

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 14-0218 CAF**

JOE R. TREVINO,
Complainant

v.

GENERAL MOTORS, LLC,
Respondent

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Joe R. Trevino (Complainant) filed a petition seeking relief pursuant to Texas Occupations Code §§ 2301.601-.613 (Lemon Law) for alleged warrantable defects in a 2012 Chevrolet Malibu manufactured by General Motors, LLC (Respondent). Complainant seeks repurchase of the vehicle due to its intermittent loss of power in the engine, steering and braking system. Respondent argues that the vehicle has no current existing defects. The hearings examiner finds that Complainant's Lemon Law claim should be upheld and orders Respondent to repurchase Complainant's vehicle.

I. PROCEDURAL HISTORY, NOTICE AND JURISDICTION

Notice and jurisdiction were not contested. These issues are discussed only in the Findings of Fact and Conclusions of Law.

The hearing on the merits convened and closed on June 13, 2014 in San Antonio, Texas before Hearings Examiner Anne K. Perez. Complainant represented himself at the hearing and testified on his own behalf. Respondent was represented by Business Resource Manager Kevin Phillips. Respondent offered the testimony of Harry Hewitt, Service Manager for Richardson Brothers Chevrolet Polaris of Floresville, Texas.

II. DISCUSSION

A. Applicable Law

The manufacturer of a motor vehicle must repurchase or replace the vehicle with a comparable vehicle if five conditions are met. First, the manufacturer has not conformed the vehicle to an applicable express warranty because the manufacturer cannot repair or correct a defect or condition in the vehicle. Second, the defect or condition in the vehicle creates a serious safety hazard or substantially impairs the use or market value of the vehicle. Third, the manufacturer has been given a reasonable number

of attempts to repair or correct the defect or condition.¹ Fourth, the owner must have mailed written notice of the alleged defect or nonconformity to the manufacturer.² Lastly, the manufacturer must have been given an opportunity to cure the defect or nonconformity.³

A “serious safety hazard” is a life-threatening malfunction or defect that substantially impedes a person’s ability to control or operate a vehicle for ordinary use or intended purposes, or creates a substantial risk of fire or explosion.⁴ A rebuttable presumption exists that a reasonable number of attempts have been undertaken to conform a vehicle to an applicable express warranty if the defect creating a serious safety hazard continues to exist after being subject to repair two or more times and: (1) one of the repair attempts was made in the 12 months or 12,000 miles, whichever occurs first, following the date of original delivery to the owner; and (2) at least one other repair attempt was made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the first repair attempt.⁵

B. Definition of Automotive Technical Terms

Testimony concerning Complainant’s 2012 Chevrolet Malibu included discussion of several automotive technical terms. The Owner’s Manual for the vehicle describes most of the relevant terms and in some cases, provides instructions for the driver:

Instrument Panel Cluster (“IPC”): Located on the driver’s side dashboard, the IPC displays various warning lights and gauges.⁶ Specific warning lights signal a problem with the Brake System; Anti-Lock Brake System (ABS); Electronic Stability Control (ESC); Traction Control System (TCS); Tire Pressure; Engine Oil Pressure; Charging System; and Emissions System.⁷ Sometimes warning lights indicate activation of a system (*e.g.*, the ESC/TCS light flashes when the system is actively limiting wheel spin) or its deactivation (*e.g.*, the ESC/TCS light comes on solid when ESC is turned off).⁸

Driver’s Information Center (“DIC”): The DIC display is located at the bottom of the IPC on the driver’s side dashboard. The DIC displays a message when a problem is detected in one of the vehicle’s systems. Examples include Low Brake Fluid; Change Engine Oil; Engine Power Reduced; Low Fuel; ESC Active; ESC Off; Service ESC; Low Traction; Service Traction; Engine Disabled; and Service Tire Monitor.⁹

¹ Tex. Occ. Code § 2301.604(a)(1) and (2).

² Tex. Occ. Code § 2301.606(c)(1).

³ Tex. Occ. Code § 2301.606(c)(2).

⁴ Tex. Occ. Code § 2301.601(4).

⁵ Tex. Occ. Code § 2301.605(a)(2)(A) and (B).

⁶ Respondent Ex. 1, diagram of IPC.

⁷ Respondent Ex. 3, 2012 Chevrolet Owner’s Manual at 5-8 through 5-21.

⁸ *Id.* at 5-27.

⁹ *Id.* at 5-21 through 5-29.

