

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 17-0173816 CAF**

JAIME RIOS,
Complainant

v.

NISSAN NORTH AMERICA, INC.,
Respondent

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Jaime Rios (Complainant) filed a petition seeking relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in his new 2016 Nissan Titan pickup truck. Complainant asserts that the vehicle pulls to the right inordinately. Nissan North America, Inc. (Respondent) argued that Complainant's vehicle has been repaired and, as such, Complainant is not entitled to repurchase or replacement relief. The hearings examiner concludes that the vehicle does have an existing warrantable defect, and Complainant is eligible for replacement relief.

I. PROCEDURAL HISTORY, NOTICE AND JURISDICTION

Matters of notice 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 June 13, 2017, in Pharr, Texas before Hearings Examiner Edward Sandoval. Complainant, Jaime Rios, represented himself in the hearing. Respondent was represented by Rafael Maridueno, Dealer Technical Specialist.

A continuance in the hearing was conducted on August 30, 2017, telephonically. Complainant represented himself in the continuance. Rafael Maridueno, Dealer Technical Specialist, represented Respondent in the continued hearing. The hearing record was closed on August 30, 2017.

II. DISCUSSION

A. Applicable Law

The Lemon Law provides, in part, that a manufacturer of a motor vehicle must repurchase or replace a vehicle complained of with a comparable vehicle if the following conditions are met. First, the manufacturer is not able to conform the vehicle to an applicable express warranty by repairing or correcting a defect after a reasonable number of attempts.¹ Second, the defect or condition in the vehicle creates a serious safety hazard or substantially impairs the use or market value of the vehicle.² Third, the owner must have mailed written notice of the alleged defect or

¹ Tex. Occ. Code § 2301.604(a).

² *Id.*

nonconformity to the manufacturer.³ Lastly, the manufacturer must have been given an opportunity to cure the defect or nonconformity.⁴

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.⁵

B. Complainant's Evidence and Arguments

Complainant purchased a new 2016 Nissan Titan pickup truck from Bert Ogden Nissan (Ogden) in McAllen, Texas on December 1, 2016.⁶ The vehicle had mileage of 27 at the time of the purchase.⁷ Respondent provided a bumper-to-bumper warranty for the vehicle which provides coverage for three (3) years or 36,000 miles, whichever comes first. At the time of the initial hearing, the vehicle's mileage was 5,775. Respondent's warranty for the vehicle was still in effect at the time of the initial hearing.

Complainant testified that soon after purchasing the vehicle, he noticed that the vehicle would pull or drift to the right when he was driving it. As a result, he took the vehicle to Ogden for repair on December 6, 2016. Ogden's wheel alignment machine's sensors were not compatible with Complainant's vehicle at the time and so no repairs were performed by Ogden's service technicians on this repair visit.⁸ The task was sublet to One Stop Shop where an alignment was performed on the vehicle's tires.⁹ The mileage on the vehicle when Complainant took it to Ogden was 488.¹⁰ The vehicle was in Ogden's possession for two (2) days. Complainant was provided a loaner vehicle at the time.

A few days later on December 12, 2016, Complainant took the vehicle to Ogden for repair for the same issue. Ogden's service technician adjusted the front right camber and toe to compensate for

³ Tex. Occ. Code § 2301.606(c)(1).

⁴ Tex. Occ. Code § 2301.606(c)(2).

⁵ Tex. Occ. Code § 2301.605(a)(1)(A) and (B). Texas Occupations Code § 2301.605(a)(2) and (a)(3) provide alternative methods for a complainant to establish a rebuttable presumption that a reasonable number of attempts have been undertaken to conform a vehicle to an applicable express warranty. However, § 2301.605(a)(2) applies only to a nonconformity that creates a serious safety hazard, and § 2301.605(a)(3) requires that the vehicle be out of service for repair for a total of 30 or more days in the 24 months or 24,000 miles, whichever occurs first, following the date of original delivery to the owner.

⁶ Complainant Ex. 1, Purchase Contract dated December 1, 2016.

