

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 14-0337 CAF**

**SERITA T. DAWKINS,  
Complainant**

v.

**FORD MOTOR COMPANY,  
Respondent**

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**BEFORE THE OFFICE  
  
OF  
  
ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Serita T. Dawkins (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in her 2013 Ford Fusion. Complainant asserts that the vehicle won't start on occasion, that the vehicle "jerks" when she drives it (i.e., there's a harsh shift in the transmission), and that there are electrical problems with the vehicle. Ford Motor Company (Respondent) argues that there are no defects with the vehicle and that it is operating appropriately. The hearings examiner concludes that the vehicle does not have an existing warrantable defect and Complainant is not eligible for repurchase or 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 December 4, 2014, in Houston, Texas, before Hearings Examiner Edward Sandoval. Complainant represented herself at the hearing. Also present as a witness for Complainant was her mother, Rhonda Menard. Respondent was represented telephonically by Melinda Steiner, Consumer Affairs Legal Analyst. Also present at the hearing for Respondent as a witness was Steven Kyle, Field Service Engineer.

**II. DISCUSSION**

**A. Applicable Law**

The Lemon Law provides, in part, that a manufacturer of a motor vehicle must repurchase or replace a vehicle complained of with a comparable vehicle if the following conditions are met. First, the manufacturer is not able to conform the vehicle to an applicable express warranty by repairing or correcting a defect after a reasonable number of attempts.<sup>1</sup> Second, the defect or condition in the vehicle creates a serious safety hazard or substantially impairs the use or market

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<sup>1</sup> Tex. Occ. Code § 2301.604(a).

value of the vehicle.<sup>2</sup> Third, the owner must have mailed written notice of the alleged defect or nonconformity to the manufacturer.<sup>3</sup> Lastly, the manufacturer must have been given an opportunity to cure the defect or nonconformity.<sup>4</sup>

In addition to these 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.<sup>5</sup>

## B. Complainant's Evidence and Arguments

Complainant purchased a 2013 Ford Fusion from Randall Reed's Planet Ford (Planet Ford) in Humble, Texas on October 31, 2012, with mileage of 30 at the time of delivery.<sup>6</sup> On the date of hearing the vehicle's mileage was 39,035. At this time, Respondent's warranty coverage for the vehicle has expired, since the "bumper to bumper" coverage was for three years or 36,000 miles, whichever comes first. However, Respondent's powertrain warranty provides for coverage for the powertrain for five years or 60,000 miles. This warranty remains in effect at this time.

Complainant testified that the first issue with the vehicle was when she picked it up after purchasing it and she noticed a stain in the vehicle's headliner. The dealer's (Planet Ford) service technicians could not get the stain out of the headliner. Since they could not get the stain out, the dealer installed a remote start system in the vehicle as compensation. Complainant was offered her choice of four free oil changes or the installation of the remote start system and Complainant accepted the remote start. The vehicle still has the stain on the headliner. The remote start system was installed on January 4, 2013.<sup>7</sup>

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<sup>2</sup> *Id.*

<sup>3</sup> Tex. Occ. Code § 2301.606(c)(1).

<sup>4</sup> Tex. Occ. Code § 2301.606(c)(2).

<sup>5</sup> 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.

<sup>6</sup> Complainant Ex. 13, Lemon Law Complaint Form dated August 18, 2014.

<sup>7</sup> Complainant Ex. 1, Repair Order dated January 4, 2013. Complainant testified that the remote start system was installed about three weeks after purchasing the vehicle. However, the repair order indicates the install date was approximately two months after the purchase.

Complainant testified that Planet Ford's service technicians tried to remove the stain with several cleaning chemicals, but were unsuccessful. She never received any invoices from the dealer for the attempts to clean the headliner.

Complainant indicated that a couple of weeks later the vehicle failed to start. She had to get the vehicle towed to Planet Ford from her work location. There was no power to the vehicle. The lights would not come on and the vehicle would not do anything. Complainant testified that this occurred on June 6, 2013.<sup>8</sup> The vehicle was in the dealer's possession for five days and then Complainant was called and told that she could pick it up. Complainant was provided with a rental vehicle by the dealer. Complainant did not receive a copy of the repair order and did not know the mileage on the vehicle when it was delivered to the dealer on this occasion.

