

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 16-0086 CAF**

**ERICK WANGU,  
Complainant**

**v.**

**HYUNDAI MOTOR AMERICA,  
Respondent**

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**BEFORE THE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Erick Wangu (Complainant) filed a complaint with the Texas Department of Motor Vehicles seeking relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged warrantable defects in his vehicle distributed by Hyundai Motor America (Respondent). The hearings examiner concludes that the subject vehicle has not had a reasonable number of repair attempts and does not have a warrantable defect that creates a serious safety hazard or substantially impairs the vehicle's use or market value. Consequently, the Complainant's vehicle does not qualify for repurchase/replacement relief.

**I. Procedural History, Notice and Jurisdiction**

Matters of notice of hearing<sup>1</sup> 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 the record closed on March 23, 2016, in Mesquite, Texas, before Hearings Examiner Andrew Kang. The Complainant represented himself. Ryan Morrison, Field Service Engineer, and Tom Wilke, District Parts and Service Manager, represented and testified for the Respondent.

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<sup>1</sup> TEX. GOV'T CODE § 2001.051.

## II. Discussion

### A. Applicable Law

#### 1. Repurchase/Replacement Relief

A vehicle qualifies for repurchase or replacement if the manufacturer cannot “conform a motor vehicle to an applicable express warranty by repairing or correcting a defect or condition that creates a serious safety hazard or substantially impairs the use or market value of the motor vehicle after a reasonable number of attempts.”<sup>2</sup> In other words, (1) the vehicle must have a defect covered by an applicable warranty (warrantable defect); (2) the defect must either (a) create a serious safety hazard or (b) substantially impair the use or market value of the vehicle; and (3) the defect must continue to exist after a “reasonable number of attempts” at repair.<sup>3</sup> In addition, the Lemon Law imposes other requirements for repurchase/replacement relief, including (1) a mailed written notice of the defect to the manufacturer, (2) an opportunity to repair by the manufacturer, and (3) a deadline for filing a Lemon Law complaint.

##### a. Serious Safety Hazard

The Lemon Law defines “serious safety hazard” as a life threatening malfunction or nonconformity that: (1) substantially impedes a person’s ability to control or operate a vehicle for ordinary use or intended purposes, or (2) creates a substantial risk of fire or explosion.<sup>4</sup>

##### b. Substantial Impairment of Use or Value

###### i. Impairment of Use

In determining substantial impairment of use, the Department considers “whether a defect or nonconformity hampers the intended normal operation of the vehicle.” For instance, “while a vehicle with a non-functioning air conditioner would be available for use and transporting passengers, its intended normal use would be substantially impaired.”<sup>5</sup>

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<sup>2</sup> TEX. OCC. CODE § 2301.604(a).

<sup>3</sup> TEX. OCC. CODE § 2301.604(a).

<sup>4</sup> TEX. OCC. CODE § 2301.601(4).

<sup>5</sup> *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012).

**ii. Impairment of Value**

The Department applies a reasonable purchaser standard for determining whether a defect substantially impairs the value of a vehicle. The reasonable purchaser standard “does not require an owner to present an expert witness or any technical or market-based evidence to show decreased value.” Instead, under this standard, “factfinders should put themselves in the position of a reasonable prospective purchaser of the subject vehicle and determine (based on the evidence presented) if the current condition of the vehicle would deter them from buying the vehicle or substantially negatively affect how much they would be willing to pay for the vehicle.”<sup>6</sup>

**c. Reasonable Number of Repair Attempts**

Generally, a rebuttable presumption is established that the vehicle had a reasonable number of repair attempts if:

[T]he same nonconformity continues to exist after being subject to repair four or more times by the manufacturer, converter, or distributor or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and: (A) two of the 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 (B) the other two repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the second repair attempt.<sup>7</sup>

However, the statutory rebuttable presumption does not preclude otherwise finding a reasonable number of attempts to repair the vehicle based on different circumstances and fewer attempts.<sup>8</sup> Furthermore, the Department adopted a decision indicating that if a consumer presents the

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<sup>6</sup> *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012) (“[T]he Division’s interpretation that expert testimony or technical or market-based evidence is not required to show diminished value or use is consistent with the statute’s goal of mitigating manufacturers’ economic advantages in warranty-related disputes.”).

