

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 17-0093 CAF**

**STEPHANIE HAYS,
Complainant**

v.

**FCA US LLC,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Stephanie Hays (Complainant) filed a petition seeking relief pursuant to Texas Occupations Code §§ 2301.601-.613 (Lemon Law) for alleged warrantable defects in her 2015 Chrysler 200. Complainant seeks repurchase of the vehicle due to the vehicle intermittently accelerating unexpectedly when it's being driven. FCA US LLC (Respondent) argued that the vehicle does not have a defect or nonconformity which would warrant repurchase or replacement. The hearings examiner concludes that the vehicle has an existing warrantable defect and Complainant is eligible for repurchase relief.

I. PROCEDURAL HISTORY, NOTICE AND JURISDICTION

Notice and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law. The hearing on the merits convened and the record was closed on April 13, 2017, in Austin, Texas before Hearings Examiner Edward Sandoval. Complainant, Stephanie Hays, appeared and represented herself at the hearing. Also testifying for Complainant was her son, Harrison Hays. Respondent was represented by Jan Kershaw, Early Resolution Case Manager. Stuart Ritchey, Technical Advisor, also testified for Respondent.

II. DISCUSSION

A. Applicable Law

Section 2301.604(a) of the Texas Occupations Code gives a motor vehicle owner the option of seeking the manufacturer's replacement or repurchase of the vehicle if: (1) the manufacturer has been unable to conform the vehicle to an applicable express warranty (2) by repairing or correcting a defect or condition that creates a serious safety hazard or substantially impairs the use or market value of the vehicle (3) after a reasonable number of attempts. "Serious safety hazard" means a life-threatening malfunction or nonconformity that substantially impedes a person's ability to control or operate a vehicle for ordinary use or intended purposes, or creates a substantial risk of fire or explosion.¹ The vehicle owner is required

¹ Tex. Occ. Code § 2301.601(4).

to mail written notice of the alleged defect to the manufacturer and provide the manufacturer with an opportunity to cure the nonconformity.²

In addition to these conditions, a rebuttable presumption exists that a reasonable number of attempts have been undertaken to conform a motor vehicle to an applicable express warranty if the same nonconformity continues to exist after being subject to repair four or more times and: (1) two of the repair attempts were made in the 12 months or 12,000 miles, whichever comes first, following the date of original delivery to the owner; and (2) the other two repair attempts were made in the 12 months or 12,000 miles, whichever comes first, immediately following the date of the second repair attempt.³

If a vehicle is found to have a nonconformity that creates a serious safety hazard which continues to exist, the rebuttable presumption that a reasonable number of repair attempts have been performed can be established if the vehicle has been subject to repair two or more times and: (1) at least one repair attempt was made during the 12 months or 12,000 miles, whichever comes first, following the date of original delivery to the owner; and (2) at least one other attempt was made in the 12 months or 12,000 miles, whichever comes first, immediately following the date of the first repair attempt.⁴

B. Complainant's Evidence

1. Stephanie Hays' Testimony

Complainant purchased a new 2015 Chrysler 200 from Benny Boyd C-D-J (Boyd) in Lampasas, Texas on August 24, 2015, with mileage of 27 at the time of delivery.⁵ Respondent provided a bumper-to-bumper warranty for the vehicle good for three (3) years or 36,000 miles.⁶ In addition, Respondent provided a powertrain warranty for the vehicle good for five (5) years or 100,000 miles.⁷ On the date of hearing the vehicle's mileage was 51,081. Respondent's bumper-to-bumper warranty has expired; although the powertrain warranty is still in effect.

Complainant testified that she first experienced a problem in the vehicle on October 21, 2015, when she was driving to work. She stated that she turned the vehicle on to a gravel road and she heard the engine rev like a race car and then it accelerated. Complainant stated that the vehicle fishtailed and she saw gravel flying as the vehicle accelerated. She stepped on the brake and was able to stop just before going off the edge of the road into a culvert. When Complainant arrived at work, she was scared and shaking. She immediately called Boyd and told them about the incident. Complainant was advised to take the vehicle to the dealer which she did that same day.

² Tex. Occ. Code § 2301.606(c).

³ Tex. Occ. Code § 2301.605(a)(1)(A) and (B).

⁴ Tex. Occ. Code § 2301.605(a)(2)(A) and (B).

⁵ Complainant Ex. 1, Retail Purchase Agreement dated August 24, 2015.

⁶ Respondent Ex. 1, VIP Summary Report.

