

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 17-0005 CAF**

**JOSE S. PEREZ,**  
**Complainant**

v.

**FOREST RIVER, INC.,**  
**Respondent**

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**BEFORE THE OFFICE**  
  
**OF**  
  
**ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Jose S. Perez (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 recreational vehicle manufactured by Forest River, Inc. (Respondent). A preponderance of the evidence shows that the subject vehicle has a warrantable defect that substantially impairs the vehicle's market value. Consequently, the Complainant's vehicle qualifies for repurchase/replacement.

**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 January 24, 2017, in Pharr, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented himself. Eliud Garza testified for the Complainant. Paul Pierce represented the Respondent. Dan Evans (Parts, Service and Warranty Manager) testified for the Respondent. Juan Roberto Santos interpreted the proceedings.

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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**

For vehicles out of service at least 30 days, a rebuttable presumption may be established that the vehicle had a reasonable number of repair attempts if:

[A] nonconformity still exists that substantially impairs the vehicle’s use or market value and: (A) the vehicle is out of service for repair for a cumulative 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; and (B) at least two repair attempts were made in the 12 months or 12,000 miles following the date of original delivery to an owner.<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)(3).

<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 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> Implied consent occurs when a party introduces evidence on an unpleaded issue without objection.<sup>20</sup>

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

On February 20, 2016, the Complainant, purchased a new 2016 Forest River Cardinal 3450RL from Dealer, an authorized dealer of the Respondent, in Wharton, Texas. The vehicle’s limited warranty covers the vehicle for one year from the date of purchase. On September 10, 2016, the Complainant mailed a written notice of defect to the Respondent. On September 5, 2016, the Complainant filed a Lemon Law complaint with the Department alleging that water leaked into the storage compartment. The Complainant took the vehicle to a dealer for repair of the alleged issues as follows:

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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).

Date	Issue
5/20/2016	Front compartments leaking from inside wiper seals along inside frame above door; sink drain pipe leaking into main compartment; front cap/roof transition may be leaking into compartments
7/21/2016	Front compartment leak from inside under wiper seal
9/28/16	Front compartment leaks

The Respondent's final opportunity to repair the vehicle occurred on September 28, 2016, through October 19, 2016. In response to the hearings examiner's clarifying questions about days out of service for repairs, the Complainant stated that the vehicle was ready after about a month to a month and a half for the May service visit and 15 to 20 days for the July visit.

The Complainant testified that water leaked into the storage compartment. He explained that water leaked when raining and when washing hands or showering. He noted that the main issue was rain. He also pointed out that an invoice showed the dealer found no problem in the sink's plumbing going to the tank. The Complainant first noticed water dripping into the storage compartment on March 15, 2016. He attested that the leak did not occur every time when running the water. Leaks did occur more often when using larger amounts of water, e.g., when pouring out a five gallon or one gallon bucket, when a group of people use water, or when raining for an extended time or multiple times. He last noticed leaking from rain on January 2, 2017. He also answered that he had not noticed leaking from running water but also affirmed that the plumbing leak was not successfully repaired. He estimated that the subject vehicle was out for repairs for three to four months. The Complainant also explained that the amount of leaked water depended on the extent of the rain. He had seen small puddles and large puddles when raining two to three days. The only damage he noticed from the water was mold on the wood. The Complainant expressed a preference for replacement of his vehicle.

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

On cross-examination, the Complainant acknowledged that the invoice for the May 20, 2016, service visit noted that the "customer is waiting." He confirmed that the subject vehicle had two repair attempts before the filing of his Lemon Law complaint. The Complainant stated that he left the vehicle at the dealer on May 20, 2016, and picked up July 6, 2016 (the dealer contacted the Complainant on June 23, 2016). He also confirmed that the notice letter to the Respondent did not mention a plumbing leak. The Complainant also recognized that the rain must last several hours

for water to appear in the storage compartment. The Complainant agreed that the leaking did not prevent the use of the subject vehicle. He also did not know of any towability issues or fire risks but did point out that the storage compartment contained electrical wiring. Mr. Garza explained that he took the video on December 5, 2016, at the request of the Complainant because of the rain in the area.

