

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 19-0003583 CAF**

**ELENA and DANIEL BESAW,
Complainants**

v.

**FCA US LLC,
Respondent**

§
§
§
§
§
§
§

BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Elena and Daniel Besaw (Complainants) filed a petition seeking relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in their new 2018 Dodge Journey Crossroad. Complainants assert that the vehicle is defective because it doesn't have enough power to go uphill, the cruise control will reduce speed 10 to 16 mph when going uphill, the brakes shake at start up, the vehicle shakes at start up, the radio display screen will freeze intermittently, and intermittently the vehicle feels like it's still going when approaching a stop. FCA US LLC (Respondent) argued that the vehicle is operating as designed and Complainants are not entitled to repurchase or replacement relief. The hearings examiner concludes that the vehicle does have an existing warrantable defect and Complainants are eligible for repurchase relief.

I. PROCEDURAL HISTORY, NOTICE AND JURISDICTION

Matters of notice and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law. The hearing in this case convened on June 12, 2019, in El Paso, Texas before Hearings Examiner Edward Sandoval. Complainants, Elena and Daniel Besaw, were present and represented themselves in the hearing. Jacqueline Cano, a cousin, appeared and testified for Complainants. Mathew Collins, co-worker, appeared telephonically and testified for Complainants. Rebecca Gonzalez, a friend, appeared at the hearing, but left the hearing before she was given an opportunity to testify. Respondent, FCA US LLC, was represented in the hearing by Jan Kershaw, Early Resolution Case Manager. Torry Piechowski, Technical Advisor, testified for Respondent. The hearing record was closed on June 13, 2019, upon the submission of Respondent's documents requested by the hearings examiner.

II. DISCUSSION

A. Applicable Law

The Lemon Law provides, in part, that a manufacturer of a motor vehicle must repurchase or replace a vehicle complained of with a comparable vehicle if the following conditions are met. First, the manufacturer is not able to conform the vehicle to an applicable express warranty by

repairing or correcting a defect after a reasonable number of attempts.¹ Second, the defect or condition in the vehicle creates a serious safety hazard or substantially impairs the use or market value of the vehicle.² Third, the owner must have mailed written notice of the alleged defect or nonconformity to the manufacturer.³ Lastly, the manufacturer must have been given an opportunity to cure the defect or nonconformity.⁴

In addition to these conditions, a rebuttable presumption exists that a reasonable number of attempts have been undertaken to conform a motor vehicle to an applicable express warranty if the same nonconformity continues to exist after being subject to repair four or more times by the manufacturer, converter, or distributor, or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and the repair 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.⁵

If a vehicle is found to have a nonconformity that creates a serious safety hazard which continues to exist, the rebuttable presumption that a reasonable number of repair attempts have been performed can be established if the vehicle has been subject to repair two or more times 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.⁶

“Serious safety hazard” means ~~a life-threatening malfunction or~~ nonconformity that substantially impedes a person’s ability to control or operate a vehicle for ordinary use or intended purposes, or creates a substantial risk of fire or explosion.⁷

B. Complainant’s Evidence and Arguments

Complainants purchased a new 2018 Dodge Journey Crossroad (the vehicle) from Viva Dodge Chrysler Jeep (Viva) in El Paso, Texas.⁸ The vehicle had mileage of 131 at the time of purchase on July 14, 2018.⁹ Respondent provided a bumper-to-bumper warranty for the vehicle which

¹ Tex. Occ. Code § 2301.604(a).

² *Id.*

³ Tex. Occ. Code § 2301.606(c)(1).

⁴ Tex. Occ. Code § 2301.606(c)(2).

⁵ Tex. Occ. Code § 2301.605(a)(1)(A) and (B). Texas Occupations Code § 2301.605(a) (3) provides a third method for a complainant to establish a rebuttable presumption that a reasonable number of attempts have been undertaken to conform a vehicle to an applicable express warranty. This section requires that the vehicle be out of service for repair for a total of 30 or more days in the 24 months or 24,000 miles, whichever occurs first, following the date of original delivery to the owner.

