

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

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:

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 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

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 satisfied the “opportunity to cure” requirement when the manufacturer authorized repairs by the dealer after written notice to the manufacturer, i.e., the manufacturer essentially authorized the dealer to attempt a repair on the manufacturer's behalf. *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 226 (Tex. App.—Austin 2012).

¹⁵ TEX. OCC. CODE § 2301.606(d)(2).

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 every required fact is more likely than not true.¹⁹ If any required fact appears more likely to be untrue or equally likely to be true or untrue, then the Complainant cannot prevail.

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

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).

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).

5. Incidental Expenses

When repurchase or replacement is ordered, the Lemon Law provides for reimbursing the Complainant for reasonable incidental expenses resulting from the vehicle's loss of use because of the defect.²⁴ Reimbursable expenses include, but are not limited to: (1) alternate transportation; (2) towing; (3) telephone calls or mail charges directly attributable to contacting the manufacturer, distributor, converter, or dealer regarding the vehicle; (4) meals and lodging necessitated by the vehicle's failure during out-of-town trips; (5) loss or damage to personal property; (6) attorney fees, if the complainant retains counsel after notification that the respondent is represented by counsel; and (7) items or accessories added to the vehicle at or after purchase, less a reasonable allowance for use. The expenses must be reasonable and verifiable (for example, through receipts or similar written documents).²⁵

A. Summary of Complainant's Evidence and Arguments

On March 21, 2017, the Complainant, leased a new 2017 Ford Explorer from Mac Haik Ford Lincoln Mercury, a franchised dealer of the Respondent, in Georgetown, Texas. The vehicle had 189 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. The vehicle's limited warranty provides bumper to bumper coverage for three years or 36,000 miles, whichever occurs first. On March 8, 2018, the Complainant filed a complaint with the Department alleging that: the vehicle vibrated at 60 mph; the screen on the dash (SYNC touchscreen) goes blank; the reverse camera did not work consistently; the hatch will not close when pushing the button; and the 12V outlet did not have a good connection. The Complainant testified that she believed that she sent written notice of the defects to the Respondent on March 10, 2018.

²⁴ TEX. OCC. CODE § 2301.604.

²⁵ 43 TEX. ADMIN. CODE § 215.209(a).

In relevant part, the Complainant took the vehicle to a dealer for repair of the alleged issues as follows:

Date	Miles	Issue
April 6, 2017	799	Vibration at highway speeds
April 17-18, 2017	1,313	Vibration at 60 mph
May 15-31, 2017	1,808	Screen blank
January 2-3, 2018	7,979	Screen black; vibration at 55 to 60 mph
March 13-29, 2018	10,301	Screen blank; back up camera not working; rear hatch not closing; vibration while driving
April 5-16, 2018	10,806	Vibration at 60 mph; hatch closes halfway; back up camera goes blank; SYNC screen not coming on; power outlet not always working

The Respondent's final opportunity to repair the vehicle occurred on April 5, 2018.

The Complainant testified that none of the repair attempts successfully resolved the issues, though some issues were noticeable less frequently. She described the vibration as a slight shimmy in the steering wheel at highway speeds, which was also noticeable with objects shaking in the passenger seat and in the cup holder. She explained that the vibration happened in the summer as well (so the issue did not depend on cold temperatures). She first noticed this issue within a month of first leasing the vehicle. She last noticed the vibration the day before the hearing. Aside from highway speeds, she did not notice any conditions associated with the vibration. The vibration would occur about three to four times a week. The Complainant clarified that the SYNC touchscreen, not the information display between the tachometer and speedometer, would go blank. The screen may be working fine but when starting the vehicle the next time, the screen may go blank and not start up. Sometimes the screen will come on and sometimes the screen will not come on for two days. She affirmed that the Bluetooth controls appeared on the screen, as well as controls for the stereo, seat, and brightness. The Complainant testified that she first noticed the screen issue within three months of acquiring the vehicle. The first instance did not cause any worry because the screen came back on quickly. However, the malfunction continued to recur. She last noticed the screen issue in early June of 2018. The screen would go blank once or twice a month and the amount of time the screen stayed blank varied, sometimes 30 seconds and sometimes two days. When working, the screen takes less than ten seconds to boot up. The Complainant described the rear-view camera as sometimes working and sometimes not, though the camera should come on automatically when shifting into reverse. She first noticed the camera issue within six months of obtaining the vehicle. She last noticed this issue in the spring but the