⁷ *Id.*

⁸ Complainant Ex. 2, Repair Order dated December 6, 2016.

⁹ *Id.*

¹⁰ *Id.*

the road crowns in the area where Complainant resided.¹¹ The vehicle's mileage on this occasion was 718.¹² The vehicle was in Ogden's possession for two (2) days. Complainant was provided a loaner vehicle for the time that his vehicle was being repaired.

Complainant testified that the vehicle continued to pull to the right inordinately. As a result, he took the vehicle to Ogden for repair on January 9, 2017. Ogden's service technician verified Complainant's concern.¹³ The technician consulted with Respondent's dealer technical specialist as to what action to take in order to repair the vehicle.¹⁴ After speaking to Respondent's representative, the technician adjusted the vehicle's right caster to the positive as much as possible.¹⁵ The technician also adjusted the vehicle's front left caster to the negative as much as possible.¹⁶ These adjustments were made pursuant to Respondent's Technical Service Bulletin (TSB) NTB 16-099.¹⁷ The vehicle's mileage on this occasion was 1,392.¹⁸ The vehicle was in Ogden's possession for one (1) day on this occasion. A loaner was provided to Complainant while his vehicle was being repaired.

Complainant testified that the vehicle continued to pull strongly to the right. He again took the vehicle to Ogden for repair on January 31, 2017. Ogden's service technician verified the concern and adjusted the vehicle's right front caster and the toe.¹⁹ The left and right casters were adjusted to have a difference of .5 degrees per instructions issued by Respondent's dealer technical specialist.²⁰ The vehicle's mileage on this occasion was 2,415.²¹ The vehicle was in Ogden's possession for the day. Complainant was not provided a rental vehicle for the period of time that the vehicle was in the dealer's possession.

Complainant testified that he spoke to Rafael Mariduena, Respondent's Dealer Technical Specialist, on February 7, 2017, about the issue with the vehicle. Mr. Mariduena picked up the vehicle on February 11, 2017 and test drove it. Mr. Mariduena informed Complainant that there was nothing wrong with the vehicle and wouldn't perform any repairs to it. However, he did advise Complainant that he could take the vehicle to another dealer for repair if he wished.

¹¹ Complainant Ex. 3, Repair Order dated December 12, 2016.

¹² *Id.*

¹³ Complainant Ex. 4, Repair order dated January 9, 2017.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Complainant Ex. 5, Repair Order dated January 31, 2017.

²⁰ *Id.*

²¹ *Id.*

Complainant filed a Lem on Law complaint with the Texas Department of Motor Vehicles (Department) with an effective date of March 9, 2017. Complainant sent written notice to Respondent on March 8, 2017, that he was dissatisfied with the vehicle.²²

Complainant took the vehicle to Charlie Clark Nissan (Clark) in Harlingen, Texas for repair on March 28, 2017, for the issue of it pulling to the right. Clark's service technician reset the vehicle's wheel alignment to new specifications pursuant to TSB BNTB 16-099.²³ The vehicle's mileage on this occasion was 3,083.²⁴ The vehicle was in Ogden's possession until March 30, 2017.²⁵

Complainant testified that the vehicle continued to pull to the right after the March 28, 2017 repair. During a test drive taken June 13, 2017, the date of the initial hearing, Complainant observed that the vehicle still pulled to the right inordinately. He stated that on one occasion in January of 2017, he bumped another vehicle due to the strong pull to the right.

During the initial hearing, Complainant decided to allow Respondent another opportunity to repair the vehicle. Complainant took the vehicle to Fiesta Nissan (Fiesta) in Edinburg, Texas for further inspection. The service technician at Fiesta determined that there was an issue with the vehicle's rear axle which caused the vehicle to pull to the right. Complainant was also informed that the axle needed to be replaced, but that it would take some time to get a replacement part. On August 4, 2017, the vehicle's rear axle was replaced in order to address Complainant's concerns with the vehicle.

