TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 18-0185060 CAF

GERARDO HERRERA, **Complainant**	§	**BEFORE THE OFFICE**
v.	§	**OF**
FORD MOTOR COMPANY, **Respondent**	§	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Gerardo Herrera (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) for alleged warrantable defects in his vehicle manufactured by Ford Motor Company (Respondent). A preponderance of the evidence shows that the subject vehicle has a warrantable defect that qualifies for 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 September 25, 2018, in Brownwood, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented himself. Jacklyn Elizabeth Horn, a co-worker, testified for the Complainant. Dionne Grace, Consumer Affairs Legal Analyst, represented the Respondent. Sayyd Asad Bashir, a subject matter expert, testified for the Respondent.

[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 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]

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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 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 more likely than not exists.[19] If any required fact appears more likely not to exist or equally likely to exist or not exist, 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]

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[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 September 28, 2016, the Complainant, purchased a new 2016 Ford F-150 from Southwest Auto Group, a franchised dealer of the Respondent, in Weatherford, Texas. The vehicle had 67 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 Complainant provided a general written notice of defect to the Respondent on December 28, 2018, and a more detailed written notice of defect on March 22, 2018. The March 22, 2018, notice identified continuing problems with the touchscreen and stereo, as well as the collision warning system and adaptive cruise control. On March 23, 2018, the Complainant filed a complaint with the Department alleging that a defect allowed rain water to enter the vehicle, soaking the seat, carpet, headliner, right panel, center console, the area around the glove compartment, and the moonroof. In relevant part, the Complainant took the vehicle to a dealer for repair of the alleged issues as follows:

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[24] TEX. OCC. CODE § 2301.604.

[25] 43 TEX. ADMIN. CODE § 215.209(a).

Date	Miles	Issue
Nov. 10, 2017 to Jan. 5, 2018	16,012	Leak at headlining, loose sunroof frame drain tube, damaged floor carpet
Feb. 16, 2018 to Feb. 19, 2018	17,603	Stereo will change stations without touching screen, mold smell
Jun. 8, 2018 to Jun. 9, 2018	22,006	Radio inoperable, touchscreen will glitch and switch screens

The Respondent's final opportunity to repair the vehicle occurred on February 16, 2018.

The Complainant testified that one of the invoices covered two repair attempts. The dealer provided a loaner vehicle for the first repair attempt. However, when leaving the dealership with the subject vehicle after the first repair attempt, the Complainant noticed more issues that required fixing, including the retractable roof. So, the Complainant returned the vehicle the same day but did not then get a loaner vehicle and Ms. Horn gave him a ride back. The Complainant did not have a loaner vehicle over the holidays during the second repair attempt. The Complainant explained that the underlying issue was a water leak from which other problems arose. He described the water as leaking in mostly from the passenger side. The rain continued for a week and the vehicle accumulated water in the panels up to the roof. He could hear water inside the panels and in the electronics. Papers in the glove compartment got wet. The Complainant could see water entering the vehicle when raining. The dealer (initially) repaired only the carpet and the headliner. After the dealer notified the Complainant that the vehicle was ready (in December), he found that the vehicle had electrical problems. He considered the third repair attempt to be when the field service engineer (FSE) inspected the vehicle. The vehicle did not leak after the repair. The remaining issues concerned electronics immersed in water. The water had damaged the carpet, headliner, retractable roof, SYNC touchscreen, and caused a short circuit burning some fuses. The Complainant confirmed that the headliner did not get wet after replacement; the carpet did not have water on it after replacement; and the sunroof currently functioned. However, the touchscreen continued to have different issues. The Complainant did not notice any difference concerning the short circuit. He added that he had a loaner vehicle for the third repair attempt but not the fourth. After the first repair, he returned the loaner vehicle before Christmas and did not have a vehicle over Christmas and New Year's when the second repair occurred. Regarding the SYNC system/touchscreen problems, the Complainant explained that the screen would go completely black and sometimes the system would be non-operational. The screen may come on but will not allow selecting items. He added that some defects posed a safety hazard, specifically, the collision

warning had come on with no vehicle in front and truck had accelerated though it needed to keep its distance, causing the Complainant to slam the brakes.

