
14 in the industry is if there are bugs out there to address
15 issues that you will never come across because maybe
16 you're not running those services on that server, it's
17 more likely to risk your operations than it is to help
18 them. And in fact, there are lots of unintended
19 consequences of applying patches that have nothing to do
20 with your application that end up causing downtime. Those
21 are all reviewed by Harold's team and then they're applied
22 as needed.

23 Moving forward in the next group, the process
24 gaps. One thing again I want to just make note, the
25 system that we're running on is less than a year old, and

1 of course, all of the associated support processes are
2 also that same age. We have closed most of the gaps, we
3 had already closed most of the gaps in those processes.
4 We did find one, though, that exacerbated the outage that
5 occurred on August 15. There was a technical change
6 implemented within the DCS program, adding some storage
7 base for a subset of the RTS servers. When that change
8 was executed, it actually had some of the servers where
9 they could read and write to their storage and other
10 servers that could only read the storage. That's where
11 the problem was for us.

12 Unfortunately, the exacerbation was our test
13 and validation process that we use whenever any changes
14 are made, whether it be software or infrastructure, had a
15 gap identified in it where this same validation process
16 that worked for six-plus months before with much more
17 intrusive changes than this, at this time it did not
18 detect it and about half of the state was down. We just
19 called it an entire statewide outage because it was
20 difficult, honestly, at that point to say that we were
21 effectively conducting business when more than half the
22 state was down and we were being flooded with calls at our
23 service desk as we worked through this issue. The gap in
24 that process was closed so we hope to not find any more
25 like that going forward.

1 The last group there around the performance
2 issues, which some of the root causes are unknown, is
3 really what the Tiger Team, I think, is spending most of
4 their time on because that's where it's taking more of the
5 expert analysis to figure out what is causing some of
6 these outages. The first inspection looks to be that it
7 could be caused by database contention. So more systems
8 than just point of sale need access to the RTS database,
9 WebDealer, for instance, E-tags, the TLETS law enforcement
10 system, all of those systems depend on the core database,
11 as well as the Cognos reporting system. Usage, depending
12 on what it is, can cause collisions where even if the
13 server operating system or the database utilization may
14 not be high, there may be contention for the same amount
15 of data or the same exact data which could be causing some
16 of these issues.

17 So looking through this, we've put a lot of
18 effort into this, we recognize the importance of
19 addressing the issues, how they've been impacting the RTS
20 availability over the last three months, we've focused on
21 issues in the past, we saw a very positive result from
22 that. With these recent outages that we have seen, we're
23 taking an even deeper dive than we did last time with a
24 much broader team of experts.

25 And with that, unless there's any more

1 questions, I'm going to hand it over to Eric Reeder so he
2 can talk about some of these findings and activities that
3 the Tiger Team is working on.

4 MR. REEDER: Thank you. For the record, my
5 name is Eric Reeder. I'm a managing director with
6 Deloitte Consulting.

7 Mr. Obermier has taken you through the last
8 large incidents that have impacted the RTS system and teed
9 it up really for the Tiger Team to say really what were
10 these plaguing I won't say smaller issues but I will say
11 the unknown issues. In most cases they were rather short-
12 term durations but it still spun up a great deal of effort
13 in order to address that.

14 The team formed in September to really just
15 address what these unknown situations might have been. We
16 didn't just task our team -- I'll give a little background
17 there. So we named it a Tiger Team because we gave it a
18 centralized focus with a defined purpose with a set start
19 and end date. We do not expect this to go on forever, we
20 expect to just get in there, pounce, if you will, identify
21 what the issues are, make recommendations, and then close
22 it up. To what Mr. Obermier said, we did staff the team
23 with some external resources initially. We wanted to
24 create an independent situation where resources that were
25 doing daily support were potentially blind to a particular

1 issue because it was something that they were an owner in.

2 The team was tasked not only to look at what
3 was the most recent unknown issues but to look back at all
4 of the incidents that had happened beyond the RTS
5 environment beyond POS, all the entire RTS environment for
6 the past three months, and then make some identifications
7 as to what categories these incidents may have occurred.
8 This was going to give the team an opportunity to then
9 develop recommendations to go forward.

10 Just as that work was being done, it became
11 very apparent that it was more than the application, it
12 involved the entire RTS ecosystem, and that's when we
13 expanded the team to Atos and DIR and then, of course, the
14 agency, DMV, themselves to participate in these
15 activities. Since then the team has met twice a week for
16 extended workshop session to work through what some of the
17 monitoring might be or some of the enhancements we can put
18 in the system, in addition to twice daily calls where the
19 team is online doing a check-in just to make sure that the
20 function is consistent.

21 The team's objectives initially started off to
22 look at what were these unknown issues and do the
23 categorization. Once we did that, we decided let's shift
24 the focus and look at the overall resiliency of the entire
25 system, and so just to highlight, the team was to

1 identify, recommend and implement increase monitoring,
2 implement configurations that reduce ad-hoc users impact
3 on the system. One of the things that we believe is some
4 of our issues were caused by connections outside of the
5 RTS core system, and so we worked to implement changes
6 that would actually isolate those a bit, and I'll talk to
7 that in a minute. Identify code in nightly batch
8 processing that might be blocking the database and
9 impacting RTS users. And then recommend enhancements to
10 address potential points of failure that, thankfully, we
11 haven't seen yet, but trying to get ahead of that game.