Electronic Control Module (“ECM”): The ECM regulates all of the vehicle’s electrical systems based on input from a vast array of sensors. The ECM receives, interprets and reacts to sensor inputs from every system in the vehicle to ensure that conditions are within normal operating range. If any malfunction is detected, the ECM generates a trouble code for diagnostic purposes.¹⁰

Engine Power Reduced: This message displays on the DIC when the engine power is reduced. The vehicle may be driven at a reduced speed while the message is displayed, but acceleration and speed may be diminished. If this message stays on the vehicle should be serviced as soon as possible.¹¹

Engine Disabled: This message displays on the DIC if the starting of the engine is disabled. The vehicle should be serviced immediately.¹²

Brake System Warning Light: If the Brake System Warning Light comes on there is a brake problem. The brake system should be inspected immediately. If the light comes on while the vehicle is operating the driver should pull off the road and stop. The brake pedal may be harder to push or the pedal may go closer to the floor, and it may take longer to stop. The driver should turn off and attempt to restart the engine once or twice, but if the light remains on the vehicle should be towed for service.¹³

Anti-lock Brake System (“ABS”): The ABS is an advanced electronic braking system that helps prevent skids.¹⁴ If the ABS Warning Light comes on while the vehicle is operating, the driver should stop as soon as possible, turn the ignition off, and restart the engine to reset the system. If the ABS light stays on, or comes on again while driving, the vehicle requires service. If the regular brake system warning light is not on the vehicle still has brakes, but not anti-lock brakes. If the regular brake system warning light is also on, the vehicle does not have anti-lock brakes and there is a problem with the regular brakes.¹⁵

Electronic Stability Control (“ESC”): The ESC system assists with directional control of the vehicle in difficult driving conditions. If the system senses that a skid is imminent or has already started, it can apply the brakes on individual wheels to bring the car back under control. The ESC system turns on automatically every time the vehicle is started.¹⁶

Traction Control System (“TCS”): The TCS senses and limits wheel spin by reducing engine power or applying the brakes. This system also turns on automatically every time

¹⁰ Mr. Hewitt described the ECM as the “brain” of the vehicle.

¹¹ *Id.* at 5-26.

¹² *Id.* at 5-28.

¹³ *Id.* at 5-17.

¹⁴ *Id.* at 9-25.

¹⁵ *Id.* at 5-18.

¹⁶ *Id.* at 1-20.

the vehicle is started.¹⁷ If the ESC/TCS light comes on and stays on, both systems are turned off.¹⁸

C. Vehicle Purchase, Warranty Information, and Repair History

Complainant purchased the 2012 Chevrolet Malibu from Richardson Brothers Chevrolet Polaris (Richardson Brothers) of Floresville, Texas on July 9, 2012. At the time of delivery the vehicle's mileage was eighty (80).¹⁹

Respondent manufactured Complainant's car. Respondent issued a basic limited warranty for the vehicle, with coverage of factory-supplied materials and workmanship for three years or 36,000 miles, whichever comes first, and powertrain coverage (of the engine, transmission, and drive train) for five years or 60,000 miles, whichever comes first.²⁰ On the hearing date, the vehicle's mileage was 22,597, and warranty coverage remained in effect.

Complainant's car was exclusively serviced by Richardson Brothers and on each occasion, he was provided with alternate transportation. The repair orders in evidence reflect the following information:²¹

Dates/Repair Order (RO)	Mileage	Reported Concerns	Dealership's Findings and Actions
In/10-5-12 Out/10-9-12 RO: 172928	In/2,886 Out/2,890	Service ESC; Engine Enabled (sic); Power Loss; Check Engine Light (CEL) On <u>Hand-written note on Original RO:</u> "On same day-Picked up car, stalled 2 blocks from home. Power Failure indicated." <u>Hand-written note on Modified RO:</u> "ECM/ESC total failure. Engine enabled (sic)."	<u>Original RO: 172928:</u> RAM Memory, Internal ECM Failure; Replaced ECM & Programmed. Drove to Verify Repair. <u>Modified RO: 172928:</u> Shows vehicle was returned to customer on 10-9-12. Hand-written note states "Code P0604 RAM Memory Performance. Document # 2449884, check for Code reset, P0604 set this ignition cycle; Replace PCM & program."
In/11-20-12 Out/11-30-12 RO: 173802	In/4,078 Out/4,079	Traction Control Light On; Master Cylinder Leaking Down; Loss of Steering Control	Replaced Master Cylinder/Bled System, verified repair. Did not duplicate steering concern.
In/9-19-13 Out/10-7-13	In/15,550 Out/15,690	Service ESC; Intermittent CEL On; Brakes Scratching; Tires	<u>Original RO 179478:</u> C0561-71 stored in History; No Other Codes stored in Other

¹⁷ *Id.* at 1-20.