Complainant then testified that the first incident when the vehicle failed to start occurred on December 28, 2012 and the second incident occurred in June of 2013.<sup>9</sup> She testified that she had the vehicle towed to Planet Ford on December 28, 2012. In addition, Respondent had issued a recall notice for the vehicle's headlamp assembly. So, while the vehicle was in the dealer's possession, both headlamp assemblies were replaced pursuant to the recall.<sup>10</sup> The mileage on the vehicle at the time it was delivered to Planet Ford for service was 5,111.<sup>11</sup>

On June 26, 2013, the vehicle did not start and she had the vehicle towed to Planet Ford again. There was another recall on the vehicle due to a fuel smell and the repair work for the recall was performed. The dealer's service technician replaced the vehicle's fuel pump assembly per the recall requirements.<sup>12</sup> In addition, Complainant was given a price quote for damage that had been done to the vehicle's left tail lights.<sup>13</sup> The vehicle was in the dealer's possession for four days during this repair visit. Complainant could not remember if she received a rental or loaner vehicle while her vehicle was being repaired, although the repair order indicated that she was

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<sup>8</sup> No repair order dated June 6, 2013, was submitted by Complainant to the hearings examiner.

<sup>9</sup> Repair orders submitted by Complainant show that the first repair occurred on December 28, 2012; the second on January 4, 2013; and the third on June 26, 2013. However, Complainant testified that she did not receive a repair order for a June 6, 2013 repair.

<sup>10</sup> Complainant Ex. 2, Repair Order dated December 28, 2012. The repair order did not address the issue of the vehicle not starting. Complainant avers that the repair order is incorrect and that she took the vehicle to the dealer due to the vehicle not starting.

<sup>11</sup> *Id.*

<sup>12</sup> Complainant Ex. 3, Repair Order dated June 26, 2013. This repair order also did not address the issue of the vehicle not starting and implied that Complainant took the vehicle to the dealer due to a fuel smell. The recall repairs were performed according to the repair order.

<sup>13</sup> *Id.*

provided with a rental vehicle.<sup>14</sup> The vehicle's mileage at the time of this service visit was 15,815.<sup>15</sup>

On July 9, 2013, Complainant took the vehicle to Planet Ford for the manufacturer's 15,000 mile recommended maintenance check. She notified the dealer's service advisor that the vehicle was jerking when she drove it. She was told by the advisor that the vehicle's engine would probably have to be decarboned and that this was part of the 15,000 mile maintenance that needed to be performed. The jerking was intermittent and occurred randomly. The dealer's service technician decarboned the engine during this repair visit. The vehicle's mileage when Complainant took it to Planet Ford on this occasion was 16,324.<sup>16</sup> Complainant testified that the vehicle was in the dealer's possession for four days. Complainant was not provided with a rental or loaner vehicle during this visit.

On July 27, 2013, Complainant's vehicle failed to start and she had the vehicle towed to the dealership, Planet Ford. The dealer's service technician reprogrammed the vehicle's PCM.<sup>17</sup> The vehicle's mileage when Complainant took it to the dealership on this occasion was 17,292.<sup>18</sup>

On August 20, 2013, Complainant took the vehicle to Planet Ford because the vehicle's display screen indicated that the key could not be found and the vehicle began to lock and unlock on its own and the vehicle's dash and dome lights were flashing. Initially the vehicle would not start. However, Complainant waited a few hours and then the vehicle started and she was able to drive it to the dealer. The dealer's service technician reprogrammed the vehicle's BCM (body control module) and RTM (radio transceiver module) in order to resolve the issue.<sup>19</sup> In addition, Complainant indicated to the dealer's service advisor that sometimes she would have to wait to start the vehicle. This occurred once before this occasion. The service technician replaced the vehicle's battery which resolved this problem. The mileage on the vehicle when Complainant took it to the dealership on this occasion was 17,795.<sup>20</sup> The vehicle was kept by the dealer for one day. Complainant was not provided with a rental vehicle during this visit.

Complainant testified that she began experiencing a harsh jerking when driving the vehicle, so on April 15, 2014, she took the vehicle to Planet Ford. She was told by the dealer's service advisor that she should get the 30,000 mile recommended maintenance for the vehicle. She was told that the engine needed to be decarboned again and the fuel injectors flushed. So, Complainant

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Complainant Ex. 4, Repair Order dated July 9, 2013.

<sup>17</sup> Complainant Ex. 5, Repair Order dated July 27, 2013.

<sup>18</sup> *Id.*

<sup>19</sup> Complainant Ex. 6, Repair Order dated August 20, 2013.

<sup>20</sup> *Id.*

approved that the work be performed by the dealer. The vehicle's mileage on this occasion was 28,194.<sup>21</sup> The vehicle was then returned to Complainant.

