

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 16-0280 CAF**

**AMNIK SAINI,  
Complainant**

v.

**FCA US LLC,  
Respondent**

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**BEFORE THE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Amnik Saini (Complainant) filed a 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 manufactured by FCA US LLC (Respondent). A preponderance of the evidence shows that the subject vehicle has a warrantable defect that substantially impairs the vehicle's use or market value. Consequently, the Complainant's vehicle qualifies 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 on October 3, 2016, in Austin, Texas, before Hearings Examiner Andrew Kang. The record closed on October 10, 2016, the date of the Respondent's response to the Complainant's written submissions. The Complainant, represented himself. Neil Elliott, an independent technician, testified for the Complainant. Jan Kershaw, Early Resolution Case Manager, represented the Respondent. Stuart Ritchey, Technical Advisor, 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, a 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> *Ford Motor Company v. Texas Department of Transportation*, 936 S.W.2d 427, 432 (Tex. App.—Austin 1996, no writ) (“[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.’”).

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

**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 sufficient 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>

### 5. Incidental Expenses

When repurchase or replacement is ordered, the Department’s rules allow reimbursement of certain incidental expenses that the complainant incurs from losing the use of the vehicle because of the defect. Such expenses must be reasonable and verified through receipts or similar documentation.<sup>21</sup> The expenses may include accessories added to the vehicle, less a reasonable allowance for their use.<sup>22</sup> However, in determining whether to grant reimbursement for

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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(a)(2).

<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> 43 TEX. ADMIN. CODE § 215.209(a).

<sup>22</sup> 43 TEX. ADMIN. CODE § 215.209(a)(7).

accessories, the hearings examiner must consider the permanence, function, and added value of the accessories and whether the accessories are original equipment manufacturer parts.<sup>23</sup>

**A. Summary of Complainant's Evidence and Arguments**

On May 17, 2014, the Complainant, purchased a new 2014 Dodge Ram 1500 from Covert Chrysler Dodge Jeep Ram, a franchised dealer of the Respondent, in Austin, Texas.<sup>24</sup> The vehicle had four miles on the odometer at the time of purchase.<sup>25</sup> The vehicle's basic limited warranty covers the vehicle for three years or 36,000 miles, whichever occurs first.<sup>26</sup> On April 20, 2015, the Complainant mailed a written notice of defect to the Respondent.<sup>27</sup> On May 16, 2016, the Complainant filed a Lemon Law complaint with the Department alleging that the vehicle had consistency issues with power loss and efficiency, and the odometer malfunctioned.

The Complainant took the vehicle to a dealer for repair of the alleged issues as follows:

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<sup>23</sup> 43 TEX. ADMIN. CODE § 215.209(c).

<sup>24</sup> Complainant's Ex. 1, Purchase Order.

<sup>25</sup> Complainant's Ex. 3, Odometer Disclosure Statement.

<sup>26</sup> Complainant's Ex. 16, 2014 Ram Truck 1500 Warranty Information.

<sup>27</sup> Complainant's Ex. 15, Notice of Defect.

Date	Miles	Issue
February 13, 2015	7,988	Vehicle dragging; no economy efficiency highway <sup>28</sup>
February 20, 2015	8,203	Check engine light on; 15 mpg on freeway <sup>29</sup>
April 9, 2015	10,336	Vehicle hesitating; lower mpg <sup>30</sup>
April 20, 2015	10,876	Check engine light on <sup>31</sup>
April 29, 2015	11,048	Loss of power driving at high speeds <sup>32</sup>
July 15, 2015	12,908	Smoke from under vehicle; odometer not correct <sup>33</sup>
August 12, 2015	13,816	Odometer jumps in mileage; smoke from exhaust pipe <sup>34</sup>
October 14, 2015	14,291	Performance dropped since first bought <sup>35</sup>
June 22, 2016	21,542	Lack of power <sup>36</sup>

The Respondent's opportunity to repair the vehicle occurred on June 22, 2016.

