TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 17-0176269 CAF

STEPHEN K. CHRISTOPHERSON, **Complainant**	§	**BEFORE THE OFFICE**
	§	
	§	
v.	§	**OF**
	§	
FORD MOTOR COMPANY, **Respondent**	§	
	§	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Stephen K. Christopherson (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) and/or Texas Occupations Code § 2301.204 (Warranty Performance) for alleged warrantable defects in his vehicle manufactured by Ford Motor Company (Respondent). A preponderance of the evidence does not show that the subject vehicle has a warrantable defect. Consequently, the Complainant's vehicle does not qualify for repurchase/replacement or warranty repair.

I. Procedural History, Notice and Jurisdiction

Matters of notice of hearing[1] 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 13, 2017, in Conroe, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented himself. Daniel Keevy, Consumer Affairs Legal Analyst, represented the Respondent. Assad Bashir, Automotive Technical Consultant, testified for the Respondent.

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[1] 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."[2] 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.[3] 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.[4]

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."[5]

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[2] TEX. OCC. CODE § 2301.604(a).

[3] TEX. OCC. CODE § 2301.604(a).

[4] TEX. OCC. CODE § 2301.601(4).

[5] *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."[6]

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 the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.[7]

Alternatively, for serious safety hazards, a rebuttable presumption is established that the vehicle had a reasonable number of repair attempts if:

> [T]he same nonconformity creates a serious safety hazard and continues to exist after causing the vehicle to have been subject to repair two or more times by the manufacturer, converter, or distributor or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.[8]

Additionally, 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:

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[6] *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.").

[7] TEX. OCC. CODE § 2301.605(a)(1)(A) and (B).

[8] TEX. OCC. CODE § 2301.605(a)(2).

> [A] nonconformity still exists that substantially impairs the vehicle's use or market value, the vehicle is out of service for repair for a cumulative total of 30 or more days, and the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.[9]

The 30 days described above does not include any period when the owner has a comparable loaner vehicle provided while the dealer repairs the subject vehicle.[10]

The existence of 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.[11] 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.[12]

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, someone on behalf of the owner, or the Department provided written notice of the alleged defect or nonconformity to the manufacturer;[13] (2) the manufacturer was given an opportunity to cure the defect or nonconformity;[14] and (3) the Lemon Law complaint was filed within six months after the earliest

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[9] TEX. OCC. CODE § 2301.605(a)(3).

[10] TEX. OCC. CODE § 2301.605(c).

[11] *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.'").

[12] *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.").

[13] TEX. OCC. CODE § 2301.606(c)(1).

[14] 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).

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.[15]

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" and the vehicle owner notified the manufacturer, converter, distributor, or its authorized agent of the defect.[16] The manufacturer, converter, or distributor has an obligation to "make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty."[17]

3. Burden of Proof

The law places the burden of proof on the Complainant.[18] The Complainant must prove all facts required for relief by a preponderance, that is, the Complainant must present sufficient evidence to show that each required fact is more likely than not true.[19] If any required fact appears equally likely or unlikely, then the Complainant has not met the burden of proof.

4. The Complaint Identifies the Issues in this Proceeding

The complaint identifies the issues to be addressed in this proceeding.[20] 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."[21] However, the parties may expressly or impliedly consent

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[15] TEX. OCC. CODE § 2301.606(d)(2).

[16] TEX. OCC. CODE § 2301.204; 43 TEX. ADMIN. CODE § 215.202(b)(3).

[17] TEX. OCC. CODE § 2301.603(a).

[18] 43 TEX. ADMIN. CODE § 215.66(d).

[19] *E.g., Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

[20] "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 factual 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.").

[21] 43 TEX. ADMIN. CODE § 215.202(a)(2).

to trying issues not included in the pleadings.[22] Implied consent occurs when a party introduces evidence on an unpleaded issue without objection.[23]

A. Summary of Complainant's Evidence and Arguments

On May 24 2016, the Complainant, purchased a new 2016 Ford Mustang Shelby GT350 from Helfman Ford, Inc., a franchised dealer of the Respondent, in Stafford, Texas. The vehicle had four miles on the odometer at the time of purchase. The vehicle's limited warranty provides bumper to bumper coverage for three years or 36,000 miles, whichever occurs first and powertrain coverage for five years or 60,000 miles, whichever occurs first. On March 11, 2017, the Complainant provided a written notice of defect to the Respondent. On May 19, 2017, the Complainant filed a complaint with the Department alleging that the vehicle had a faulty oil system causing excessive oil consumption.

