

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 14-0231 CAF**

TABATHA HENDRIX,	§	BEFORE THE OFFICE
Complainant	§	
v.	§	
	§	OF
FORD MOTOR COMPANY,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Tabatha Hendrix (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-.613 (Lemon Law) for an alleged defect in her 2013 Ford Escape Titanium. Complainant asserts that the vehicle “lunges forward” at times, shakes, and hesitates when she tries to accelerate. Ford Motor Company (Respondent) asserted no defense at the hearing. The Hearings Examiner concludes that the vehicle has an existing warrantable defect, and Complainant is eligible for replacement relief.

I. PROCEDURAL HISTORY, NOTICE AND JURISDICTION

Matters of notice and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law. The hearing in this case convened and closed on July 31, 2014, in San Antonio, Texas before Hearings Examiner Edward Sandoval. The Complainant represented herself at the hearing. Also, present at the time of hearing was the Complainant’s partner, Tiffany Denson. Respondent was represented by Field Service Engineer, Kurt Kindler.

II. DISCUSSION

A. Applicable Law

The Texas Lemon Law provides that a manufacturer of a motor vehicle must repurchase or replace a vehicle complained of under the Act 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

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).

In addition to the five conditions, a rebuttable presumption exists that a reasonable number of attempts have been undertaken to conform a motor vehicle to an applicable express warranty if the same nonconformity continues to exist after being subject to repair four or more times and: (1) two of the repair attempts were made in the 12 months or 12,000 miles, whichever comes first, following the date of original delivery to the owner; and (2) the other two repair attempts were made in the 12 months or 12,000 miles, whichever comes first, immediately following the date of the second repair attempt.⁴

B. Complainant's Evidence and Arguments

Complainant purchased a 2013 Ford Escape Titanium from Red McCombs Ford of San Antonio, Texas on October 30, 2012, with mileage of eighteen (18) at the time of delivery.⁵ On the date of hearing the vehicle's mileage was approximately 24,717.

Complainant testified that she first noticed a problem with her new vehicle in January of 2013, approximately three months after she purchased it. On January 31, 2013, Complainant was driving the vehicle when the "Engine Fault, Service Engine Now" light illuminated and the vehicle started lunging and shaking. Rather than continue driving the vehicle, Complainant parked it on the side of the road and called Ford's Roadside Assistance to have the vehicle towed to a dealership. At this time, the vehicle's mileage was 3,042. The vehicle was taken to Red McCombs Ford where it was examined for potential issues. The Ford representatives could not find anything wrong with the vehicle and there were no computer codes that appeared to be inappropriate. However, the Manifold Absolute Pressure (MAP) sensor was replaced at that time. The Complainant was then advised that the vehicle was safe to drive.

On February 14, 2013, Complainant was driving the vehicle when it again began to lunge and shake. The "Engine Fault, Service Engine Now" light illuminated again. Complainant took the vehicle to Red McCombs Ford again on February 15, 2013. During this period of time, Complainant was provided with a loaner vehicle by the dealership. The dealer's mechanics were unable to replicate the problem and the computer diagnostics again did not indicate any trouble codes. However, the Powertrain Control Module (PCM) was updated and recalibrated. The vehicle was returned to Complainant on February 20, 2013.

⁴ Tex. Occ. Code § 2301.605(a)(1)(A) and (B). Texas Occupations Code § 2301.605(a)(2) and (a)(3) provide alternative methods for a complainant to establish a rebuttable presumption that a reasonable number of attempts have been undertaken to conform a vehicle to an applicable express warranty. However, § 2301.605(a)(2) applies only to a nonconformity that creates a serious safety hazard, and § 2301.605(a)(3) requires that the vehicle be out of service for repair for a total of 30 or more days in the 24 months or 24,000 miles, whichever occurs first, following the date of original delivery to the owner.

⁵ Complainant Ex. 1, Motor Vehicle Buyer's Order and Odometer Disclosure Statement.

In early March of 2013, Complainant was driving the vehicle when it again began shaking and lunging. Complainant parked the vehicle at that time, but then took it to Red McCombs Ford again on March 8, 2013. While at the dealership, the "Engine Fault, Service Engine Now" light illuminated. Several tests were performed on the vehicle and the dealer replaced the PCM. The car was kept by the dealer until March 26, 2013. However, the dealer representatives could not determine what was causing the problems with the vehicle. During this period of time, Complainant was provided with a rental vehicle. While the car was being evaluated at Red McCombs Ford, Complainant spoke to several Ford representatives to discuss her dissatisfaction with the vehicle.

