

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 18-0187932 CAF**

**GRETCHEN M. and  
JAMES C. MERCER,  
Complainants**

v.

**FORD MOTOR COMPANY,  
Respondent**

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**BEFORE THE OFFICE  
  
OF  
  
ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Gretchen M. Mercer and James C. Mercer (Complainants) 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 their 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<sup>1</sup> and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law. The hearing in this case convened on October 30, 2018, in Amarillo, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainants represented and testified for themselves. Chauncey Hanke, a technician and owner of an independent repair facility, testified by telephone for the Complainants. Robert (Bob) Kendall, appearing by telephone, represented the Respondent. Rudy Ibarra, Parts and Service Director for Gene Messer Ford, and Jimmi Juarez, Service Advisor for Gene Messer Ford, testified by telephone for the Respondent.

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<sup>1</sup> 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.”<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

##### 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.”<sup>5</sup>

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<sup>2</sup> TEX. OCC. CODE § 2301.604(a).

<sup>3</sup> TEX. OCC. CODE § 2301.604(a).

<sup>4</sup> TEX. OCC. CODE § 2301.601(4).

<sup>5</sup> *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.”<sup>6</sup>

**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.<sup>7</sup>

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.<sup>8</sup>

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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<sup>6</sup> *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.”).

<sup>7</sup> TEX. OCC. CODE § 2301.605(a)(1)(A) and (B).

<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup>

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.<sup>11</sup> 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.<sup>12</sup>

**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;<sup>13</sup> (2) the manufacturer was given an opportunity to cure the defect or nonconformity;<sup>14</sup> 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.<sup>15</sup>

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<sup>9</sup> TEX. OCC. CODE § 2301.605(a)(3).

<sup>10</sup> TEX. OCC. CODE § 2301.605(c).

<sup>11</sup> *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.’”).

<sup>12</sup> *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.”).

<sup>13</sup> TEX. OCC. CODE § 2301.606(c)(1).

<sup>14</sup> 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).

<sup>15</sup> 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.<sup>16</sup> The manufacturer, converter, or distributor has an obligation to “make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty.”<sup>17</sup>

## 3. Burden of Proof

The law places the burden of proof on the Complainants.<sup>18</sup> The Complainants must prove all facts required for relief by a preponderance of the evidence. That is, the Complainants must present sufficient evidence to show that every required fact more likely than not exists.<sup>19</sup> Accordingly, the Complainants cannot prevail where the existence of any required fact appears equally likely or unlikely.

## 4. The Complaint Identifies the Issues in this Proceeding

The complaint identifies the issues to be addressed in this proceeding.<sup>20</sup> 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.”<sup>21</sup> However, the parties may expressly or impliedly consent

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<sup>16</sup> TEX. OCC. CODE § 2301.204; 43 TEX. ADMIN. CODE § 215.202(b)(3).

<sup>17</sup> TEX. OCC. CODE § 2301.603(a).

<sup>18</sup> 43 TEX. ADMIN. CODE § 215.66(d).

<sup>19</sup> *E.g., Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

<sup>20</sup> “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.”).

<sup>21</sup> 43 TEX. ADMIN. CODE § 215.202(a)(2).

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

## 5. Incidental Expenses

When repurchase or replacement is ordered, the Lemon Law provides for reimbursing the Complainants for reasonable incidental expenses resulting from the vehicle's loss of use because of the defect.<sup>24</sup> 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 Complainants 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).<sup>25</sup>

### A. Summary of Complainants' Evidence and Arguments

On June 13, 2017, the Complainants, purchased a new 2017 Ford Explorer from Gene Messer Ford Lincoln, a franchised dealer of the Respondent, in Amarillo, Texas. The vehicle had two 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. On June 23, 2018, the Complainants provided a written notice of defect to the Respondent. On June 25, 2018, the Complainants filed a complaint with the Department alleging that: the second row power fold seat will not fold; the engine shudders; the BLIS (Blind Spot Information System) exhibits random alarms; the front and back cameras work intermittently; the vehicle exhibits random error messages and alarms, such as: "camera malfunction", "service required", and a coffee cup indicator; the cross-traffic alarm does not always work when backing out.

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<sup>22</sup> 43 TEX. ADMIN. CODE § 215.42; TEX. R. CIV. P. 67.

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

<sup>24</sup> TEX. OCC. CODE § 2301.604.

<sup>25</sup> 43 TEX. ADMIN. CODE § 215.209(a).

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

<b>Date</b>	<b>Miles</b>	<b>Issue</b>
11/1/17	6,406	Turbos loud under load
11/8/17- 11/13/17	7,407	Loud roar - turbo; vehicle shudders; seat will not fold properly
11/16/17- 11/29/17	7,556	Power folding seat not working properly; vehicle shudders
6/4/18- 7/30/18	13,186	Vehicle would not restart; power folding seat not working properly; rear view camera works intermittently; random BLIS alarms

The Respondent's field service engineer inspected the vehicle on July 23, 2018.