The following day, April 16, 2014, Complainant was driving the vehicle and experienced the same type of jerking from the vehicle. So, she took the vehicle back to Planet Ford. She test drove the vehicle with a dealer representative. The representative felt the jerking and harsh shift described by Complainant. The dealer's service technician updated and recalibrated the software for the PCM. In addition, the transmission's adaptive learning strategy was reset.<sup>22</sup> The mileage on the vehicle at the time of this repair visit was 28,282.<sup>23</sup> The vehicle was in the dealer's possession for one day. Complainant received a rental vehicle during this repair visit.

After this repair visit, Complainant could still feel the vehicle jerking, but not as hard as prior to the repairs being made. However, the jerking began to increase. So, on May 13, 2014, Complainant took the vehicle back to Planet Ford due to the jerking. While the vehicle was in the dealer's possession, the shop foreman drove the vehicle for about 23 miles and he could not duplicate Complainant's concern. The vehicle was in the dealer's possession for one day on this occasion. The vehicle's mileage when Complainant took it to the dealership on this occasion was 29,669.<sup>24</sup> Complainant was not provided with a loaner vehicle.

On July 26, 2014, Complainant took the vehicle to Planet Ford for an oil change. She mentioned to the dealer's service advisor that the vehicle was jerking when she drove it. Complainant was advised to deliver the vehicle to the dealer on July 29, 2014, and to leave the vehicle overnight so that they could ascertain what the problem was with the vehicle. On July 29, Complainant test drove the vehicle with a service technician and felt the vehicle jerk twice while driving it. Complainant left the vehicle with the dealership and returned later to test drive with the shop foreman. He acknowledged the harsh shift of the vehicle to Complainant.<sup>25</sup> The vehicle was in the dealer's possession for one day during this repair visit. Complainant was provided with a rental vehicle during this visit. The mileage on the vehicle on this occasion was 33,598.<sup>26</sup>

Complainant testified that on August 1, 2014, she took the vehicle back to Planet Ford because of the jerking sensation she felt when driving the vehicle. She test drove the vehicle with the

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<sup>21</sup> Complainant Ex. 7, Repair Order dated April 15, 2014.

<sup>22</sup> Complainant Ex. 8, Repair Order dated April 16, 2014.

<sup>23</sup> *Id.*

<sup>24</sup> Complainant Ex. 9, Repair Order dated May 13, 2014.

<sup>25</sup> Complainant Ex. 10, Repair Order dated July 29, 2014. Complainant testified that both the service technician and the shop foreman acknowledged a hard shift when she test drove the vehicle with them. The repair order indicated that the dealer's technicians were unable to duplicate Complainant's concerns during the repair visit. In addition, the repair order does not indicate that Complainant test drove the vehicle with the dealer's representatives.

<sup>26</sup> *Id.*

dealer's shop foreman. He acknowledged feeling a bump while driving the vehicle. The dealer kept the vehicle for the day. The shop foreman told Complainant that he test drove another similar vehicle (the same model) and duplicated the same bump. The shop foreman told Complainant that this was normal for this type of vehicle. However, Complainant had been provided with a rental vehicle which was the same model also and she did not experience the bump while driving the rental vehicle. The mileage on Complainant's vehicle when she took it to the dealer on this occasion was 34,111.<sup>27</sup> Complainant's vehicle was in the dealer's possession for two days on this occasion. Complainant was provided with a rental vehicle while her car was being repaired by the dealer.

Complainant indicated that on August 11, 2014, she took the vehicle back to Planet Ford because of the jerking issue. The vehicle was in the dealer's possession for ten (10) days on this occasion. The dealer's service technician was able to duplicate Complainant's concern during this repair visit. The technician contacted Respondent's hotline for help in repairing the vehicle. The technician replaced the vehicle's control assembly and solenoid assembly.<sup>28</sup> The mileage on the vehicle on this date was 34,150.<sup>29</sup> Complainant received the vehicle back from the dealer on August 20, 2014. Complainant was provided with a rental vehicle while her vehicle was being repaired.

Complainant testified that she still feels the vehicle jerk when she drives it. It's not as hard as before, but she still feels it. She feels the vehicle hesitate as she nears 40 miles per hour, but it's not as bad as in the past.

On December 3, 2014, Complainant took the vehicle to Planet Ford because the dome lights have been flashing while driving. In addition, the radio's volume has turned up on its own at least twice. When Complainant took the vehicle to the dealer, she was told that they would have to wait to do anything about Complainant's concerns because they had to wait for an update from Respondent.