⁶ Tex. Occ. Code § 2301.605(a)(2)(A) and (B).

⁷ Tex. Occ. Code § 2301.601(4).

⁸ Complainant Ex. 1, Motor Vehicle Retail Installment Sales Contract and Cash Retail Purchase Order dated July 14, 2018.

⁹ *Id.*, p. 3.

provides coverage for three (3) years or 36,000 miles, whichever comes first.¹⁰ Respondent also provided a powertrain warranty for the vehicle providing coverage for the vehicle's powertrain for five (5) years or 60,000 miles.¹¹ At the time of hearing, the vehicle's mileage was 12,488. Respondent's warranties for the vehicle were still in effect on the hearing date.

1. Elena Besaw's Testimony

Elena Besaw, co-Complainant, testified at the hearing. She's the primary driver of the vehicle. Ms. Besaw stated that she did test drive the vehicle prior to purchasing it. However, it was a rainy day and she was driving slower than she would have if the weather had been better. Ms. Besaw stated that soon after purchasing the vehicle, she noticed that it seemed to lack power or acceleration. It did not seem to pick up speed as a normal vehicle would. Ms. Besaw testified that she thought that the lack of acceleration might be because the vehicle needed to be "broken in."

Ms. Besaw stated that she and her husband drove the vehicle to Ruidoso, New Mexico on vacation on August 15, 2018. She observed that the vehicle lacked power driving through the New Mexico mountains on their way to their destination. Ms. Besaw also felt that the vehicle's cruise control failed to operate properly on the trip, in that the vehicle's speed seemed to drop far below the speed set on the cruise control. In addition, the vehicle did not have enough power or acceleration to be able to drive them to their rental cabin or the crest of the hill. They had to park several feet below the cabin.

Upon their return to El Paso, Complainants took the vehicle to Viva for repair for the lack of power, lack of acceleration issue on August 22, 2018. Viva's service technician performed a diagnostic scan on the vehicle's computers and did not find any active or stored diagnostic trouble codes (DTC's).¹² The technician determined that the vehicle was operating as designed and did not perform any repairs for Complainants' concern.¹³ The vehicle's mileage at the time was 1,683.¹⁴ The vehicle was in Viva's possession for one (1) day. Complainants did not receive a loaner vehicle at the time.

Ms. Besaw testified that on August 24, 2018, she attempted to drive the vehicle up a hill in El Paso. Ms. Besaw stated that the vehicle was rolling back when she was driving it up the hill. She pulled the vehicle to the side to allow another car behind her to pass her. Ms. Besaw made a U turn in the vehicle, since she felt that the vehicle would not be able to finish the drive uphill. Complainants took the vehicle to Viva for repair on August 25, 2018, because of the lack of power issue. Viva's technician determined that the vehicle was operating as designed and did not perform

¹⁰ Complainant Ex. 10, Vehicle Monroney Sticker.

¹¹ *Id.*

¹² Complainant Ex. 3, Repair Order dated August 22, 2018.

¹³ *Id.*

¹⁴ *Id.*

any repairs at the time.¹⁵ The vehicle's mileage on this occasion was 1,806.¹⁶ The vehicle was in Viva's possession for four (4) days on this occasion. Complainants were not provided with a loaner vehicle during this visit.

Ms. Besaw testified that the vehicle continued to suffer from a lack of power or lack of acceleration. Ms. Besaw stated that she attempted to drive the vehicle up a hill on August 30, 2018. The vehicle struggled to make it to the top of the hill and wouldn't go faster than 15 mph when going up the hill. As a result, Complainants took the vehicle for repair to Dick Poe Dodge (Poe) in El Paso on August 31, 2018. Complainants raised several issues during this repair visit. The issues complained of were: the vehicle lacking power going uphill, the vehicle's brake pedal vibrating at start up, the vehicle shaking at start up, the cruise control reducing speed after it was set at a certain speed, and the vehicle's display screen freezing up when a cell phone was connected to the vehicle with a USB cord. Poe's technician determined that the vehicle was operating as designed regarding the vehicle's lack of acceleration and the cruise control issues.¹⁷ The technician was unable to duplicate any of the other concerns raised by Complainants.¹⁸ The vehicle's mileage on this occasion was 1,998.¹⁹ The vehicle was in Poe's possession for one (1) day. Complainants did not receive a loaner vehicle at the time.

