

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 18-0184436 CAF**

**DENNIS PUNGERCHAR,  
Complainant**

v.

**HYUNDAI MOTOR AMERICA,  
Respondent**

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**BEFORE THE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Dennis Pungerchar (Complainant) filed a petition seeking relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in his new 2017 Hyundai Elantra. Complainant asserts that the vehicle's automatic emergency braking (AEB) system is defective and does not work properly. Hyundai Motor America (Respondent) argued that the vehicle is working as designed 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 July 31, 2018, in San Antonio, Texas before Hearings Examiner Edward Sandoval. Complainant, Dennis Pungerchar, represented himself in the hearing. His wife, Soraya Pungerchar, was present and testified in the hearing. Respondent, Hyundai Motor America, was represented in the hearing by Susan Lucas, independent representative. The hearing record was closed on August 10, 2018, after Complainant submitted a hard copy of a video to the hearings examiner which had previously been entered as evidence at the hearing.

**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.<sup>1</sup> Second, the defect or condition in the vehicle creates a serious safety hazard or substantially impairs the use or market value of the vehicle.<sup>2</sup> Third, the owner must have mailed written notice of the alleged defect or

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<sup>1</sup> Tex. Occ. Code § 2301.604(a).

<sup>2</sup> *Id.*

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

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 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.<sup>5</sup>

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 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.<sup>6</sup>

“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.<sup>7</sup>

## **B. Complainant’s Evidence and Arguments**

Complainant purchased a new 2017 Hyundai Elantra (the vehicle) from Red McCombs Superior Hyundai (Superior) in San Antonio, Texas.<sup>8</sup> The vehicle had mileage of 17 at the time of purchase on December 15, 2017.<sup>9</sup> Respondent provided a bumper-to-bumper warranty for the vehicle which provides coverage for five (5) years or 60,000 miles, whichever comes first.<sup>10</sup> At the time of hearing, the vehicle’s mileage was 2,340. Respondent’s warranty for the vehicle was still in effect on the hearing date.

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<sup>3</sup> Tex. Occ. Code § 2301.606(c)(1).

<sup>4</sup> Tex. Occ. Code § 2301.606(c)(2).

<sup>5</sup> Tex. Occ. Code § 2301.605(a)(1)(A) and (B). Texas Occupations Code § 2301.605(a) (3) provides a third method 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. This section 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.

<sup>6</sup> Tex. Occ. Code § 2301.605(a)(2)(A) and (B).

<sup>7</sup> Tex. Occ. Code § 2301.601(4).

<sup>8</sup> Complainant Ex. 1, Motor Vehicle Retail Sale Installment Contract, undated.

<sup>9</sup> Respondent Ex. 1, Hyundai Motor America’s Position Statement, p. 1.

<sup>10</sup> *Id.*

## 1. Dennis Punggerchar's Testimony

Complainant testified that one of the primary reasons he purchased the vehicle was because it was equipped with an AEB system. His wife had purchased a Nissan with a similar system and he was impressed with how it worked. Complainant would not have purchased the vehicle but for the vehicle having the AEB system.

Complainant attempted to test the AEB system after purchasing the vehicle. However, according to Complainant it never seemed to work. The system is designed to detect a pedestrian or another vehicle in front which may collide with the driver's vehicle.<sup>11</sup> The system is supposed to indicate a warning message on the vehicle's instrument panel cluster and a warning chime in accordance with the collision risk level.<sup>12</sup>

Since the AEB system didn't seem to be working, Complainant presented the vehicle to Superior for repair on January 3, 2018, at 277 miles and January 11, 2018, at 348 miles.<sup>13,14</sup> The vehicle was in Superior's possession for a few days on each occasion. Complainant was provided with a loaner vehicle during each repair visit.

Superior's service technicians determined that the AEB system was operating as designed and that no repairs to the system were necessary. On one occasion Complainant offered to go on a test drive with Superior's technicians to validate his concerns with the system, but Complainant was informed it was not safe for the technicians to do so.

Complainant mailed a notice to Respondent on February 6, 2018, that Complainant was dissatisfied with the vehicle.<sup>15</sup> Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) with an effective date of March 6, 2018.<sup>16</sup> Respondent did not request an opportunity for a final repair attempt on the vehicle.

Complainant was not satisfied with the outcome of the repair visits and still felt that the system was not working properly. He took the vehicle to Red McCombs Hyundai Northwest (Northwest) in San Antonio, Texas for repair to the system on March 20, 2018. Northwest's technician informed Complainant that the AEB system was working as designed and no repair was necessary.