Mr. Hanke testified that the Complainants brought the subject vehicle to him for a second opinion. He found that: with the vehicle in reverse, he could walk within two feet of the back and the cameras would not pick him up; the second-row seat malfunctioned about every second attempt, whether failing to latch or folding improperly; the vehicle shuddered, which was hard to duplicate but significant, which he believed involved a small issue with the turbo or something related. He noted that the subject vehicle's cameras showed the perimeter differently than other vehicles. Sometimes far-away objects appeared close and sometimes the cameras would not pick up anything. He estimated the cameras worked about 10% of the time. He explained that subject vehicle did not sense the posts of the lift when backing the vehicle off the lift. In contrast, other vehicles with camera systems usually shows the posts. Regarding the shudder, Mr. Hanke elaborated that he experienced the shudder twice, which was extremely noticeable. He described the shudder as feeling like a diesel with turbo blowback – turbo shudder.

On cross-examination, Mr. Hanke affirmed that he was not a Ford certified technician. Although he had not evaluated any other 2017 Explorer's for the same issues as the subject vehicle, he did do an alignment on a Ford Explorer that showed the posts around the vehicle when pulling onto the lift. He acknowledged that he was not an expert on BLIS and that his facility could not check the vehicle's camera targeting but he understood the principle of how they worked and he owned two Toyotas with a bird's eye system but not a Ford. He explained that the shudder depended on the throttle position and load. When shuddering, the vehicle jerked back and forth, as if from a power surge or the transmission but he did not believe it was from the transmission. Mr. Hanke stated that he only tried the power fold seat function and not the manual function.

Mrs. Mercer testified that none of the issues were successfully resolved. She first noticed the second row power fold seat issue about two days after taking the vehicle home and trying to let people in and the seat would not raise (fold and tumble). The power fold feature would initially work after repair but would malfunction within a day. She was not aware of the seats manual latch. She estimated that the power fold malfunctioned about 80% to 90% of the time. She pointed out that when the seat did fold, it slapped so hard she was afraid of injury to passengers that get too close. She elaborated that the dealer lubricated the seat and she was concerned whether the seat would function properly in a wreck, so she no longer allowed passengers in that seat. She last noticed the seat failing the day before the hearing.

Mrs. Mercer compared the engine shudder to the feel of a Camaro taking off in 5th gear. The shudder started when she first bought the vehicle. She explained that when passing, the vehicle sounded like a wind tunnel and started shuddering. The dealer attributed the shudder to the turbos and the hoses the turbos were not all properly connected or were cracked. The vehicle will shudder after sitting at two or three traffic lights. Mr. Mercer added that the shudder occurred the morning of the hearing. Mrs. Mercer confirmed she last noticed the shudder the morning of the hearing.

Regarding BLIS, Mrs. Mercer testified that when backing up, the rear camera did not come on. The vehicle also displayed an error message for a front camera malfunction. The vehicle would display random warnings. When getting the mail, sometimes BLIS would turn on and other times not. The display would show red around the car with no cars around. She first noticed a rear camera/cross traffic warning issue when leaving the dealer's parking lot; Mrs. Mercer pulled out too far so she backed up and the alarm went off with no traffic around. Another time, when backing up, the vehicle did not pick up two people. She last noticed the issue when getting the mail on the Friday before the hearing. The vehicle also did not sense the parking lot gate arms when leaving the airport. Also, the vehicle did not sense anything when going through a car wash in park the night before the hearing, but she added that the system may not work in park.

Mrs. Mercer explained that when shifting in to reverse, the vehicle may show a message to check the surrounding area but no camera view. Other times, the vehicle will not show the surround view and only show the front. She first noticed the front camera malfunction about two weeks after purchasing the vehicle and the rear camera after about two months. She stated she last saw the front camera malfunction several months ago. She last noticed the rear camera malfunction about

three weeks before the hearing. While backing up, the vehicle brought up the camera but not the “message system”.

Mrs. Mercer testified that the vehicle displayed error messages for front camera malfunctions and once displayed a coffee cup symbol, which has not recurred. The vehicle first displayed a camera malfunction message about two weeks after purchasing the vehicle. The vehicle last displayed a warning message for the charging system on June 4th (2018), which did not occur on any other day. The front camera warning last occurred around November 2017; she thought that flashing the system helped.