Complainants mailed a notice to Respondent on September 13, 2018, advising them that Complainants were dissatisfied with the vehicle.²⁰ Complainants filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) on November 27, 2018.²¹

Ms. Besaw stated that she was contacted by Respondent's representative in January of 2019 who asked that Respondent's technician be allowed to inspect the vehicle. Complainants agreed to allow the technician to inspect the vehicle at Viva on February 23, 2019. The vehicle's mileage at the time was 9,545.²² The vehicle was in Viva's possession until February 28, 2019, on this occasion.²³ Complainants received a loaner vehicle while the vehicle was being inspected. Complainants were not given any information regarding the technician's findings or whether any repairs had been performed to the vehicle. Complainants were informed that they'd be contacted by Respondent regarding the action taken on this occasion. Ms. Besaw testified that they never received any news regarding the technician's findings.

Ms. Besaw testified that she had a scare in the vehicle in late March of 2019. Ms. Besaw stated that she was driving the vehicle on the highway, a vehicle cut in front of her, and the vehicle behind was close to her vehicle. Ms. Besaw attempting to speed up to give the vehicle following her space

¹⁵ Complainant Ex. 4, Repair Order dated August 25, 2018.

¹⁶ *Id.*

¹⁷ Complainant Ex. 5, Repair Order dated August 31, 2018.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Complainant Ex. 6, Letter to FCA US LLC Customer Center dated September 13, 2018.

²¹ Complainant Ex. 1, Lemon Law Complaint dated November 27, 2018.

²² Complainant Ex. 8, Repair Order dated February 23, 2019.

²³ *Id.*

and her vehicle did not respond. The vehicle behind Ms. Besaw came near to hitting Complainant's vehicle and the driver had to slam on their brakes in order to avoid a collision. As a result of the near accident, Ms. Besaw took the vehicle to Viva for repair on March 29, 2019. Viva's service technician was unable to duplicate a concern with the vehicle and did not perform any repair at that time.²⁴ The vehicle's mileage at the time was 10,307.²⁵ The vehicle was Viva's possession for the weekend. Complainants did not receive a loaner vehicle at the time.

Ms. Besaw testified that the vehicle still suffers from a lack of power or acceleration. Ms. Besaw said that this last occurred about a week to a week and a half prior to the hearing date. She has gotten to the point where she avoids driving up hills if possible. In addition, the vehicle's cruise control is still behaving the same way as far as she knows. Also, the vehicle's brake pedal and the vehicle itself intermittently shake at start up. These last concerns occurred two (2) weeks and three (3) weeks prior to the hearing respectfully. Intermittently the radio display screen will freeze up. This last occurred about a month before the hearing. Finally, the issue with the vehicle feeling like it's still going when it's coming to a stop last occurred about two (2) weeks prior to the hearing.

Ms. Besaw said that she doesn't feel safe when driving the vehicle. She feels that she may get in an accident because the vehicle lacks acceleration. Ms. Besaw stated that she's driven vehicles that had four (4) cylinder engines in the past and that this one doesn't act like any of them. Ms. Besaw testified that about two (2) weeks prior to the hearing she stopped driving the vehicle due to her concerns.