⁷ *Id.*

Boyd's service technician inspected and test drove the vehicle, but was unable to duplicate the problem.⁸ No repairs were performed at the time, although the technician performed an update to the vehicle's transmission control module (TCM).⁹ The vehicle's mileage on this occasion was 6,808.¹⁰ The vehicle was in the dealer's possession until December 31, 2015.¹¹ Boyd provided Complainant with a loaner vehicle while her vehicle was being repaired.

Complainant stated that soon after receiving the vehicle back from Classic, it again accelerated unexpectedly several times before she could take it back to Boyd. Complainant recalled one particular incident that occurred in a restaurant drive through with her son in the vehicle. She stated that after getting her food, the vehicle accelerated from a stop. She slammed on the vehicle's brakes immediately. The incident frightened her and her son. Complainant also stated that there were several occasions when she was driving on the highway where the vehicle accelerated unexpectedly.

Complainant took the vehicle to Boyd for repair on February 20, 2016. Boyd's service technician updated the vehicle's powertrain control module (PCM) in order to address the concern.¹² The vehicle's mileage when it was taken to the dealership on this occasion was 10,306.¹³ The vehicle was in the dealer's possession until April 23, 2016.¹⁴ Complainant was not provided a loaner vehicle while her vehicle was being repaired.

Complainant testified that the vehicle continued to have the same problem. On July 20, 2016, Complainant took the vehicle to Boyd for repair. Boyd's service technician could not duplicate the concern; however, he decided to update the vehicle's PCM and TCM.¹⁵ The vehicle's mileage when it was delivered to the dealer on this occasion was 20,484.¹⁶ The vehicle was in the dealer's possession for the day. Complainant received a loaner vehicle while her vehicle was being repaired. Complainant testified that she spoke to Boyd's service manager on this occasion and that he told her that he didn't think that the dealer's diagnostic computers would be able to pick up what was causing the problem with the vehicle.

Complainant testified that the problem with the vehicle's unexpected acceleration continued to occur. She took the vehicle to Boyd on July 29, 2016, for repair for the issue. Boyd's technician test drove the vehicle, but could not duplicate the concern.¹⁷ The vehicle's mileage when it was delivered to the dealer was 21,243.¹⁸ The vehicle was in the dealer's possession for one (1) day on this occasion. Complainant

⁸ Complainant Ex. 2, Repair Order dated October 21, 2015.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Complainant Ex. 3, Repair Order dated February 20, 2016.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Complainant Ex. 4, Repair Order dated July 20, 2016.

¹⁶ *Id.*

¹⁷ Complainant Ex. 5, Repair Order dated July 29, 2016.

¹⁸ *Id.*

was provided with a rental vehicle while her vehicle was being repaired. At this time, Complainant was told by Boyd's personnel that she could file a Lemon Law complaint about the vehicle. In addition, Complainant contacted Respondent's customer call center to express her concerns about the vehicle.

Complainant continued to experience the problem with the vehicle's unexpected acceleration. This seemed to occur on an almost weekly basis. Complainant took the vehicle to Boyd on October 11, 2016. The service technician could not duplicate the concern and did not perform any repairs to the vehicle.¹⁹ The vehicle's mileage on this occasion was 23,399.²⁰ The vehicle was in Boyd's possession for the day. Complainant was not provided with a loaner vehicle on this occasion.

Complainant testified that she mailed a letter on November 20, 2016, to Respondent advising them of her dissatisfaction with the vehicle.²¹ On November 28, 2016, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).²² Complainant testified that she was not asked by Respondent's representatives to submit the vehicle for a final repair attempt.

Complainant testified that she experienced the acceleration issue with the vehicle on the date of hearing (April 13, 2017). She was driving in traffic and slowing down. As she took her foot off the accelerator, the vehicle seemed to speed up gradually. She had to step on the vehicle's brake in order to keep from hitting the vehicle in front of hers. She also stated that the last time that the vehicle's engine revved and the vehicle accelerated quickly was a few weeks before the hearing date. On this occasion, Complainant was driving on a highway at night. The engine revved and the vehicle accelerated. She stated that she crossed the double stripe on the middle of the highway and almost hit another vehicle head on.

Complainant stated that she does not feel safe in the vehicle.