On cross-examination, the Complainant elaborated that the water issue resulted from heavy rain as opposed to vehicle flooding. He also confirmed that the seats operated well, but he was concerned about trapped water. He noted three instances of false collision warnings. The Complainant stated that before or after the water damage, neither the SYNC system nor his cell phone received an update and connectivity issues were not a factor. He explained that the FSE mentioned updating the vehicle's SYNC, but since then, the Complainant did not replace his phone. The Complainant pointed out that his phone was stolen about three months before the hearing. When the FSE mentioned updating, no cell phone was then used and everything essentially stayed the same then and after – no updates that he knew of were done. The FSE mentioned that SYNC needed to be updated to 3.0 but that has not happened. Mr. Bashir confirmed that on July 28, 2018, the vehicle was updated to SYNC version 2.3 but not the 3.0 level. When asked if the Complainant ever configured the vehicle to update through wi-fi or attempted to update the vehicle's SYNC software, the Complainant answered that he did not know how to do that and that as far as he knew, he had to have the dealer install updates. Mr. Bashir acknowledged that this was the case previously but SYNC 2 allowed updating with a flash drive and SYNC 3 allowed updating with a flash drive or over the air through wi-fi. Ms. Grace inquired whether he had lost his phone on June 4th (2018) and recently obtained a new one and the Complainant affirmed. He confirmed that when getting the vehicle back from the second repair, everything worked fine and he did not see more issues until later. Upon clarifying questions by the hearings examiner, the Complainant responded that he obtained a same-model replacement through insurance, an iPhone 6. He checked the phone for the operating system version, which was 11.3.1. Mr. Bashir stated the compatibility can vary by carrier. With version 11, there are some known conflicts with SYNC 3. The Complainant stated that the phone's carrier is AT&T. Mr. Bashir stated that for an iPhone 6 from AT&T, the last successfully tested version was 8.3. Mr. Complainant inquired if he would have to downgrade his phone to upgrade SYNC (to version 3). Mr. Bashir added that this does not necessarily mean the phone will not work with SYNC but if the software does not meet the manufacturer's criteria, the software is not listed as compatible until corrected. Apple devices tend to operate differently in their Bluetooth profiles, which can result in some conflicts. Depending on the version of the iPhone, e.g., 6s, 9.3.1 would be the latest version for AT&T. The most up to date

version tested successfully was the iPhone X from Verizon, which supports up to 11.1.1. Most compatible would be 8.3 or 9.3 depending on the model of iPhone 6. There are different levels of functionality. As software level increases, fewer functions are supported. Mr. Bashir inquired if replacement of the display made a difference in operation. The Complainant remembered the touchscreen working that day. The hearings examiner asked if the Complainant noticed any problems with the touchscreen before the water leak and he answered, "no." He confirmed he had the same model phone except for the replacement in June (2018).

Ms. Horn testified that when going to lunch in the subject vehicle, water poured into the vehicle from the grab handle. The leak was so bad she could not sit in the passenger seat. Over time, she noticed several glitches, such as with the center screen. Specifically, she noticed the screen go black, saw that the vehicle did not detect a key with the vehicle on and the keys inside, the touchscreen would not do anything or sometimes would have a delay. She added that after the Complainant took the vehicle in for repair, he had to return the truck because of a problem not part of the original fix, but the dealer did not provide a loaner vehicle, so she offered to give the Complainant a ride.

B. Inspection and Test Drive

Upon inspection at the hearing, the subject vehicle would not unlock using the key fob. The odometer displayed 27,003 miles before the test drive. The vehicle initially did not start when pushing the start button and the instrument panel displayed a "no key detected" message and a "tire pressure monitor fault" message along with a flashing tire pressure monitor warning light. Mr. Bashir noted the possibility of radio interference, which was consistent with the presence of a large antenna at the hearing site. The SYNC touchscreen remained blank and unresponsive during the inspection and test drive. Pressing the audio system's physical power button did nothing and pressing the other physical buttons resulted in no response as well. The Complainant noted that the vehicle would display a collision warning with no vehicle ahead and accelerated with a vehicle in front of the subject vehicle. The test drive ended with 27,026 miles on the odometer.

C. Summary of Respondent's Evidence and Arguments

Ms. Grace stated that the first service visit occurred on November 10, 2017, approximately 14 months after the warranty started. The vehicle had two visits for electrical concerns and a single

visit for water, with no mention of subsequent visits. The vehicle was out of service for 40 days, 25 of the days with a loaner vehicle, for a total of 15 days without a comparable vehicle.

Mr. Bashir testified that the first concern was with a water leak. The vehicle had a leak in the front right of the headliner. A loose drain tube at the sunroof caused the leak inside the headliner. The drain tube was re-secured and water tested, which revealed no concern. The FSE inspected the vehicle for concerns regarding a water leak and a mold smell. The FSE did not notice a moldy smell and the vehicle had a new headliner and carpeting. The vehicle had aftermarket floormats over the factory floormats, which the FSE suspected caused the smell. The glass (sunroof) panel's seal is not 100% watertight. Some small water drips pass the seal and run into the drain trough and down the drain holes. The SYNC concerns were not duplicated. However, the FSE saw the video of the SYNC system making selections without input. The FSE directed no further repairs for the leak but directed replacement of the front display, the touchscreen. The SYNC software was also updated. The Apple iPhone 6 with iOS 11.0 was found not compatible, so there may be some undesired operation. Apple devices paired with Bluetooth or connected with USB may result in locking up or a blank display. The June 8, 2018, visit addressed the radio being inoperative and the touchscreen operating on its own. The SYNC screen is a combination of modules. The radio is a separate module, the screen has its own module, and SYNC is separate. The blown radio fuse from the shorted wire indicated physical damage, not typically resulting from corrosion and high resistance as opposed to a short circuit. The radio (short circuit) was resolved. The FSE felt the touchscreen related to software incompatibility with the device (iPhone). Mr. Bashir explained that some vehicle characteristics were conducive to hearing water. The door area and the door itself are used as water drain channels. The door threshold area between the body and two seals, has a path that allows water to run down the door and sill but not inside the vehicle. Mr. Bashir explained that the collision warning system has limitations, noted in the manual, that in some situations can trigger a false warning.