Ms. Besaw also testified that Complainants are requesting that Respondent be ordered to reimburse them for expenses incurred as the result of the rental vehicle provided to them when Respondent's representative inspected the vehicle on February 26, 2019. Complainants were provided a rental vehicle for five (5) days on this occasion. Complainants elected to accept the optional damage waiver offered by the rental car company.²⁶ They did not want to be responsible for paying their insurance deductible on the rental vehicle if it was damaged in an accident. The cost for the waiver was \$103.44.²⁷ In addition, Ms. Besaw requested that Complainants also be reimbursed \$44.59 for gasoline for the vehicle and for the rental vehicle.²⁸

2. Daniel Besaw's Testimony

Daniel Besaw, co-Complainant, testified in the hearing. He stated that he is not the primary driver of the vehicle. He does drive it periodically on weekends and when Complainants go on a trip together.

²⁴ Complainant Ex. 9, Repair Order dated March 29, 2019.

²⁵ *Id.*

²⁶ Complainant Ex. 14, Enterprise Rental Agreement dated February 28, 2019, and Circle K gas receipts (2) dated February 28, 2019, p. 1.

²⁷ *Id.*, p. 2.

²⁸ *Id.*, pp. 4-5.

Mr. Besaw specifically testified about how the vehicle behaved on a trip to Ruidoso, New Mexico. Mr. Besaw was driving the vehicle on the highway and would set the cruise control at 70 mph. He noticed that the vehicle's speed would drop to approximately 48 mph before the cruise control kicked in. This occurred whenever they were driving uphill. In addition, the engine's RPM's would increase to approximately 5,000 before the vehicle's transmission would kick in and change gears.

Mr. Besaw stated that they had rented a cabin to stay in while in Ruidoso. The cabin was on top of a hill and had a steep incline just in front of the cabin. He attempted to drive the vehicle to the cabin's front door and was unable to do so. The vehicle would not go the last 20 to 30 feet to the cabin's front. The vehicle would roll back and Mr. Besaw had to step on the brake to keep it from rolling too far back. Mr. Besaw attempted to drive to the cabin's front three (3) times before parking the vehicle on the road below the cabin.

Mr. Besaw stated that he experienced similar issues with the vehicle when driving it to Nevada in November of 2018. The vehicle did not want to accelerate going up the mountains in the area and the engine's RPM's would increase severely. However, the vehicle never rolled back on any of the roads on this trip.

Mr. Besaw stated that he was aware that the vehicle's engine only had four cylinders. He's owned other vehicles that had four cylinder engines, a Nissan Versa and a Toyota Highlander, and he's never experienced an acceleration issue with them when he drove them.

3. Jacqueline Cano's Testimony

Jacqueline Cano, Ms. Besaw's cousin, testified for Complainants. She stated that she accompanied Ms. Besaw on a trip to a local outlet mall in March of 2019. Ms. Cano observed that the vehicle's RPM's jumped up whenever they drove up an incline. When leaving the mall, they were afraid to pull out into traffic because of the fear that the vehicle would not accelerate quickly enough to avoid oncoming traffic.

4. Matthew Collins' Testimony

Matthew Collins, Ms. Besaw's co-worker, testified for Complainants. Mr. Collins used to work as an automotive technician. He worked in an automotive repair shop for about a year and a half in 2007.

Mr. Collins stated that he test drove the vehicle for Complainants early in 2019. Mr. Collins stated that it was a clear day with light traffic. He was driving the vehicle west bound on a local road. He was driving about 25 to 30 mph and attempted to accelerate. Mr. Collins stated that when he stepped on the accelerator, the vehicle's transmission seemed as if it didn't want to downshift. It took about 8 to 10 seconds to accelerate to 60 mph. Mr. Collins stated that the vehicle seemed to

accelerate fine up to about 30 mph and after that it's slow to accelerate to a faster speed. In addition, when driving uphill the vehicle's transmission doesn't seem to want to shift to get more power. Mr. Collins also stated that when coming to a stop in the vehicle, he hears a clunk from the transmission, as if the vehicle is not shifting to first gear.