12 Recommendations that have come from the Tiger
13 Team that have already been implemented. Mr. Obermier was
14 talking about some of the human elements of that. Some of
15 that was in change management. We're working to
16 coordinate all of the entities into a single change
17 management. There will still be separate ones as well,
18 but at least one point where we all get together and we
19 have the same understanding of what this potential impact
20 might be. And then from the application side, we call it
21 tuning the database to put in some configuration changes
22 that would prevent external RTS access from clogging the
23 pipe, if you will, preventing the core RTS system from
24 doing its primary job. So in this case, if the ad-hoc
25 users needed to go in and get something, they kind of

1 waited behind. We also worked to train these ad-hoc users
2 to write their queries more efficiently so they wouldn't
3 use as much of the competing processing.

4 Another implementation that we've already done
5 is there are a couple of systems that do read access to
6 the database, and that would be MVINet and TLETS. We have
7 also isolated that out as well, so that as those systems
8 are hitting the production of the RTS database that they
9 won't contend with the core RTS users and so we'll be able
10 to keep that number of connections to a minimum.

11 Lastly, and something that we've already seen a
12 real benefit from, and that is we made a global database
13 change that actually helps how the connection are managed
14 within the RTS core situation itself. Mr. Obermier was
15 talking about that we haven't had any significant issues
16 since the last release, we've had a couple of little
17 hiccups behind the scenes. A few days ago we had a minor
18 blip, it was a little bigger than minor but it caused no
19 issue to anybody, but we noticed through active monitoring
20 that we have a number of database connections that were
21 just growing and we couldn't understand why.

22 Now, since the Tiger Team was meeting in one of
23 their twice weekly four-hour sessions, we were watching
24 this occur, we were all ready to address the issue if it
25 was going to take down the system, it never did. We sat

1 there and monitored it and then slowly but surely all of
2 the connections were released by the system and nobody
3 called and saw any impact. We had seen spikes with that
4 earlier in the last previous eleven months and when that
5 would happen, there would be an impact on performance.
6 That performance impact did not occur so we feel pretty
7 confident that this global change actually prevented an
8 outage.

9 What is currently in progress is the team is
10 looking to make recommendations to improve overall
11 monitoring in the entire ecosystem. Right now there is
12 some isolation that occurs across the network in different
13 segments, and then, of course, application monitoring is
14 somewhat limited, database monitoring exists but we're
15 looking to beef that up as well. Our goal is to make a
16 recommendation to the agency so that they can evaluate
17 whether or not additional monitoring would be advantageous
18 to provide some insight as to how the system is performing
19 behind the scenes so that we can look for additional
20 opportunities to make application changes or network
21 infrastructure changes wherever the issue may have
22 occurred.

23 The other thing is I just mentioned we've
24 implemented two changes with configuration, we're calling
25 it isolation to kind of keep it all together. We are

1 going to apply these exact same isolation configuration
2 changes to Cognos, the enterprise reporting system, that
3 we have already done in RTS but these will go in the next
4 release which is scheduled for the end of November.

5 It is expected by the end of December the Tiger
6 Team is going to complete its work and produce a formal
7 document with recommendations and the activities that the
8 team had accomplished throughout its period of time. A
9 few of those recommendations that we already have on the
10 list are evaluating and creating an entire separate
11 environment Cognos reporting so there's zero contention,
12 and then updating one of the pieces of software that would
13 better utilize memory which would allow the overnight
14 batch processing to run more efficiently and not spill
15 over into the production period. Some of the issues that
16 we have had is that we're still trying to play catch-up on
17 some of the batch jobs as we're doing the opening of that
18 next day, so this is an opportunity to pull that in.

19 As far as next steps, the team is going to
20 continue to work diligently until they complete their
21 assignment in mid December. As we see changes that can be
22 implemented along the way, we'll make those
23 recommendations, and if something that the agency can
24 adopt sooner than later, then we will go ahead and work
25 toward an implementation.

1 With that, my comments are concluded.

2 MR. OBERMIER: For the last slide I just have
3 the upcoming planned RTS releases. One thing to note is,
4 again, we typically try and avoid the first week or the
5 last week of the month as any change to business process
6 and/or unexpected outages that may occur because of a
7 change, and during the first and last weeks of the month
8 have more impact, and should they occur in the middle
9 because that is the highest volume of traffic into the
10 county offices.

11 Unfortunately, you'll see one of the releases
12 here on August 28, that one we really don't have much
13 choice about there because we're likely to have
14 legislation that is going to have an effective date of
15 September 1 and we'll work our best to get everything done
16 appropriately. And if there is any risk, I know in the
17 past we have worked successfully with the legislators to
18 delay the effective date of some bills.

19 For instance, when we were going live with the
20 core RTS system there were numerous statutes that
21 originally had an effective date of 9/1, we were able to,
22 based on where we were in the RTS refactoring and the
23 launch date of getting off the mainframe looming just
24 literally a couple of months away, it would have cost the
25 DMV and the state a pretty sizable amount of money to

1 delay that project and have to do a bunch of rework for
2 the application that had already made just about to the
3 end of its schedule for getting it refactored and
4 launched. So there may be some that actually occurs this
5 time but although there will likely not be nearly as much
6 of a need to ask for that this year.