¹⁸ *Id.* at 5-18.

¹⁹ Complainant Ex. 10, Buyer's Order for the vehicle.

²⁰ Respondent Ex. 2, Summary of Applicable Warranties.

²¹ Complainant Exs. 1, 2, 4-7; Respondent Ex. 5. Some of the repair orders initially admitted as Complainant's exhibits were incomplete (missing pages). During the course of the hearing Mr. Hewitt produced complete copies of the same repair orders. For purposes of establishing a complete record, the parties agreed to supplement the incomplete repair orders offered by Complainant with missing pages supplied by Mr. Hewitt.

RO: 179478		Shake at 40 mph; [Engine] dies while driving Service Tire Monitor Light On Hand-written note on RO: "Drove out not even less than a mile car detected ESC Malfunction and stalled. Return to Chevy dealer."	Modules; Cleaned History Code + Test Drive; No brake noise/tire shaking on test drive. <u>Modified RO 179478:</u> (Prepared after Complainant's vehicle stalled while driving away from dealership) Called Tech Assist; Connector at P/S C/M TRMS Control (Part at Valve Body); PCM Failure? ECM Error? DVR? Take Picture of Message; Tech Assist James Brewer Check OIN 6 to 14 at DCC for 60 OHMS, if OK Replace PVM; Called Tech Assist, Check Voltage Drop in Battery Cables if OK Replace Body Control Module +80 AMP Mega Fuse, per Tech. Test Drive + Called Tech Assist, per Tech Assist Replace PCM + Reprogram + Test Drive
In/10-21-13 Out/11-12-13 RO: 180084	In/15,983 Out/15,993	ABS (Anti-lock Brake System) Malfunction (Warning Light) ESC/TCS Warning Light Failure	Test Drive + Check Codes; Test Traction Light on IPC; No Lights/Codes in any Module; Called Tech Assist; Test Switch + IPC, Indicators Higher Than Normal. Resistance in Switch + No Traction Light on IPC; Replace IPC
In/1-9-14 Out/1-17-14 RO: 181686	In/18,595 Out/18,602	CEL, Brake, and ABS Lights Come On Intermittently; "Service ECM" Message Displays Intermittently	Code 0899 00 Electronic Brake Control Module (EBCM) Low Voltage; Diagnose EBCM Losing Voltage; Replace and Reprogram EBCM
In/2-12-14 Out/2-29-14 ²² RO: 182383	In/19,325 Out/19,325	Driving 25 mph & brakes failed; Light came on Dash; Swerved to avoid collision & crossed cement barrier; Came to rest; Light off and Brakes Worked	GM Representative Inspected Brake Pads, Rotors, & Calipers; Checked All Modules for Codes, No Codes Found.

D. Testimony and Additional Evidence Presented by Complainant

Complainant testified that his new car began exhibiting problems almost immediately after purchase. Within a week, he returned to Richardson Brothers and asked Sales Manager Blake Bento whether the dealer could place him in a different model. Although the mileage was only slightly increased, Mr. Bento advised Complainant that his car had already depreciated more than \$6,500. If Complainant wanted to trade it for another model he would have to come up with \$4,000. This option was not financially feasible for Complainant so he kept the vehicle.²³

In the months that followed Complainant's car had "problem after problem." The vehicle was repeatedly serviced by Richardson Brothers, but as soon as one issue was repaired another would

²² The repair order lists April 30, 2014 as the "Date Returned." This is an obvious error. It appears that Complainant was provided with a rental car for 17 days. Therefore, February 29, 2014 is the correct "Date Returned."

²³ Complainant did not describe the nature of the issues that led him to request a trade-in one week after purchase, nor is there any indication that Richardson Brothers opened a repair order at that time.

appear. The problems were so pervasive that Respondent provided Complainant with a complimentary one-year OnStar subscription.²⁴ Additionally, Complainant said the repair orders in evidence do not accurately reflect the frequency of his service visits. Warning lights and service messages periodically lit up the electronic dashboard, Complainant said, and each time this happened he brought the car in for service. He was not provided with written repair order on these occasions. He instead received verbal advisories, such as "The problem was a little glitch and didn't require any paper work."