In April of 2013, Complainant was offered a replacement vehicle by Respondent. Complainant picked out a replacement from Red McCombs Ford. However, when she went to the dealership to have a dealer representative provide information to Respondent, they attempted to have Complainant sign some paperwork as if she were buying a new vehicle. While at the dealership, Complainant contacted the Respondent's representative and was advised not to sign any paperwork at that time. When this issue was finally straightened out, Respondent submitted a replacement offer to Complainant. Complainant refused the offer because the mileage upon which the usage charge was based was incorrect and because she was being assessed an upgrade fee because the new vehicle had a towing package and she did not want the upgrade. As a result, the replacement agreement did not proceed and Complainant continued driving the vehicle.

In August of 2013, the vehicle again started lunging and hesitating, although the Engine Fault light did not illuminate. Complainant took the vehicle to Red McCombs Ford on August 13, 2013. The dealer's mechanic could not replicate the problem, but did splice the wiring harness as per Technical Service Bulletin 13-7-5.⁶ The vehicle was returned to Complainant on August 14, 2013. As of the date of hearing, the vehicle still lunges and hesitates, although not as bad as when the problem first surfaced.

C. Respondent's Evidence and Arguments

Kurt Kindler testified that he works as a Field Service Engineer for Respondent. He was unable to testify about what could be causing the problems with Complainant's vehicle, since he had not inspected the vehicle prior to hearing. During a test drive of the vehicle on the date of hearing, he did indicate that the vehicle did seem to be hesitating inappropriately, especially during acceleration. In addition, Virginia Tucker, Respondent's Dispute Resolution Specialist, indicated in her written response for the hearing that Respondent was not asserting a defense. She indicated that Respondent was requesting that the Hearings Examiner calculate the consumer's replacement in accordance with the state's Lemon Law statutes.⁷

⁶ Complainant Ex. 2, Repair Orders and Technical Service Bulletin 13-7-5.

⁷ Respondent Ex. 1, Respondent Position Statement, Repair Orders, Vehicle Replacement Worksheet.

D. Analysis

Under Texas' Lemon Law, Complainant bears the burden of proof to establish by a preponderance of evidence that a defect or condition creates a serious safety hazard or substantially impairs the use or market value of the vehicle.

Complainant testified that on four separate occasions the vehicle in question experienced lunging, hesitation, and sputtering. On each occasion, Complainant took the vehicle to a Ford dealership for repair. The dealer's mechanics could not determine what was causing the problems with the vehicle. No trouble codes showed up on the computer diagnostics, even though the Engine Fault light illuminated at the dealership in March of 2013. It was at this time that Respondent attempted to replace the vehicle, which offer Complainant declined.

The evidence establishes that Complainant's vehicle was serviced by an authorized dealer of Respondent on the following dates: January 31, 2013; February 15, 2013; March 8, 2013; and August 13, 2013. During each service visit, Complainant informed dealer representatives that the vehicle was lunging and shaking at different times, and that it was sometimes hesitating when she attempted to accelerate. In addition, Complainant advised the representatives that the "Engine Fault, Service Engine Now" light illuminated. The failure of the defect in Complainant's vehicle to manifest during a service visit or to trigger a specific diagnostic error code, is not considered a determinative factor, particularly given the intermittent nature of the problem. Based on the evidence as a whole, the Hearings Examiner concludes that a reasonable number of attempts have been undertaken to conform Complainant's vehicle to the applicable express warranty.

The evidence further demonstrates that the defect in Complainant's vehicle creates a serious safety hazard. The intermittent nature of the condition increases the safety risk and substantially impedes Complainant's ability to control or operate the vehicle for ordinary use or intended purposes. Complainant has met her burden of proof to establish a warrantable and existing defect or condition that creates a serious safety hazard.

Moreover, the defect (lunging, shaking, and hesitating) in Complainant's vehicle substantially impairs its use and market value. An unimpaired vehicle with the similar mileage should not behave in such a manner. Complainant cannot rely on the vehicle in normal day to day driving, as she's not aware when it may start acting up.