Mrs. Mercer explained that the cross traffic alert worked intermittently. In one instance, the vehicle did not give any warning with two people near the vehicle. Another time, Mr. Mercer stood behind the vehicle, but the vehicle sensed him in front of the vehicle. She also captured video of a vehicle driving by that the system did not pick up. She first noticed the cross traffic issue about April or May 2017. She last noticed this issue about four weeks before the hearing.

On cross-examination, Mrs. Mercer testified that a passenger would have to crawl over the second row seating to access the third row. Mr. Kendall asked if passengers could access the third row through either side of the second row, the driver side, which has both a power and manual function or the passenger side, which only has the manual function. Mrs. Mercer explained that a passenger would have to crawl over the seat in the middle (row). When asked if passengers could access the third row with either second row seat released, she answered that they could through the passenger side. However, Mrs. Mercer noted that they have an infant seat on the passenger side second row seat, which has to be removed to fold the seat. Mrs. Mercer clarified that the shudder occurred when pressing the gas to take off. She compared the shudder to starting in too high of a gear in a manual transmission. When sitting at two or three lights, the vehicle will present the same shudder at take off. Mr. Kendall asked if Mrs. Mercer knew about alert systems other than BLIS and cross traffic, such as proximity (obstacle distance indicator). She answered yes, that it would go off within two feet. Regarding the system turning red while stopped at a traffic light, Mr. Kendall asked if Mrs. Mercer knew that the red bar that showed something there was not BLIS. She answered that Mr. Ibarra referred to it as BLIS. She confirmed that the system detected something. She confirmed that she first reported the front camera issue at the first service visit for the front camera. She probably reported the rear camera issue on November 8th (2017). When

asked when the charging system message appeared, she answered June 4th (2018). Mrs. Mercer affirmed that the message did not reappear after the dealer found a belt had come off. Mr. Kendall asked about Mrs. Mercer's testimony that the front camera issue has not happened since November 17, 2017, in relation to the Complainants' claims that the front and rear cameras worked intermittently. She explained that the back camera still malfunctioned. Regarding the instance when the vehicle did not identify a nearby car while backing up, Mr. Kendall asked about the location of the other car when she first saw it. She replied that the vehicle was beside her with both vehicles on the same street. She confirmed that the manual stated that system may pick up objects up to 20 feet away, which means the system may or may not pick up an object at 20 feet. She affirmed the vehicle was more than five feet away. The complaint listed November 16, 2017, as the first repair visit for the cross traffic system but she testified she first noticed the issue about April 2018, which Mrs. Mercer confirmed. She noted that the dealer provided a loaner vehicle for the November 16, 2017, visit and that they still had the loaner vehicle when their grandson was born and did not return the loaner until after July 23rd. In response to the hearings examiner's clarifying questions, Mrs. Mercer stated that she had a loaner vehicle from the June 16 to July 24, 2018 (Mrs. Mercer appeared to intend to say November 16 and not June 16).

### **B. Inspection**

Upon inspection at the hearing, the vehicle's odometer displayed 15,227 miles. The power fold seat (driver's side, second row) folded on the first attempt but did not tumble forward. Mrs. Mercer noted that sometimes the power fold seat would not fold at all. The hearings examiner attempted to fold and tumble the seat manually. The seat folded but would not initially tumble forward. The seat eventually tumbled forward after multiple difficult attempts due to stiffness in the latch release handle. Mrs. Mercer confirmed that only the left side of the second row had the problem with folding/tumbling. The vehicle shuddered soon after starting the engine when leaving the parking lot. Mrs. Mercer commented that the transmission appeared to work well. She noted that she felt some shudder when accelerating at different times. The lane assist indicator was initially grayed out but turned on shortly afterwards. The vehicle was test driven for four miles on a service road and major arterials. The cross traffic alert activated with a vehicle about one or more feet away; however, the hearings examiner observed the distance after hearing the alert and the

distance had narrowed. The vehicle's cameras would pick up Mr. Mercer walking around the vehicle about two feet or less but not at three feet.

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

Mr. Juarez testified that the first repair order, for the November 1, 2017, visit only showed two items: passenger seat stitching and turbos loud under load. In e-mail correspondence with Mrs. Mercer, he was only aware of the stitching and turbo noise but not any shudder or power folding function. He stated that the dealer did not find any shudder on a test drive after the turbo repair.

Mr. Ibarra affirmed that the shudder was not verified and the turbo noise was resolved. He confirmed that the Complainants did not report shudder other than November 8th and 16th and not November 1st or June 4th. the Complainants may have notified sales personnel but not service personnel. He confirmed that the power fold seat would not function (tumble forward) about 20% of the time. He affirmed that BLIS was only mentioned on June 4th (2018). Random error messages and cross traffic were not reported at any repair visits

Mr. Kendall testified, that the shudder and power folding seat issues were reported within the first 12,000 miles but none of the other complained of issues were reported in that time. The Respondent understood the folding seat issue was ongoing but contended that the issue was not a substantial impairment or a safety hazard and the third row remained accessible.