Complainant stated that a long-standing issue with the vehicle's tires was eventually resolved after several unsuccessful repair attempts.²⁵ Brake problems have also been a repetitive concern. Although the brake system underwent repairs in November 2012, and again January 2014, Complainant testified that a complete brake failure in February 2014 caused him to have a collision. According to Complainant, he was approaching an intersection where other vehicles were stopped in front of him. When his brakes went out he swerved to avoid rear-ending another car, but in the process ran over a curb and damaged his vehicle's front bumper.

As a result of this incident, Complainant filed a "faulty product" claim with Respondent to recover the cost of collision damage to his car. Respondent retained an individual named Martin Houle²⁶ to interview Complainant about the collision, and to inspect the vehicle's brakes and front-end. In a telephone interview conducted by Mr. Houle, Complainant described his car's February 11, 2014 brake malfunction, as well as previous failures in the braking system:

I was driving from a doctor's appointment. I went to brake and the ABS failure light came on, the brake pedal was hard, and the vehicle would not operate. I have experienced several incidents with this vehicle. Without warning the Service EBCM message will come on.

On another occasion I was driving about 70 mph and the Service EBCM message came on, everything shut down, and my vehicle stalled. I also experienced braking issues when I was in my bank's parking lot. While in the parking lot I was driving less than 5 mph, went to stop, got a hard pedal, the ABS light came on, and the vehicle would not stop, I heard a fluttering noise and only then would the vehicle stop.²⁷

²⁴ Complainant Ex. 3, September 10, 2012 Letter regarding OnStar subscription.

²⁵ In October 2013, a service technician wrote: "Car shakes and steering wheel vibrates from 40 mph and up." The dealer replaced the tire sensor, rotated and balanced all four tires, replaced all four tires and one wheel, and reprogrammed all tire monitors. See Complainant Exs. 1 and 2. Despite these repair attempts, Complainant said the shaking persisted for almost 18 months. Richardson Brothers eventually repaired the vehicle after identifying the source of the problem as a defective rim. Complainant's account of this matter was not disputed by Mr. Hewitt. It is unclear why the defective rim replacement is not shown on a repair order.

²⁶ Mr. Houle did not offer testimony at the hearing, and this record does not establish his credentials.

²⁷ Respondent Ex. 5, Inspection Summary prepared by Mr. Houle.

Beyond discrete instances of brake failure, Complainant testified that an intermittent loss of power completely disables his vehicle's engine, steering and braking systems. On at least four occasions "the ECM computer went out and the vehicle shut down [without] warning. The ABS did not work and I had no braking system."²⁸ When pressed for more details he said the circumstances are always the same. Each time he was driving the car there were no signs of malfunction. Moments before the failure occurred, however, the DIC displayed unexpected activity:

Suddenly without warning it lights up and just says "Service ECM Computer." Then it says "Engine Enabled" and the doors lock, the engine shuts down, and I have no steering, I can't put it in park, I can't turn, and I have no brakes. This happens when I'm driving 60 miles per hour (mph) or 40 mph or any speed. I have no power whatsoever.²⁹

On two of the occasions when his vehicle suffered complete power loss, Complainant testified that he left the car and called for a ride. He also notified Richardson Brothers, and the dealer brought the vehicle in for servicing.

With respect to his vehicle's failure on the highway, Complainant's testimony included details that do not appear in Mr. Houle's inspection report. Complainant stated that he was traveling at 65 or 70 mph when the engine suddenly lost power, and he was unable to turn the steering wheel, or brake to reduce his speed, or shift gears into park. Eventually, he said the car came to a stop in the middle of the road while other drivers honked for him to get out of the way. At that point, he called Onstar to report: "I'm in the middle of the highway. I'm afraid of being hit. My car is enabled (sic)." With remote assistance from OnStar he was able to re-start the vehicle.

Complainant testified that the vehicle's intermittent loss of power reoccurred in April 2014. He was driving the car and it seemed to be operating normally. Once again, the dashboard lit up and a few moments later his vehicle was completely disabled. He utilized OnStar services a second time to re-start the car.

On cross-examination, Complainant said Richardson Brothers' Service Advisor Robbie Reed typically looked at the IPC and recorded his own observations as "customer concerns" on repair orders for the vehicle. He was also adamant that he repeatedly described his car's loss of power to dealer service personnel, to the point that "they knew why I was there, I didn't have to tell them anymore."

²⁸ Although Complainant used technical terms to describe the car's problems, he freely admitted to a limited understanding of automotive technology.