Mr. Evans testified that the “customer is waiting” notation on Complainant’s Exhibit 5 normally indicates that the customer is physically present waiting. The invoice reflects that the appointment was on May 20th and out on May 20th. The invoice also noted NPF (no problem found) for the sink drip. As with the prior invoice, Complainant’s Exhibit 6 also noted “customer is waiting” with the date in on July 21st and the date out on July 21st. The invoice did not indicate that the vehicle was out months for repair. On the warranty claim submitted to the Respondent, the dealer represented that the repair was started and done on the same day. Mr. Evans construed the invoice to mean that the seals did not have enough adhesive from the manufacturer so the dealer resealed and tested the repair. The repair took an hour and a half. If the leak went unrepaired, water would be present in the storage compartment on the molded plastic, which is designed to have some exposure to the elements without damage. He confirmed that the compartment is typically used for storage of boots, fishing gear, lawn chairs, etc. The dealer submitted 1.5 hours for the warranty repair of the seal. The dealer claimed a total of 3.2 hours for all repairs. Mr. Evans opined that there was no reason all the repairs could not be accomplished in one day. He stated that (while at the Respondent’s facilities) the vehicle was tested twice in a rain bay, before and after repairs, with no leaks on the first or second run. Mr. Evans added that they also worked on the roof, though not involved in this case, and never found a leak. They also tested the plumbing, which they did for all vehicles that came in, and found no issues there as well. The vehicle underwent repairs from September 28, 2016, to October 19, 2016. Mr. Evans concluded that they found no issues with the safety, value or use of the vehicle.

### **C. Inspection**

The Complainant identified the exterior wall over the storage compartment as the point where water dripped into the compartment. The storage compartment did not present any current signs of water intrusion. Carpet covered the walls of the compartment.

### D. Analysis

The subject recreational vehicle continues to have a warrantable defect that substantially impairs the market value after reasonable repair attempts. Accordingly, the vehicle qualifies for repurchase/replacement relief.

#### 1. Warrantable Defect

In this case, the photos/video taken by Mr. Garza shows water leaking in the storage compartment when raining on December 5, 2016,<sup>21</sup> after completion of the last repair attempt on October 19, 2016.<sup>22</sup> Accordingly, a warrantable defect continues to exist.

#### 2. Substantial Impairment of Value

The water leak substantially impairs the vehicle's market value under the reasonable perspective purchaser standard. As explained in the discussion of applicable law, the Department uses a reasonable perspective purchaser standard (a simplified method) to determine the existence of substantial impairment of value. This standard considers whether the condition of the vehicle would deter a reasonable purchaser from buying the vehicle or would substantially reduce the amount a reasonable purchaser would be willing to pay. Although the Respondent indicated that the storage compartment design resists damage to water exposure, in part due to the plastic flooring, the compartment nevertheless contained other materials that appeared susceptible to water damage. For instance, the walls of the compartment are covered in a felt-like fabric, which may absorb moisture and impart the moisture to other parts of the compartment. The Complainant pointed out that the moisture caused mold growth on some wood. Moreover, the intrusion of water would make the compartment unfit for storing anything sensitive to water. The Complainant also noted that the compartment contained wiring, which moisture may corrode or even short circuit. Given these considerations, a prospective buyer may reasonably be deterred from purchasing the vehicle.

#### 3. Reasonable Repair Attempts

The evidence shows that the vehicle has had three repair attempts (May 20, 2016, July 21, 2016, and September 28, 2016) and had been out of service for repairs for over thirty days. Though

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<sup>21</sup> Complainant's Ex. 9, Photos December 5, 2016;

<sup>22</sup> Complainant's Ex. 7, Warranty Repair Claim Form.

