

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 16-0214 CAF**

**JIAN TANG,**  
Complainant

v.

**SUBARU OF AMERICA,**  
Respondent

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**BEFORE THE OFFICE  
  
OF  
  
ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Jian Tang (Complainant) filed a complaint (Complaint) with the Texas Department of Motor Vehicles (Department) seeking relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged warrantable defects in his vehicle distributed by Subaru of America (Respondent). A preponderance of the evidence does not show that the subject vehicle has a warrantable defect. Consequently, the Complainant's vehicle does not qualify for repurchase/replacement or warranty repair.

**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 September 26, 2016, in Austin, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented and testified for himself. Jim Sciolla, along with Pat Hayes and Hector Flores appeared 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 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>

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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).

<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).

<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).

**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, converter's, or distributor's . . . warranty agreement applicable to the vehicle.”<sup>13</sup> The manufacturer, converter, or distributor 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>10</sup> TEX. OCC. CODE § 2301.606(c)(1). 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). 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 all facts required for relief by a preponderance, that is, the Complainant must present evidence to show that every required fact is more likely than not true.<sup>16</sup>

### 4. The Complaint Identifies the Issues in this Proceeding

The Complaint identifies the issues to be addressed in this proceeding.<sup>17</sup> The Complaint 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> However, the parties may expressly or impliedly consent to trying issues not included in the pleadings.<sup>19</sup> Trial by implied consent occurs when a party introduces evidence on an unpleaded issue without objection.<sup>20</sup>

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

On November 15, 2014, the Complainant, purchased a new 2015 Subaru Forester from Subaru of Georgetown, a franchised dealer of the Respondent in Georgetown, Texas.<sup>21</sup> The vehicle had 128 miles on the odometer at the time of purchase.<sup>22</sup> The vehicle’s limited warranty covers the vehicle for three years or 36,000 miles, whichever occurs first.<sup>23</sup> On February 29, 2016, the Complainant mailed a written notice of defect to the Respondent. On March 18, 2016, the Complainant filed a Lemon Law complaint with the Department requesting repair relief and

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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* 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).

<sup>19</sup> 43 TEX. ADMIN. CODE § 215.42; TEX. R. CIV. P. 67.

<sup>20</sup> *See Gadd v. Lynch*, 258 S.W.2d 168, 169 (Tex. Civ. App.—San Antonio 1953, writ ref’d).

<sup>21</sup> Complainant’s Ex. 2, Retail Installment Sales Contract.

<sup>22</sup> Complainant’s Ex. 4, Title Application Receipt.

<sup>23</sup> Complainant’s Ex. 1, 2015 Warranty and Maintenance Booklet.

alleging that the subject vehicle exhibited a high pitch noise from the transmission. The Complainant took the vehicle to a dealer for repair of the complained of issue as follows:

Date	Miles	Issue
December 30, 2015	14,889	Engine noise when driving <sup>24</sup>
January 27, 2016	15,427	Constant hum noise when driving at highway speed up a slope with light acceleration <sup>25</sup>
February 10, 2016	15,784	High pitched noise at highway speeds <sup>26</sup>
April 26, 2016	17,384	High pitched noise at highway speeds <sup>27</sup>
August 23, 2016	22,026	Hum like noise on acceleration and driving between 50 to 60 mph <sup>28</sup>

The Respondent's final opportunity to repair the vehicle occurred on August 23, 2016.

The Complainant testified that his vehicle had a transmission noise. Although replaced, the transmission continued to make noise. He stated that he tried folding the mirrors but the noise persisted. The Complainant first noticed the noise almost right after purchasing the vehicle in November. The noise became louder and the Complainant scheduled service in January of 2016 and had the transmission replaced. The original noise disappeared but the vehicle exhibited a humming noise. The Complainant explained that the original noise was louder when driving faster but the current noise was monotone. He first noticed the new noise after the repair and test drive, about one or two days after. He described the current noise as occurring often when driving between 50 to 60 mph in a single tone. He would hear the noise at other speeds but not as often. He added that the noise would come and that the noise would go away when releasing the gas pedal but would come again when pressing the gas pedal. The Complainant could not tell if the noise had any effect on the vehicle's performance but he found the noise annoying. He concluded that the vehicle drove alright but the noise was annoying. He did not believe the noise was due to environmental conditions because he heard the noise almost every day. He concurred that the noise improved after the second transmission replacement but he could still hear the noise from time to time. He elaborated that he was concerned about the transmission because of the repairs but the noise was not that much of an issue and he was personally "okay" with driving the vehicle.

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<sup>24</sup> Complainant's Ex. 3, Work Order 54851.

<sup>25</sup> Complainant's Ex. 3, Work Order 56164.

<sup>26</sup> Complainant's Ex. 3, Work Order 56943.

<sup>27</sup> Complainant's Ex. 3, Work Order 61129.

<sup>28</sup> Complainant's Ex. 3, Work Order 69077.