2. Harrison Hays' Testimony

Harrison Hays, Complainant's son, testified in the hearing. He stated that he has been in the vehicle on several occasions when it seemed to accelerate without warning. Mr. Hays recalled being in the vehicle in a drive through for a restaurant when the engine revved and the vehicle accelerated unexpectedly. He was jerked back in his seat. Mr. Hays said that the incident frightened him. Mr. Hays stated that he has experienced similar incidents about every two (2) weeks or so when he's ridden in the vehicle.

Mr. Hays testified that the morning of the hearing (April 13, 2017), he observed that the vehicle accelerated and lurched forward when he and Complainant were on a highway on-ramp in stopped traffic. Mr. Hays stated that he feels that there is a problem with the vehicle's transmission or computers. He has

¹⁹ Complainant Ex. 6, Repair Order dated October 11, 2016.

²⁰ *Id.*

²¹ Complainant Ex. 8, Undated Letter "To whom it may concern."

²² Complainant Ex. 7, Lemon Law Complaint dated November 28, 2016. Complainant signed the complaint on November 20, 2016. However, the complaint was actually received by Texas Department of Motor Vehicles on November 28, 2016, which is the effective date of the complaint.

observed the vehicle's engine's RPM's increase to 3000 to 4000 unexpectedly when he's ridden in the vehicle as a passenger.

Mr. Hays stated that the vehicle scares him. He feels that Complainant may accidentally hit someone or something as a result of the problem with the vehicle.

C. Respondent's Evidence

1. Stuart Ritchey's Testimony

Stuart Ritchey, Technical Advisor, testified for Respondent. Mr. Ritchey has worked for 31 years with Respondent and has been in his current position since 1994. He has a degree in Automotive Technology. Mr. Ritchey is also an Automotive Service Excellence (ASE) certified technician.

Mr. Ritchey testified that he had not seen Complainant's vehicle prior to the date of hearing. He stated that the vehicle has 2.4 liter, 4 cylinder engine coupled with a nine (9) speed automatic transmission. The transmission is designed to look for the best gear to maximize fuel economy and power. As a result, the transmission is very busy and the driver may experience more downshifting than they're used to. When the transmission downshifts, the vehicle's engine's RPM's will increase. Mr. Ritchey stated that this may be what Complainant is experiencing in the vehicle.

Mr. Ritchey also stated that the noise that Complainant is hearing from the vehicle may be caused by the radiator fan turning on. He stated that the fan can be noisy and that Complainant may be hearing it and thinking that the noise is from the engine.

Mr. Ritchey does not feel that the vehicle has a defect or any abnormalities. He thinks that the vehicle is safe to drive.

2. Jan Kershaw's Testimony

Jan Kershaw, Early Resolution Case Manager, also testified for Respondent. Ms. Kershaw became involved in this matter when Respondent received Complainant's Lemon Law complaint. Complainant was initially represented by legal counsel, so Mr. Kershaw was not assigned the case until January of 2017, when it was learned that Complainant no longer had counsel. Ms. Kershaw had several conversations with Complainant about her concerns with the vehicle. Ms. Kershaw is not aware if Complainant was asked to provide Respondent with a final opportunity to repair the vehicle.

D. Analysis

Under the Lemon Law, Complainant bears the burden of proof to establish by a preponderance of evidence that a defect or condition creates a serious safety hazard or substantially impairs the use or market value of the vehicle. In addition, Complainant must meet the presumption that a reasonable number of attempts have been undertaken to conform the vehicle to an applicable express warranty. Finally, Complainant is required to serve written notice of the nonconformity on Respondent, who must be allowed an opportunity to cure the defect. If each of these requirements is met and Respondent is still unable to conform the vehicle to an express warranty by repairing the defect, Complainant is entitled to have the vehicle repurchased or replaced.

Complainant credibly testified that the vehicle has accelerated unexpectedly several times while she was driving it. On several occasions, she took the vehicle almost immediately to an authorized dealer of Respondent and reported the problem. Her testimony was consistent with, and documented by, all of the repair orders submitted as evidence.

The evidence establishes that the vehicle was serviced by an authorized dealer of Respondent on the following dates: October 21, 2015; February 20, 2016; July 20, 2016; July 29, 2016; and October 11, 2016. During each service visit, Complainant informed dealer technicians of the fact that the vehicle was accelerating unexpectedly. Occupations Code § 2301.604(a) requires a showing that Respondent was unable to conform the vehicle to an applicable express warranty “after a reasonable number of attempts.” Section 2301.605(a)(1) specifies that a rebuttable presumption that a reasonable number of attempts to repair have been made if “two or more repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, following the date of original delivery to the owner, and two other repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the second repair attempt.” The evidence presented at the hearing establishes that Complainant has met the requirements of this test since she took the vehicle for repair the requisite number of times within the specified time frame. As such, Complainant has established that a reasonable number of attempts to repair the vehicle were made by Respondent.