C. Respondent's Evidence and Arguments

Torry Piechowski, Technical Advisor, testified for Respondent. Mr. Piechowski has worked in the automotive industry for 10 years. He has been in his current position for the last two and half years. Prior to being hired by Respondent, Mr. Piechowski worked for Ford Motor Company. In addition, he received a degree in automotive technology from Montana State University. Mr. Piechowski is an Automotive Service Excellence (ASE) Certified Master Technician. He has also received full certification from Respondent in their vehicles.

Mr. Piechowski stated that he inspected the vehicle on February 26, 2019, at the Viva dealership. This was Respondent's final repair attempt on the vehicle. Mr. Piechowski stated that he began the inspection by checking the vehicle's computers with a scan tool in order to determine if there were any stored DTC's. He did not find any stored DTC's at the time.

Mr. Piechowski then inspected the vehicle to determine if it was shaking at start up. He verified that the vehicle's brakes, as well as the vehicle, would shake at start up. He then compared the shaking with other similar vehicles and determined that they all had the same characteristics on start up.

Mr. Piechowski testified that he then drove the vehicle on the local roads. He drove the vehicle up and over a local mountain pass a couple of times. He felt that the vehicle was performing within Respondent's specifications. He stated that the vehicle has a four cylinder, 186 horsepower engine and a four speed transmission and that this combination does not provide much power. The vehicle's engine has to get up to 4000 RPM's in order to get the transmission to shift gears. He compared the vehicle's performance with that of other similar vehicles. He feels that the vehicles had similar operating characteristics and that Complainants' vehicle was performing within specifications.

Regarding the cruise control issue, Mr. Piechowski stated that the cruise control should not be used when driving in mountainous terrain. This is explained in the owner's manual which was provided with the vehicle. In addition, the cruise control is designed to deactivate when the vehicle's speed is more than 10 mph less than the set speed on the cruise control. If the driver is attempting to accelerate up a hill that requires more input than the powertrain control module (PCM) can provide, then the cruise control will cancel and disengage.

Mr. Piechowski also testified that the vehicle's display screen did not freeze at any time during the vehicle inspection, despite attaching a cell phone to the vehicle using a USB cord.

Mr. Piechowski did not look into the issue of the vehicle feeling like it was still going when approaching a stop.

D. Analysis

Under the Lemon Law, Complainants bear the burden of proof to establish by a preponderance of evidence that a defect or condition creates a serious safety hazard or substantially impairs the use or market value of the vehicle. In addition, Complainants must meet the presumption that a reasonable number of attempts have been undertaken to conform the vehicle to an applicable express warranty. Finally, Complainants are required to serve written notice of the nonconformity on Respondent, who must be allowed an opportunity to cure the defect. If each of these requirements is met and Respondent is still unable to conform the vehicle to an express warranty by repairing the defect, Complainants are entitled to have the vehicle repurchased or replaced.

1. Cruise Control Issue

The first issue to address is the issue with the vehicle's cruise control not keeping the vehicle driving at the set speed. Evidence presented at the hearing indicates that the cruise control system is designed to disengage under certain circumstances, including when the vehicle is going up a hill that requires more input than the vehicle's powertrain control module (PCM) can provide. The hearings examiner must hold that the vehicle's cruise control is operating as designed. As such, this issue does not provide grounds to order repurchase or replacement of the vehicle.

2. Brakes and Vehicle Shaking Issues

Complainants state that the vehicle's brakes and the vehicle shake at start up. The evidence presented at hearing indicates that this is a normal operating characteristic of the vehicle. As such, this issue does not provide grounds to order repurchase or replacement of the vehicle.

3. Radio Display Freezes Issue

Complainants state that the radio display intermittently freezes when attaching a phone to the system using a USB cord. The evidence presented at hearing revealed that Complainants raised this issue only once prior to the filing of the Lemon Law complaint. Since Respondent was not provided a reasonable number of attempts to repair this issue, the hearings examiner must hold that this issue does not provide grounds to order repurchase or replacement of the vehicle.