problem has not happened this summer. For a while, the camera issue occurred once every other week. The Complainant pointed out that when the touchscreen malfunctioned, the rearview camera would not display. The touchscreen itself was not working at the beginning of June (2018). In April (2018), the screen itself worked but would not change to the parking assist view. The Complainant testified that the hatch (liftgate) functioned inconsistently. Sometimes the liftgate will not open using the dashboard button or the liftgate button. Sometimes the liftgate will open but will not close using the button on the dashboard or the button on the liftgate. Even with nothing in the way, the liftgate may close three-quarters of the way and stop, requiring closing manually. Sometimes the liftgate will not open, requiring intervention to open. The Complainant first noticed problems with the liftgate opening or closing within three to six months after obtaining the vehicle. She last noticed the liftgate issues on July 26, 2018. The frequency of the liftgate issues varied, from every other month to twice a week, to consecutive malfunctions. She more consistently had problems trying to close the liftgate with the button on the dashboard or with the button on the liftgate. The Complainant stated that the 12V power outlet acted as if it had a poor connection. She tried different charges with the same results. She would think the charger was charging when it was not. The charger may charge after adjusting it but would stop after a little while. She stated that this issue was ongoing. She elaborated that the problem was intermittent as with all the other issues.

On cross-examination, when asked if the intermittent vibration occurred after parking on a hard surface, the Complainant testified that she could not think of when the vehicle is not parked on a hard surface, with the vehicle parked on caliche at home and a hard surface at work. She testified that the vibration did not go away after driving 15 miles. She explained that she noticed the vibration by the feel in the steering wheel and a cup made obvious vibration noise. Road force balancing did not improve the vibration. She stated that the vibration did not occur consistently, whether sitting for a while or not sitting. The Complainant confirmed that she had an AT&T iPhone 8 with iOS version 11.4.1 paired with the vehicle. When asked if she had tried the USB port, she answered that the phone will charge when plugged into the USB port but will not charge when using a charger in the 12V port. She tried using a different charger but experienced the same issue. When asked if the Complainant experienced an air bag warning light, she identified a light for the passenger airbag, which went off the same day.

B. Summary of Respondent's Evidence and Arguments

Mr. Bashir reviewed the vehicle's repair history, including: road force balancing to address the vibration; updating the software to address the blank screen; replacing the SYNC module and front control interface module; replacing three tires because of vibration; and replacing the trunk module and liftgate motor. Concerns regarding the backup camera and 12V power port could not be duplicated. Mr. Bashir explained that low profile tires transmit vibration back into the vehicle because the short sidewalls cannot absorb the vibration. He also pointed out that phones can cause conflict with the SYNC display. Because the vehicle uses this screen for the backup camera, phones could possibly cause the problem with the backup camera view. Problems with the phones may relate to background applications or metadata left on the system, which can lead to the corruption of data. The manufacturer tested the compatibility of the iPhone 8 and only the Verizon version was listed as compatible, leading to a possible software concern. The field service engineer could only duplicate the liftgate issue after 50 to 60 repetitions. Particularly with power activated features, the vehicle may disable a feature for a key cycle if a switch is activated multiple times as a response to potential tampering. However, the liftgate could still be closed manually.

Mr. Keevy summarized that the vehicle did not have sufficient repair attempts. Only the tire replacements can be considered as repair attempts and only one attempt occurred in the first year of ownership. Nothing satisfies the reasonable repair standard. Given the engine and transmission, the vehicle will always exhibit some vibration normally.

On cross-examination, Mr. Bashir explained that the SYNC 3 system was designed to be updated over a wi-fi connection, as well as by taking the vehicle to the dealer. While Bluetooth protocols are fairly standard, different manufacturers may use them in different ways. A device may use a Bluetooth standard that may have changed or may be newer than what the system uses. Backward compatibility issues may require a software update to allow the devices to communicate. Applications running on the phone may access Bluetooth profiles, which may create conflicts. When the SYNC system does not have a good method to resolve a conflict, other than to reset the system, which clears the stored metadata, which can cause corruption. A dealer not precisely following the steps for an update can cause a concern with the APIM, which may have occurred with the subject vehicle. After an update the vehicle's APIM needed replacement because it would no longer take an update. Mr. Keevy noted that vibration was subjective. Some may feel a vibration as strong but other may barely notice the vibration. Smaller sidewalls result in more road feel. Mr.

Bashir explained that reducing road force to an acceptable level, 25 pounds or less, does not mean that vibration cannot be felt. Shorter sidewalls have more impact and will reflect more road force than a truck with 35 pounds of road force. Mr. Bashir added that shorter sidewalls performed better for cornering. He explained that while vibration was more prevalent with shorter sidewalls, this did not itself cause vibration. When parked for a long time, tires will develop flat spots. Shorter sidewalls make vibrations more noticeable. The flat spots may be a reason for intermittent vibration. Additionally, the road surface itself can contribute to vibration. Mr. Bashir elaborated that the passenger airbag light the Complainant saw was a deactivation light due to the operation of the occupant classification sensor. By design, if the occupant classification sensor detects anything smaller than an adult in the passenger seat, such as an object placed in the seat, the system will disable the passenger airbag. Mr. Bashir further explained that the air bag system and the SYNC system operated separately, with critical systems typically on a separate high-speed network, so an issue in one module will not cause a problem in another module. Mr. Bashir stated that an airbag malfunction will result in a fault message on the display in the center area of the instrument cluster between the tachometer and the speedometer.