D. Analysis

1. Warrantable Defect

To qualify for Lemon Law relief, the vehicle must have a defect covered by warranty (warrantable defect).[26] Lemon Law relief does not apply to all issues that a consumer may have with a vehicle but only to defects covered by warranty (warrantable defects).[27] In part, the vehicle's warranty generally states that:

> Under your New Vehicle Limited Warranty if:
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> - your Ford vehicle is properly operated and maintained, and
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> - was taken to a Ford dealership for a warranted repair during the warranty period,
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> 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).[28] 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. Unlike manufacturing defects, issues that do not arise from manufacturing, such as characteristics of the vehicle's design (which exists before manufacturing) or dealer representations and improper dealer repairs (which occur after manufacturing), are not warrantable defects. Design characteristics result from the vehicle's specified design and not from any error during manufacturing.[29] In sum, the warranty only covers

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[26] TEX. OCC. CODE §§ 2301.603(a), 2301.604(a); TEX. OCC. CODE § 2301.204.

[27] TEX. OCC. CODE §§ 2301.603(a), 2301.604(a); TEX. OCC. CODE § 2301.204.

[28] 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.").

[29] 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).

manufacturing defects and the Lemon Law does not apply to design characteristics or design defects.

In the present case, the problems with the SYNC touchscreen and stereo appear more likely to be a warranted manufacturing defect rather than an unwarranted design defect. At the inspection of the vehicle at the hearing, the SYNC touchscreen remained blank and unresponsive during the inspection and test drive. Pressing the audio system's physical power button did nothing and pressing the other physical buttons resulted in no response as well. Most significantly, the record reflects that the SYNC touchscreen operated properly until after the water leak caused by a manufacturing defect, specifically, a loose drain tube by the sunroof. The SYNC touchscreen functioned properly from September 28, 2016, the date of sale to some point during or after the first repair visit on November 10, 2017, a span of over a year. Although the record includes evidence of possible design-related compatibility issues, the timing of the problem indicates that the touchscreen problem directly resulted from the defective drain tube, considering that the Complainant had the same iPhone 6 before the touchscreen issues, but the issues did not arise until after the leak due to the defective drain tube.

The issues regarding the collision warning system and adaptive cruise control appear to be design issues not covered by warranty. The owner's manual warns that: (1) "This system is an extra driving aid. It does not replace your attention and judgment, or the need to apply the brakes. This system does NOT automatically brake your vehicle. If you fail to press the brake pedal when necessary, you may collide with another vehicle." (2) "The collision warning system with brake support cannot help prevent all collisions. Do not rely on this system to replace your judgment and the need to maintain correct distance and speed." And (3) "The collision warning system's brake support reduces collision speed only if you brake your vehicle before any collision. As in any typical braking situation, you must press your brake pedal."[30] Regarding adaptive cruise control, the owner's manual warns, in part: (1) "Always pay close attention to changing road conditions, especially when using adaptive cruise control. Adaptive cruise control cannot replace attentive driving. Failing to follow any of the warnings below or failing to pay attention to the road may result in a crash, serious injury or death." (2) "Adaptive cruise control is not a crash warning or avoidance system." And (3) "It is your responsibility to stay alert, drive safely and control the

[30] Complainant's Ex. 9, 2016 F-150 Owner's Manual at 239-240.

vehicle at all times."[31] As designed, the collision avoidance and adaptive cruise control are aids that do not guarantee prevention of collisions and clearly do not replace the driver's judgment and operation.

2. Substantial Impairment

Under the Department's reasonable prospective purchaser test (previously addressed in the discussion of applicable law), the malfunctioning SYNC touchscreen substantially impairs the market value of the vehicle. Under certain circumstances, Texas law requires the use of a hands-free device when using a wireless communication device.[32] However, such hands-free operation is a feature of SYNC,[33] which cannot be utilized when malfunctioning as described by the Complainant and as shown during the inspection at the hearing.