4. Vehicle Feeling Like It's Still Going Issue

The issue that the vehicle sometimes feels like it's still going when coming to a stop was included on the Lemon Law complaint. However, the issue was not raised to any of the dealers' representatives prior to the filing of the complaint. Respondent was not provided with an opportunity to resolve the issue. As such, this issue does not provide grounds to order repurchase or replacement of the vehicle.

5. Vehicle Lacks Power Going Uphill

The totality of the evidence presented at the hearing reveals that the vehicle lacks power or acceleration when going up an incline. This was demonstrated at the test drive taken at the time of hearing when the vehicle seemed to struggle when going up some hills and the vehicle's engine's RPM's increased dramatically. A new vehicle should not behave in such a manner. The hearings examiner must hold that Complainants have carried the burden of persuasion to establish the existence of a defect in the subject vehicle. The vehicle's lack of acceleration and power creates a serious safety hazard as it substantially impedes Complainants' ability to control or operate the vehicle for its ordinary or intended purposes.

Complainants also presented evidence to indicate that Respondent or its authorized representative was provided with a reasonable number of repair attempts to repair the defect or nonconformity with the vehicle. Complainants presented the vehicle for repair to Respondent's authorized representatives on three (3) occasions prior to the filing of the Lemon Law complaint: August 22, 2018; August 25, 2018; and August 31, 2018. Occupations Code § 2301.604(a) requires a showing that Respondent was unable to conform the vehicle to an applicable express warranty "after a reasonable number of attempts." Section 2301.605(a)(2) specifies that a rebuttable presumption that a reasonable number of attempts to repair a serious safety hazard is established if Respondent or its authorized representative has had two (2) repair attempts prior to the vehicle having been driven 24,000 miles or within the first 24 months of ownership. The evidence presented at the hearing establishes that Complainants have met the requirements of this test since they took the vehicle for repair the requisite number of times within the specified time frame and the problem continued to exist. As such, Complainants have established that a reasonable number of attempts to repair the vehicle were made by Respondent.

In addition, the evidence presented at the hearing indicates that Complainants also provided Respondent with written notice of the defect and a final opportunity to cure the defect. Complainants informed Respondent via letter dated September 13, 2018, of the issue with the vehicle's lack of power and providing Respondent with an opportunity to cure. Respondent had its technical advisor inspect and test drive the vehicle on February 26, 2019. No repairs were performed at the time.

Although Respondent has been provided adequate opportunity to repair the vehicle and to ensure that it operates properly, they have not been able to repair the vehicle so that it conforms to their written warranty. As such, Complainants have met their burden of proof to establish that the vehicle has a warrantable and existing defect or nonconformity which creates a serious safety hazard.

6. Incidental Expenses

Complainants requested reimbursement for incidental expenses accrued as a result of their use of a rental vehicle while a vehicle inspection was performed on the subject vehicle by Respondent's technical advisor. Respondent paid for a rental vehicle for five (5) days for Complainants to use while their vehicle was inspected. Complainants elected to pay for the Optional Damage Waiver offered by the rental company which totaled \$103.44 for the period in question. This was entirely Complainants' decision to make. Complainants were concerned that if they were in an accident in the rental vehicle, they would be required to pay their insurance deductible prior to having the vehicle repaired. However, if Complainants were to have an accident in their own vehicle, they would have to pay the deductible anyway. Since the waiver was not required and it was Complainants' decision to pay for it, they are not entitled to reimbursement for it.

In regards to reimbursement for fuel purchased for the rental and subject vehicle, Complainants provided two gas receipts dated February 28, 2019, totaling \$44.59 (\$24.09 and \$20.50). Since Complainants would have had to purchase fuel for their vehicle regardless of whether it was being repaired or not and since an individual is required to refill a rental vehicle's fuel tank prior to returning it to the rental company (thus paying for the gas used while driving the rental vehicle), the hearings examiner will hold that Complainants are not entitled to reimbursement for the fuel.