Complainant testified that the vehicle still pulls strongly to the right despite the rear axle being replaced. Complainant is not comfortable with the vehicle and feels that he could have an accident in the vehicle due to it pulling to the right when he's driving it.

C. Respondent's Evidence and Arguments

Rafael Maridueno, Dealer Technical Specialist, testified for Respondent. He has worked in the automotive industry for thirty (30) years. He worked for Nissan dealers as a master technician from 1990 until 2015. In 2015, Mr. Maridueno assumed his current position. He is a Master Certified Automotive Service Excellence (ASE) technician. His current duties require that he act as a liaison between Respondent and their authorized dealers in his specified territory.

Mr. Maridueno testified that he has inspected the vehicle on more than one occasion. He saw the vehicle on January 20, 2017, at Ogden and was asked for advice on repairs by the service technician. Mr. Maridueno informed the service technician to follow the alignment specifications found in TSB NTB 16-099. Mr. Maridueno stated that TSB's are issued by auto manufacturers to

²² Complainant Ex. 7, Letter to Nissan North America Inc. [*sic*] dated March 8, 2017.

²³ Complainant Ex. 6, Repair Order dated March 28, 2017.

²⁴ *Id.*

²⁵ *Id.*

provide guidance to dealer service technicians in performing repairs for issues that may arise after a vehicle is manufactured.

Mr. Mariduena also performed the final repair attempt on the vehicle on March 28, 2017, at the Clark location. He had the vehicle's wheel alignment adjusted to conform with TSB BNTB 16-099. He stated that the wheel adjustment machine at Ogden had not been set to the proper specifications which had caused the adjustments to Complainant's vehicle to be incorrect.

Mr. Mariduena stated that Respondent's vehicle specifications allow for a slow drift to the right which should take about eight (8) seconds. In addition, he stated that the roads in the area had a crown which would cause a vehicle to drift to the right. Mr. Mariduena feels that the vehicle is acting normally and that there is no issue with it.

After taking the test drive in the vehicle on June 13, 2017, Mr. Mariduena suggested to Complainant that he allow Respondent a final opportunity to repair the vehicle at a different dealership, Fiesta Nissan. Complainant agreed to the request. Mr. Mariduena also observed that the vehicle's steering wheel was off center.

Mr. Mariduena testified that during the vehicle inspection at Fiesta the vehicle's rear axle was found to be biased to the left. As a result, the axle was replaced on August 4, 2017. It took approximately a month to get the replacement axle delivered to the dealer so that the repair could be performed.

Mr. Mariduena testified that Respondent provided a three (3) year or 36,000 mile bumper-to-bumper warranty and a one (1) year or 12,000 mile adjustment warranty for 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.

The first issue to address is whether Complainant's vehicle has a defect or condition that substantially impairs its use or market value. The evidence presented at the hearing reveals that the Respondent's dealer technicians did not detect the issue with the vehicle's rear axle until after several repair attempts had been performed. Despite the axle replacement, the vehicle still pulls to

the right inordinately. This was also demonstrated during the test drive taken on June 13, 2017. It is apparent from the evidence presented at the hearing and from the test drive that the vehicle does have a defect or nonconformity which substantially affects its use and market value, as a potential buyer would be more hesitant to purchase a vehicle that pulls strongly to the right when it's being driven.

Complainant also presented evidence to indicate that Respondent or its authorized representative was provided with a reasonable number of repair attempts to repair the defect or nonconformity with the vehicle. Complainant presented the vehicle for repair to Respondent's authorized representatives on: December 6, 2016; December 12, 2016; January 9, 2017; and January 31, 2017. In addition, Complainant allowed Respondent two (2) additional opportunities to repair the vehicle after he filed the Lemon Law complaint. 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 he 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.

In addition, the evidence presented at the hearing indicates that Complainant also provided Respondent with written notice of the defect and a final opportunity to cure the defect. Complainant informed Respondent via letter dated March 8, 2017, of the issue with the vehicle pulling strongly to the right and providing them with two (2) opportunities to cure of which Respondent availed themselves. The vehicle was inspected and repair attempts were performed on March 28, 2017 and August 4, 2017, by Respondent's representative.