On August 11, 2014, Complainant wrote a letter to Respondent advising them of her dissatisfaction with the vehicle. This letter was to provide notice to the Respondent that Complainant intended to file a complaint with the Texas Department of Motor Vehicles under Section 2301 of the Texas Occupations Code (the Texas Lemon Law). Through this letter

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<sup>27</sup> Complainant Ex. 11, Repair Order dated August 1, 2014.

<sup>28</sup> Complainant Ex. 12, Repair Order dated August 11, 2014.

<sup>29</sup> *Id.*

Complainant also advised Respondent of their final opportunity to repair the vehicle.<sup>30</sup> Complainant went on to file the Lemon Law complaint on August 18, 2014.<sup>31</sup>

Complainant testified that she provided Respondent with a final repair attempt of the vehicle. She stated that Respondent's field service engineer has inspected the vehicle twice. The first time he was there for a day when the vehicle was in the dealer's possession for ten days. However, she could not remember the date.

During redirect examination, Complainant indicated that the vehicle has not failed to start since the last no start incident in August of 2013. The current issues with the vehicle have to do with the harsh shift (jerking) and the vehicle's lighting.

During cross examination, Complainant testified that the vehicle's left tail light was damaged as a result of an accident. She asked the dealer for a quote as to how much it would cost to repair the damage during the repair visit on June 26, 2013. Complainant was advised that the cost to repair the damage was high because the vehicle was so new. She was also told that the cost would go down as the vehicle got older. So, Complainant declined to have the damage repaired. As of the date of hearing, the vehicle has not been repaired.

### **C. Respondent's Evidence and Arguments**

Melinda Steiner, Consumer Affairs Legal Analyst, testified that she first became involved in this case on September 8, 2014, when Respondent first received notice that a complaint had been filed by Complainant with the state of Texas. Complainant had mailed her demand letter to Respondent on August 11, 2014, which was handled by a different legal analyst. This individual began the process to have Complainant's vehicle inspected for a final repair attempt. One of Respondent's field service engineers (Steve Kyle) was assigned to inspect Complainant's vehicle. The final inspection and repair attempt took place August 22, 2014, at Planet Ford.

Ms. Steiner was not aware if the vehicle had any electrical issues at the time of hearing. She was not aware as to why the dealer did not perform any repair work for the electrical issues raised by Complainant when she took it to the dealer on December 3, 2014. The vehicle's bumper to bumper limited warranty is for three years or 36,000 miles. Complainant also purchased a premium care package for the vehicle which provides limited extended coverage for 72 months

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<sup>30</sup> Complainant Ex. 14, Letter to Ford Motor Company dated August 11, 2014.

<sup>31</sup> Complainant Ex. 13, Lemon Law Complaint. Complainant testified that she filed the Lemon Law complaint on August 12, 2014. However, the complaint contained in the file was dated as being received by the Texas Department of Motor Vehicles (TxDMV) on August 18, 2014. Since the document appears to have actually been received by TxDMV on August 18, 2014, (see date on the bottom of page one of the exhibit) that is the date that the complaint is considered to have been perfected.

or 75,000 miles and includes roadside assistance. The vehicle also has a five year or 60,000 mile powertrain warranty.

Ms. Steiner testified that Respondent had issued a Technical Service Bulletin (TSB) for the keyless entry system. A TSB is like a supplemental workshop aid for the dealers' service departments. It provides information on updated processes for repairs or new parts for repairs. It details new processes for the service technicians.

Steve Kyle, field service engineer, testified that he was responsible for performing the final inspection and repair attempt on Complainant's vehicle. He performed the inspection of the vehicle on August 22, 2014, at Planet Ford. He spoke to the dealer's shop foreman regarding the issues with the vehicle. The shop foreman indicated that he was able to duplicate some of Complainant's concerns regarding the vehicle jerking when being driven. This was before the vehicle's valve body was replaced. Since replacing the valve body, the concern was no longer present. The shop foreman and Mr. Kyle took the vehicle on a test drive to see if the problem could be duplicated again. They took the same route that the shop foreman had driven when he was originally able to duplicate the concern. The problem did not occur during Mr. Kyle's test drive. So, Mr. Kyle determined that the vehicle was operating normally. Mr. Kyle also noticed that one of the vehicle's tail lights was broken and had not been repaired. After taking the test drive, the vehicle had mileage of 34,236.

