

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 18-0181731 CAF**

**MAURICE and VICKI ORR,
Complainants**

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BEFORE THE OFFICE

v.

OF

**MASERATI NORTH AMERICA,
INC.,**

Respondent

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Maurice and Vicki Orr (Complainants) seek relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in their new 2017 Maserati Ghibli. Complainants assert that the vehicle has a problem with its fuel system and that Respondent has been unable to repair it. Maserati North America, Inc. (Respondent) asserts that replacement or repurchase of the vehicle is not warranted since they have not been provided with an adequate opportunity to repair the vehicle. The hearings examiner concludes that the vehicle does have an existing warrantable defect and Complainant is eligible for repurchase 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 and the hearing record closed on April 11, 2018, in Texarkana, Texas before Hearings Examiner Edward Sandoval. Complainants were represented by Cory J. Floyd, attorney with Norton & Wood LLP. Maurice and Vicki Orr, Complainants, were present to offer testimony. Also testifying were Brian Hathorn, employee at Ace Wrecker Company, and Clay Mitchell, owner of Forza Auto Repair. Adam Ray, associate attorney with Norton & Wood LLP, was present at the hearing as an observer. Respondent was represented by Edward Davis, attorney with Lewis, Brisbois, Bisgaard & Smith LLP.

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 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 the above 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 the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever comes first, following the date of original delivery to the owner.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 the attempts for repair were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever comes first, following the date of original delivery to the owner.⁴

B. Complainants’ Evidence and Arguments

1. Maurice Orr’s Testimony

Complainants purchased a new 2017 Maserati Ghibli from Park Place Maserati (the Dealer) in Dallas, Texas, on February 3, 2017, with mileage of 52 at the time of delivery.⁵ Respondent provided a new car limited warranty for the vehicle for the first four (4) years of ownership or the first 50,000 miles driven in the vehicle, whichever comes first. On the date of hearing the vehicle’s mileage was 2,958. The warranty for the vehicle was still in effect as of the date of hearing.

¹ Tex. Occ. Code § 2301.601(4).

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. 7, Retail Purchase Agreement dated February 3, 2017.

Maurice Orr, co-Complainant, testified that his wife, Vicki Orr, is the primary driver of the vehicle. Mr. Orr feels that there is a problem with the vehicle's fuel system and he requests that the vehicle be repurchased by Respondent.

Mr. Orr testified that the vehicle started becoming difficult to start in June and July of 2017. Mr. Orr took the vehicle to Park Place for repair for the issue on July 14, 2017. The Dealer's service technician verified that the vehicle struggled to start in the morning.⁶ The technician replaced the vehicle's fuel pump, fuel pump relay, and the fuel pump resistor after discussing the issue with Respondent's technical help department.⁷ The vehicle's mileage on this occasion was 2,384.⁸ The vehicle was in the Dealer's possession until July 26, 2017.⁹ A loaner was provided to Complainants for this period of time.

Mr. Orr testified that they had a problem with the vehicle soon after it was returned to them. In September of 2017, Ms. Orr was driving the vehicle and discovered that it would not accelerate above 30 mph. In addition, the vehicle died in Complainant's driveway as Ms. Orr attempted to return to her home. Mr. Orr was able to start the vehicle and took it for a drive. The vehicle struggled to run and would not accelerate properly when Mr. Orr drove it on this occasion. Complainants had the vehicle towed to the Dealer for repair for this issue on September 12, 2017. The Dealer's service technician verified that the vehicle was in "limp mode" and would not accelerate above 30 mph.¹⁰ The technician determined that the vehicle's high pressure pump was not achieving the needed pressure to meet vehicle specifications.¹¹ The technician also determined that the vehicle's engine was misfiring because the cylinder #6 fuel injector was leaking fuel into the cylinder.¹² The technician replaced the vehicle's high pressure fuel pump and left and right fuel rails in order to resolve the issue.¹³ The mileage on the vehicle on this date was 2,712.¹⁴ The vehicle was in the dealer's possession until September 27, 2017, on this occasion.¹⁵

⁶ Complainant Ex. 4, Repair Order dated July 14, 2017.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Complainant Ex. 4, Repair Order dated September 12, 2017.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

A few days after the vehicle was returned to Complainants, they had another problem with it. On October 4, 2017, Ms. Orr was driving the vehicle and was on her way home when it died. The vehicle ended up in a ditch and Ms. Orr could not restart it. She called Mr. Orr and the police to get help. Mr. Orr went to the location and tried to start the vehicle, but was unable to do so. Mr. Orr testified that he detected a strong odor of gasoline whenever he attempted to start the vehicle. Mr. Orr called a towing service to help get the vehicle out of the ditch. Mr. Orr and the tow truck driver were unable to start the vehicle or get the vehicle's transmission to shift into neutral.