7 MR. PALACIOS: Thank you.

8 We have a couple of other guests here that
9 would like to, I guess, provide us some updates. Mr.
10 Richardson.

11 MR. RICHARDSON: Chairman, members of the
12 board. My name is Dale Richardson, chief operations
13 officer for the Department of Information Resources.

14 Just to echo Eric and Eric's comments, based on
15 my observations and having members of my own team involved
16 with the daily operations of the RTS project, I'd have to
17 say it's been very successful transformation off the
18 mainframe. As Eric alluded to earlier, a lot of those
19 type of projects go south pretty quick. This one is
20 successful. I think the amount of focus, laser-like focus
21 on the daily operations, understanding the impact to
22 citizens of the state with this particular application, I
23 have to commend the teams. A lot of times when you get
24 different vendors, you get a lot of finger pointing. We
25 have not seen that, the teams are working real close

1 together. So I'm excited and I'm going to continue
2 monitoring it and continue doing whatever DIR can and
3 bring to help ensure that this system continues to operate
4 properly.

5 MR. PALACIOS: Thank you, Mr. Richardson.

6 And we also have Mr. Gilchrist with us.

7 MR. GILCHRIST: Harold Gilchrist with Atos.

8 So I'd like to echo the comments. RTS is a
9 very young system, it's a very complicated system with
10 multiple layers of integration. It's not uncommon to see
11 something like this go through an evolution where it's
12 stabilized after its initial rollout, so that's consistent
13 with what we're seeing. The RTS Tiger Team is coming up
14 with very good recommendations and things we'll likely
15 implement going forward. I do want to ensure you that
16 Atos considers this very serious. We have 40 resources on
17 the account and we've put all of them to bear when we've
18 had an outage or as part of the Tiger Team to improve
19 performance.

20 MR. PALACIOS: Thank you.

21 Are there any questions for our panel?

22 (No response.)

23 MR. PALACIOS: Mr. Obermier, Mr. Reeder, Mr.
24 Richardson, Mr. Gilchrist, thank you so much.

25 Let's move on now to the other two items on the

1 Projects and Operations agenda. We'll start with a
2 facilities update from Ms. Linda Flores.

3 MS. FLORES: Good afternoon. For the record,
4 my name is Linda Flores. I'm the chief financial officer
5 for the Texas Department of Motor Vehicles. Today I'm
6 just going to give you a very brief update of where we're
7 at with facilities.

8 In early October, Ms. Brewster and James Bass
9 from TxDOT came to an agreement that we would be
10 relocating the Bull Creek staff over to Camp Hubbard.
11 That encouraged a lot of collaboration between the two
12 agencies and our teams have already met and identified
13 some particular layout for office space that the Bull
14 Creek staff is going to need. We're all very excited,
15 including the Bull Creek Motor Carrier Division. They now
16 know that they have a place to call home for the next
17 several years.

18 I also have some pictures that I want to show
19 you of the Corpus Christi Regional Transit Authority
20 complex. This will serve as the agency's new home for the
21 Corpus Christi Regional Service Center. We are scheduled
22 to move in, our move-in date is April 1, 2017.

23 MR. WALKER: Not the whole building, though.

24 MS. FLORES: Not the whole building, no, sir.

25 If you can see the cursor, that little arrow, our space is

1 right along this hallway and we will have an exit door to
2 the public. Behind this, I think you can barely see, it
3 might be a little bit over here, the courthouse is behind
4 this building. We recently visited there a couple of
5 weeks ago and we literally just walked across a couple of
6 parking lots to this facility.

7 MS. BREWSTER: Mr. Chairman, if I might just
8 add?

9 MR. PALACIOS: Yes.

10 MS. BREWSTER: Sorry to interrupt, Ms. Flores.
11 I just wanted to note in that courthouse is the tax
12 assessor-collector office, and so they were absolutely
13 thrilled that our staff, the regional service center, is
14 going to be so closely located to them in Nueces County.

15 MR. PALACIOS: That's great.

16 MS. FLORES: So I believe this is the door that
17 will be open to the public and this will be our area, our
18 office space.

19 We have commenced weekly meetings with the
20 director of capital projects for the transit authority, as
21 well as the architect, and we have a meeting scheduled
22 Friday at three o'clock, every Friday. So we were very
23 excited. There is a real large room that's used for board
24 meetings and we were told that our staff would have access
25 to that room when it's not in use by their board.

1 With regards to San Antonio, we are close to
2 negotiating a draft lease for a particular property in San
3 Antonio, so I don't have any pictures of that yet. TFC is
4 the lead agency putting together that draft lease, so
5 hopefully in the next board meeting we'll have something
6 to share with you at that time.

7 MS. BREWSTER: Mr. Chairman, TFC is Texas
8 Facilities Commission.

9 MS. FLORES: They are the agency that actually
10 leases on behalf of state agencies.

11 And the last area that we had wanted to
12 relocate was the Pharr Regional Service Center. We're not
13 having as much luck there, but we do have some time left
14 to identify some particular space, so hopefully that too
15 will occur in the next couple of months.

16 And that concludes my briefing.

17 MR. INGRAM: What is our timeline in Pharr?

18 MS. FLORES: I have until August 31, 2017.

19 MR. INGRAM: Not much time.

20 MR. PALACIOS: Any other questions for Ms.
21 Flores?

22 (No response.)