Mr. Kyle testified that the information he obtained regarding Complainant's concern with the vehicle was that the vehicle's transmission would jerk at times when it shifted. Planet Ford's shop foreman informed Mr. Kyle that this would occur when the vehicle upshifted from second gear to third gear or from third gear to fourth gear. He felt that the vehicle would experience an RPM flare which would lead to a "harsh engagement." The concern seemed to occur when the vehicle was traveling at twenty mph or higher. Mr. Kyle indicated that he did not inspect the vehicle twice as indicated by Complainant, but only on August 22, 2014, when he performed the final inspection and repair attempt.

In regards to the repairs performed by the dealer, Mr. Kyle testified that the replacement of the headlamp assembly on December 28, 2012, was required by Respondent's recall notice regarding the vehicle. As far as the repair order dated January 4, 2013, regarding the installation of a remote start system on the vehicle, Mr. Kyle felt that the installment was paid for by the dealer for goodwill and that's why he had no documentation for that repair. On June 26, 2013, repair work was performed on the vehicle pursuant to a recall notice. This recall required that the vehicle's fuel pump assembly be replaced. In addition, Complainant was quoted a price to repair the vehicle's tail lamp assembly, but she did not approve any repairs to it.

On July 9, 2013, Complainant had the vehicle's engine decarboned. According to Mr. Kyle, a carbon buildup can occur on internal engine components. To decarbon the engine, the technician will run fuel additives through the engine which will clean the valve train, help break down the carbon, and help the engine run more economically. Excessive carbon buildup can lead to engine misfires. If the carbon buildup is severe enough, it can cause the vehicle to jerk when being driven. The carbon buildup can't be seen visually, so when someone says that a vehicle is jerking, then it's reasonable to suspect that the vehicle's behavior can be due to carbon buildup. So, the recommendation for an engine decarbon can be made to the vehicle's owner.

On July 27, 2013, Complainant took the vehicle to the dealer because it failed to start. The repair performed on this occasion was to reprogram the vehicle's powertrain control module (PCM). This module controls the engine's functions, including fuel pump operation and fuel injector operation. The module receives data from all of the engine's sensors. The PCM also houses the transmission control module (TCM) functions and controls the vehicle's transmission. The TCM is internal to the PCM.

Mr. Kyle testified that there was a TSB regarding the keyless entry system which was addressed during the August 20, 2013 repair visit. Complainant took the vehicle to the dealer because the vehicle's display indicated that the key could not be found, the vehicle locked and unlocked on its own, and because the vehicle's dome lights flashed on and off. The TSB indicated that a diagnostic trouble code (DTC) could be set. It didn't appear that the service technician found that code set on Complainant's vehicle, but still decided to perform the repairs indicated in the TSB. This involved reprogramming the radio transceiver module (RTM) and the body control module (BCM). Those modules carry out the functions for the keyless entry, the remote start, and the lighting functions of the vehicle. In addition, it appeared that the vehicle's battery had failed, so it was replaced.

Complainant took her vehicle to the dealer on April 15, 2014, because it was jerking and it was recommended to her that she have the engine decarboned again. Mr. Kyle testified that there is no set period of time or mileage for a vehicle's engine to be decarboned. It depends on the vehicle. A passenger vehicle may not need it as much as a vehicle that's operated in the oil fields. It depends on where and how a vehicle is being operated. A vehicle that carries heavy loads may need its engine decarboned more often than other vehicles. He testified that it seemed odd that a vehicle with 28,000 miles would have its engine decarboned twice, but it would depend on how the vehicle is being driven. Complainant's vehicle is driven approximately 1500 miles per month which is above the national average of 12,000 to 15,000 miles per year, so carbon buildup in the engine could have occurred faster.

When Complainant took the vehicle back to the dealer on April 16, 2014, due to the vehicle still jerking, the dealer's service technician performed an EEC test on the vehicle. The EEC test checks all of the vehicle's modules, specifically the PCM to see if there are any diagnostic trouble codes to be set. There were no codes. In addition, the technician monitored the parameter identification data (PID) which allows the technician to look at live data while the vehicle is running. The technician can see the data that is being inputted into the PCM, as well as what the PCM is controlling on the output side. This is done by hooking up a computer to the engine. The gear and transmission ratio was checked, as well as the low pressure control (LPC) which checks the fluid pressure within the transmission, and everything was within the manufacturer's required specifications. Also, the PCM software level was checked and it was determined that there was an update available for the module, so it was updated. The technician also cleared the transmission tables which deal with the transmission's learned behavior. The transmission is designed to adapt to the way a person drives in order to allow the owner to get the most optimal fuel economy for the vehicle. So, the tables were reset and set to default. This was done pursuant to Respondent's workshop manual (WSM).