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<sup>11</sup> Complainant Ex. 9, Hyundai Elantra Owner's Manual, p. 5-61.

<sup>12</sup> *Id.*

<sup>13</sup> Complainant Ex. 3, Repair Order dated January 3, 2018.

<sup>14</sup> Complainant Ex. 4, Repair Order dated January 11, 2018.

<sup>15</sup> Complainant Ex. 8, Letter to Hyundai Motor America Corp. dated February 6, 2018.

<sup>16</sup> Complainant Ex. 7, Lemon Law Complaint dated March 6, 2018. Although Complainant signed the complaint on February 8, 2018, it was not received by the Texas Department of Motor Vehicles Enforcement Division until March 6, 2018, which is the effective date of the complaint.

The vehicle's mileage on this occasion was 1,128.<sup>17</sup> The vehicle was in Northwest's possession for a day. Complainant was not provided with a loaner vehicle on this occasion.

Complainant feels that the vehicle is unsafe because the AEB system is not working properly. He has tested the system a few times and provided video evidence to show that the system does not trigger any warning chimes or make any other noise when he has approached other vehicles from the rear without slowing down. In addition, the system did not seem to work during the test drive taken at the time of hearing. On at least four (4) occasions during the test drive, Complainant drove his vehicle towards the rear of slower moving or stopped vehicles and the system did not work. On the final occasion, as Complainant was approaching a stopped vehicle and just prior to turning into the parking lot for the hearing site, the AEB alarm finally chimed. Complainant indicated that it was the first time since he owned the vehicle that the alarm chimed.

## **2. Soray Pungchar's Testimony**

Soray Pungchar, Complainant's wife, testified in the hearing. She stated that she rarely drives the vehicle, as Complainant is the primary driver of the vehicle. Ms. Pungchar stated that she has never heard the AEB system's alarm chime and she has never seen any warning messages for the system on the instrument panel cluster.

Ms. Pungchar accompanied Complainant when he attempted to test the AEB system and she operated a video camera while he was driving. (This is the video that was entered into the record as Complainant's Exhibit 10.) She indicated that she was nervous and scared during the drive because the system did not engage no matter how close they came to hitting another vehicle. Ms. Pungchar said she does not feel that the vehicle is safe to drive.

## **C. Respondent's Evidence and Arguments**

Susan Lucas, independent representative, appeared at the hearing on behalf of Respondent. She had not seen the vehicle prior to the hearing date. Ms. Lucas did not know whether Respondent had requested a final repair attempt on the vehicle. She was aware that no repairs had been done by Respondent's authorized dealer's technicians to the vehicle's AEB system. Ms. Lucas argued that the system was working as designed.

## **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

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<sup>17</sup> Complainant Ex. 5, Repair Order dated March 20, 2018.

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 or which creates a serious safety hazard. The totality of the evidence presented at the hearing reveals that the vehicle's EAB system may not be working properly. Complainant submitted video evidence to verify his attempts to activate the system. In addition, the hearings examiner, Complainant, and Respondent's representative took a test drive in the vehicle at the time of hearing and the system seemed to operate inconsistently. Since the system is supposed to be an enhanced safety system, the hearings examiner must hold that the issue creates a serious safety hazard as it substantially impedes Complainant's ability to control or operate the vehicle for its ordinary or intended purposes.

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 two occasions: January 3, 2018 and January 11, 2018. 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 a rebuttable presumption that a reasonable number of attempts to repair have been made to repair a serious safety hazard if "two (2) attempts to repair the nonconformity were made in the 24 months or 24,000 miles, whichever occurs first, following the date of original delivery to the owner." 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 February 6, 2018, of the issue with the vehicle's EAB system and providing them with an opportunity to cure of which Respondent did not avail themselves.

Although Respondent has been provided adequate opportunity 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 which creates a serious safety hazard.