The evidence further demonstrates that the defect in Complainant’s vehicle creates a serious safety hazard. A vehicle that unexpectedly accelerates while driving on the highway creates obvious safety issues. The intermittent nature of the condition also increases the safety risk. The sudden acceleration of Complainant’s vehicle is likely to surprise and confuse the driver and can increase the risk of traffic accidents. Complainant has met her burden of proof to establish a warrantable and existing defect or condition that creates a serious safety hazard.

Moreover, the defect in Complainant’s vehicle substantially impairs its use and market value. The vehicle’s intermittent sudden acceleration would tend to inhibit a person’s desire to drive it. The vehicle’s reduced capacity for use makes it less marketable than other similar vehicles.

The record also establishes that Complainant provided written notice of the defect to Respondent, and Respondent was given the opportunity to inspect the vehicle and did not avail themselves of that opportunity.

When a complainant establishes that relief under the Lemon Law is appropriate, the manufacturer may be required to repurchase the motor vehicle, or replace the motor vehicle with a comparable motor vehicle. Based on the evidence and the arguments presented, the hearings examiner finds that repurchase of the vehicle is the appropriate remedy in this case.

Based on the above analysis, the hearings examiner orders Respondent to repurchase Complainant's vehicle, as further detailed in the Findings of Fact and Conclusions of Law.

III. FINDINGS OF FACT

1. Stephanie Hays (Complainant) purchased a new 2015 Chrysler 200 from Benny Boyd C-D-J (Boyd) in Lampasas, Texas on August 24, 2015, with mileage of 27 at the time of delivery.
2. The manufacturer of the vehicle, FCA US LLC (Respondent), issued a bumper-to-bumper warranty good for three (3) years or 36,000 miles, whichever occurs first; and a separate powertrain warranty good for five (5) years or 100,000 miles.
3. At the time of hearing, the vehicle's mileage was 51,081.
4. On the date of hearing, Respondent's bumper-to-bumper was expired; although, the powertrain warranty was still in effect.
5. Complainant's vehicle has a defect that causes it to intermittently rev and speed up unexpectedly.
6. Complainant took the vehicle to Respondent's authorized dealer, Boyd, in order to address her concerns with the vehicle on the following dates:
 - a. October 21, 2015, at 6,808 miles;
 - b. February 20, 2016, at 10,306 miles;
 - c. July 20, 2016, at 20,484 miles;
 - d. July 29, 2016, at 21,243 miles; and
 - e. October 11, 2016, at 29,399 miles.
7. On October 21, 2015, Boyd's service technician was unable to duplicate the concern and performed no repair to the vehicle.

8. On February 20, 2016, Boyd's service technician reprogrammed the vehicle's powertrain control module (PCM) in order to address Complainant's concern.
9. On July 20, 2016, Boyd's service technician reprogrammed the vehicle's PCM and transmission control module (TCM) in order to address the concern.
10. On July 29, 2016, Boyd's service technician was unable to duplicate Complainant's concern.
11. On October 11, 2016, Boyd's service technician was unable to duplicate Complainant's concern.
12. Respondent, through its authorized dealer, undertook a reasonable number of attempts to conform Complainant's vehicle to an applicable express warranty, but the nonconformity in the vehicle continues to exist.
13. Complainant provided written notice of the defect to Respondent.
14. Respondent did not avail themselves of the opportunity to inspect the vehicle for a final repair attempt.
15. The appropriate calculations for repurchase are:

Purchase price, including tax, title, license and registration	\$31,813.00
Delivery mileage	27
Mileage at first report of defective condition	6,808
Mileage on hearing date	51,081
Useful life determination	120,000

Purchase price, including tax, title, license and registration									
									\$31,813.00
Mileage at first report of defective condition									6,808
Less mileage at delivery									<u>-27</u>
Unimpaired miles									6,781
Mileage on hearing date									51,081
Less mileage at first report of defective condition									<u>-6,808</u>
Impaired miles									44,273
Reasonable Allowance for Use Calculations:									
Unimpaired miles									
									<u>6,781</u>
									120,000
									X
									\$31,813.00
									=
									\$1,797.70
Impaired miles									
									<u>44,273</u>
									120,000
									X
									\$31,813.00
									X .5
									=
									<u>\$5,868.57</u>
Total reasonable allowance for use deduction:									\$7,666.27
Purchase price, including tax, title, license and registration									\$31,813.00
Less reasonable allowance for use deduction									<u>-\$7,666.27</u>
Plus filing fee refund									<u>\$35.00</u>
TOTAL REPURCHASE AMOUNT									\$24,181.73

16. Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) on November 28, 2016.
17. On February 13, 2017, the Department's Office of Administrative Hearings issued a notice of hearing directed to Complainant and Respondent, giving all parties not less than 10 days' notice of hearing and their rights under the applicable rules and statutes. The notice stated the time, place and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; particular sections of the statutes and rules involved; and the matters asserted.
18. The hearing on the merits convened and the record was closed on April 13, 2017, in Austin, Texas before Hearings Examiner Edward Sandoval. Complainant, Stephanie Hays, appeared and represented herself at the hearing. Also testifying for Complainant was her son, Harrison Hays. Respondent was represented by Jan Kershaw, Early Resolution Case Manager. Stuart Ritchey, Technical Advisor, also testified for Respondent.

IV. CONCLUSIONS OF LAW

1. The Department has jurisdiction over this matter. Tex. Occ. Code §§ 2301.601-.613 (Lemon Law).
2. A hearings examiner of the Department's Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a decision with findings of fact and conclusions of law, and the issuance of a final order. Tex. Occ. Code § 2301.704.
3. Complainant timely filed a complaint with the Department. Tex. Occ. Code § 2301.204; 43 Tex. Admin. Code § 215.202.
4. The parties received proper notice of the hearing. Tex. Gov't Code §§ 2001.051 and 2001.052; 43 Tex. Admin. Code § 215.206(2).
5. Complainant bears the burden of proof in this matter.
6. Complainant's vehicle has an existing defect or condition that creates a serious safety hazard. Tex. Occ. Code § 2301.604(a).
7. Complainant's vehicle has an existing nonconformity that substantially impairs the use and market value of the vehicle. Tex. Occ. Code § 2301.604(a).
8. After a reasonable number of attempts, Respondent, FCA US LLC, has been unable to repair the nonconformity in Complainant's vehicle so that it conforms to the applicable express warranty. Tex. Occ. Code §§ 2301.604(a) and 2301.605.
9. Based on the above Findings of Fact and Conclusions of Law, Complainant is entitled to relief under Texas Occupations Code § 2301.604(a).
10. Based on the above Findings of Fact and Conclusions of Law, Respondent, FCA US LLC, is required to repurchase Complainant's 2015 Chrysler 200 at the price of \$24,181.73. Tex. Occ. Code § 2301.604(a)(2); 43 Tex. Admin. Code § 215.208(b)(1) and (2).

IT IS THEREFORE ORDERED that:

1. Respondent shall accept the return of the vehicle from Complainant. Respondent shall have the right to have its representatives inspect the vehicle upon the return by 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. Respondent shall repurchase the subject vehicle in the amount of **\$24,181.73**. Complainant is not entitled to reimbursement of incidental expenses. The refund shall be paid to Complainant and the vehicle lien holder as their interests require. If clear title to the vehicle is delivered to Respondent, then the full refund shall be paid to Complainant. At the time of the return, 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, Complainant is responsible for providing Respondent with clear title to the vehicle;
3. Within 20 calendar days from the receipt of this order, the parties shall complete the return and repurchase of the subject vehicle. If the repurchase of the subject vehicle is not accomplished as stated above, barring a delay based on a party's exercise of rights in accordance with Texas Government Code § 2001.144, starting on the 31st calendar day from receipt of this order, Respondent is subject to a contempt charge and the assessment of civil penalties. However, if the Office of Administrative Hearings determines the failure to complete the repurchase as prescribed is due to Complainants' refusal or inability to deliver the vehicle with clear title, the Office of Administrative Hearings may deem the granted relief rejected by Complainants and the complaint closed pursuant to 43 Texas Administrative Code § 215.210(2);
4. 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. 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
6. 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 calendar days of the transfer.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that Complainant's petition for repurchase relief pursuant to Texas Occupations Code §§ 2301.601-.613 is hereby **GRANTED**. It is further **ORDERED** that Respondent, FCA US LLC, shall repair the warrantable defect in the reacquired vehicle identified in this Decision.

SIGNED April 17, 2017.



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