the actual repair time may have amounted to a few hours, the Lemon Law indicates that the time out of service for repair includes the time the vehicle is at the dealership for repair, i.e., unavailable for the Complainant's use, not just the time actually undergoing repair.<sup>23</sup> In the present case, the Complainant estimated that the vehicle was out of service for repair for about three to four months. Although the repair invoices show same-day completion of repairs, the invoices appear unreliable. Significantly, the May 20, 2016, invoice shows the "Date and Time In" as "5/21/2016 – 4:53 PM" and the "Date and Time Out" as "5/20/2016 – 2:36 PM", which clearly could not have happened.<sup>24</sup> Additionally, the July 21, 2016, invoice shows the "Date and Time In" as "7/21/2016 – 9:53 PM" and the "Date and Time Out" as the same date and time: "7/21/2016 – 9:53 PM", which would mean the repairs took no time at all.<sup>25</sup> However, the Complainant's testimony appears credible and substantially differs from the invoices. For the May 20th repair visit alone, the Complainant testified the vehicle spent 35 days out of service, from May 20, 2016, through June 23, 2016 (the date the dealer called the Complainant to notify him of the completion of the vehicle's repairs). Additionally, the May 20th invoice's print date (June 23, 2016) matches the repair completion date. The invoice for the July 21st repair visit shows an August 9, 2016, print date, which appears to indicate 19 days out of service, consistent with the Complainant's testimony that the vehicle was ready after 15 to 20 days. In addition, the vehicle spent 21 days out of service for the Respondent's final repair attempt beginning September 28, 2016, and ending October 19, 2016. Overall, the vehicle remained out of service for 75 days over three repair visits, all occurring less than 12 months after the vehicle's purchase on February 20, 2016.

### III. Findings of Fact

1. On February 20, 2016, the Complainant, purchased a new 2016 Forest River Cardinal 3450RL from Dealer, an authorized dealer of the Respondent, in Wharton, Texas.
2. The vehicle's limited warranty covers the vehicle for one year from the date of purchase.
3. The Complainant took the vehicle to a dealer for repair as shown below:

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<sup>23</sup> "Reasonable allowance for use' means the amount directly attributable to use of a motor vehicle when the vehicle is not out of service for repair." TEX. OCC. CODE § 2301.601(3).

<sup>24</sup> Complainant's Ex. 5, Invoice 407674.

<sup>25</sup> Complainant's Ex. 6, Invoice 408454.

Date	Issue
5/20/2016	Front compartments leaking from inside wiper seals along inside frame above door; sink drain pipe leaking into main compartment; front cap/roof transition may be leaking into compartments
7/21/2016	Front compartment leak from inside under wiper seal
9/28/16	Front compartment leaks

4. The Respondent's opportunity to repair occurred on September 28, 2016.
5. On September 10, 2016, the Complainant mailed a written notice of defect to the Respondent.
6. On September 5, 2016, the Complainant filed a Lemon Law complaint with the Department alleging that water leaked into the storage compartment.
7. On November 15, 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.
8. The hearing in this case convened and the record closed on January 24, 2017, in Pharr, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented himself. Eliud Garza testified for the Complainant. Paul Pierce, represented the Respondent. Dan Evans, Parts, Service and Warranty Manager, testified for the Respondent.
9. The vehicle's warranty was in effect at the time of the hearing.
10. The vehicle's storage compartment leaked water when raining on December 5, 2016.
11. Wood in the storage had mold growing on it.
12. The vehicle's storage compartment contains electrical wiring.
13. The vehicle was out of service for repairs for a total of 75 days.

14. The appropriate calculations for repurchase are:

#### 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 provided sufficient notice of the defect(s) to the Respondent. TEX. OCC. CODE § 2301.606(c)(1).
7. The Respondent had an opportunity to cure the alleged defect(s). TEX. OCC. CODE § 2301.606(c)(2).
8. The Complainant's vehicle qualifies for replacement or repurchase. A warrantable defect that substantially impairs the 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 in the reacquired vehicle identified in this Decision. **IT IS THEREFORE ORDERED** that:

1. The Respondent shall, in accordance with Texas Administrative Code § 215.208(d)(1)(A), promptly authorize the exchange of the Complainant's vehicle (the reacquired vehicle) with the Complainant's choice of any comparable motor vehicle.
2. The Respondent shall instruct the dealer to contract the sale of the selected comparable vehicle with the Complainant under the following terms:
  - a. The sales price of the comparable vehicle shall be the vehicle's Manufacturer's Suggested Retail Price (MSRP);
  - b. The trade-in value of the Complainant's vehicle shall be the MSRP at the time of the original transaction, less a reasonable allowance for the Complainant's use of the vehicle;
  - c. The use allowance for replacement relief shall be calculated in accordance with the formula outlined in Texas Administrative Code § 215.208(b)(2) (the use allowance is \$3,540.00);
  - d. The use allowance paid by the Complainant to the Respondent shall be reduced by \$35.00 (the refund for the filing fee) (after deducting the filing fee, the use allowance is reduced to **\$3,505.00**, which is the amount that the Complainant must be responsible for at the time of the vehicle exchange).
3. The Respondent's communications with the Complainant finalizing replacement of the reacquired vehicle shall be reduced to writing, and a copy thereof shall be provided to the Department within twenty (20) days of completion of the replacement.
4. The Respondent shall obtain a Texas title for the reacquired vehicle prior to resale and issue a disclosure statement on a form provided or approved by the Department.<sup>26</sup>
5. The Respondent shall affix the disclosure label to the reacquired vehicle in a conspicuous location (e.g., hanging from the rear view mirror). Upon the Respondent's first retail sale of the reacquired vehicle, the disclosure statement shall be completed and returned to the Department.
6. Within sixty (60) days of transfer of the reacquired vehicle, the Respondent shall provide to the Department written notice of the name, address and telephone number of any transferee (wholesaler or equivalent), regardless of residence.