²⁹ The word "Enabled" is plainly incorrect. Given the context of Complainant's testimony, the DIC probably displayed the "Engine Disabled" message. The recollection that he saw a "Service ECM Computer" message indicates similar confusion. "ECM" means Electronic Control Module, and his vehicle's DIC is not programmed to display that message. See Respondent's Ex. 3, 2012 Chevrolet Owner's Manual (Instruments and Controls).

Ultimately, on March 7, 2014 Complainant sent written notice to Respondent that his 2012 Chevrolet Malibu was defective.³⁰ On March 14, 2014, Complainant filed a Lemon Law complaint against Respondent with the Texas Department of Motor Vehicles. Complainant's petition alleged the presence of warrantable defects described as: (1) Computer ESC Malfunctioned; Computer ECM; (2) 10/05/2012 ESC Computer Malfunction; Engine Enable; (3) 10/10/2012 ESC Computer Shut down; and (4) 9/19/12 ESC Total Failure.³¹

E. Testimony and Additional Evidence Presented by Respondent

Mr. Hewitt testified that as Richardson Brothers' Service Manager, he is familiar with both the Complainant and his car. During the hearing he test drove Complainant's vehicle 11 miles. He said that no warning lights came on during that time, nor did the DIC display any messages. In his opinion the brakes were also functioning fine.

Mr. Hewitt testified that when the vehicle was brought in for service Complainant typically stated that "All the lights on the [IPC] came on." The service manager did not explain why this apparently-consistent observation was never listed as a "customer concern" on the dealer's repair orders.

According to Mr. Hewitt, the customer concerns that do appear on Richardson Brothers' repair orders (e.g., intermittent ESC/TCL, ABS and CEL lights) are inconsistent with Complainant's report of power loss in the engine, steering and braking system. He explained that ESC/TCS warning light and ESC-related messages on the DIC relate solely to vehicle stability issues. In other words, the type of problems that might cause the car to lose power would not trigger ESC-related lights or messages. He characterized in similar fashion, the relationship between the ABS warning light and problems in the electronic braking system. On the other hand, the Check Engine Light (CEL) could be related to loss of power in the vehicle's engine, steering, and braking system. That is because the CEL is triggered by the malfunction of many different components, including oxygen sensors, timing, and spark plugs.

Mr. Hewitt admitted he was aware of two occasions when Complainant's vehicle lost power and stalled on the road. He also admitted that the car was towed to the dealership "once or twice." During the course of his testimony, however, the service manager learned that Richardson Brothers failed to request from Respondent reimbursement of the related towing expenses. Mr. Hewitt then retracted his earlier statement and denied having any knowledge of Complainant's vehicle being towed to the dealer.

Mr. Hewitt acknowledged that two repair orders reflect Complainant's concern regarding the vehicle's loss of power. In October 2012, Richardson Brothers addressed the issue by replacing the car's

³⁰ Complainant Ex. 9.

³¹ Complainant Ex. 8.

Electronic Control Module (ECM) and reprogramming. The very next year, in September 2013, the vehicle was serviced for the same problem and the dealer replaced the ECM a second time.

In addition to Mr. Hewitt's testimony, Respondent offered Mr. Houle's inspection report. The report establishes that on February 18, 2014, Mr. Houle inspected the car's brake pedals, master cylinder, and brake rotors, which he concluded were in good working order. He also inspected the car's front bumper and underbody for collision damage.³²

F. Analysis

A preponderance of the evidence demonstrates that Complainant's car has a defective condition that not only creates a serious safety hazard, but substantially impairs the use or market value of the vehicle. Moreover, the record developed at hearing establishes that: (1) Respondent's express warranty applicable to Complainant's vehicle covers the existing nonconformity; (2) Respondent has been given a reasonable number of attempts to repair defective condition; (3) Complainant provided written notice of the car's nonconformity to Respondent; and (4) Respondent was given the opportunity to cure the defect but repairs were unsuccessful.

Complainant credibly testified that on four separate occasions, his car lost power in the engine, steering and brake system while traveling at speeds of up to 60 mph. In two instances, he left the vehicle on the road where it stalled, called for a ride, and reported the problem to an authorized dealer of Respondent. Mr. Hewitt, Richardson Brothers Service Manager, admitted he was aware of two incidents when Complainant's vehicle lost power and stalled on the road. The service manager also admitted that Complainant's car was towed to the dealership "once or twice," but retracted the admission upon learning that Richardson Brothers did not document the expense. This was only one example of the dealer's failure to maintain adequate records.