Complainants had the vehicle towed to the Dealer for repair on October 4, 2017. The Dealer's service technician determined that the failure to start and the service transmission light illuminating were because the software for the transmission control module (TCM) needed to be updated.¹⁶ The technician performed the software update at the time of the repair visit.¹⁷ The mileage on the vehicle on this occasion was 2,910.¹⁸ The vehicle was in the Dealer's possession until April of 2017, because Complainants refused to pick it up from the Dealer after the repair was completed. Mr. Orr testified that although the repair order for this repair indicated that the service transmission light was illuminated, he never saw the light on during his attempts to start the vehicle. In addition, Mr. Orr stated that he never spoke to the Dealer's service advisor about the issues with the vehicle prior to a repair being performed in October of 2017.

Complainants filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) effective December 7, 2017.¹⁹ Complainants' attorney mailed a letter to Respondent on December 7, 2017, in which Complainants expressed their dissatisfaction with the vehicle.²⁰

Mr. Orr stated that he feels that the vehicle is unsafe. He believes that there is a risk of fire or explosion with the vehicle since he detected a fuel odor when he attempted to start it in October. Mr. Orr does not feel that the vehicle is repairable. The vehicle was returned to Complainants in April of 2018. Mr. Orr drove the vehicle and felt a severe shaking and heard a loud noise when he drove the vehicle over 50 mph. Ms. Orr does not drive the vehicle now as she feels unsafe.

During cross-examination, Mr. Orr stated that he spoke to the Dealer's general manager (GM) after the October 2017 repair. Mr. Orr informed the GM that he no longer wanted the vehicle and that he felt that there was a safety issue with it. Mr. Orr stated that he told the GM that the

¹⁶ Complainant Ex. 6, Repair Order dated October 4, 2017.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Complainant Ex. 8, Complainants' Lemon Law complaint dated December 7, 2017.

²⁰ Complainant Ex. 1, Letter to Maserati North America, Inc. *et al.* dated December 7, 2017.

vehicle refused to start. He does not recall discussing the vehicle's transmission with the GM. Mr. Orr stated that he feels that the vehicle is dangerous to drive.

2. Brian Hathorn's Testimony

Brian Hathorn testified in the hearing for Complainants. He is an employee of Ace Wrecking Company.

Mr. Hathorn is familiar with the vehicle since he's towed it to Park Place on two (2) separate occasions. Mr. Hathorn was called to tow the vehicle after it died while Ms. Orr was driving it and rolled into a ditch in early October of 2017. Mr. Hathorn testified that when he arrived at the location where the vehicle had died, the police were on site directing traffic. He observed that the vehicle would not restart and neither he nor Mr. Orr were able to get the vehicle's transmission to shift into neutral in order to get it on the tow truck. After calling several people in an attempt to determine how to override the transmission, he finally dragged the vehicle onto the tow truck.

Mr. Hathorn stated that he detected a gas odor whenever Mr. Orr attempted to restart the vehicle prior to getting it onto the tow truck.

3. Clay Mitchell's Testimony

Clay Mitchell, owner of Forza Auto Repair, testified for Complainants in the hearing. Forza Auto Repair specializes in diagnosing and repairing vehicles manufactured by European companies. In addition, Mr. Mitchell has over the years owned three vehicles manufactured by Respondent.

Mr. Mitchell inspected Complainants' vehicle in April of 2018. He stated that the vehicle currently has a dead #1 cylinder. In addition, there appears to be an ABS communication failure, in that the anti-lock braking system (ABS) module is not communicating correctly with other modules in the vehicle. Mr. Mitchell stated that the repair orders consistently indicate a power failure in the vehicle. He feels that this is a safety issue which has not be resolved by Respondent or its dealers.

Mr. Mitchell testified that he would not drive the vehicle given the communication problems with the ABS module.

4. Vicki Orr's Testimony

Vicki Orr, co-Complainant, testified in the hearing. She is the primary driver of the vehicle. She stated that she no longer feels comfortable driving the vehicle. Ms. Orr testified that the vehicle has been repaired three (3) times and she feels that the vehicle is acting worse after each repair.