Although Respondent has been provided several opportunities to repair the vehicle and to ensure that it operates properly, they have not been able to repair the vehicle so that it conforms to their written warranty. As such, Complainant has met his burden of proof to establish that the vehicle has a warrantable and existing defect or condition that substantially impairs the vehicle's use and market value.

Based on the evidence and the arguments presented, the hearings examiner finds that replacement of the vehicle is the appropriate remedy in this case. Complainant's request for replacement relief is hereby granted.

III. FINDINGS OF FACT

1. Jaime Rios (Complainant) purchased a new 2016 Nissan Titan pickup truck on December 1, 2016, from Burt Ogden Nissan (Ogden) in McAllen, Texas with mileage of 27 at the time of delivery.
2. The manufacturer of the vehicle, Nissan North America, Inc. (Respondent), issued a bumper-to-bumper warranty for the vehicle for three (3) years or 36,000 miles.
3. The vehicle's mileage on the date of the initial hearing was 5,775.
4. At the time of hearing the warranty for the vehicle was still in effect.
5. Complainant first experienced a problem with the vehicle within a few days after purchasing it. He observed that the vehicle pulled strongly to the right whenever he drove it.
6. Complainant's vehicle was serviced by Respondent's authorized dealer, Ogden, on the following dates because of Complainant's concerns with the vehicle pulling to the right when he was driving it:
 - a. December 6, 2016, at 488 miles;
 - b. December 12, 2016, at 718 miles;
 - c. January 9, 2017, at 1,392 miles; and
 - d. January 31, 2017, at 2,415 miles.
7. On December 6, 2016, Ogden's service technician was unable to perform any repairs to the vehicle because their alignment machine was not compatible with the vehicle, so they sent it to a sub-contractor to perform an alignment on the vehicle's tires.
8. On December 12, 2016, Ogden's service technician adjusted the vehicle's front right camber and toe to compensate for road crowns on the roads in the area where Complainant resided.
9. On January 9, 2017, Ogden's service technician adjusted the vehicle's front right caster to the positive as much as possible, the front left caster was put to the negative per specifications provided by Respondent's Technical Service Bulletin (TSB) NTB 16-099.
10. On January 31, 2017, Ogden's service technician adjusted the left and right casters to have a difference of .5 degrees and adjusted the toe to address the issue of the vehicle drifting to the right.

11. On March 8, 2017, Complainant provided written notice to Respondent of his dissatisfaction with the vehicle.
12. On March 9, 2017, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
13. On March 28, 2017, Respondent's dealer technical specialist performed a final repair attempt on the vehicle at Charlie Clark Nissan in Harlingen, Texas. The technical specialist reset the vehicle's alignment to new specifications indicated by Respondent's TSB BNTB 16-099.
14. After the initial hearing conducted on June 13, 2017, Complainant provided Respondent with another opportunity to repair the vehicle.
15. On August 4, 2017, Complainant took the vehicle to Fiesta Nissan in Edinburg, Texas for repair for the vehicle pulling to the right.
16. Fiesta Nissan's service technician replaced the vehicle's rear axle in an attempt to address Complainant's concerns with the vehicle.
17. The vehicle still pulls to the right after the repairs performed on August 4, 2017.
18. On April 21, 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.
19. The hearing in this case convened on June 13, 2017, in Pharr, Texas before Hearings Examiner Edward Sandoval. Complainant, Jaime Rios, represented himself in the hearing. Respondent was represented by Rafael Mariduena, Dealer Technical Specialist. A continuance in the hearing was conducted on August 30, 2017, telephonically. Complainant represented himself in the continuance. Rafael Mariduena, Dealer Technical Specialist, represented Respondent in the continued hearing. The hearing record was closed on August 30, 2017.