The credibility of Mr. Hewitt's testimony is undermined by both documentary evidence and Complainant's testimony. Richardson Brothers' first repair order establishes that on October 5, 2012, Complainant reported the power failure of his vehicle. The engine was disabled, the CEL was on, and the DIC displayed the "Service ESC" message. At that time the car's mileage was only 2,886. Service technicians were apparently unable to diagnose the problem, and the vehicle was released to Complainant on October 8, 2012. Before Complainant even reached his home the car stalled, lost power, and was completely disabled. Back at the dealership, diagnostic testing revealed a trouble code (P0604). Mr. Hewitt could not identify the malfunction associated with this code, but the car's ECM was replaced and reprogrammed. Barely a month later Complainant reported braking and steering problems. In November 2012 the car's Master Cylinder was replaced.

³² Respondent Ex. 5. Mr. Houle characterized the reported collision as a "No-Event," but the basis for this conclusion was not explained.

In September 2013, Complainant testified that a loss of power in the engine, steering and braking system once again disabled his vehicle. The car's mileage was at 15,550. Richardson Brothers' repair order opened on September 19, 2013 indicates that the CEL was coming on intermittently, and the DIC displayed the "Service ESC" message. Diagnostic testing uncovered a trouble code stored in the ECM's memory but service technicians "cleaned the history." The vehicle passed a test drive, no repairs were deemed necessary, and Complainant drove off the lot. Within a mile of the dealership, however, his car stalled and completely lost power. The vehicle was immediately returned to the dealer but repair order suggests that service technicians were mystified. Unable to diagnose the problem, they called Respondent's Technical Assistance hotline for advice. Eventually, the ECM was replaced and reprogrammed a second time.

This was not the end of Complainant's car problems. In October 2013 the vehicle underwent further repair. The invoice reflects that the ABS and ESC/TCS warning lights were activated on the IPC, and the DIC displayed a service message. When diagnostic testing failed to identify a trouble code service technicians sought technical assistance from Respondent. This time the vehicle's IPC was replaced.

In January 2014, when mileage was at 18,595, another major power failure in the vehicle occurred. Rather than refer to this concern, the repair order notes the presence of service messages and intermittent warning lights (CEL, ABS, and Brake Light). Low voltage in the car's Electronic Control Brake Module (EBCM) was diagnosed through testing (trouble code 0899). The EBCM was replaced and reprogrammed. Less than a month later, on February 11, 2014, the ABS light came on while Complainant was driving and the car suffered complete brake failure, causing him to have a collision.

It is true that Complainant was provided with a rental vehicle each time his car was at Richardson Brothers. That said, the repair orders establish that between October 2012 and February 2014, Complainant's vehicle was out of service 78 days. The dealer's extensive repair attempts have not resolved the vehicle's intermittent loss of power. The fact that the ECM was replaced twice speaks volumes. According to Mr. Hewitt, each warning light (except the CEL) signifies a problem with a specific system in the car (*e.g.*, the ESC/TCS relates only to vehicle stability issues), but if the problem is electrical in nature that explanation makes no sense. Electrical issues could account for an intermittent loss of power in the vehicle's major systems, as well as the display of inconsistent warning lights and service messages. The sudden brake failure that occurred in February 2014, less than a month after the EBCM replacement, and the total loss of power that disabled the vehicle in April 2014, suggest the existence of an electrical defect that remains unresolved. These recent events further establish that attempts to repair Complainant's vehicle have been unsuccessful.

There is no question that the intermittent failure of the vehicle's engine, braking and steering system presents a serious safety hazard. A car that unexpectedly loses power creates obvious safety issues for the driver and others. The presence of a stalled vehicle on the roadway increases the risk of traffic

accidents. Motor vehicle collisions can result in personal injury and even death, not to mention property damage. The intermittent nature of the car's defective condition also increases the safety risk.

Richardson Brothers' failure to repair the car in October 2012 and September 2013 establishes a rebuttable presumption that a reasonable number of attempts have been undertaken to conform Complainant's vehicle to the limited warranties issued by Respondent, which remain in effect. Lastly, the defect in Complainant's car also substantially impairs its use and market value. The vehicle is unfit for travel because it could stall at any time. In addition, the vehicle's reduced capacity for use makes it less marketable than other cars of the same type.

In summary, Complainant has established that he is entitled to relief under the Lemon Law. Respondent may be required to repurchase the vehicle, or replace it with a comparable vehicle. Based on the evidence and the arguments presented, the hearings examiner finds that repurchase of the vehicle is the appropriate remedy in this case.

Accordingly, the hearings examiner orders Respondent to repurchase Complainant's vehicle, as further detailed in the Findings of Fact and Conclusions of Law.