When a complainant establishes that relief under the Lemon Law is appropriate, the manufacturer may be required to repurchase the motor vehicle, or replace the motor vehicle with a comparable motor vehicle. Based on the evidence and the arguments presented, the Hearings Examiner finds that replacement of the vehicle is the appropriate remedy in this case.

Based on the above analysis, the Hearings Examiner orders Respondent to replace Complainant's vehicle, as further detailed in the Findings of Fact and Conclusions of Law.

III. FINDINGS OF FACT

1. Tabatha Hendrix (Complainant) purchased a new 2013 Ford Escape Titanium on October 30, 2013, from Red McCombs Ford of San Antonio, Texas, with mileage of eighteen (18) at the time of delivery.
2. The vehicle's mileage on the date of hearing was 24,717.
3. At the time of hearing the vehicle was still under warranty.
4. About three months after purchase, Complainant noticed the vehicle "lunging," shaking and hesitating intermittently when she drove the vehicle. In addition, the "Engine Fault, Service Engine Now" light illuminated.
5. Complainant's vehicle was serviced for the "Engine Fault, Service Engine Now" light coming on by Red McCombs Ford, one of Respondent's authorized dealers, on the following dates:
 - a. January 31, 2013 to February 1, 2013, at 3,042 miles;
 - b. February 15, 2013 to February 20, 2013, at 3,499 miles;
 - c. March 8, 2013 to March 26, 2013, at 3,989 miles; and
 - d. August 13, 2013 to August 14, 2013, at 10,045 miles.
6. Complainant was provided with a rental car throughout the February and March 2013 service visits at Red McCombs Ford.
7. Complainant's reports that her vehicle was "lunging," shaking, and hesitating could not be verified by the dealer's representatives.
8. Respondent, through its authorized dealers, undertook a reasonable number of attempts to conform Complainant's vehicle to an applicable express warranty, but the nonconformity in the vehicle continues to exist.
9. Complainant was frustrated with the dealer's inability to repair her vehicle.
10. In April of 2013, an attempt was made by Respondent to replace the vehicle. However, an agreement could not be reached at that time.

11. On April 30, 2014, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
12. On June 20, 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.
13. The hearing convened on July 31, 2014, in San Antonio, Texas before Hearings Examiner Edward Sandoval. Complainant represented herself in the hearing. Respondent was represented by Kurt Kindler, Field Service Engineer. The hearing adjourned and the record closed that same day.

IV. CONCLUSIONS OF LAW

1. The Texas Department of Motor Vehicles (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, 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 replace Complainant's 2013 Ford Escape Titanium with a comparable motor vehicle. Tex. Occ. Code § 2301.604(a)(1).
11. Complainant is not entitled to reimbursement of incidental expenses. Tex. Occ. Code § 2301.604(a); 43 Tex. Admin. Code § 215.209.

IT IS THEREFORE ORDERED that:

1. Respondent shall, in accordance with Texas Administrative Code § 215.208(d)(1)(A), promptly authorize the exchange of Complainant's 2013 Ford Escape Titanium (the reacquired vehicle) with Complainant's choice of any comparable motor vehicle.
2. Respondent shall instruct the dealer to contract the sale of the selected comparable vehicle with Complainant under the following terms:
 - (a) The sales price of the comparable vehicle shall be the vehicle's Manufacturer's Suggested Retail Price (MSRP);
 - (b) The trade-in value of Complainant's 2013 Ford Escape Titanium shall be the MSRP at the time of the original transaction, less a reasonable allowance for Complainant's use of the vehicle;
 - (c) The use allowance for replacement relief shall be calculated in accordance with the formula outlined in Texas Administrative Code § 215.208(b)(2) (the use allowance is \$4,035.62);
 - (d) The use allowance paid by Complainant to Respondent shall be reduced by \$35.00 (the refund for the filing fee) (after deducting the filing fee, the use allowance is reduced to **\$4,000.62**, which is the amount that Complainant must be responsible for at the time of the vehicle exchange).