Ms. Orr testified that she was driving the vehicle in early October of 2017 when everything in the vehicle turned off. She said that the vehicle would not accelerate above 20 or 30 mph and the vehicle died while she was attempting to turn right onto another street. The vehicle's power steering and brakes both went out. She was unable to stop the vehicle and it rolled into a ditch. Ms. Orr stated that the vehicle ended up across the street facing oncoming traffic. Ms. Orr was unable to restart the vehicle and she detected a gas odor. As a result, she left the vehicle while she called Mr. Orr and the police to come help her.

Ms. Orr stated that she was also driving the vehicle in September of 2017 when it would not accelerate above 30 mph. She was driving home when this occurred. Ms. Orr stated the vehicle died in her home driveway and had Mr. Orr see if he could get the vehicle to operate properly, but he was unable to get the vehicle to accelerate over 30 mph when he drove the vehicle.

C. Respondent's Evidence and Arguments

Edward Davis, attorney with Lewis, Brisbois, Bisgaard & Smith LLP, represented Respondent in the hearing. He did not offer testimony.

D. Analysis

Under the Lemon Law, Complainants bear 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, Complainants must meet the presumption that a reasonable number of attempts have been undertaken to conform the vehicle to an applicable express warranty. Finally, Complainants are 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, Complainants are entitled to have the vehicle repurchased or replaced.

In order to determine whether Complainants have a remedy under Section 2301.604 of the Occupations Code, there first has to be evidence of a defect or condition in the vehicle that has not been repaired by Respondent. The evidence provided by the parties establishes that the vehicle does have a defect or nonconformity which creates a serious safety hazard and which has not been repaired by Respondent.

The evidence has established that there is an unrepaired issue with the vehicle's fuel system. Repairs to the vehicle have included replacing the vehicle's fuel pump, fuel pump relay, fuel pump resistor, high pressure fuel pump and the left and right fuel injector rails. At the time that the injector rails and high pressure fuel pump were replaced, the Dealer's service technician determined that the engine's cylinder #6 fuel injector was leaking fuel into the cylinder. After this repair was performed the vehicle died and Complainants detected a fuel odor when they attempted to restart the vehicle. The final repair performed on the vehicle had nothing to do with the fuel system, but was a software update. Finally, the vehicle shook abnormally and made a loud noise when accelerating during the test drive taken at the time of hearing. Mr. Mitchell testified at the hearing that he believes that the #1 cylinder is misfiring which is causing the vehicle to shake and make noise during acceleration.

In addition, the testimony established that the vehicle died twice while Ms. Orr was driving it: the first time in her driveway and the second time while she was driving in traffic. These two incidents combined with the vehicle's behavior during the test drive at the time of hearing indicate to the hearings examiner that the vehicle has a defect or nonconformity which creates a serious safety hazard since it impedes Complainants' ability to control or operate the vehicle for ordinary use or intended purposes.

Complainants presented the vehicle to Park Place Maserati, an authorized dealer of Respondent, due to their concerns regarding the vehicle's fuel system on the following dates: July 14, 2017; September 12, 2017; and October 4 2017. 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)(2) specifies that if a serious safety hazard 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 the attempts for repair were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever comes first, following the date of delivery of the motor vehicle to the owner. The evidence presented at the hearing establishes that Complainants have met the requirements of this test. As such, Complainants have 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 Complainants provided Respondent with written notice of the nonconformity and with a final opportunity to cure the defect. Complainants' attorney mailed the notice to Respondent on December 7, 2017. The vehicle was in the Dealer's possession until April of 2018 and Respondent could have asked for a final opportunity to cure at any time, but did not do so.

Although Respondent or its authorized representatives have been provided sufficient opportunities to repair the vehicle and to ensure that it is operating properly, they have not been able to fully repair the vehicle. As such, Complainants have met their burden of proof to establish the existence of a warrantable and existing defect or condition that creates a serious safety hazard.

Based on the evidence and the arguments presented, the hearing examiner finds that repurchase of the vehicle is the appropriate remedy in this case. Complainants' request for repurchase relief is hereby granted.