<sup>7</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 establishing a rebuttable presumption that a reasonable number of attempts have been undertaken to conform a vehicle to an applicable express warranty. Section 2301.605(a)(2) only applies 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>8</sup> “[T]he existence of statutory presumptions does not forbid the agency from finding that different circumstances or fewer attempts meet the requisite ‘reasonable number of attempts.’” *Ford Motor Company v. Texas Department of Transportation*, 936 S.W.2d 427, 432 (Tex. App.—Austin 1996, no writ).

vehicle to a dealer for repair and the dealer fails to repair the vehicle, then that visit would constitute a repair attempt unless the consumer was at fault for the failure to repair the vehicle.<sup>9</sup>

**d. Other Requirements**

Even if a vehicle satisfies the preceding requirements for repurchase/replacement relief, the Lemon Law prohibits repurchase or replacement unless: (1) the owner or someone on behalf of the owner mailed written notice of the alleged defect or nonconformity to the manufacturer;<sup>10</sup> (2) the manufacturer was given an opportunity to cure the defect or nonconformity;<sup>11</sup> and (3) the Lemon Law complaint was filed within six months after the earliest of: the warranty's expiration date or the dates on which 24 months or 24,000 miles had passed since the date of original delivery of the motor vehicle to an owner.<sup>12</sup>

**2. Warranty Repair Relief**

Even if repurchase or replacement relief does not apply, a vehicle may still qualify for warranty repair if the vehicle has a “defect . . . that is covered by a manufacturer's . . . warranty agreement applicable to the vehicle.”<sup>13</sup> The manufacturer has an obligation to “make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty.”<sup>14</sup>

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<sup>9</sup> “[O]nly those occasions when failure to repair the vehicle was the fault of the consumer would not be considered a repair attempt under the statute.” *DaimlerChrysler Corporation v. Williams*, No. 03-99-00822-CV (Tex. App.—Austin, June 22, 2000, no writ) (not designated for publication).

<sup>10</sup> TEX. OCC. CODE § 2301.606(c)(1). Note: the Lemon Law does not define the words “mailed” or “mail”, so under the Code Construction Act, the common usage of the word applies. TEX. GOV'T CODE § 311.011. Dictionary.com defines “mail” as “to send by mail; place in a post office or mailbox for transmission” or “to transmit by email.” mail. Dictionary.com. *Dictionary.com Unabridged*. Random House, Inc. <http://www.dictionary.com/browse/mail> (accessed: April 01, 2016). Also, 43 TEX. ADMIN. CODE § 215.204 provides that “[u]pon receipt of a complaint for lemon law or warranty performance relief, the department will provide notification of the complaint to the appropriate manufacturer, converter, or distributor.” The Department's notice of the complaint to the Respondent may satisfy the requirement that someone on behalf of the owner mailed notice of the defect/nonconformity to the Respondent.

<sup>11</sup> TEX. OCC. CODE § 2301.606(c)(2). Note: a repair visit to a dealer can satisfy the “opportunity to cure” requirement if the manufacturer authorized repairs by the dealer after written notice to the manufacturer, i.e., the manufacturer essentially authorized the dealer to attempt the final repair on the manufacturer's behalf. See *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 226 (Tex. App.—Austin 2012).

<sup>12</sup> TEX. OCC. CODE § 2301.606(d)(2).

<sup>13</sup> TEX. OCC. CODE § 2301.204.

<sup>14</sup> TEX. OCC. CODE § 2301.603(a).