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

Mr. Sciolla testified that the engine noise complained of (at the December 30, 2015, service visit) was diagnosed as a failure in the transmission, which was replaced with a remanufactured unit. The noise concern could not be duplicated in subsequent visits. However, the transmission was then replaced with a new transmission and not a rebuilt one. During a test drive, Mr. Sciolla asked the Complainant to raise his hand when hearing the noise. Between 50 to 59 mph, the Complainant would lift his hand and point to the driver's side window, although the other occupants could not hear the noise. They switched drivers, rolled the windows down, and folded the mirrors. The Complainant commented that the noise was not as loud and the pitch had changed, and there was a cross wind, so the noise appeared to be wind noise. Although the Complainant heard noise from the transmission, the diagnosis found no faults and no other mechanical problems with the vehicle. Mr. Tang clarified that when he pointed, he did not mean to indicate that the noise came from the driver's side but just that he heard the noise. Mr. Sciolla concluded that based on his experience in the vehicle, he did not feel the vehicle had a mechanical defect and the vehicle did not have a significant impairment of value or safety. He added that the CVT (continuously variable transmission) has different operating sounds (as opposed to a conventional transmission). When asked if the Complainant had driven a CVT vehicle before, he answered that he had driven a loaner vehicle with a CVT (while his vehicle was at a dealer for repair).

### **C. Inspection and Test Drive**

The test drive occurred on a freeway and a highway with controlled intersections (overlapping the route which the Complainant commutes to and from work). The vehicle exhibited two instances of a faint high pitched whine with the engine under load, going uphill, and with little ambient noise. The test drive took approximately 44 minutes.

### **D. Analysis**

The record shows that the vehicle did not have the reasonable repair attempts necessary to qualify for repurchase or replacement and the evidence does not show that the vehicle more likely than not has a defect. As an initial matter, the vehicle did not have its first repair visit for the noise until December 30, 2015, at 14,889 miles (over 13 months and 14,761 miles after delivery). Under the statutory presumptions for reasonable repairs, the first attempt must occur within the first 12 months or 12,000 miles, whichever occurs first. Further, the facts do not otherwise support finding

a reasonable repair attempts occurred. In part, the Complainant noticed the noise almost immediately after delivery but did not have a service visit for the noise until over 13 months later. Accordingly, the vehicle has not had the required reasonable repair attempts. The warranty applies to “defects in material or workmanship”<sup>29</sup> but the complained of noise does not appear to be a defect. The record indicates that a CVT may sound differently than a conventional transmission. Moreover, the noise the transmission exhibited did not appear significant. During the test drive at the hearing, the noise could only be heard when accelerating or going uphill at highway speeds and only when the ambient noise was sufficiently quiet. Significantly, the noise did not appear related to any negative effect on the vehicle’s performance. In sum, the vehicle does not have a defect that creates a serious safety hazard or substantially impairs the use or market value of the vehicle that qualifies for repurchase or replacement. Furthermore, the noise does not appear to be a defect at all, so the vehicle does not qualify for repair relief.

### III. Findings of Fact

1. On November 15, 2014, the Complainant, purchased a new 2015 Subaru Forester from Subaru of Georgetown, a franchised dealer of the Respondent in Georgetown, Texas. The vehicle had 128 miles on the odometer at the time of purchase.
2. The vehicle’s limited warranty covers the vehicle for three years or 36,000 miles, whichever occurs first.
3. The Complainant took the vehicle to a dealer for repair of the complained of issue as follows:

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<sup>29</sup> Complainant’s Ex. 1, 2015 Warranty & Maintenance Booklet.



Date	Miles	Issue
December 30, 2015	14,889	Engine noise when driving <sup>30</sup>
January 27, 2016	15,427	Constant hum noise when driving at highway speed up a slope with light acceleration <sup>31</sup>
February 10, 2016	15,784	High pitched noise at highway speeds <sup>32</sup>
April 26, 2016	17,384	High pitched noise at highway speeds <sup>33</sup>
August 23, 2016	22,026	Hum like noise on acceleration and driving between 50 to 60 mph <sup>34</sup>

4. On February 29, 2016, the Complainant mailed a written notice of defect to the Respondent.
5. On March 18, 2016, the Complainant filed a Lemon Law complaint with the Department requesting repair relief and alleging that the subject vehicle exhibited a high pitch noise from the transmission.
6. On May 31, 2016, the Department's Office of Administrative Hearings issued a notice of hearing directed to the Complainant and the 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.
7. The hearing in this case convened and the record closed on September 26, 2016, in Austin, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented and testified for himself. Jim Sciolla, along with Pat Hayes and Hector Flores appeared for the Respondent.
8. The vehicle's odometer displayed 23,122 miles at the time of the hearing.
9. The vehicle's warranty was in effect at the time of the hearing.

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<sup>30</sup> Complainant's Ex. 3, Work Order 54851.

<sup>31</sup> Complainant's Ex. 3, Work Order 56164.

<sup>32</sup> Complainant's Ex. 3, Work Order 56943.

<sup>33</sup> Complainant's Ex. 3, Work Order 61129.

<sup>34</sup> Complainant's Ex. 3, Work Order 69077.

10. During the approximately 44 minute test drive at the hearing, the vehicle exhibited two instances of a slight whining noise while going uphill. The noise could only be heard with the ambient noise at a sufficiently low level. The noise appeared to have no effect on the vehicle's actual performance.

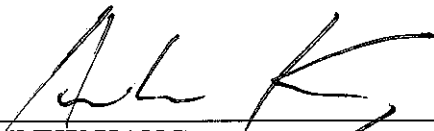
#### IV. Conclusions of Law

1. The Texas Department of Motor Vehicles has jurisdiction over this matter. TEX. OCC. CODE §§ 2301.601-2301.613.
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 Complainants' vehicle does not qualify for warranty repair. TEX. OCC. CODE §§ 2301.204 and 2301.603.
10. The Respondent remains responsible to address and repair or correct any defects that are covered by the Respondent's warranties. TEX. OCC. CODE §§ 2301.603 and 2301.204.

**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**.

**SIGNED November 18, 2016**

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