III. FINDINGS OF FACT

1. Joe R. Trevino (Complainant) purchased a new 2012 Chevrolet Malibu (the vehicle) from Richardson Brothers Chevrolet Polaris (Richardson Brothers) of Floresville, Texas on July 9, 2012, with mileage of eighty (80) at the time of delivery.
2. The manufacturer of the vehicle, General Motors, LLC (Respondent) issued a limited warranty for the vehicle, with coverage of factory-supplied materials and workmanship for three years or 36,000 miles, whichever comes first, and powertrain coverage (of the engine, transmission, and drive train) for five years or 60,000 miles, whichever comes first.
3. Complainant's vehicle has a defective condition that causes it to lose power in the engine, steering and braking system. The problem occurs intermittently and unexpectedly while the vehicle is traveling at speeds up to 70 miles per hour (mph).
4. The defective condition of Complainant's car substantially impairs its use and market value. The vehicle is unfit for travel because it could stall at any time. The vehicle's reduced capacity for use also makes it less marketable than other cars of the same type.

5. The defect in Complainant's car creates a serious safety hazard. Loss of power in the vehicle's engine, steering and braking system creates obvious safety issues for the driver and others on the road. A stalled vehicle on the roadway increases the risk of traffic accidents. The intermittent nature of the condition also increases the safety risk.
6. Complainant reported his vehicle's loss of power in the engine, steering and braking systems to Richardson Brothers of Austin, Texas, on following dates:
 - a. October 5, 2012, at 2,886 miles;
 - b. September 19, 2013 at 15,550 miles; and
 - c. January 9, 2014 at 18,595 miles.
7. Richardson Brothers is an authorized dealer of Respondent.
8. The underlying cause of the vehicle's loss of power is probably electrical in nature.
9. The vehicle's Electronic Control Module (ECM) was replaced and reprogrammed twice, in October 2012 and again in September 2013.
10. The vehicle's Electronic Control Brake Module (EBCM) was replaced and reprogrammed in January 2014.
11. On February 11, 2014, Complainant was driving the vehicle and the brakes completely failed, causing him to have a collision. The collision may have resulted in damage to the vehicle's front-end.
12. In April 2014, Complainant was driving the vehicle and there was a sudden loss of power in the engine, steering and braking system.
13. The defective condition in Complainant's vehicle accounts for both failures described in Findings of Fact 11 and 12.
14. Respondent, through its authorized dealer, undertook a reasonable number of attempts to conform Complainant's car to an applicable express warranty, but the nonconformity in the vehicle continues to exist.
15. Complainant provided written notice of the defect to Respondent on March 7, 2014.

- 16. Complainant presented no evidence of incidental expenses incurred from loss of use of his vehicle.
- 17. At the time of hearing, the vehicle's mileage was 22,597.
- 18. The appropriate calculations for repurchase are:

Purchase price, plus tax, title, fees, add-on accessories, less rebate, if any					\$22,127.65
Mileage at first report of defective condition		2,886			
Less mileage at delivery		<u>-80</u>			
Unimpaired miles		2,806			
Mileage on hearing date		22,597			
Less mileage at first report of defective condition		<u>-2,886</u>			
Impaired miles		19,711			
Reasonable Allowance for Use Calculations:					
Unimpaired miles		<u>2,806</u>			
	120,000		X	\$22,127.65	= \$517.42
Impaired miles		<u>19,711</u>			
	120,000		X	\$22,127.65 X .5	= <u>\$1,817.33</u>
Total reasonable allowance for use deduction:					<u>\$2,334.74</u>
Purchase price, including tax, title, license and registration					\$22,127.65
Less reasonable allowance for use deduction					<u>-\$2,334.74</u>
Plus filing fee refund					<u>\$35.00</u>
TOTAL REPURCHASE AMOUNT					\$19,827.91

- 19. Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) on March 14, 2014, seeking repurchase or replacement of his 2012 Chevrolet Malibu.
- 20. On May 6, 2014, the Department's Office of Administrative Hearings issued a notice of hearing directed to Complainant and Respondent, giving all parties not less than 10 days' notice of hearing and their rights under the applicable rules and statutes. The notice stated the time, place and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; particular sections of the statutes and rules involved; and the matters asserted.
- 21. The hearing convened on June 13, 2014 in San Antonio, Texas before Hearings Examiner Anne K. Perez. Complainant represented himself at the hearing. Respondent was represented by Business Resource Manager Kevin Phillips. The hearing adjourned and the record closed that same date.