23 MR. PALACIOS: Thank you, Ms. Flores.

24 Let's move on to the next item. We'll go to
25 the enterprise projects update by Ms. Judy Sandberg.

1 MS. SANDBERG: For the record, Judy Sandberg,
2 director of TxDMV Enterprise Project Management Office.
3 This afternoon I'll be giving you a very brief update on
4 some enterprise projects.

5 In your briefing book you have a copy of a
6 project dashboard for each of our eight open active
7 projects, but in the interest of time this afternoon, I'll
8 be providing you an update on two of our major projects.
9 One is the RTS refactoring project, and the other is the
10 LACE replacement project.

11 I have provided you two updates on each one of
12 these project dashboards. If you'll refer to the one
13 entitled "RTS Refactoring TxDMV Fund and P&H Fee" first,
14 that replaces page 98 in your briefing book. This one is
15 hot off the presses this week.

16 MS. BREWSTER: Mr. Chairman, if I might. For
17 members of the board, these are separate handouts that are
18 on your desks, the slides that she's referring to, these
19 are updated slides. Ms. Sandberg wanted to make sure you
20 had the most up-to-date information.

21 MR. WALKER: Also, Ms. Sandberg changed those
22 profiles the way we asked them to be changed to make it so
23 that it shows what percent of the project is done, what
24 encumbrances have been spent on it and so forth, so we
25 have a better perspective. We asked her to do that at the

1 last meeting. Thank you, Judy.

2 MR. PALACIOS: It's very nice.

3 MS. SANDBERG: You're welcome. I'm glad you
4 find it helpful. Thank you for the feedback and for the
5 assistance since the last meeting. We went through a
6 couple of versions of this and the members were very
7 helpful in getting it to the point it is now.

8 The section that Member Walker is referring to
9 is on the second row, left side, project percent complete.

10 That was really the main thing I wanted to highlight
11 about the RTS refactoring project today since Mr. Obermier
12 has already provided you an update on some of the more
13 specifics about the project. But you can see from this
14 that this project began in 2013, it is scheduled to end
15 December 31, 2018. The scope of work is 83 percent
16 complete, the schedule elapsed is 60 percent of the
17 duration, so you can see in terms of accomplishing work in
18 alignment with the schedule, we're doing very well.

19 It also shows you the percent of budget that
20 has been spent or encumbered, and we're also in good
21 alignment with budget expenditures. This shows that 70.2
22 percent of the budget has actually been spent, 25.7
23 percent has been encumbered, and that is the full contract
24 amount that takes us through the December 2018 project end
25 date. And in the box below that you'll see the amount of

1 budget remaining is \$2.5 million is the amount in our
2 contingency fund at this time.

3 Mr. Obermier already mentioned that the first
4 part of the process and handling fee deployment went
5 successfully into production over this past weekend. The
6 second portion of just wrapping up process and handling
7 fee is scheduled to go into production on December 19.
8 That will also include some Cognos enhancements as well.
9 By that point in time, we will be completely finished with
10 the process and handling fee portion, and of course, the
11 TxDMV Fund portion has already been implemented.

12 The reason the overall project and the schedule
13 and resources are shaded yellow is that's a cautionary
14 attention-getter for us as we manage the project. The
15 project is proceeding on schedule overall, as you can tell
16 from the project percent complete, but when we're in the
17 midst of releases with short durations like the process
18 and handling fee, we monitor that schedule very closely.
19 We do that with each one of the releases. It was yellow
20 in the release that just went live over the weekend, and
21 thankfully, I think through the focused attention, it was
22 successfully deployed. We're continuing to do that for
23 this next deployment for December 19, just to make sure
24 that things stay on track and that we get it deployed on
25 time. We do have some resource constraints and the

1 testing effort is fairly significant, but we are, even
2 with that, very confident that we will meet the December
3 19 deadline.

4 I also wanted to mention that as a part of this
5 project, as well, that Mr. Kuntz's area has completed
6 training for regional service centers, counties, full-
7 service deputies, and subcontractors on the P&H fee
8 portion, and within the next 30 days they will also be
9 providing training to dealers. And the Government and
10 Strategic Communications area is also doing outreach and
11 communication and making sure that we try to get the
12 proper information out to the counties and others who are
13 interested.

14 Do you have any questions about this particular
15 project?

16 MR. WALKER: Let's move to LACE and talk about
17 why we're so far off budget on that.

18 MS. SANDBERG: Yes, sir. We will move to LACE
19 replacement. We are off budget on LACE replacement. I
20 would just like to clarify a little bit, we are within the
21 budget of the project but we are spending more than the
22 original contracted amount on the services piece with our
23 vendor. The line item budget for services for the LACE
24 replacement project was in the neighborhood -- well, not
25 neighborhood, it was \$5.6 million for that particular

1 piece. We awarded a contract for less than that amount,
2 and over the last four months we have done three contract
3 amendments, we're in the process of doing the third
4 contract amendment.

5 The first amendment was to implement for the
6 project security for user authentication and sign-on and
7 password resets. Then for those of you who are new to the
8 board, we found during the early stages of this project
9 that business requirements that were documented were
10 significantly more detailed than what we had originally
11 budgeted. So we went through a process of re-review with
12 the business areas who would be using LACE replacement.
13 We had to clarify our intended expectations for this
14 project. That resulted in the second contract amendment.