C. Inspection and Test Drive

Upon inspection before the test drive, the vehicle's odometer displayed 14,687 miles. The SYNC touchscreen turned on normally. The vehicle was driven mostly on a freeway and service roads. The vehicle had 14,700 miles on the odometer at the end of the test drive. The vehicle did not exhibit any unusual vibration. The liftgate did not respond/open when pressing the exterior liftgate button. The liftgate operated normally when pressing: the button on the dashboard below the instrument panel, the button on the remote control, and the button on the bottom of the liftgate. While inserted in the 12V port, the charger remained powered until pulled out slightly.

D. Analysis

As previously explained above, for any given defect to qualify a vehicle for repurchase or replacement relief: the warranty must apply to the defect; the defect must create a serious safety hazard or substantially impair the vehicle's use or market value; and the defect must continue to exist after a reasonable number or repair attempts. To qualify for repurchase or replacement relief,

the vehicle must satisfy all the above requirements as well as the other requirements specified in the discussion of applicable law.

With regard defects covered by warranty (warrantable defects), the vehicle's warranty generally states:

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.

According to these terms, the warranty only applies to defects in materials or workmanship (manufacturing defects).²⁶ A manufacturing defect is generally 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. Unlike manufacturing defects, issues that do not arise from manufacturing, such as characteristics of the vehicle's design, are not warrantable defects. Design characteristics result from the vehicle's specified design and not from any error during manufacturing.²⁷ In sum, the warranty only covers manufacturing defects and the Lemon Law does not apply to design characteristics or design defects.

1. Vibration

A preponderance of the evidence does not show that the vibration is a warrantable defect. The record suggests that the source of the vibration results from varying external conditions.

²⁶ Courts have affirmed that warranty language covering "defects in material or workmanship" do not cover design issues. *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.").

²⁷ 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." *Torres v. Caterpillar, Inc.*, 928 S.W.2d 233, 239 (Tex. App.—San Antonio 1996), writ denied, (Feb. 13, 1997).

Vibration due to external conditions is consistent with the subject vehicle's design incorporating low profile tires, which provide better handling but at the cost of transmitting more vibration from road surface features. In sum, the vibration does not appear to arise from a manufacturing defect but instead appears to result from a normal design characteristic.

2. SYNC Touchscreen

The evidence indicates that incompatibility with the vehicle's design is as likely to have caused the malfunctioning touchscreen as a manufacturing defect. More specifically, after testing various phones, the manufacturer did not find the AT&T iPhone 8, the same phone as the Complainant's, to be compatible with the vehicle's SYNC system. The record reflects that the use of an incompatible phone may lead to errors ultimately causing the screen to malfunction. However, phone compatibility is a design issue not subject to the warranty. Accordingly, the vehicle does not qualify for repurchase/replacement or warranty repair.

3. Rear View Camera

As with the SYNC touchscreen, the rear-view camera malfunction appears as likely to be the result of incompatibility with the vehicle's design as any manufacturing defect. As noted above, the AT&T iPhone 8s, are not shown to be compatible after testing. Importantly, testimony reflects that the rear-view camera may malfunction similarly to the SYNC touchscreen. However, phone compatibility is a design issue not subject to the warranty. Given these considerations, the vehicle does not qualify for repurchase/replacement or warranty repair.

4. Liftgate

As demonstrated during the inspection at the hearing, the vehicle clearly has a warrantable defect that prevented the liftgate from opening by pressing the button on the liftgate exterior. Although the power liftgate may not operate reliably, the liftgate nevertheless remained operable manually. Accordingly, the defect does not impair the value or use of the vehicle to the substantial degree required for repurchase or replacement relief.²⁸ Furthermore, the service history only shows two attempts for the liftgate issue, which does not satisfy the requirement for a reasonable number

²⁸ The Lemon Law does not expressly define "substantial" but the Department's rules use a 50% loss in value as a proxy for substantial impairment. 43 TEX. ADMIN. CODE § 215.208(b)(2)(B).

of repairs, which by itself precludes repurchase/replacement relief. However, the vehicle still qualifies for repair relief.