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

III. FINDINGS OF FACT

1. Elena and Daniel Besaw (Complainants) purchased a new 2018 Dodge Journey Crossroad on July 14, 2018, from Viva Dodge Chrysler Jeep (Viva) in El Paso, Texas with mileage of 131 at the time of delivery.
2. The manufacturer of the vehicle, FCA US LLC (Respondent), issued a bumper-to-bumper warranty for the vehicle providing coverage for three (3) years or 36,000 miles, whichever comes first. In addition, Respondent provided a five (5) year or 60,000 mile warranty for the vehicle's powertrain.
3. The vehicle's mileage on the date of the hearing was 12,488.

4. At the time of hearing the warranties for the vehicle were still in effect.
5. Complainants state that the vehicle doesn't have enough power to go uphill, the cruise control will reduce speed 10 to 16 mph when going uphill, the brakes shake at start up, the vehicle shakes at start up, the display screen will freeze intermittently, and intermittently the vehicle feels like it's still going when approaching a stop.
6. Complainants' vehicle was serviced by Respondent's authorized dealers on the following dates because of Complainants' concerns with the vehicle:
 - a. August 22, 2018, at 1,683 miles;
 - b. August 25, 2018, at 1,806 miles; and
 - c. August 31, 2018, at 1,998 miles.
7. On August 22, 2018, Viva's service technician inspected the vehicle for Complainants' concern that it was losing power. The technician did not find any stored diagnostic trouble codes (DTC's) stored on the vehicle's computers and determined that the vehicle was operating as designed.
8. On August 25, 2018, Viva's service technician inspected the vehicle because Complainants stated that it lacked power going up hills. The technician determined that the vehicle was operating as designed.
9. On August 31, 2018, Complainants took the vehicle to Dick Poe Dodge (Poe) in El Paso, Texas for repair due to their concerns regarding the vehicle lacking power when going uphill, brake pedal vibration, vehicle shaking at start up, cruise control not working properly, and the display screen freezing up when a phone is connected to the vehicle via USB cord.
10. During the repair visit described in Findings of Fact #9, Poe's service technician was unable to duplicate the issues of the brake pedal vibrating, vehicle shaking at start up, or the display screen freezing. In addition, the technician determined that there was no problem with the vehicle lacking power going uphill or with the cruise control.
11. On September 13, 2018, Complainants' provided written notice to Respondent of their dissatisfaction with the vehicle.
12. On November 27, 2018, Complainants filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).

13. On February 26, 2019, Respondent's technical advisor, Torry Piechowski, inspected the vehicle at the Viva dealership to investigate Complainants' concerns regarding the vehicle lacking power to go uphill, the cruise control reducing speed from between 10 to 16 mph when going uphill, the vehicle's brakes staking at start up, the vehicle shaking at start up, and the display screen freezing.
14. During the inspection described in Findings of Fact #13, Mr. Piechowski determined that there was no problem with the vehicle and recommended no repairs to the vehicle.
15. Mr. Piechowski determined that the lack of power described by Complainants was due to the engine size (four cylinder) coupled with the transmission installed in the vehicle and that the vehicle was operating as designed.
16. Mr. Piechowski determined that the brakes and vehicle shaking at start up, which he was able to recreate, were characteristic of the vehicle.
17. Respondent designed the vehicle so that the cruise control will deactivate when the speed is more than 10 mph below the set speed which can occur if the vehicle is going uphill and the vehicle's speed reduces.
18. Mr. Piechowski was not able to duplicate the problem with the vehicle's display screen freezing when a cell phone was connected to the vehicle.
19. On March 29, 2019, Complainants took the vehicle to Viva for repair because they almost had an accident due to the vehicle's lack of acceleration and power. The technician was unable to duplicate Complainants' concern at the time.
20. During the test drive performed at the time of hearing, the vehicle discernibly struggled to accelerate when going uphill.