15 Then as we began testing a couple of weeks ago,
16 we discovered that a significant portion of the
17 notification piece for our Enforcement Division had been
18 missed. It had been identified in the requirements but it
19 was not sufficiently defined in the design document which
20 we approved. And so in order to make sure that that
21 functionality was in place for the Enforcement Division,
22 we went back to the vendor and asked them to work with us
23 on what would it take to make sure we had that
24 functionality. Without it, we did not see how we could
25 proceed, and Enforcement, in fact, indicated that that was

1 a showstopper for them. That is the third contract
2 amendment that we're working on right now, Member Walker.

3 MR. WALKER: So how much are we going to be
4 short and what's that going to cost?

5 MS. SANDBERG: We are not going to be short, we
6 have sufficient funds within the budget.

7 MR. WALKER: We only have \$1.2 million left to
8 do this.

9 MS. SANDBERG: And that is sufficient to cover
10 the amount of this third amendment that we're talking
11 about, so we will stay within the budget of the project.

12 MR. WALKER: So this project is supposed to be
13 finished this month.

14 MS. SANDBERG: Yes, sir. We will not meet that
15 deployment date, we have pushed that date out. Our vendor
16 has recommended a deployment of December 14, and our
17 executives have approved that new deployment date.

18 MR. INGRAM: I'm sorry, one more time.

19 MS. SANDBERG: December 14 is the new date.

20 MR. WALKER: So by our next board meeting, this
21 project will be finished, you're saying.

22 MS. SANDBERG: Yes, sir.

23 MR. WALKER: Do you agree with that, Whitney?

24 MS. BREWSTER: Yes.

25 MR. PALACIOS: Any other questions for Ms.

1 Sandberg?

2 (No response.)

3 MR. PALACIOS: Thank you very much.

4 MS. SANDBERG: Thank you.

5 MR. PALACIOS: Okay. Let's move on, I guess
6 we're going to skip to item 11, Texas Administrative Code,
7 Chapter 217, Vehicle Titles and Registration. Mr.
8 Jeremiah Kuntz and Mr. Duncan to present.

9 MR. DUNCAN: While Jeremiah is walking up here,
10 David Duncan, general counsel.

11 These were rule amendments and one new section
12 that were proposed. The rule amendments were primarily
13 cleanup. The middle bullet corrections was entirely
14 cleanup. It did things like update statutory references,
15 we removed things like references to forms. There were
16 actual form numbers in our rules that some of the forms
17 don't even exist anymore. So that was all cleanup.

18 The first one, the bonded title amendment, we
19 did receive some comments on that, primarily from ABTPA.
20 Bryan's constituency found some issues with that, and we
21 have adjusted the rule in response to a couple of their
22 comments. Some of their comments actually were on
23 language that we weren't changing in the bonded title
24 rule, so I think Jeremiah and Bryan are going to visit on
25 some going forward consultations on that section of the

1 rule. It's about verifying VIN numbers on vehicles, so it
2 plays very well into what Bryan does.

3 And then the very last bullet relates to a
4 report on alternatively fueled vehicles which was driven
5 by a piece of legislation from the last session, and that
6 report is?

7 MR. KUNTZ: In its final review at this point,
8 so we should have that, I'm hoping to get it done in the
9 next two weeks to get it to the legislature immediately,
10 so upon this rule becoming effective, we'll have the
11 report ready for the legislature.

12 MR. DUNCAN: And we did receive one comment on
13 that as well, which was on behalf of an alternatively
14 fueled vehicle association that relates to hydrogen fuel
15 cell vehicles, and they said, We hope you're counting our
16 vehicles. And our response to that is if we can figure it
17 out from the VIN, we'll count them.

18 MR. KUNTZ: So the comment came in, I believe,
19 from Plug-In Texas, and the VIN does have an indicator for
20 hydrogen fueled vehicles, so we are able to decode that
21 VIN. I will tell you in doing the report there are no
22 hydrogen fueled vehicles in the State of Texas currently
23 that are currently registered that are showing in our
24 system, but we can decode that VIN and we are able to
25 provide that information in the report.

1 MR. DUNCAN: And with that, we would urge the
2 board's adoption of the rules as we propose them, with
3 some minor adjustments for the comments that we received.

4 MR. PALACIOS: Are there any questions for Mr.
5 Kuntz or Mr. Duncan?

6 (No response.)

7 MR. PALACIOS: If not, I'll entertain a motion
8 to accept the amendments and corrections.

9 MR. INGRAM: So moved.

10 MR. WALKER: Second.

11 MR. PALACIOS: Motion by Member Ingram, second
12 by Member Walker. All in favor please signify by raising
13 your right hand.

14 (A show of hands.)

15 MR. PALACIOS: Motion passes unanimously.
16 Thank you very much.

17 Okay, folks, hang in there. We're coming down
18 to the home stretch here. Our favorite part, at least my
19 favorite part, finance and audit. I'll ask Ms. Sandra
20 Menjivar and Ms. Flores to come forward. We'll start off
21 with the Internal Audit Charter recommendation from Ms.
22 Menjivar.

23 MS. MENJIVAR-SUDEATH: Good afternoon, board.

24 For the record, my name is Sandra Menjivar-Suddeath. I'm
25 the Internal Audit director, and I'm requesting approval

1 in the Internal Audit Charter which can be found on page
2 25 of your board books.