The Complainant testified that the vehicle initially performed as expected. However, after installation of the remote start module, he experienced a noticeable reduction in the responsiveness of the vehicle. He first noticed the power loss issue in the fall of 2014. After an update to the vehicle, the power loss occurred intermittently, several times a week. He explained that the repair (August 12, 2015) completely changed the way the vehicle drove. The Complainant elaborated that sometimes he would have to press the accelerator a couple of inches to get the same speed as compared to other times when the vehicle would get to 95 mph without any effort. The power varied so wildly that he did not know what he would get from the vehicle. The Complainant believed the issue probably last occurred on the Thursday before the hearing. The Complainant confirmed that the vehicle no longer smoked after repair (on August 12, 2015).

The Complainant affirmed that the instrument cluster replacement fixed the inconsistent mileage display. However, the odometer displayed over 900 miles less than shown before the odometer replacement. The Complainant confirmed that he believed that the odometer currently accumulated mileage correctly, but he had no way of knowing for sure. The Complainant stated

<sup>28</sup> Complainant's Ex. 5, Invoice 28446.

<sup>29</sup> Complainant's Ex. 6, Invoice 28697.

<sup>30</sup> Complainant's Ex. 7, Invoice DOCS688755.

<sup>31</sup> Complainant's Ex. 8, Invoice DOCS689342.

<sup>32</sup> Complainant's Ex. 9, Invoice DOCS689805.

<sup>33</sup> Complainant's Ex. 10, Invoice DOCS694303.

<sup>34</sup> Complainant's Ex. 11, Invoice DOCS696306.

<sup>35</sup> Complainant's Ex. 12, Invoice DOCS700371.

<sup>36</sup> Complainant's Ex. 14, Invoice DOCS715478.

that the instrument cluster was replaced due to the malfunctioning odometer. He first documented the problem in June or July of 2015, but he actually noticed the issue previously. The odometer would display a certain mileage but after cycling the power (off and on) the odometer would have a different mileage. He noticed that the tenths of a mile would turn over but the miles would not. The Complainant explained that he tracked the performance (fuel economy) of the vehicle, which shifted dramatically after repair (on August 12, 2015).<sup>37</sup>

Mr. Elliott, testified that the graphs showed the vehicle on a dynamometer exhibiting differences in average horsepower and torque between the lowest and highest pulls of about 15%. The peak horsepower varied by about 6% and the peak torque differed by about 8% but should have been within about 1/2%. He added that because the performance was tested with a wide open throttle, the vehicle (averages) should not vary more than 2%. With respect to fuel, he noted that gasoline can lead to variance because of different octane levels. However, Mr. Elliott had not sampled different diesels over years or a single year. However, he had seen gasoline vehicles tested multiple times and their graphs would overlay (the horsepower and torque curves would match between measurements at different times).

The Complainant alleged that the dealers and the Respondent denied finding problems with the vehicle but that documentation showing various updates/flushes contradicted the absence of any problems.

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

Mr. Ritchey explained that the vehicle does not calculate mileage based on the cluster's mileage. He confirmed that using the incorrect mileage from the cluster would lead to incorrect calculation of mpg. Mr. Ritchey confirmed that the odometer does not actually store the mileage. Rather, the vehicle stores the mileage elsewhere. Accordingly, replacement of the instrument cluster would not change the actual mileage stored in the vehicle and the new odometer would reflect the actual mileage.

The Complainant acknowledged that the vehicle had not left him stranded, yet. The Complainant acknowledged that he had not changed the fuel filter. He later noted that the fuel filter was not due for change under the owner manual's maintenance schedule. Mr. Elliott stated

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<sup>37</sup> Complainant's Ex. 21, MPG Data.



that performance may be affected by faulty solder, the fuel filter, anything. When asked if Mr. Elliott knew if the vehicle actually had anything wrong, he answered that he did not know. He also confirmed that the fuel could affect performance.