5. 12V Power Outlet

The evidence reflects that the 12V power outlet functioned intermittently, even when using different chargers, and continued to malfunction. However, the record does not show that the intermittent functioning of the power outlet substantially impairs the use of the vehicle. Significantly, the USB ports operated/charged properly, providing an alternative to the 12V power outlet. Given these considerations, the defect does not substantially impair the value or use of the vehicle. Additionally, the service history only shows one repair attempt for this issue. Consequently, the power outlet issue cannot qualify the vehicle for repurchase or replacement. Nevertheless, repair relief still applies.

III. Findings of Fact

1. On March 21, 2017, the Complainant, leased a new 2017 Ford Explorer from Mac Haik Ford Lincoln Mercury, a franchised dealer of the Respondent, in Georgetown, Texas. The vehicle had 189 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.
3. The Complainant took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
April 6, 2017	799	Vibration at highway speeds
April 17-18, 2017	1,313	Vibration at 60 mph
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April 5-16, 2018	10,806	Vibration at 60 mph; hatch closes halfway; back up camera goes blank; SYNC screen not coming on; power outlet not always working

4. The Complainant testified that she believed that she sent written notice of the defects to the Respondent on March 10, 2018.

5. On March 8, 2018, the Complainant filed a complaint with the Department alleging that: the vehicle vibrated at 60 mph; the screen on the dash (SYNC touchscreen) goes blank; the reverse camera did not work consistently; the hatch will not close when pushing the button; and the 12V outlet did not have a good connection.
6. On May 11, 2018, the Department's Office of Administrative Hearings issued a notice of hearing directed to all parties, giving them 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.
7. The hearing in this case convened on August 6, 2018, in Austin, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented and testified for herself. Daniel Keevy, Consumer Affairs Legal Analyst, represented and testified for the Respondent. In addition, Asad Bashir, Automotive Technical Specialist, testified for the Respondent. Brandon Bains, attorney, appeared for CABT LLC (Intervenor).
8. The vehicle's odometer displayed 14,687 miles at the time of the hearing.
9. The vehicle's warranty was in effect at the time of the hearing.
10. Upon inspection at the hearing, the SYNC touchscreen turned on normally. The vehicle was test driven 13 miles, mostly on a freeway and service roads. The vehicle did not exhibit any unusual vibration. The liftgate did not respond/open when pressing the exterior liftgate button. The liftgate operated normally when pressing: the button on the dashboard below the instrument panel, the button on the remote control, and the button on the bottom of the liftgate. While inserted in the 12V port, the charger remained powered until pulled out slightly.
11. The vehicle's vibration appears to result from the vehicle's design, the low-profile tires, allowing greater transmission of vibration from the road surface.
12. Issues regarding the malfunction of the SYNC touchscreen and the rear-view cameras appear as likely to be caused by incompatibility with the Complainant's phone as by a manufacturing defect.

13. Though the liftgate's powered function may not operate consistently, the liftgate will still operate manually.
14. The 12V power port's intermittent malfunction was ongoing. However, the USB ports functioned normally.

IV. Conclusions of Law

1. The Texas Department of Motor Vehicles has jurisdiction over this matter. TEX. OCC. CODE §§ 2301.601-2301.613 and 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. The Complainant did not prove that the vehicle has a warrantable defect that creates a serious safety hazard or substantially impairs the use or market value of the vehicle. TEX. OCC. CODE § 2301.604(a).
7. If the Complainant's vehicle does not qualify for replacement or repurchase, this Order may require repair to obtain compliance with the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603; 43 TEX. ADMIN. CODE § 215.208(e).
8. The Complainant's vehicle qualifies for warranty repair. The Complainant proved that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603.

9. 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**. It is **FURTHER ORDERED** that the Respondent shall make any repairs needed to conform the subject vehicle's power liftgate and 12V power outlet to the applicable warranty as specified here. Upon this Order becoming final under Texas Government Code § 2001.144:²⁹ (1) the Complainant shall deliver the vehicle to the Respondent within 20 days; and (2) the Respondent shall complete the repair of the vehicle within **20 days** after receiving it. However, if the Department determines the Complainant's refusal or inability to deliver the vehicle caused the failure to complete the required repair as prescribed, the Department may consider the Complainant to have rejected the granted relief and deem this proceeding concluded and the complaint file closed under 43 Texas Administrative Code § 215.210(2).

SIGNED October 5, 2018



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

²⁹ This Order does not become final on the date this Order is signed, instead: (1) this Order becomes final if a party does not file a motion for rehearing within 25 days after the date this Order is signed, or (2) if a party files a motion for rehearing within 25 days after the date this Order is signed, this Order becomes final when: (A) an order overruling the motion for rehearing is signed, or (B) the Department has not acted on the motion within 55 days after the date this Order is signed. Accordingly, this Order cannot become final (1) while a motion for rehearing remains pending; or (2) after the grant of a motion for rehearing.