IV. CONCLUSIONS OF LAW

1. The Texas Department of Motor Vehicles (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, 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 nonconformity that substantially impairs the use and market value of the vehicle. Tex. Occ. Code § 2301.604(a).
7. After a reasonable number of attempts, Respondent 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.
8. Based on the above Findings of Fact and Conclusions of Law, Complainant is entitled to relief and replacement of his 2016 Nissan Titan pickup truck under Texas Occupations Code § 2301.604(a).

IT IS THEREFORE ORDERED that:

1. Respondent shall, in accordance with Texas Administrative Code § 215.208(d)(1)(A), promptly authorize the exchange of Complainant's new 2016 Nissan Titan pickup truck (the reacquired vehicle) with Complainant's choice of any comparable motor vehicle.
2. Respondent shall instruct the dealer to contract the sale of the selected comparable vehicle with 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 Complainant's 2016 Nissan Titan pickup truck shall be the MSRP at the time of the original transaction, less a reasonable allowance for 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 \$1,493.98);
 - (d) The use allowance paid by Complainant to Respondent shall be reduced by \$35.00 (the refund for the filing fee) (after deducting the filing fee, the use allowance is reduced to **\$1,458.98**);
3. Respondent's communications with 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. 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.²⁶
 5. Respondent shall affix the disclosure label to the reacquired vehicle in a conspicuous location (*e.g.*, hanging from the rear view mirror). Upon 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, Respondent shall provide to the Department written notice of the name, address and telephone number of any transferee (wholesaler or equivalent), regardless of residence.
 7. Respondent shall repair the defect or condition that was the basis of the 2016 Nissan Titan pickup truck's reacquisition and issue a new 12-month/12,000-mile warranty on the reacquired vehicle.
 8. Upon replacement of Complainant's 2016 Nissan Titan pickup truck, 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, Complainant shall be responsible at the time of sale to pay or finance the

²⁶ 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, ph. (512) 465-4076.

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, 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. 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 calendar days from the receipt of this Order. If the transaction cannot be accomplished within the ordered time period, Respondent shall repurchase Complainant's 2016 Nissan Titan pickup truck pursuant to the repurchase provisions set forth in 43 Tex. Administrative Code § 215.208(b)(1) and (2). The repurchase price shall be **\$56,288.73**. The refund shall be paid to Complainant and the lien holder, if any, as their interests appear. If clear title is delivered, the full refund shall be paid to Complainant.

Purchase price, including tax, title, license and registration	\$57,747.71
Delivery mileage	27
Mileage at first report of defective condition	488
Mileage on hearing date	5,775
Useful life determination	120,000

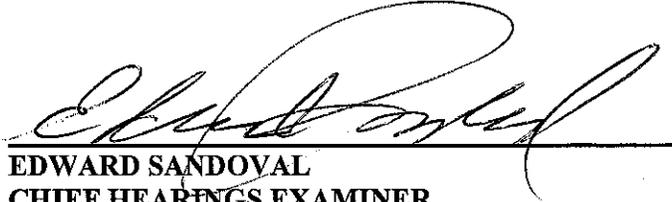
Purchase price, including tax, title, license and registration	\$57,747.71
Mileage at first report of defective condition	488
Less mileage at delivery	<u>-27</u>
Unimpaired miles	461
Mileage on hearing date	5,775
Less mileage at first report of defective condition	<u>-488</u>
Impaired miles	5,287
Reasonable Allowance for Use Calculations:	
Unimpaired miles	461
	120,000 X \$57,747.71 = \$221.85
Impaired miles	<u>5,287</u>
	120,000 X \$57,747.71 X .5 = <u>\$1,272.13</u>
Total reasonable allowance for use deduction:	\$1,493.98
Purchase price, including tax, title, license and registration	\$57,747.71
Less reasonable allowance for use deduction	-\$1,493.98
Plus filing fee refund	<u>\$35.00</u>
TOTAL REPURCHASE AMOUNT	\$56,288.73

11. If Complainant's 2016 Nissan Titan pickup truck 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 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 Complainant's vehicle.

ORDER

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

SIGNED September 12, 2017



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