### **D. Analysis**

As an initial matter, the record does not show the required repair attempts for any of the existing issues. The vehicle only had two repair attempts for the shudder, three attempts for the power folding seat, and one attempt each for the rear view camera and BLIS alarms. Also, the record reflects that the Complainants had a loaner vehicle for the vast majority of the relevant repair time except for a little over a week. Moreover, testimony shows the front camera issue to have been successfully resolved by flashing an update. Further, the cross traffic system and random error messages/alarms have no recorded repair attempts at all and the cross traffic and proximity sensor issues were not included in the complaint. Accordingly, the vehicle cannot qualify for repurchase or replacement but may still qualify for repair relief. The record shows that the following issues qualify for repair: second row power folding seat, engine shudder, and rear camera. With regard to BLIS, cross traffic system, and proximity sensor (obstacle distance

indicator), the evidence is equivocal as to whether the problems arise from actual manufacturing defects or simply limitations and characteristics of the technology as described in the owner's manual.

### III. Findings of Fact

1. On June 13, 2017, the Complainants, purchased a new 2017 Ford Explorer from Gene Messer Ford Lincoln, a franchised dealer of the Respondent, in Amarillo, Texas. The vehicle had two 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 Complainants took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
11/1/17	6,406	Turbos loud under load
11/8/17- 11/13/17	7,407	Loud roar - turbo; vehicle shudders; seat will not fold properly
11/16/17- 11/29/17	7,556	Power folding seat not working properly; vehicle shudders
6/4/18- 7/30/18	13,186	Vehicle would not restart; power folding seat not working properly; rear view camera works intermittently; random BLIS alarms

4. On June 23, 2018, the Complainants provided a written notice of defect to the Respondent.
5. On June 25, 2018, the Complainants filed a complaint with the Department alleging that: the middle row power seat will not fold; the engine shudders; the BLIS (Blind Spot Information System) exhibits random alarms; the front and back cameras work intermittently; the vehicle exhibits random error messages and alarms, such as: "camera malfunction", "service required", and a coffee cup indicator; the cross-traffic alarm does not always work when backing out.
6. On August 3, 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 October 30, 2018, in Amarillo, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainants represented and testified for themselves. Chauncey Hanke, a technician and owner of an independent repair facility, testified by telephone for the Complainants. Robert (Bob) Kendall, appearing by telephone, represented the Respondent. Rudy Ibarra, Parts and Service Director for Gene Messer Ford, and Jimmi Juarez, Service Advisor for Gene Messer Ford, testified by telephone for the Respondent.
8. The vehicle's odometer displayed 15,227 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 vehicle's odometer displayed 15,227 miles. The power fold seat (driver's side, second row) folded on the first attempt but did not tumble forward. Mrs. Mercer noted that sometimes the power fold seat would not fold at all. The hearings examiner attempted to fold and tumble the seat manually. The seat folded but would not initially tumble forward. The seat eventually tumbled forward after multiple difficult attempts due to stiffness in the latch release handle. Mrs. Mercer confirmed that only the left side of the second row had the problem with folding/tumbling. The vehicle shuddered soon after starting the engine when leaving the parking lot. Mrs. Mercer commented that the transmission appeared to work well. She noted that she felt some shudder when accelerating at different times. The lane assist indicator was initially grayed out but turned on shortly afterwards. The vehicle was test driven for four miles on a service road and major arterials. The cross traffic alert activated with a vehicle about one or more feet away; however, the hearings examiner observed the distance after hearing the alert and the distance had narrowed. The vehicle's cameras would pick up Mr. Mercer walking around the vehicle about two feet or less but not at three feet.
11. The rear view camera would only display an image intermittently.

#### 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 hearing 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 Complainants 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 Complainants bears the burden of proof in this matter. 43 TEX. ADMIN. CODE § 206.66(d).
6. The Complainants' vehicle does not qualify for replacement or repurchase. The Complainants did not meet the requirement for a reasonable number of repair attempts. TEX. OCC. CODE §§ 2301.604(a) and 2301.605(a).
7. If the Complainants' 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 Complainants' vehicle qualifies for warranty repair. The Complainants 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 Complainants' 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 second row power folding seat, engine shudder, and rear camera to the applicable warranty as specified here. Upon this Order becoming final under Texas

Government Code § 2001.144:<sup>26</sup> (1) the Complainants 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 Complainants' refusal or inability to deliver the vehicle caused the failure to complete the required repair as prescribed, the Department may consider the Complainants 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 December 31, 2018**



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

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<sup>26</sup> 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.