The Complainant testified that the subject vehicle consumed about one quart of oil every 600 to 650 miles. He noticed the oil consumption issue essentially immediately after purchase. In addition, the Complainant believed the vehicle went into limp mode three times. He drove the vehicle an average of about 100 miles a week, for example, going to the grocery store, driving through the countryside, and taking trips to San Antonio, typically a mix of city and highway driving. When asked if the Complainant ever cruises on the highway in fourth gear, the Complainant answered that drove a "mix", noting that the manual provides shift points for fuel economy.

In response to the Respondent's contention that the vehicle did not have sufficient repair attempts, the Complainant outlined the service visits. He claimed no less than four attempts to resolve the issue and a total of five opportunities in the first five years in less than 12,000 miles. The Complainant also argued that the 30 day out of service provision applied to the vehicle. Although the vehicle was not parked at the dealership, there was a safety recall without parts available for repair. He further contended that the vehicle posed a safety hazard, specifically a risk of overheating, which is a prerequisite for fire, loss of control – turning, acceleration, and deceleration. The vehicle's condition impairs its use – high acceleration causes oil consumption.

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[22] 43 TEX. ADMIN. CODE § 215.42; TEX. R. CIV. P. 67.

[23] *See Gadd v. Lynch*, 258 S.W.2d 168, 169 (Tex. Civ. App.—San Antonio 1953, writ ref'd).

In addition the vehicles has lost value because of the frequency of maintenance and the cost to repair.

B. Respondent's Evidence and Arguments

Mr. Keevy asserted that the vehicle did not have sufficient repair attempts to qualify for repurchase/replacement and the oil consumption was not excessive.

Mr. Bashir testified the dealer did not find any leaks in the vehicle and prepared it for an oil consumption test. The dealer did find oil in the PCV tube and therefore replaced the PCV valve. As part of a recall/customer satisfaction program, the engine oil cooler tube was replaced to prevent potential oil loss because of the possibility that the engine oil cooler tube could be crimped incorrectly and the hose could separate. At the final repair attempt on April 5, 2017, the vehicle had 4,098 miles with no leak present, no blue exhaust, so the piston ring seal did not have an issue. The Ford Mustang GT with the 5 liter V8 is typically the top of the line but the Shelby version of the Mustang has a 5.2 liter V8 that produces 526 horsepower at 7,500 rpm. The Shelby engine is hand assembled and designed to handle higher rpms with a flat-plane crank. Other Ford engines typically use a cross-plane crank design. The flat-plane crank is something seen in high performance cars. The Shelby engine design allows greater engine braking, allows the throttle plate to close completely so that it responds more quickly to reducing throttle. In comparison, the Mustang GT leaves the throttle plate a little open. The Shelby engine produces more vacuum. The Shelby's normally aspirated engine achieves its power through higher compression. The design of the pistons and cylinder head chambers leads to higher efficiency, so engine braking occurs under higher vacuum. Engine braking is something drivers do inherently. Engine braking does not wear the brakes and does not damage the engine and driveline. Essentially, the engine produces a braking effect from the vacuum. Higher engine vacuum translates to higher oil consumption because oil is scavenged back. The Shelby can consume up to a quart per 500 miles. Other high performance vehicles, e.g., Porsche, Ferrari, have similar oil consumption rates. The shop manual notes that higher oil consumption of one liter per 500 miles is possible. Mileage should not be less than 3,000 miles per liter for conventional vehicles and 500 miles per liter for performance vehicles. The consumption test showed one quart consumed in 679 miles, which falls within normal specifications. The over temperature protection (limp mode) is designed to prevent damage to the engine and differential. Typically, over temperature protection is not seen unless driven

under track conditions. However, the subject vehicle, does not have the track package, which includes transmission and differential coolers. In this case, the over temperature protection occurred in the heat at highway speeds. The higher ambient temperature, long drive, and possibly lower oil levels, may have triggered the limp mode.