3 The Internal Audit Charter describes the
4 mission, purpose, authority, scope and responsibilities of
5 the Internal Audit function. It also establishes the
6 independence of the activity of the Internal Audit
7 function so we can provide assurance and advisory services
8 to the board and management. The charter was last
9 approved in 2014, and since then there has been changes to
10 the Internal Audit leadership, as well as the
11 International Standards for Professional Practice of
12 Internal Auditing, which is one of the standards we have
13 to follow.

14 The changes to the standards require that the
15 Internal Audit Charter have the updated internal audit
16 definition and a reference to the core principles for the
17 Professional Practice of Internal Auditing. Those changes
18 were made to the charter, as well as a mission statement
19 was added that supports and reflects the agency's vision,
20 missions and goals.

21 Are there any questions on this item?

22 (No response.)

23 MS. MENJIVAR-SUDDEATH: Okay, great. So I'm
24 requesting approval of it.

25 MR. INGRAM: I just love how quick you were.

1 MS. MENJIVAR-SUDDEATH: I'm very efficient.

2 MR. WALKER: She's hungry too.

3 (General laughter.)

4 MR. WALKER: I so move that we accept the
5 recommendations of the internal auditor on the plan for
6 this coming year.

7 MR. INGRAM: The charter?

8 MR. WALKER: The charter.

9 MR. PALACIOS: We have a motion by member
10 Walker to accept the Internal Audit Charter
11 recommendations.

12 MS. CARAWAY: Second.

13 MR. PALACIOS: Second by Board Member Caraway.
14 All in favor signify by raising your right hand.

15 (A show of hands.)

16 MR. PALACIOS: Motion passes unanimously.

17 Thank you, Ms. Menjivar, and proceed with the
18 Internal Audit update.

19 MS. MENJIVAR-SUDDEATH: The next item is the
20 status update on current Internal Audit activities which
21 is on page 35, and this is a briefing item only.

22 The first items on the update are current
23 audits. The first one is oversize/overweight permitting
24 audit. We have finished the audit, we're currently in
25 reporting and plan to present that to the board in the

1 next meeting.

2 We've also begun the RTS post-implementation
3 review. That began in October, and we're focusing on the
4 data reliability of the reporting that is produced to the
5 Cognos reporting system. Our review will be looking at
6 both the ad-hoc reports that the system produces as well
7 as the pre-built reports, and we'll be looking at the
8 logic and architecture that is used to build those
9 reports. We plan to have the report ready by February.

10 We also finished the annual internal audit
11 reports for fiscal year 2016, which is on page 36 for your
12 reference. The report was submitted to the Governor's
13 Office, the Legislative Budget Board, the Sunset
14 Commission and the State Auditor's Office on November 1,
15 as required by statute. The report summarizes our
16 internal audit activities for fiscal year 2016. We did
17 produce two audits and advisory service, and for time's
18 sake, I won't go into the details of those audits.

19 The next item on the status update is on
20 external coordination. We submitted a letter to the State
21 Auditor's Office on the fraud hotline coordination which
22 is the State Auditor's Office complaints that we received
23 for the fourth quarter. We had a total of about six
24 complaints received from the State Auditor's Office and we
25 provided a response on two internal references.

1 The next item is the State Auditor's Office
2 also has commenced an audit on the agency's complaint
3 process. Their objective is to determine whether the
4 department has processes and related controls to help
5 ensure that it reviews, investigates and resolves
6 complaints in a timely manner, and in compliance with
7 applicable statutes, rules, policies and procedures and
8 other requirements. The SAO sent a letter to all the
9 board members in October. They plan to have the report
10 ready in April.

11 And then the last item is our personnel update.

12 Derrick Miller was an Auditor V in our division, he was
13 promoted to the Auditor VI position. He also received his
14 Certified Government Auditing Professional. And on
15 November 14 we will be fully staffed. Jason Gonzalez will
16 be coming in as an Auditor V. He has 14 years of internal
17 audit experience in government, public and private
18 organizations, including managing internal audit projects,
19 conducting enterprise risk assessment, and evaluating SOX
20 compliance and internal control designs for several
21 private entities.

22 That concludes my update. Are there any
23 questions?

24 MR. PALACIOS: No. Just want to commend Mr.
25 Miller. Congratulations on your promotions. Well

1 deserved.

2 (Applause.)

3 MR. PALACIOS: And Ms. Menjivar, enjoy your
4 vacation. We promise not to call you while you're on
5 vacation.

6 MS. MENJIVAR-SUDDEATH: It will take you a bit
7 to get a hold of me.

8 MR. WALKER: Where are you going?

9 MS. MENJIVAR-SUDDEATH: New Zealand and
10 Australia.

11 MR. WALKER: That's a long airplane ride.

12 MR. PALACIOS: Thank you.

13 Let's move on now to the approval to modify the
14 November 14, 2013 resolution adopting contract approval
15 procedures.

16 MS. FLORES: For the record again, Linda
17 Flores, chief financial officer for the Texas Department
18 of Motor Vehicles.

19 Item 8.C, contract approval procedures, staff
20 is requesting approval to modify contract procedures for
21 board's approval of contracts that exceed \$200,000. The
22 value does not change in this modification. The
23 modifications include three things: addition of language
24 that clarifies that the agency may enter into the
25 procurement process prior to board approval of a

1 particular contract; two, clarification of items excluded
2 from board approval such as contracts for routine
3 operations, janitorial services, the mowers, that kind of
4 item; and three, just overall cleanup language.