FINDINGS OF FACT

1. Maurice and Vicki Orr (Complainants) purchased a new 2017 Maserati Ghibli on February 3, 2017, from Park Place Maserati (the Dealer) in Dallas, Texas with mileage of 52 at the time of delivery.
2. Respondent provided a four (4) year or 50,000 mile new car limited warranty for the vehicle.
3. The vehicle's mileage on the date of hearing was 2,958.
4. At the time of the hearing, the vehicle's warranty was still in effect.
5. A few months after purchasing the vehicle Complainants had difficulty starting the vehicle first thing in the morning.
6. Complainants have experienced the vehicle refusing to accelerate over 30 mph and dying when it's being driven.
7. Prior to the filing of the Lemon Law complaint, Complainants' vehicle was serviced by the Dealer on the following dates because of Complainants' concerns regarding the vehicle's fuel system:

- a. July 14, 2017, at 2,384 miles;
 - b. September 12, 2017, at 2,712 miles; and
 - c. October 4, 2017, at 2,910 miles.
8. On July 14, 2017, the Dealer's service technician replaced the vehicle's fuel pump, fuel pump relay, and the fuel pump resistor in order to address Complainants' concerns with the vehicle.
 9. On September 12, 2017, the Dealer's service technician replaced the vehicle's high pressure fuel pump and the left and right fuel injector rails.
 10. On October 4, 2017, the Dealer's service technician performed an update to the vehicle's transmission control module (TCM) software.
 11. On December 7, 2017, Complainants filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
 12. On December 7, 2017, Complainant mailed a notice to Respondent advising them of his dissatisfaction with the vehicle.
 13. On April 11, 2018, during the vehicle inspection that took place at the time of hearing, the vehicle shook abnormally and a loud knocking noise was heard during acceleration.
 13. On February 6, 2018, the Department's Office of Administrative Hearings issued a notice of hearing directed to Complainants 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.
 14. The hearing in this case convened and the hearing record closed on April 11, 2018, in Texarkana, Texas before Hearings Examiner Edward Sandoval. Complainants were represented by Cory J. Floyd, attorney with Norton & Wood LLP. Maurice and Vicki Orr, Complainants, were present to offer testimony. Also testifying were Brian Hathorn, employee at Ace Wrecker Company, and Clay Mitchell, owner of Forza Auto Repair. Adam Ray, associate attorney with Norton & Wood LLP, was present at the hearing as an observer. Respondent was represented by Edward Davis, attorney with Lewis, Brisbois, Bisgaard & Smith LLP.

III. 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. Complainants 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. Complainants bear the burden of proof in this matter.
6. Complainants' vehicle has an existing nonconformity that creates a serious safety hazard. Tex. Occ. Code § 2301.604(a).
7. After a reasonable number of attempts, Respondent has been unable to repair the nonconformity in Complainants' 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, Respondent is required to repurchase Complainants' 2017 Maserati Ghibli. Tex. Occ. Code § 2301.604(a)(1).

IT IS THEREFORE ORDERED that:

1. Respondent shall accept the return of the vehicle from Complainants. Respondent shall have the right to have its representatives inspect the vehicle upon the return by Complainants. 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 this final order;

2. Respondent shall repurchase the subject vehicle in the amount of **\$87,030.36**. In addition, Complainants are entitled to reimbursement of the lemon law filing fee in the amount of **\$35.00**. The total refund of **\$87,065.36** shall be paid to Complainants 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 Complainants. At the time of 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, Complainants are responsible for providing Respondent with clear title to the vehicle;

Purchase price, including tax, title, license and registration	\$88,972.18
Delivery mileage	52
Mileage at first report of defective condition	2,384
Mileage on hearing date	2,958
Useful life determination	120,000

Purchase price, including tax, title, license and registration					\$88,972.18
Mileage at first report of defective condition				2,384	
Less mileage at delivery				<u>-52</u>	
Unimpaired miles				2,332	
Mileage on hearing date				2,958	
Less mileage at first report of defective condition				<u>-2,384</u>	
Impaired miles				574	
Reasonable Allowance for Use Calculations:					
Unimpaired miles					
				<u>2,332</u>	
	120,000	X	\$88,972.18	=	\$1,729.03
Impaired miles					
				<u>574</u>	
	120,000	X	\$88,972.18	X .5	= <u>\$212.79</u>
Total reasonable allowance for use deduction:					\$1,941.82
Purchase price, including tax, title, license and registration					\$88,972.18
Less reasonable allowance for use deduction					-\$1,941.82
Plus filing fee refund					<u>\$35.00</u>
TOTAL REPURCHASE AMOUNT					\$87,065.36

3. Within twenty (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 reacquired vehicle prior to resale and issue a disclosure statement on a form provided or approved by the Department;²¹
5. Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall affix the disclosure label to the reacquired vehicle in a conspicuous. 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, pursuant to 43 Texas Administrative Code § 215.210(4), shall provide to the Department written notice of the name, address and telephone number of any transferee (wholesaler or equivalent), regardless of residence.

²¹ 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.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that Complainants' 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 May 4, 2018

A handwritten signature in black ink, appearing to read 'Edward Sandoval', is written over a horizontal line.

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