### 3. Burden of Proof

The law places the burden of proof on the Complainant.<sup>15</sup> The Complainant must prove each fact required for relief by a preponderance, that is, the Complainant must present evidence showing that all of the required facts are more likely than not true.<sup>16</sup> For example, the Complainant must show that a warrantable defect more likely than not exists. For any required fact, if the evidence weighs in favor of the Respondent or if the evidence equally supports the Complainant and the Respondent, the Respondent will prevail. The Complainant prevails only if the evidence shows that all of the required facts are more likely than not true.

### 4. The Complaint Limits the Issues in this Case

The Complaint identifies the issues to be addressed in this proceeding.<sup>17</sup> The pleadings should state “sufficient facts to enable the department and the party complained against to know the nature of the complaint and the specific problems or circumstances which form the basis of the claim for relief under the lemon law.”<sup>18</sup>

#### A. Complainant’s Evidence and Arguments

On May 4, 2015, the Complainant, purchased a new 2015 Hyundai Sonata from Bob Stallings Hyundai, a franchised dealer of the Respondent, Hyundai Motor America, in Dallas, Texas. The vehicle had 10 miles on the odometer at the time of purchase. The vehicle’s warranty covers the vehicle for five years or 60,000 miles, whichever occurs first. On October 27, 2015, the Complainant mailed a written notice of defect to the Respondent. On November 9, 2015, the Complainant filed a Lemon Law complaint (Complaint) with the Texas Department of Motor Vehicles (Department) alleging that: the vehicle feels like it is losing power (drag feeling); the

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<sup>15</sup> 43 TEX. ADMIN. CODE § 215.66(d).

<sup>16</sup> *E.g., Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

<sup>17</sup> “In a contested case, each party is entitled to an opportunity . . . for hearing after reasonable notice of not less than 10 days.” TEX. GOV’T CODE §§ 2001.051; “Notice of a hearing in a contested case must include . . . a short, plain statement of the matters asserted.” TEX. GOV’T CODE § 2001.052. *See also* TEX. OCC. CODE § 2301.204(b) (“The complaint must be made in writing to the applicable dealer, manufacturer, converter, or distributor and must specify each defect in the vehicle that is covered by the warranty.”); TEX. OCC. CODE § 2301.204(d) (“A hearing may be scheduled on any complaint made under this section that is not privately resolved between the owner and the dealer, manufacturer, converter, or distributor.”).

<sup>18</sup> 43 TEX. ADMIN. CODE § 215.202(b).

vehicle will not always start; and the trip meter and fuel gauge reading incorrectly (fuel economy).

In relevant part, the Complainant took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
April 24, 2015	16	Electronic intake continuously variable valve timing seal seating <sup>19</sup>
September 14, 2015	9,111	Vehicle will not start; oil leaking <sup>20</sup>
September 24, 2015	9,470	Vehicle will not start; lack of acceleration <sup>21</sup>
September 29, 2015	9,864	Drag in power <sup>22</sup>
October 26, 2015	11,321	Hesitation when cold <sup>23</sup>

The Complainant testified that he first experienced the acceleration issue about a week before taking the vehicle to the dealer for service about May 2015.<sup>24</sup> He stated that the issue would occur every time, mostly when driving two to three hours. The Complainant described the loss of acceleration as feeling like braking. The Complainant confirmed that he felt this loss of acceleration during the test drive at the hearing. He explained that someone the same height, weight as him driving alone can feel the acceleration issue but a heavier person cannot. The Complainant first noticed the starting problem around two months after purchasing the vehicle, around July. The starting issue would occur about three times a month and last occurred two to three weeks before the hearing. However, the Complainant explained that the engine will start when cranking the engine a second time. With regard to the fuel economy issue, the Complainant explained, for example, that the trip computer may show the range (distance to empty) as 20 miles but instead the vehicle may travel 50 miles. The hearings examiner asked if noticed if the range went down slower on the highway or faster in the city but the Complainant answered he did not pay attention to that. He first noticed the discrepancy a month after buying the vehicle. The hearings examiner asked if he had tried calculating the fuel economy but he answered that he did not. He last noticed the discrepancy on the day of the hearing. The Complainant stated that none of the issues improved after repair.