Complainant took the vehicle to Planet Ford again on May 13, 2014, to complain about the vehicle jerking when she drove it. The dealer's service technician performed another EEC test and determined that there were no codes. In addition, the technician ran an Oasis report on the vehicle. (Oasis is a software program that has information specific to an individual's vehicle identification number (VIN). The report can indicate if there are any outstanding recalls for a vehicle and provides warranty information regarding the vehicle.) The technician ran the Oasis report to determine if there was an outstanding service message (SSM) or TSB for the vehicle. The SSM is used when a problem starts arising with a certain model vehicle. It informs dealer technicians that Respondent has an awareness that there may be an issue with a certain model vehicle, because Respondent is starting to see some issues becoming more prevalent. The TSB is used in a situation where a problem is recognized and a repair has been determined for a specific problem. Complainant's vehicle did not have any SSM's or TSB's on record. It was determined by the dealer's service technician on this occasion that Complainant's vehicle was operating properly.

Complainant took the vehicle to Planet Ford on August 11, 2014, due to the vehicle jerking when being driven. During this repair visit, the dealer's service technician contacted Respondent's technical hotline. The hotline provides assistance to dealers' technicians to repair a vehicle. The technician will fill out a web request form specifying the issue with a vehicle and what the technician has done to attempt to repair the vehicle, along with any questions they may have. The hotline will provide feedback to the technician. After a webchat has been initiated, the technician can call the hotline directly to get more direct information. The technician was advised by the hotline representative to perform a pressure test on the vehicle to check the transmission's fluid

pressure. This test came back within specifications. The dealer technician was then advised to repair or replace the vehicle's side pan (part of the transmission where transmission fluid is held and provides access to the valve body) and valve body. In addition, the technician was instructed to disassemble and check all of the vehicle's valves. The technician performed an air test on the vehicle's forward clutch pack (a part of the transmission). The clutch pack tested okay. The technician then replaced the vehicle's valve body and solenoid (a part of the vehicle's transmission).

Mr. Kyle testified that during the final inspection and repair attempt he was only required to inspect the vehicle's transmission issues. That was the only involvement he had with the vehicle. The inspection occurred after the transmission's valve body was replaced. The concern was not able to be duplicated after the valve body was replaced.

On the date of hearing Mr. Kyle participated in a test drive in Complainant's vehicle, along with the hearings examiner and Complainant. Mr. Kyle testified that in his viewpoint, during the test drive the vehicle was driving as intended. No issues arose during the drive that he considered to be abnormal. The driver's side tail light housing lens is broken which exposes the internals of the assembly. Water can be introduced into the environment and be getting on the harnesses and bulb sockets. The moisture can also be "wicking" up (this is similar to how a candle will pull wax up through the wick) through the harness and could be a cause of some of the electrical concerns Complainant is experiencing. The water can go up the assembly's copper strands and will work its way up a harness. Mr. Kyle's involvement, however, has not been related to any electrical issues.

#### **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. In addition, Complainant must meet the presumption that a reasonable number of attempts have been undertaken to conform the vehicle to an applicable express warranty. Finally, Complainant is required to serve written notice of the nonconformity on Respondent, who must be allowed an opportunity to cure the defect. If each of these requirements is met and Respondent is still unable to conform the vehicle to an express warranty by repairing the defect, Complainant is entitled to have the vehicle repurchased or replaced.

Complainant purchased the vehicle on October 31, 2012 and presented the vehicle to an authorized dealer of Respondent due to her concerns with the vehicle on the following dates: December 28, 2012; January 4, 2013; June 26, 2013; July 9, 2013; July 27, 2013; August 20,

2013; April 15, 2014; April 16, 2014; May 13, 2014; July 29, 2014; August 1, 2014; and August 11, 2014. Occupations Code § 2301.605(a) requires a showing that Respondent was unable to conform the vehicle to an applicable express warranty "after a reasonable number of attempts." Section 2301.605(a)(1) goes on to specify that a rebuttable presumption that a reasonable number of attempts to repair have been made if "two or more repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, following the date of original delivery to the owner, and two other repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the second repair attempt." Complainant has not met the requirements of this test.

Complainant presented the vehicle for repairs to an authorized dealer for Respondent within the first 12,000 miles from purchase on one occasion. This occurred on December 28, 2012 and Complainant's concern on that occasion was the stain on the headliner. The repair order for the date in question did not address the issue of the vehicle not starting. Although Complainant testified that when she took the vehicle to the dealer on December 28, 2012, she also had a concern with the vehicle not starting, her testimony is less than credible due to the many inconsistencies with her testimony regarding time frames, when incidents occurred, and the work performed for each visit. According to the repair orders submitted for hearing, the first indication that the vehicle did not start was on July 27, 2013, when the vehicle's mileage was 17,262 from the date of delivery (the vehicle had 30 miles on it when Complainant received it, actual mileage on the vehicle on the date in question was 17,292). The final incident regarding the vehicle not starting occurred on August 20, 2013. Complainant has not had an issue with the vehicle not starting since that date.