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<sup>26</sup> Correspondence and telephone inquiries regarding disclosure labels should be addressed to: Texas Department of Motor Vehicles, Enforcement Division-Lemon Law Section, 4000 Jackson Avenue Building 1, Austin, Texas 78731, Phone (512) 465-4076.

7. The Respondent shall repair the defect or condition that was the basis of the vehicle's reacquisition and issue a new 12 month/12,000 mile warranty on the reacquired vehicle.
8. Upon replacement of the Complainant's vehicle, the Complainant shall be responsible for payment or financing of the usage allowance of the reacquired vehicle, any outstanding liens on the reacquired vehicle, and applicable taxes and fees associated with the new sale, excluding documentary fees. Further, in accordance with 43 Tex. Administrative Code § 215.208(d)(2):
  - a. If the comparable vehicle has a higher MSRP than the reacquired vehicle, the Complainant shall be responsible at the time of sale to pay or finance the difference in the two vehicles' MSRPs to the manufacturer, converter or distributor; and
  - b. If the comparable vehicle has a lower MSRP than the reacquired vehicle, the Complainant will be credited the difference in the MSRP between the two vehicles. The difference credited shall not exceed the amount of the calculated usage allowance for the reacquired vehicle.
9. The Complainant shall be responsible for obtaining financing, if necessary, to complete the transaction.
10. The replacement transaction described in this Order shall be completed within 20 days after the date this Order becomes final under Texas Government Code § 2001.144.<sup>27</sup> If the transaction cannot be accomplished within the ordered time period, the parties shall complete the return and repurchase of the subject vehicle, within 20 days after the date this Order becomes final under Texas Government Code § 2001.144, pursuant to the repurchase provisions set forth in 43 Texas Administrative Code § 215.208(b)(1) and (2). The repurchase price shall be **\$69,495.00**. The refund shall be paid to the Complainant and the lien holder, if any, as their interests appear. If clear title is delivered, the full refund shall be paid to the Complainant. At the time of the repurchase, 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. However, if the Office of Administrative Hearings determines the failure to complete the repurchase as prescribed is due to the Complainant's refusal or

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<sup>27</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.

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). The calculations for the repurchase price are as follows:

Purchase price, including tax, title, license & registration	\$73,000.00
Date of delivery	02/20/16
Date of first report of defective condition	05/20/16
Date of hearing	01/24/17
Days out of service	75
Useful life determination	3,650

Purchase price, including tax, title, license & registration				\$73,000.00
<i>Unimpaired Days:</i> Date of first report of defective condition less date of delivery	05/20/16	-	02/20/16	= 90
<i>Impaired Days:</i> Date of hearing less date of first report of defective condition Less days out of service for repair	01/24/17	-	05/20/16	= 249 -75 <u>174</u>
<i>Reasonable Allowance for Use Calculations:</i> Unimpaired days	90	÷	3,650	× \$73,000.00 = \$1,800.00
Impaired days	174	÷	3,650	× \$73,000.00 × 50% = \$1,740.00
<b>Total reasonable allowance for use deduction</b>				<b>\$3,540.00</b>
Purchase price, including tax, title, license & registration				\$73,000.00
Less reasonable allowance for use deduction				-\$3,540.00
Plus filing fee refund				\$35.00
<b>TOTAL REPURCHASE AMOUNT</b>				<b>\$69,495.00</b>

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

**SIGNED March 24, 2017**



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