IV. CONCLUSIONS OF LAW

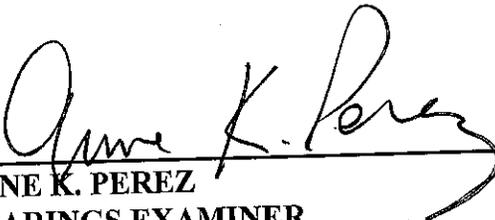
1. The Department has jurisdiction over this matter. Tex. Occ. Code §§ 2301.601-.613 (Lemon Law).
2. A hearings examiner of the Department's Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a decision with findings of fact and conclusions of law, and the issuance of a final order. Tex. Occ. Code § 2301.704.
3. Complainant timely filed a complaint with the Department. Tex. Occ. Code § 2301.204; 43 Tex. Admin. Code § 215.202.
4. The parties received proper notice of the hearing. Tex. Gov't Code §§ 2001.051 and 2001.052; 43 Tex. Admin. Code § 215.206(2).
5. Complainant bears the burden of proof in this matter.
6. Complainant's vehicle has an existing defect or condition that creates a serious safety hazard. Tex. Occ. Code § 2301.604(a).
7. Complainant's vehicle has an existing nonconformity that substantially impairs the use and market value of the vehicle. Tex. Occ. Code § 2301.604(a).
8. After a reasonable number of attempts, Respondent has been unable to repair the nonconformity in Complainant's vehicle so that it conforms to the applicable express warranty. Tex. Occ. Code §§ 2301.604(a) and 2301.605.
9. Based on the above Findings of Fact and Conclusions of Law, Complainant is entitled to relief under Texas Occupations Code § 2301.604(a).
10. Based on the above Findings of Fact and Conclusions of Law, Respondent is required to repurchase Complainant's 2012 Chevrolet Malibu at the price of \$ 19,827.91. Tex. Occ. Code § 2301.604(a)(2); 43 Tex. Admin. Code § 215.208(b)(1) and (2).

IT IS THEREFORE ORDERED that:

1. Respondent shall accept the return of the vehicle from Complainant. Respondent shall have the right to have its representatives inspect the vehicle upon the return by Complainant. If from the date of the hearing to the date of repurchase the vehicle is substantially damaged or there is an adverse change in its condition beyond ordinary wear and tear, and the parties are unable to agree on an amount of an allowance for such damage or condition, either party may request reconsideration by the Office of Administrative Hearings of the repurchase price contained in the final order;
2. Respondent shall repurchase the subject vehicle in the amount of \$19,827.91. Respondent is not entitled to a reduction of this amount for damage to the subject vehicle resulting from the collision referenced in Finding of Fact 11. Complainant is not entitled to reimbursement of incidental expenses. The refund shall be paid to Complainant and the vehicle lien holder as their interests require. If clear title to the vehicle is delivered to Respondent, then the full refund shall be paid to Complainant. At the time of the return, Respondent or its agent is entitled to receive clear title to the vehicle. If the above noted repurchase amount does not pay all liens in full, Complainant is responsible for providing Respondent with clear title to the vehicle;
3. Within 20 calendar days from the receipt of this order, the parties shall complete the return and repurchase of the subject vehicle. If the repurchase of the subject vehicle is not accomplished as stated above, barring a delay based on a party's exercise of rights in accordance with Texas Government Code § 2001.144, starting on the 31st calendar day from receipt of this order, Respondent is subject to a contempt charge and the assessment of civil penalties. However, if the Office of Administrative Hearings determines the failure to complete the repurchase as prescribed is due to Complainants' refusal or inability to deliver the vehicle with clear title, the Office of Administrative Hearings may deem the granted relief rejected by Complainant and the complaint closed pursuant to 43 Texas Administrative Code § 215.210(2);
4. Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall obtain a Texas title for the vehicle prior to resale and issue a disclosure statement provided by or approved by the Department's Enforcement Division – Lemon Law Section;
5. Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall affix the disclosure label to the reacquired vehicle in a conspicuous place, and upon the first retail sale of the vehicle, the disclosure statement shall be completed and returned to the Department's Enforcement Division – Lemon Law Section; and

6. Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall provide the Department's Enforcement Division – Lemon Law Section, in writing, the name, address and telephone number of the transferee (wholesale purchaser or equivalent) of the vehicle within 60 calendar days of the transfer.

SIGNED August 7, 2014.



ANNE K. PEREZ
HEARINGS EXAMINER
OFFICE OF ADMINISTRATIVE HEARINGS
TEXAS DEPARTMENT OF MOTOR VEHICLES