Mr. Ritchey testified that he inspected the vehicle for the lack of power, center drawer, switch bank not working for video, park assist, check engine light, fuel economy, hard transmission shifts, and inaccurate odometer. He checked for aftermarket equipment (and found none); checked for fault codes; and reviewed the repair history. The park assist and center drawer had been repaired; the vehicle had not stored or active trouble codes; an engine flash was available; and the check engine light was off. When test driving, the vehicle did not exhibit hesitation but had a service bulletin regarding hesitation; the mpg calculator was reset; when upshifting and downshifting, the vehicle did not exhibit hard shifts. Mr. Ritchey did not find any issues matching the concerns but had the dealer replace the switch bank and update the controller.

Mr. Ritchey explained that the manufacturer did not have specifications for horsepower and torque at the rear wheel (as opposed to the back of the engine) to compare with the dynamometer readings. He added that the vehicle may produce different numbers at different times. The only repair that would have changed performance was the exhaust repair prior to the second reading. However, the graphs do not indicate anything other than to update the controller.

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

Upon inspection before the test drive, the vehicle had 23,665 miles on the odometer. The vehicle was driven primarily on a freeway, accelerating and decelerating at various speeds. The vehicle did not exhibit any noticeable inconsistency in power/acceleration. The vehicle had 23,684 miles on the odometer at the end of the test drive.

### **D. Analysis**

#### **1. Inaccurate Mileage**

The evidence indicates that replacement of the instrument cluster successfully repaired the inaccurate mileage. The odometer only displays the mileage and does not store the mileage; rather, the vehicle stores the mileage elsewhere. Although the original odometer had a defect, the new replacement instrument cluster, with a properly functioning odometer, displayed the actual mileage stored elsewhere in the vehicle. Moreover, any mpg calculations based on the faulty odometer

would inject an error in those calculations and would therefore not reflect the true mpg, making those mpg figures unreliable.

## **2. Power Loss/Inconsistency**

The record shows that the power loss issue constitutes a warrantable defect that substantially impairs the vehicle's use or market value. This defect continues to exist after a reasonable number of repair attempts. The evidence shows that after the final repair, the power issue continued to occur and occurred as recently as the week before the hearing. The Complainant testified that the vehicle's acceleration varied widely even with the same pressure on the accelerator. The dynamometer readings comport with the Complainant's experience driving the vehicle. Given the unpredictability of the vehicle's response to the accelerator, the power loss/inconsistency may constitute a serious safety hazard. The term "serious safety hazard" includes a condition that "substantially impedes a person's ability to control or operate a vehicle for ordinary use or intended purposes."<sup>38</sup> In this case, for example, the unexpectedly high or low power response could foreseeably cause a failure to safely merge into traffic, that is, the unpredictable acceleration impedes the control of the vehicle for ordinary use. Moreover, under the reasonable purchaser perspective, the power loss/inconsistency would substantially impair the vehicle's value. With respect to the power loss issue, the record shows the vehicle had a reasonable number of repair attempts under the general statutory presumption (two repair attempts in nine months, three days and 8,199 miles and two more attempts in the next 7 months, 24 days and 6,088 miles). Accordingly, the vehicle qualifies for repurchase relief.

## **3. Incidental Expenses**

The Department's rules allow reimbursement of certain expenses attributable to the loss of use of the vehicle due to the complained of defect. Such expenses expressly include, among other things, mail charges for contacting the manufacturer and items/accessories added to the vehicle. In this case, the Complainant filed a written submission identifying expenses for window tinting, a bed liner, running boards, bed mat, floor mats, tool box, certified mail for the notice of defect and Lemon Law complaint, dynamometer testing, Lemon Law complaint filing fee, copying, and an expert witness. As an initial matter, the Department's rules do not include the Lemon Law filing

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<sup>38</sup> TEX. OCC. CODE § 2301.601(4).