<sup>19</sup> Complainant's Ex. 9, Invoice 306929.

<sup>20</sup> Complainant's Ex. 11, Invoice 311645.

<sup>21</sup> Complainant's Ex. 12, Invoice 311856.

<sup>22</sup> Complainant's Ex. 13, Invoice 312229.

<sup>23</sup> Complainant's Ex. 14, Invoice 158156.

<sup>24</sup> The repair history shows a service visit in late April 2015 but not in May of 2015.

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

Mr. Morrison testified that, based on all the testimony and the test drive at the hearing, he believed the vehicle was operating normally. Mr. Morris explained that the distance to empty is an estimate based on the average fuel economy and the amount of fuel in the tank at that moment. Mr. Morrison explained that a drag feeling may occur when the vehicle cuts off fuel (as a fuel economy measure). However, this was a normal function of all Hyundai vehicles.

## **C. Inspection**

The vehicle operated normally during the inspection and test drive, with no indication of any of the complained of issues. Although the Complainant apparently experienced the acceleration issue, any slowing appeared normal.

## **D. Analysis**

As an initial matter, the record reflects that the vehicle had no more than three repair attempts for any single issue. Moreover, the record does not support finding a reasonable number of repair attempts with fewer than four attempts. Accordingly the vehicle does not qualify for repurchase or replacement.

### **1. Acceleration issue**

The acceleration issue appears to stem from the difference in the way the Complainant experiences the vehicle's operation as opposed to any defect. The Complainant testified that someone of a different height and weight than him would not experience the acceleration issue. The Complainant affirmed that he felt the drag during the test drive; however, none of the other occupants experienced any abnormality. In sum, this issue seems dependent on the individual rather than any defect in the vehicle.

### **2. Starting issue**

The starting issue does not substantially impair the use or value of the vehicle. The Complainant testified that the starting issue occurs about three times a month and the vehicle will start on the second attempt. A preponderance of the evidence does not show the existence of a manufacturing defect as opposed to some temporary environmentally-caused impediment such as dirty battery connections, a wet distributor cap, or a cold battery.

### 3. Fuel economy

The fuel economy issue does not appear to be a manufacturing defect. The testimony shows that the distance to empty is a “snapshot” calculated using the prior average fuel economy with the amount of fuel in the tank at the time of the snapshot. Consequently, if the parameters change (e.g., rate of fuel consumption), the range will change. For example, if prior to the snapshot, the vehicle is driven in stop and go city traffic with a low miles per gallon, but after the snapshot, the vehicle is driven only on the highway with a high miles per gallon, the actual range will be greater than the range expected based on the distance to empty at the snapshot. In sum, the fuel economy discrepancy is simply a limitation in the estimated nature of the distance to empty and not a defect.

### III. Findings of Fact

1. On May 4, 2015, the Complainant, purchased a new 2015 Hyundai Sonata from Bob Stallings Hyundai, a franchised dealer of the Respondent, Hyundai Motor America, in Dallas, Texas. The vehicle had 10 miles on the odometer at the time of purchase.
2. The vehicle’s warranty covers the vehicle for five years or 60,000 miles, whichever occurs first.
3. The vehicle’s warranty was in effect at the time of the hearing.
4. In relevant part, the Complainant took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
April 24, 2015	16	Electronic intake continuously variable valve timing seal seating <sup>25</sup>
September 14, 2015	9,111	Vehicle will not start; oil leaking <sup>26</sup>
September 24, 2015	9,470	Vehicle will not start; lack of acceleration <sup>27</sup>
September 29, 2015	9,864	Drag in power <sup>28</sup>
October 26, 2015	11,321	Hesitation when cold <sup>29</sup>

5. On October 27, 2015, the Complainant mailed a written notice of defect to the Respondent.

<sup>25</sup> Complainant’s Ex. 9, Invoice 306929.