The second issue raised by Complainant was that the vehicle would jerk when she drove it. The first indication that Complainant had a concern with the vehicle jerking was when she took the vehicle to Respondent's authorized dealer for repairs on July 9, 2013, when the vehicle's mileage was 16,294 from the date of delivery (actual mileage on the vehicle on the date in question was 16,324). The evidence presented also shows that although Complainant did present the vehicle to Respondent's authorized dealer for repairs multiple times for this issue (six times total), only one of these repairs (the July 9, 2014, repair) occurred within the first 24,000 miles from the date of delivery of the vehicle to Complainant. The five other repair attempts occurred after Complainant's vehicle had accumulated 28,000 or more miles.

Finally, Complainant indicated that the vehicle had electrical issues with which she was concerned. Prior to filing the Lemon Law complaint, Complainant raised a possible electrical issue once on August 20, 2013. This was a situation where the vehicle's display screen indicated that no key could be found, the vehicle locked and unlocked itself several times, and the

vehicle's dome lights flashed on and off. The mileage on the vehicle on this occasion was 17,765 from the date of delivery (total mileage was 17,795). Complainant did not present the vehicle to Respondent's authorized dealer for an electrical issue again until December 3, 2014.

The evidence reveals that Complainant did not present the vehicle for repair to an authorized dealer for any of the issues she raised in her complaint prior to the vehicle accumulating 12,000 miles from the date of delivery. In addition, although there were four repair attempts in the next 12,000 miles, one of these was for a recall, one for the vehicle jerking, and two for the vehicle not starting which has been repaired. As such, the hearings examiner holds that Complainant has been unable to establish that a reasonable number of attempts to repair the vehicle were made by Respondent in accordance with Occupations Code § 2301.605(a)(1).

Therefore, the hearings examiner finds that there is no defect with the vehicle as defined in the Occupations Code and, as such, there are no grounds to grant repurchase or replacement relief for Complainant.

Respondent's express warranty applicable to Complainant's vehicle provides "bumper to bumper" coverage for three (3) years or 36,000 miles whichever comes first. In addition, the powertrain warranty provides coverage for five (5) years or 60,000 miles. On the date of hearing, the vehicle's mileage was 39,035 and it remains under the powertrain warranty and extended warranty purchased by Complainant. As such, the Respondent is still under an obligation to repair the vehicle whenever there is a problem covered by the applicable warranty.

In addition, Complainant's issues concerning the vehicle jerking when she drives it arose during the period of Respondent's limited warranty applicable to the vehicle. As a result, Respondent will have a continuing obligation to make repairs for this issue even though the warranty has expired as required by Occupations Code § 2301.603(b).

Complainant's request for repurchase or replacement relief is denied.

### III. FINDINGS OF FACT

1. Serita T. Dawkins (Complainant) purchased a new 2013 Ford Fusion on October 31, 2012 from Planet Ford in Humble, Texas, with mileage of 30 at the time of delivery.
2. The manufacturer of the vehicle, Ford Motor Company (Respondent) issued a bumper to bumper warranty for the vehicle for three (3) years or 36,000 miles, whichever occurs first and a separate powertrain warranty for five (5) years or 60,000 miles. In addition,

Complainant purchased a premium care package allowing for additional warranty coverage for 72 months or 75,000 miles.

3. The vehicle's mileage on the date of hearing was 39,035.
4. At the time of hearing the basic warranty had expired, but the vehicle was still covered by Respondent's powertrain warranty and the extended warranty.
5. Complainant took the vehicle to Respondent authorized dealer, Randall Reed's Planet Ford (Planet Ford), in order to address her concerns on the following dates:
  - a. December 28, 2012, at 5,111 miles;
  - b. June 26, 2013, at 15,815 miles;
  - c. July 9, 2013, at 16,324 miles;
  - d. July 27, 2013, at 17,292 miles;
  - e. August 20, 2013, at 17,795 miles;
  - f. April 15, 2014, at 28,194 miles;
  - g. April 16, 2014, at 28,282 miles;
  - h. May 13, 2014, at 29,669 miles;
  - i. July 29, 2014, at 33,598 miles;
  - j. August 1, 2014, at 34,111 miles; and
  - k. August 11, 2014, at 34,150 miles.
6. Complainant took the vehicle to Planet Ford on December 28, 2012, because of a stain on the vehicle's headliner. The dealer was unable to remove the stain and offered to Complainant and installed in the vehicle a remote keyless start system on January 4, 2013.
7. On June 26, 2013, Complainant took the vehicle to Planet Ford because of a fuel smell. The dealer performed repairs pursuant to a recall order issued by Respondent.
8. On July 9, 2013, Complainant took the vehicle to Planet Ford for routine maintenance and advised the dealer representative that the vehicle was jerking when she drove it. The dealer's service representative informed Complainant that the jerking could be caused by carbon buildup on the engine and recommended that the engine be decarboned, which Complainant approved.