Mr. Keevy pointed out that procedures change as technicians, engineers, and dealers learn more. Mr. Keevy added that the warranty allows changes in standards and repairs. He also noted that the limp mode occurrence was not previously documented.

Mr. Bashir explained that the prior version of the shop manual did not have a performance vehicle section. The 2016 model year was the first year for the current Shelby design. The reason the information was not seen previously was because the prior Shelby version used a supercharger with low compression engines. The shop manual was revised in response to experience with oil consumption. Additionally, compared to typical vehicles, performance vehicles have higher maintenance costs, such as fully synthetic oil, more expensive brakes, higher cost tires, lower than typical life expectancy.

Mr. Keevy concluded that the oil consumption was not an indicator of a defect and limp mode was not relevant to any repair orders or raised with the field service engineer.

C. Inspection and Test Drive

Upon inspection at the hearing, prior to the test drive, the vehicle had soot on the tailpipes, the oil level was slightly above the minimum mark, and the odometer displayed 7,858 miles. During the test drive, the Complainant noted that when the engine overheats, the AC turns off, which occurs more often than limp mode. At the end of the test drive, the odometer showed 7,871 miles. The vehicle appeared to operate normally.

D. Analysis

A preponderance of the evidence does not show that the vehicle has a defect subject to the warranty. The Lemon Law does not apply to all problems that a consumer may have with a vehicle but only to defects covered by warranty (warrantable defects).[24] However, the complained of condition in this case appears as likely to result from the design of the vehicle as from any

[24] TEX. OCC. CODE § 2301.603(a).

warrantable defect.[25] Though the vehicle's condition is a problem for the Complainant, Lemon Law relief depends on the existence of a warrantable defect. If the manufacturer's warranty does not cover the complained of condition; the Lemon Law does not provide any relief. The Lemon Law does not require that a manufacturer provide any particular warranty coverage nor does the Lemon Law specify any standards for vehicle characteristics. The Lemon Law only requires the manufacturer to conform its vehicles to whatever coverage the warranty provides. Consequently, to qualify for replacement or repurchase or for warranty repair, the vehicle must have a defect covered by warranty.[26] The warranty specifies in relevant part that: "Under your New Vehicle Limited Warranty if: - your Ford vehicle is properly operated and maintained, and - was taken to a Ford dealership for a warranted repair during the warranty period, then authorized Ford Motor Company dealers will, without charge, repair, replace, or adjust all parts on your vehicle that malfunction or fail during normal use during the applicable coverage period due to a manufacturing defect in factory-supplied materials or factory workmanship." Accordingly, the warranty only apply to defects in materials or workmanship. On the other hand, the warranty does not cover conditions arising from the vehicle's design. Courts have affirmed that warranty language covering "defects in material or workmanship" do not cover design issues.[27] That is, defects in materials or workmanship (manufacturing defects) differ from characteristics of the design. A manufacturing defect is an isolated aberration occurring only in those vehicles not produced according to the manufacturer's specifications. A defectively manufactured vehicle has a flaw because of some error in making it, such as incorrect assembly or the use of a broken part. As a result, a defective vehicle differs from a properly manufactured vehicle. Unlike manufacturing defects, issues that do not arise from manufacturing, such as characteristics of the vehicle's design (which occurs before manufacturing) are not warrantable defects. Design characteristics result from the vehicle's

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[25] The whining noise from the rear will not be addressed since the issue was not previously reported/noticed or included in the complaint. TEX. OCC. CODE §§ 2301.204, § 2301.606(c)(1) and 43 TEX. ADMIN. CODE § 215.202(b)(3).

[26] TEX. OCC. CODE § 2301.604(a); TEX. OCC. CODE § 2301.204.