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. Dennis Pungcherchar (Complainant) purchased a new 2017 Hyundai Elantra on December 15, 2017, from Red McCombs Superior Hyundai (Superior) in San Antonio, Texas with mileage of 17 at the time of delivery.
2. The manufacturer of the vehicle, Hyundai Motor America (Respondent), issued a bumper-to-bumper warranty for the vehicle providing coverage for five (5) years or 60,000 miles, whichever comes first.
3. The vehicle's mileage on the date of the hearing was 2,340.
4. At the time of hearing the bumper-to-bumper warranty for the vehicle was still in effect.
5. Complainant feels that the vehicle's automatic emergency braking (AEB) system is defective and does not work properly.
6. Complainant tried testing the AEB system, but it never activated prior to the hearing date.
7. Complainant's vehicle was serviced by Respondent's authorized dealer, Superior, on the following dates because of Complainant's concerns with the vehicle's AEB system:
  - a. January 3, 2018, at 277 miles; and
  - b. January 11, 2018, at 348 miles.
8. At both repair visits Superior's service technicians determined that the AEB system was working as designed and did not perform any repairs to the vehicle for the issue.
9. On February 6, 2018, Complainant provided written notice to Respondent of Complainant's dissatisfaction with the vehicle.
10. On March 6, 2018, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
11. On March 20, 2018, Complainant took the vehicle to Red McCombs Hyundai Northwest (Northwest) in San Antonio, Texas for repair to the AEB system.

12. Northwest's technician determined that the AEB system was operating as designed during the repair visit described in Findings of Fact #11.
13. Respondent did not ask Complainant for an opportunity to perform a final repair or inspection of the vehicle.
14. The vehicle's AEB system worked inconsistently during the test drive taken at the time of hearing.
15. On May 11, 2018, 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.
16. The hearing in this case convened on July 31, 2018, in San Antonio, Texas before Hearings Examiner Edward Sandoval. Complainant, Dennis Pungchar, represented himself in the hearing. His wife, Soraya Pungchar, was present and testified in the hearing. Complainant was also present to offer testimony. Respondent, Hyundai Motor America, was represented in the hearing by Susan Lucas, independent representative. The hearing record was closed on August 10, 2018, after Complainant submitted a hard copy of a video to the hearings examiner which had previously been entered as evidence at the hearing.

#### 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 defect or condition 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 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 2017 Hyundai Elantra 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 2017 Hyundai Elantra (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 2017 Hyundai Elantra 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 \$255.19);
  - (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 \$220.19);
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.<sup>18</sup>
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 2017 Hyundai Elantra's reacquisition and issue a new 12-month/12,000-mile warranty on the reacquired vehicle.
8. Upon replacement of Complainant's 2017 Hyundai Elantra, 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 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 2017 Hyundai Elantra

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<sup>18</sup> Correspondence and telephone inquiries regarding disclosure labels should be addressed to: Texas Department of Motor Vehicles, Enforcement Division-Lemon Law Section, 4000 Jackson Avenue Building 1, Austin, Texas 78731, ph. (512) 465-4076.

pursuant to the repurchase provisions set forth in 43 Tex. Administrative Code § 215.208(b)(1) and (2). The repurchase price shall be **\$23,490.17**. 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 | \$23,710.90 |
| Delivery mileage   | 17          |
| Mileage at first report of defective condition                 | 277         |
| Mileage on hearing date  | 2,340       |
| Useful life determination                                      | 120,000     |

|  |         |   |  |                |                        |
|--|---------|---|--|----------------|------------------------|
| Purchase price, including tax, title, license and registration |         |   |  |                | \$23,710.90            |
| Mileage at first report of defective condition                 |         |   |  | 277            |                        |
| Less mileage at delivery                                       |         |   |  | <u>-17</u>     |                        |
| Unimpaired miles   |         |   |  | 260            |                        |
| Mileage on hearing date  |         |   |  | 2,340          |                        |
| Less mileage at first report of defective condition            |         |   |  | <u>-277</u>    |                        |
| Impaired miles   |         |   |  | 2,063          |                        |
| Reasonable Allowance for Use Calculations:                     |         |   |  |                |                        |
| Unimpaired miles   |         |   |  |                |                        |
|  |         |   |  | <u>260</u>     |                        |
|  | 120,000 | X |  | \$23,710.90    | = \$51.37              |
| Impaired miles   |         |   |  |                |                        |
|  |         |   |  | <u>2,063</u>   |                        |
|  | 120,000 | X |  | \$23,710.90    | X .5 = <u>\$203.81</u> |
| Total reasonable allowance for use deduction:                  |         |   |  |                | \$255.19               |
| Purchase price, including tax, title, license and registration |         |   |  | \$23,710.90    |                        |
| Less reasonable allowance for use deduction                    |         |   |  | -\$255.19      |                        |
| Plus filing fee refund   |         |   |  | <u>\$35.00</u> |                        |
| <b>TOTAL REPURCHASE AMOUNT</b>                                 |         |   |  | \$23,490.71    |                        |

11. If Complainant's 2017 Hyundai Elantra 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 August 30, 2018**



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