3. Reasonable Repair Attempts

As outlined in the discussion of applicable law, the Complainant must every element required for Lemon Law relief. Lemon Law relief cannot be granted if even one element remains unproven. In the present case, a preponderance of the evidence does not show reasonable repair attempts. As explained by the Complainant, the November 10, 2017, service visit includes two repair attempts since the Complainant picked up the vehicle and returned after finding further problems. Accordingly, the vehicle has had a total of four repair attempts as outlined in the repair orders. However, to qualify as a reasonable number of repair attempts, the Lemon Law requires that "the same nonconformity continues to exist after being subject to repair four or more times."[34] In this case, the repair history only shows two repair attempts for the SYNC touchscreen or stereo. Two repair attempts can qualify as a reasonable number of attempts for serious safety hazards, the malfunctioning SYNC touchscreen and stereo do not fit the Lemon Law's definition of "serious safety hazard."[35] Finally, the evidence does not show that the vehicle more likely than not satisfies the requirement for reasonable repairs by being out of service for repair 30 or more days. Although

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[31] Complainant's Ex. 9, 2016 F-150 Owner's Manual at 222.

[32] TEX. TRANSP. CODE § 545.425-545.4252.

[33] Complainant's Ex. 9, 2016 F-150 Owner's Manual at 419-430.

[34] TEX. OCC. CODE § 2301.605(a)(1).

[35] TEX. OCC. CODE § 2301.601(4) ("'Serious safety hazard' means a life-threatening malfunction or nonconformity that: (A) substantially impedes a person's ability to control or operate a motor vehicle for ordinary use or intended purposes; or (B) creates a substantial risk of fire or explosion.").

the record shows that the vehicle has been out of service for repair for over 30 days, the Lemon Law also provides that the 30 days out of service does not include any period during which the Complainant has a loaner vehicle.[36] The repair history reflects a total of 60 days out of service for repair. The Complainant testified that he had a loaner vehicle for the first repair attempt of the November 10, 2017, visit and the three days of the February 16, 2018, visit. However, the Complainant could not specify the date when he returned the rental vehicle after the first repair attempt but could only narrow the time frame to a period before Christmas. Without a more certain date, the record does not contain sufficient the information to determine whether the days out of service for repair without a loaner vehicle. In contrast, the Respondent submitted documentation from Southwest Ford showing 40 days at the dealership for repair and 25 days with a comparable loaner vehicle, for a total of15 days out of service without a loaner vehicle. Because the evidence does not show reasonable repair attempts, the vehicle cannot qualify for repurchase or replacement relief.[37] Nevertheless, because a warrantable defect does exist, the vehicle qualifies for repair relief.

III. Findings of Fact

1. On September 28, 2016, the Complainant, purchased a new 2016 Ford F-150 from Southwest Auto Group, a franchised dealer of the Respondent, in Weatherford, Texas. The vehicle had 67 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
Nov. 10, 2017 to Jan. 5, 2018	16,012	Leak at headlining, loose sunroof frame drain tube, damaged floor carpet
Feb. 16, 2018 to Feb. 19, 2018	17,603	Stereo will change stations without touching screen, mold smell
Jun. 8, 2018 to Jun. 9, 2018	22,006	Radio inoperable, touchscreen will glitch and switch screens

[36] TEX. OCC. CODE § 2301.605(c).

[37] 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. However, the facts in this case does not support deviating from the number of attempts and days out of service specified in the presumption.

4. The Complainant provided a general written notice of defect to the Respondent on December 28, 2018, and a more detailed written notice of defect on March 22, 2018. The March 22, 2018, notice identified continuing problems with the touchscreen and stereo, as well as the collision warning system and adaptive cruise control.

5. On March 23, 2018, the Complainant filed a complaint with the Department alleging that a defect allowed rain water to enter the vehicle, soaking the seat, carpet, headliner, right panel, center console, the area around the glove compartment, and the moonroof.

6. On June 27, 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 September 25, 2018, in Brownwood, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented himself. Jacklyn Elizabeth Horn, a co-worker, testified for the Complainant. Dionne Grace, Consumer Affairs Legal Analyst, represented the Respondent. Sayyd Asad Bashir, a subject matter expert, testified for the Respondent.

8. The vehicle's odometer displayed 27,003 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 odometer displayed 27,003 miles before the test drive. The SYNC touchscreen remained blank and unresponsive during the inspection and test drive. Pressing the audio system's physical power button did nothing and pressing the other physical buttons resulted in no response as well. The test drive ended with 27,026 miles on the odometer.

11. The record does not show that the subject vehicle was out of service for repair 30 days or more without a loaner vehicle provided to the Complainant.

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 meets the requirement for a reasonable number of repair attempts. TEX. OCC. CODE §§ 2301.604(a) and 2301.605(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.

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 SYNC touchscreen and audio system to the applicable warranty

as specified here. Upon this Order becoming final under Texas Government Code § 2001.144:[38] (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 November 26, 2018

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

[38] 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.