<sup>26</sup> Complainant’s Ex. 11, Invoice 311645.

<sup>27</sup> Complainant’s Ex. 12, Invoice 311856.

<sup>28</sup> Complainant’s Ex. 13, Invoice 312229.

<sup>29</sup> Complainant’s Ex. 14, Invoice 158156.

6. On November 9, 2015, the Complainant filed a Lemon Law complaint (Complaint) with the Texas Department of Motor Vehicles (Department) alleging that: the vehicle feels like it is losing power; the vehicle will not always start; and the trip meter and fuel gauge read incorrectly.
7. On January 4, 2016, the Department's Office of Administrative Hearings issued a notice of hearing directed to the Complainant and the Respondent, Hyundai Motor America, 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.
8. The hearing in this case convened and the record closed on March 23, 2016, in Mesquite, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented himself. Ryan Morrison, Field Service Engineer, and Tom Wilke, District Parts and Service Manager, represented and testified for the Respondent.
9. The vehicle's odometer displayed 23,643 miles at the time of the hearing.
10. The vehicle operated normally during the test drive at the hearing.
11. The acceleration issue stems from differences in the way the occupants experience the operation of the vehicle.
12. The vehicle will not start intermittently on the first try, approximately three times a month, but the vehicle will start on the second try.
13. The fuel economy discrepancy is a result of the limitations in estimating the miles to empty and not any defect.

#### **IV. Conclusions of Law**

1. The Texas Department of Motor Vehicles 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. The Complainant timely filed a sufficient complaint with the Department. TEX. OCC. CODE §§ 2301.204, 2301.606(d); 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. The Complainant bears the burden of proof in this matter. 43 TEX. ADMIN. CODE § 206.66(d).
6. The Complainant did not prove that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE § 2301.604(a).
7. The Complainant did not meet the statutory requirement for a reasonable number of repair attempts. TEX. OCC. CODE §§ 2301.604(a) and 2301.605(a).
8. The Complainant's vehicle does not qualify for replacement or repurchase. TEX. OCC. CODE § 2301.604.
9. The Respondent remains responsible to address and repair or correct any defects that are covered by the Respondent's warranties. TEX. OCC. CODE §§ 2301.204, 2301.603.

#### V. Order

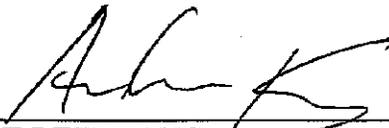
Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that the Complainant's petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is **DISMISSED**. However, it is **FURTHER ORDERED** that the Respondent shall repair any existing starting issue to conform the vehicle to the applicable warranty. The Complainant shall deliver the subject vehicle to the Respondent within 20 days after the date this Order becomes final under Texas Government Code § 2001.144.<sup>30</sup> Within 20 days after receiving the vehicle from the Complainant, the Respondent shall complete any repair of the subject vehicle (if repairs are

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<sup>30</sup> (1) If a party does not timely file a motion for rehearing, this Order becomes final when the period for filing a motion for rehearing expires, or (2) if a party timely files a motion for rehearing, this Order becomes final when: (A) the Department renders an order overruling the motion for rehearing, or (B) the Department has not acted on the motion within 45 days after the party receives a copy of this Decision and Order.

necessary). However, if the Department determines the Complainant's refusal or inability to deliver the vehicle caused the failure to complete the required repair, the Department may consider the Complainant to have rejected the granted relief and deem this proceeding concluded and the complaint file closed under 43 Texas Administrative Code § 215.210(2).

**SIGNED May 20, 2016**



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**ANDREW KANG**  
**HEARINGS EXAMINER**  
**OFFICE OF ADMINISTRATIVE HEARINGS**  
**TEXAS DEPARTMENT OF MOTOR VEHICLES**