5 And I'm available to answer any questions that
6 you may have.

7 MR. WALKER: Does all that meet the
8 requirements of the last legislative session where the
9 legislators mandated that boards look at certain
10 contracts?

11 MS. FLORES: Yes, sir, Senate Bill 20. Yes,
12 sir, sure does. And with that, I close.

13 MR. BARNWELL: Mr. Chairman, I move to approve
14 the contract approval procedures as presented today, and
15 rescind the prior contract approval procedures dated
16 November 14, 2013.

17 MR. PAINTER: Second.

18 MR. PALACIOS: There's a motion by Member
19 Barnwell, second by Board Member Painter. All in favor
20 please signify by raising your right hand.

21 (A show of hands.)

22 MR. PALACIOS: Motion passes unanimously.

23 Thank you, Ms. Flores. And now you and Ms.
24 Bankhead will give us the quarterly report.

25 MS. FLORES: Yes. Moving on in your briefing

1 book, it starts on page 58. Again, Linda Flores, Renita
2 Bankhead of Financial and Administrative Services
3 Division. We're here to provide a status, it's briefing
4 only, of our last quarter for fiscal year ending 2016.

5 If I can direct your attention to page 62 of
6 your document, I'll just go over very briefly how we ended
7 the year with revenues. Overall we exceeded our revenue
8 collections by approximately \$28 million over fiscal year
9 2015. The largest factor impacting this increase was due
10 to the number of registered vehicles was higher than the
11 previous year.

12 MR. INGRAM: So we did quite well. Is there a
13 way that we can actually turn the air conditioning on in
14 the future? I know you control the money.

15 MS. FLORES: If you notice, Board Member
16 Ingram, I have my shawl with me. My fingers and my feet
17 are freezing.

18 MR. INGRAM: I'm sorry. Keep going.

19 (General laughter.)

20 MS. FLORES: So we did very well. The one
21 thing that I would like to mention is that we did see
22 another slump in Motor Carrier oversize/overweight permit
23 revenues. That continues on from FY 15. We continue to
24 monitor that but we do see fewer and fewer permits being
25 purchased for that particular activity.

1 MR. WALKER: I warned you.

2 MS. FLORES: You did.

3 And now I'll turn it over to the expense side
4 of the house. Before I do, I just wanted to briefly
5 mention MyPlates ended the year depositing \$9.6 million to
6 general revenue. We believe that they will meet their \$50
7 million obligation to general revenue by August of 2017.
8 This contract, for the new members of the board, the term
9 ends in November 2019, so they're way ahead of where we
10 thought they would be in their obligation to the State of
11 Texas.

12 MS. BANKHEAD: For the record, my name is
13 Renita Bankhead, assistant chief financial officer.

14 For our expenditures, just a couple of things.
15 Our year-end expenditures totaled \$127 million in the
16 categories that you see above on the slide, basically,
17 registration activities, purchase of plates and our
18 salaries. The agency expects to lapse \$6.3 million at the
19 end of this fiscal year as of August 31, and we'll talk
20 about that in just a second. That money will lapse to
21 general revenue and those are operating expenses.

22 For capital projects, just briefly, as you can
23 see, most of our expenditures are related to the Texas
24 automation project, and most of that is the RTS
25 refactoring project. The other big percentage is for the

1 Data Center consolidation contract, our contract with the
2 Department of Information Resources for the Data Center,
3 and we are projecting to carry forward \$49.8 million. The
4 total amount that's left over in the capital budget will
5 be eligible to be carried forward, and most of that money
6 will be for RTS, the registration and titling system, and
7 for the project for the update for the computers for the
8 counties.

9 Finally, in conclusion, we didn't have any
10 unanticipated expenses but there were several expenditures
11 that we had planned to do in 2016 that did not occur, and
12 that's what contributed to our increased lapse. As we
13 move forward in 2017, we will be funded from our own fund,
14 the TxDMV Fund, so we will have to closely monitor our
15 expenditures and our costs related to the implementation
16 of the process and handling fee. We have estimated these
17 costs and we've budgeted for them, but we still want to
18 exercise additional vigilance just to make sure that our
19 expenses do not exceed our collective revenues.

20 Finally, to address the excess balances that we
21 experienced at the end of '16, in addition to our current
22 midyear review process, we are going to institute another
23 review process at the beginning of the third quarter in
24 June of next summer to make sure that we don't have excess
25 balances and that we're able to redirect those funds to

1 other portions of the agency pursuant to our legislative
2 appropriations.

3 That ends my presentation.

4 MR. WALKER: Question.

5 MS. BANKHEAD: Yes.

6 MR. WALKER: So going forward with the DMV
7 Fund, will we still have to lapse funds if there's excess,
8 Linda, or do we maintain those as a rainy day fund?

9 MS. BANKHEAD: Those funds would lapse but they
10 would lapse to our own fund, it would add to our fund
11 balance in the DMV Fund.

12 MS. FLORES: Unlike a lot of other agency funds
13 that are swept, if they're considered general revenue
14 dedicated, they're swept on a routine basis, the DMV Fund
15 is a other fund so it's not subject to that sweep. So it
16 stays in the fund, you'll see that fund balance.