fee in the reimbursement of incidental expenses but provides for filing fee reimbursement as a separate item.<sup>39</sup> Though most of the alleged expenses appear to qualify as reimbursable incidental expenses, two of the added accessories (the bed mat and floor mats) are not of the permanent nature contemplated by the Department's rules (i.e., the less permanent the accessory, the less likely it qualifies for reimbursement).<sup>40</sup> Presumably, the bed mat and floor mats are not permanently affixed to the vehicle and would appear to be easily removed. Accordingly, the cost of the bed mat and floor mats are not included in the reimbursement of incidental expenses, leaving a total cost of \$2,835.39. Additionally, the Department's rules require deducting a reasonable allowance for use when reimbursing accessories costs. In this case, the reasonable allowance for accessories use is \$296.62 when applying the formula for the reasonable allowance for vehicle use.<sup>41</sup> Accordingly, the Complainant will be reimbursed a net total of \$2,538.77 for incidental expenses.

### III. Findings of Fact

1. On May 17, 2014, the Complainant, purchased a new 2014 Dodge Ram 1500 from Covert Chrysler Dodge Jeep Ram, a franchised dealer of the Respondent, in Austin, Texas. The vehicle had four miles on the odometer at the time of purchase.
2. The vehicle's basic 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 as shown below:

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<sup>39</sup> 43 TEX. ADMIN. CODE § 215.208(b)(1) ("The award to the vehicle owner shall include reimbursement for the amount of the lemon law complaint filing fee paid by or on behalf of the vehicle owner.").

<sup>40</sup> 43 TEX. ADMIN. CODE § 215.209(c) ("When awarding reimbursement for the cost of items or accessories presented under subsection (a)(7) of this section, the hearings examiner shall consider the permanent nature, functionality, and value added by the items or accessories and whether the items or accessories are original equipment manufacturer (OEM) parts or non-OEM parts.")

<sup>41</sup> 43 TEX. ADMIN. CODE § 215.208(b)(2).

Date	Miles	Issue
February 13, 2015	7,988	Vehicle dragging; no economy efficiency highway
February 20, 2015	8,203	Check engine light on; 15 mpg on freeway
April 9, 2015	10,336	Vehicle hesitating; lower mpg
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August 12, 2015	13,816	Odometer jumps in mileage; smoke from exhaust pipe
October 14, 2015	14,291	Performance dropped since first bought
June 22, 2016	21,542	Lack of power

4. On April 20, 2015, the Complainant mailed a written notice of defect to the Respondent.
5. On May 16, 2016, the Complainant filed a Lemon Law complaint with the Department alleging that the vehicle had consistency issues with power loss and efficiency, and the odometer malfunctioned.
6. On July 14, 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 on October 3, 2016, in Austin, Texas, before Hearings Examiner Andrew Kang. The record closed on October 10, 2016, the date of the Respondent's response to the Complainant's written submissions. The Complainant, represented himself. Neil Elliott, an independent technician, testified for the Complainant. Jan Kershaw, Early Resolution Case Manager, represented the Respondent. Stuart Ritchey, Technical Advisor, testified for the Respondent.
8. The vehicle's odometer displayed 23,665 miles at the time of the hearing.
9. The vehicle's warranty was in effect at the time of the hearing.
10. The vehicle operated normally during the test drive at the hearing.
11. The odometer only displays, rather than stores, the mileage and the vehicle actually stores the mileage elsewhere.

12. Replacement of the instrument cluster, which includes the odometer, successfully repaired the odometer/mileage issue, allowing the display of the actual mileage.
13. Testing of the vehicle on a dynamometer on different days showed that the horsepower and torque varied substantially between days.
14. The vehicle continued to exhibit the power loss issue after the final repair attempt.
15. The appropriate calculations for repurchase are:

Purchase price, including tax, title, license and registration, less rebates	\$45,567.70
Delivery mileage	4
Mileage at first report of defective condition	7,988
Mileage on hearing date	23,665
Useful life determination	120,000