[27] *E.g., Whitt v. Mazda Motor of America*, 5th Dist. Stark No. 2010CA00343, 211-Ohio-3097, ¶¶ 18-21 ("The manufacturer's express warranty in the case sub judice provides: 'Mazda warrants that your new Mazda Vehicle is free from defects in material or workmanship . . . .' The trial court found the warranty did not cover claims of design defects. . . . The problems about which Appellants complained did not fall within the applicable expressed warranty."); *see GT & MC, Inc. v. Texas City Refining, Inc.*, 822 S.W.2d 252, 257 (Tex. App.—Houston [1st Dist.] 1991, writ denied) ("the language in the contract of May 12, 1980, expressly limited TCR's recovery only for defects in materials or workmanship to damages for repair or replacement value. No mention was made in the guarantee of remedies for design defects.").

specified design and not from any error during manufacturing, so that the same-model vehicles made according to the manufacturer's specifications may ordinarily exhibit the same characteristics. In contrast to manufacturing defects, "[a] design defect exists where the product conforms to the specification but there is a flaw in the specifications themselves."[28] Consequently, regardless of how problematic or undesirable the complained of condition may be, if the condition arises from the vehicle's design, the Lemon Law does not apply because the warranty only covers manufacturing defects.

1. Over Temperature Protection (Limp Mode)

As outlined in the discussion of applicable law, the complaint identifies the issues to be addressed in this proceeding. Neither the complaint nor the notice of defect identified over temperature protection/limp mode as an issue. Additionally, the Respondent asserted the issue was not relevant and that this issue had not been previously addressed. The law does not provide any relief for issues not previously identified pursuant to TEXAS OCCUPATIONS CODE §§ 2301.204, § 2301.606(c)(1) and 43 TEXAS ADMINISTRATIVE CODE § 215.202(b)(3).

2. Oil Consumption

In the present case, the vehicle's oil consumption is not a warrantable defect subject to Lemon Law relief. The record reflects that as a consequence of the Shelby engine design, the vehicle's engine will consume more oil relative to conventional engines. In particular, the vacuum caused by a vehicle decelerating will normally draw oil into the combustion chamber. And the Shelby engine's high compression design amplifies such oil consumption. Simply releasing the throttle (engine braking) will increase oil consumption. Additionally, individual driving habits also affects oil consumption. For performance vehicles, like the subject vehicle, Ford has an oil consumption specification of up to one liter (about 1.06 quarts) per 500 miles. The consumption test showed that the vehicle consumed one quart over 679 miles or about 0.74 quarts in 500 miles, which falls within the established specifications. Because the vehicle conforms to specifications, no warrantable defect exists.

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[28] *Torres v. Caterpillar, Inc.*, 928 S.W.2d 233, 239 (Tex. App.—San Antonio 1996), *writ denied*, (Feb. 13, 1997).

III. Findings of Fact

1. On May 24 2016, the Complainant, purchased a new 2016 Ford Mustang Shelby GT350 from Helfman Ford, Inc., a franchised dealer of the Respondent, in Stafford, Texas. The vehicle had four miles on the odometer at the time of purchase.

2. The vehicle's limited warranty provides bumper to bumper coverage for three years or 36,000 miles, whichever occurs first and powertrain coverage for five years or 60,000 miles, whichever occurs first.

3. On March 11, 2017, the Complainant provided a written notice of defect to the Respondent.

4. On May 19, 2017, the Complainant filed a complaint with the Department alleging that the vehicle had a faulty oil system causing excessive oil consumption.

5. On June 26, 2017, 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 factual matters asserted.

6. The hearing in this case convened on October 13, 2017, in Conroe, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented himself. Daniel Keevy, Consumer Affairs Legal Analyst, represented the Respondent. Assad Bashir, Automotive Technical Consultant, testified for the Respondent.

7. The vehicle's odometer displayed 7,858 miles at the time of the hearing.

8. The vehicle's warranty was in effect at the time of the hearing.

9. The vehicle operated normally during the test drive at the hearing.

10. The subject vehicle employs a high compression design to produce 526 horsepower.

11. A high compression engine will normally consume more oil relative to other engines.

12. The manufacturer's specification for oil consumption in performance vehicles is one liter (about 1.06 quarts) per 500 miles.

13. Testing showed that the subject vehicle consumed one quart per 679 miles or about 0.74 quarts per 500 miles.

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 filed a sufficient complaint with the Department. 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's vehicle does not qualify for replacement or repurchase or warranty repair. The Complainant did not prove that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.603(a) and 2301.604(a).

7. The Respondent remains responsible to address and repair or correct any defects that are covered by the Respondent's warranty. TEX. OCC. CODE § 2301.603.

V. Order

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that the Complainant's petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is **DISMISSED**.

SIGNED December 12, 2017

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