3. Respondent's communications with Complainant finalizing replacement of the reacquired vehicle shall be reduced to writing, and a copy thereof shall be provided to the Department within twenty (20) days of completion of the replacement.
4. Respondent shall obtain a Texas title for the reacquired vehicle prior to resale and issue a disclosure statement on a form provided or approved by the Department.⁸
5. Respondent shall affix the disclosure label to the reacquired vehicle in a conspicuous location (*e.g.*, hanging from the rear view mirror). Upon Respondent's first retail sale of the reacquired vehicle, the disclosure statement shall be completed and returned to the Department.
6. Within sixty (60) days of transfer of the reacquired vehicle, Respondent shall provide to the Department written notice of the name, address and telephone number of any transferee (wholesaler or equivalent), regardless of residence.
7. Respondent shall repair the defect or condition that was the basis of the 2013 Ford Escape Titanium's reacquisition and issue a new 12-month/12,000-mile warranty on the reacquired vehicle.
8. Upon replacement of Complainant's 2013 Ford Escape Titanium, Complainant shall be responsible for payment or financing of the usage allowance of the reacquired vehicle, any outstanding liens on the reacquired vehicle, and applicable taxes and fees associated with the new sale, excluding documentary fees. Further, in accordance with 43 Tex. Administrative Code § 215.208(d)(2):
 - (a) If the comparable vehicle has a higher MSRP than the reacquired vehicle, Complainant shall be responsible at the time of sale to pay or finance the difference in the two vehicles' MSRPs to the manufacturer, converter or distributor; and
 - (b) If the comparable vehicle has a lower MSRP than the reacquired vehicle, Complainant will be credited the difference in the MSRP between the two vehicles. The difference credited shall not exceed the amount of the calculated usage allowance for the reacquired vehicle.

⁸ Correspondence and telephone inquiries regarding disclosure labels should be addressed to: Texas Department of Motor Vehicles, Enforcement Division-Lemon Law Section, 4000 Jackson Avenue Building 1, Austin, Texas 78731, Phone (512) 465-4076.

9. Complainant shall be responsible for obtaining financing, if necessary, to complete the transaction.
10. The replacement transaction described in this Order shall be completed within 20 calendar days from the receipt of this Order. If the transaction cannot be accomplished within the ordered time period, Respondent shall repurchase Complainant's 2013 Ford Escape Titanium pursuant to the repurchase provisions set forth in 43 Tex. Administrative Code § 215.208(b)(1) and (2). The repurchase price shall be **\$32,243.39**. The refund shall be paid to Complainant and the lien holder, if any, as their interests appear. If clear title is delivered, the full refund shall be paid to Complainant. The calculations for the repurchase price are as follows:

Purchase price, including tax, title, license and registration					\$36,244.01
Mileage at first report of defective condition					2,042
Less mileage at delivery					<u>-18</u>
Unimpaired miles					2,024
Mileage on hearing date					24,717
Less mileage at first report of defective condition					<u>-2,042</u>
Impaired miles					22,675
Reasonable Allowance for Use Calculations:					
Unimpaired miles					
	<u>2,024</u>				
	120,000	X	\$36,244.01	=	\$611.32
Impaired miles					
	<u>22,675</u>				
	120,000	X	\$36,244.01	X .5	= <u>\$3,424.30</u>
Total reasonable allowance for use deduction:					\$4,035.62
Purchase price, including tax, title, license and registration					\$36,244.01
Less reasonable allowance for use deduction					-\$4,035.62
Plus filing fee refund					<u>\$35.00</u>
TOTAL REPURCHASE AMOUNT					\$32,243.39

11. If Complainant's 2013 Ford Escape Titanium is substantially damaged or there is an adverse change in its condition, beyond ordinary wear and tear, from the date of the hearing to the date of Respondent's reacquisition of the vehicle, and the parties are unable to agree on an amount allowed for such damage or condition, either party may request reconsideration by the final order authority of the trade-in value of Complainant's vehicle.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that Complainant's petition for repurchase relief pursuant to Texas Occupations Code §§ 2301.601-.613 is hereby **GRANTED**. It is further **ORDERED** that Respondent shall repair the warrantable defect in the reacquired vehicle identified in this Decision.

SIGNED August 13, 2014.



**EDWARD SANDOVAL
CHIEF HEARINGS EXAMINER
OFFICE OF ADMINISTRATIVE HEARINGS
TEXAS DEPARTMENT OF MOTOR VEHICLES**