9. On July 27, 2013, Complainant took the vehicle to Planet Ford because it would not start. The dealer's service technician reprogrammed the vehicle's powertrain control module (PCM) in order to address the issue.
10. On August 20, 2013, Complainant took the vehicle to Planet Ford because the vehicle's display screen indicated that no key could be found, the vehicle locked and unlocked itself several times, and the vehicle's dome lights flashed on and off. In addition, the vehicle would not start. The dealer's service technician replaced both the vehicle's body control module (BCM) and radio transceiver module (RTM), as well as replaced the battery to address Complainant's concerns on this occasion.
11. On April 15, 2014, Complainant took the vehicle to Planet Ford for routine maintenance and advised the dealer representative that the vehicle again was jerking when she drove it. The dealer's service representative again raised the issue that this could be caused by carbon buildup on the engine and recommended that the engine be decarboned, which Complainant approved.
12. On April 16, 2014, Complainant returned the vehicle to Planet Ford because she still felt the vehicle jerking. At this time, the dealer's service technician updated the PCM software in order to address the issue.
13. On May 13, 2014, Complainant took the vehicle to Planet Ford because the vehicle was jerking when she drove it. The dealer's service technician performed no repairs because the vehicle seemed to be operating as designed during a test drive.
14. On July 29, 2014, Complainant took the vehicle to Planet Ford because the vehicle was still jerking when she drove it. The dealer's service technician was unable to duplicate the concern, so no repairs were performed at the time.
15. On August 1, 2014, Complainant took the vehicle to Planet Ford because the vehicle was jerking when she drove it. The dealer's shop foreman test drove the vehicle with Complainant and felt a thump at one point. However, he felt that this was normal for the vehicle, so no repairs were performed.
16. On August 11, 2014, Complainant took the vehicle back to Planet Ford for the jerking issue. On this occasion, the dealer's service technician was able to duplicate the issue and effect repairs. The technician replaced the vehicle's side pan, valve body, and solenoid assembly.

17. Complainant filed a Lemon Law complaint regarding the vehicle with the Texas Department of Motor Vehicles on August 18, 2014.
18. On August 22, 2014, Respondent's field service engineer performed a final inspection and repair attempt on Complainant's vehicle. The field service engineer felt that no repairs were necessary as the vehicle was operating as designed.
19. On October 15, 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.
20. The hearing convened on December 4, 2014, in Houston, Texas before Hearings Examiner Edward Sandoval. Complainant represented herself at the hearing. Also present as a witness for Complainant was her mother, Rhonda Menard. Respondent was represented telephonically by Melinda Steiner, Consumer Affairs Legal Analyst. Also present at the hearing for Respondent was Steven Kyle, Field Service Engineer. The hearing adjourned and the record closed that same day.

#### IV. CONCLUSIONS OF LAW

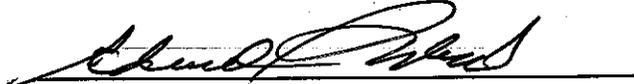
1. The Texas Department of Motor Vehicles (Department) has jurisdiction over this matter. Tex. Occ. Code §§ 2301.601-2301.613 (Lemon Law).
2. A hearings examiner of the Department's Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, 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 failed to prove by a preponderance of the evidence that the vehicle has a verifiable defect or condition that presents a serious safety hazard or substantially impairs the use or market value of the vehicle. Tex. Occ. Code § 2301.604.
7. Respondent remains responsible to address and repair or correct any defects that are covered by Respondent's warranties. Tex. Occ. Code § 2301.204.
8. Complainant's vehicle does not qualify for replacement or repurchase. Tex. Occ. Code § 2301.604.

### 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 §§ 2301.601-2301.613 is hereby **DISMISSED**.

**SIGNED January 22, 2015.**



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