17 MR. INGRAM: But they still have to be
18 appropriated.

19 MS. FLORES: Absolutely, yes. Just because
20 it's in the fund balance doesn't mean we get to spend it,
21 we have to ask permission from the legislature.

22 MR. WALKER: Still go through the LAR with it.

23 MS. FLORES: Yes, sir.

24 MR. PALACIOS: Any other questions?

25 MS. FLORES: The only other things I'd like to

1 just mention, this was a cash basis for fiscal year 2016.

2 We're in the middle of completing our financial
3 statements for fiscal year ending 2016. Financial
4 statements are a little bit different from a cash review,
5 financial statement are compiled in accordance with
6 Governmental Accounting Standards. You'll be seeing that
7 probably in January. The due date for our financial
8 statements is November 20.

9 If there are no other questions, and that was
10 just a briefing item, I'll move on to the last item in
11 your agenda which is on page 69. It's a snapshot of the
12 DMV Fund.

13 So as you know, September 1 was a red letter
14 day. We did receive our one-time \$23 million cash
15 transfer into the account. In your board book we tried to
16 present a revenue expenditure for the month of September.
17 I welcome any kind of feedback you may have as far as the
18 presentation. We will be incorporating the DMV Fund
19 revenue expenditure within the quarterly financial reports
20 that you get. But basically, outside of the \$23 million
21 one-time transfer, we did see revenue collections of
22 approximately \$12 million, our expense side was \$7.6
23 million, so we do have some fund balance as of September,
24 if you will, approximately \$5 million. We know that
25 expenditures for the most part we start out slow, we start

1 to ramp up. You'll see that in the projected expenditures
2 in the green. You'll notice a significant spike in
3 October. That's because a lot of bills come in September
4 that are paid in October, like the Data Center services
5 bill, specifically.

6 On the revenue side, again, we kind of start
7 out slow and then we do see a lot more ups and downs when
8 it comes to revenue, and again, a lot of that is tied to
9 the registered vehicles. We know that November-December
10 we start to see increases in registered vehicles, people
11 renewing their stickers, and then there's some dips, and
12 then you'll see a spike up again in March. So I think for
13 the most part we're just going to be watching that process
14 and handling fee that goes into effect January 1, you'll
15 see the impact in February. So that will be the real
16 challenge for us moving forward is to see if we're hitting
17 our targets or not.

18 MR. PALACIOS: Ms. Flores, can you explain how
19 the \$23 million?

20 MS. FLORES: I did not include it in this
21 because I really wanted to take it outside.

22 MR. PALACIOS: I understand, but how is that
23 going to be appropriated, I guess, compared to these
24 projections?

25 MS. FLORES: It's within the fund, so it's like

1 my beginning balance, if you will, and I have that money
2 available to pay for agency operations. So it's going
3 into the fund, it's all in revenue, I have expenses, and
4 we are projecting a fund balance, even with the \$23
5 million cash, if process and handling fee goes in as we
6 expect it to, I will have a significant fund balance that
7 will, in turn, help us for the following biennium.

8 MR. PALACIOS: Okay.

9 MS. FLORES: Cash-wise. You've got to think
10 about cash and appropriations.

11 MR. PALACIOS: I understand. The cash flow.

12 MR. INGRAM: Ms. Flores, I'm assuming your
13 actuals versus projections, I guess I'm a little bit
14 confused. So your actual numbers, are they just based on
15 the last year?

16 MS. FLORES: Our actuals are based on September
17 one month.

18 MR. INGRAM: You have an entire blue line
19 there.

20 MS. FLORES: The blue line is our projected for
21 the year in revenue, projected revenue, and the green is
22 projected expenditures. The little square is my actual
23 for expenditures.

24 MR. INGRAM: Okay. Now I've got it.

25 MS. FLORES: And we did use prior trends, if

1 you will, to come up with that projection on both sides.

2 MR. INGRAM: So safe to say that your
3 expectation, at least until January-February, we're close
4 maybe, and maybe about a million upside down.

5 MS. FLORES: Yes, sir, absolutely. But again,
6 I welcome any suggested changes you all may have to
7 provide you with more meaningful information, but you'll
8 be seeing this on a regular basis.

9 And that concludes the presentation.

10 MR. PALACIOS: Thank you, Ms. Flores.

11 (General talking and laughter.)

12 MR. PALACIOS: Unless there's any further
13 business, I'd like to entertain a motion to adjourn.

14 MR. BARNWELL: So moved.

15 MR. WALKER: Second.

16 MS. HARDY: Second.

17 MR. PALACIOS: Motion by Member Barnwell,
18 second and third by Members Hardy and Walker. All in
19 favor?

20 (A chorus of ayes.)

21 MR. PALACIOS: Let the record reflect the vote
22 was unanimous.

23 (Whereupon, at 1:48 p.m., the meeting was
24 adjourned.)

C E R T I F I C A T E

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2
3 MEETING OF: TxDMV Board
4 LOCATION: Austin, Texas
5 DATE: November 3, 2016

6 I do hereby certify that the foregoing pages,
7 numbers 1 through 178, inclusive, are the true, accurate,
8 and complete transcript prepared from the verbal recording
9 made by electronic recording by Nancy H. King before the
10 Texas Department of Motor Vehicles.
11
12
13
14
15

16 /s/ Nancy H. King 11/14/2016
17 (Transcriber) (Date)
18

19 On the Record Reporting
20 3636 Executive Cntr Dr., G22
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22
23