Purchase price, including tax, title, license and registration		\$45,567.70	
Mileage at first report of defective condition	7,988		
Less mileage at delivery	-4		
<b>Unimpaired miles</b>	<b>7,984</b>		
Mileage on hearing date	23,665		
Less mileage at first report of defective condition	-7,988		
<b>Impaired miles</b>	<b>15,677</b>		
<i>Reasonable Allowance for Use Calculations:</i>			
Unimpaired miles	7,984 ÷ 120,000	× \$45,567.70	= \$3,031.77
Impaired miles	15,677 ÷ 120,000	× \$45,567.70 × 50%	= \$2,976.52
<b>Total reasonable allowance for use deduction</b>			<b>\$6,008.29</b>
Purchase price, including tax, title, license and registration		\$45,567.70	
Less reasonable allowance for use deduction		-\$6,008.29	
Plus filing fee refund		\$35.00	
Plus incidental expenses, less reasonable allowance for use of accessories		\$2,538.77	
<b>TOTAL REPURCHASE AMOUNT</b>		<b>\$42,133.18</b>	

**IV. Conclusions of Law**

1. The Texas Department of Motor Vehicles has jurisdiction over this matter. TEX. OCC. CODE §§ 2301.601-2301.613; TEX. OCC. CODE § 2301.204.
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 showed that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE § 2301.604(a).
  7. The Complainant met the statutory requirement for a reasonable number of repair attempts. TEX. OCC. CODE §§ 2301.604(a) and 2301.605(a).
  8. The Complainant provided sufficient notice of the defect to the Respondent. TEX. OCC. CODE § 2301.606(c)(1).
  9. The Respondent had an opportunity to cure the alleged defect(s). TEX. OCC. CODE § 2301.606(c)(2).
  10. The Complainant's vehicle qualifies for replacement or repurchase. A warrantable defect that creates a serious safety hazard or substantially impairs the use or market value of the vehicle continues to exist after a reasonable number of repair attempts. TEX. OCC. CODE § 2301.604.

#### 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 **GRANTED**. It is further **ORDERED** that the Respondent shall repair the warrantable defect(s) in the reacquired vehicle identified in this Decision. **IT IS THEREFORE ORDERED** that:

1. The Respondent shall accept the return of the vehicle from the Complainant. The Respondent shall have the right to have its representatives inspect the vehicle upon the

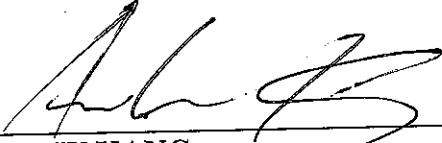
- return by the Complainant. If from the date of the hearing to the date of repurchase the vehicle is substantially damaged or there is an adverse change in its condition beyond ordinary wear and tear, and the parties are unable to agree on an amount of an allowance for such damage or condition, either party may request reconsideration by the Office of Administrative Hearings of the repurchase price contained in the final order;
2. The Respondent shall repurchase the subject vehicle in the amount of \$42,133.18. The refund shall be paid to the Complainant and the vehicle lien holder as their interests require. If clear title to the vehicle is delivered to the Respondent, then the full refund shall be paid to the Complainant. At the time of the return, the Respondent or its agent is entitled to receive clear title to the vehicle. If the above noted repurchase amount does not pay all liens in full, the Complainant is responsible for providing the Respondent with clear title to the vehicle;
  3. Within 20 days after the date this Order becomes final under Texas Government Code § 2001.144,<sup>42</sup> the parties shall complete the return and repurchase of the subject vehicle. However, if the Office of Administrative Hearings determines the failure to complete the repurchase as prescribed is due to the Complainant's refusal or inability to deliver the vehicle with clear title, the Office of Administrative Hearings may deem the granted relief rejected by the Complainant and the complaint closed pursuant to 43 Texas Administrative Code § 215.210(2);
  4. The Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall obtain a Texas title for the vehicle prior to resale and issue a disclosure statement provided by or approved by the Department's Enforcement Division – Lemon Law Section;
  5. The Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall affix the disclosure label to the reacquired vehicle in a conspicuous place, and upon the first retail sale of the vehicle, the disclosure statement shall be completed and returned to the Department's Enforcement Division – Lemon Law Section; and

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<sup>42</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.

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

**SIGNED December 9, 2016**



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