21. The appropriate calculations for repurchase are:

Purchase price, including tax, title, license and registration	\$30,286.72
Delivery mileage	131
Mileage at first report of defective condition	1,683
Mileage on hearing date	12,488
Useful life determination	120,000

Purchase price, including tax, title, license and registration					\$30,286.72
Mileage at first report of defective condition				1,683	
Less mileage at delivery				<u>-131</u>	
Unimpaired miles				1,552	
Mileage on hearing date				12,488	
Less mileage at first report of defective condition				<u>-1,683</u>	
Impaired miles				10,805	
Reasonable Allowance for Use Calculations:					
Unimpaired miles					
				<u>1,552</u>	
	120,000	X	\$30,286.72	=	\$391.71
Impaired miles					
				<u>10,805</u>	
	120,000	X	\$30,286.72	X .5	= <u>\$1,363.53</u>
Total reasonable allowance for use deduction:					\$1,755.24
Purchase price, including tax, title, license and registration					\$30,286.72
Less reasonable allowance for use deduction					-\$1,755.24
Plus filing fee refund					<u>\$35.00</u>
TOTAL REPURCHASE AMOUNT					\$28,566.48

22. Complainants requested reimbursement for incidental expenses accrued due to issues with the vehicle as follows:

a. Optional Damage Waiver for rental vehicle (5 days)	\$103.44
b. Fuel costs for vehicles	<u>44.59</u>
Total	\$148.03

23. On February 28, 2019, the Department's Office of Administrative Hearings issued a notice of hearing directed to Complainants and Respondent, giving all parties not less than 10 days' notice of hearing and their rights under the applicable rules and statutes. The notice

stated the time, place and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; particular sections of the statutes and rules involved; and the matters asserted.

24. The hearing in this case convened on June 12, 2019, in El Paso, Texas before Hearings Examiner Edward Sandoval. Complainants, Elena and Daniel Besaw, were present and represented themselves in the hearing. Jacqueline Cano, a cousin, appeared and testified for Complainants. Mathew Collins, co-worker, appeared telephonically and testified for Complainants. Rebecca Gonzalez, a friend, appeared at the hearing, but left the hearing before she was given an opportunity to testify. Respondent, FCA US LLC, was represented in the hearing by Jan Kershaw, Early Resolution Case Manager. Torry Piechowski, Technical Advisor, testified for Respondent. The hearing record was closed on June 13, 2019, upon the submission of Respondent's documents requested by the hearings examiner.

IV. CONCLUSIONS OF LAW

1. The Texas Department of Motor Vehicles (Department) has jurisdiction over this matter. Tex. Occ. Code §§ 2301.601-.613 (Lemon Law).
2. A hearings examiner of the Department's Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a decision with findings of fact and conclusions of law, and the issuance of a final order. Tex. Occ. Code § 2301.704.
3. Complainants timely filed a complaint with the Department. Tex. Occ. Code § 2301.204; 43 Tex. Admin. Code § 215.202.
4. The parties received proper notice of the hearing. Tex. Gov't Code §§ 2001.051, 2001.052; 43 Tex. Admin. Code § 215.206(2).
5. Complainants bear the burden of proof in this matter.
6. Complainants' vehicle has an existing defect or condition that creates a serious safety hazard. Tex. Occ. Code § 2301.604(a).
7. After a reasonable number of attempts, Respondent has been unable to repair the nonconformity in Complainants' vehicle so that it conforms to the applicable express warranty. Tex. Occ. Code §§ 2301.604(a) and 2301.605.

8. Based on the above Findings of Fact and Conclusions of Law, Complainants are entitled to relief and repurchase of their 2018 Dodge Journey Crossroad under Texas Occupations Code § 2301.604(a).
9. Complainant is not entitled to reimbursement of incidental expenses as outlined in Findings of Fact #22. Tex. Occ. Code § 2301.604(a); 43 Tex. Admin. Code § 215.209.

IT IS THEREFORE ORDERED that:

1. Respondent shall accept the return of the vehicle from Complainants. Respondent shall have the right to have its representatives inspect the vehicle upon the return by Complainants. If from the date of the hearing to the date of repurchase the vehicle is substantially damaged or there is an adverse change in its condition beyond ordinary wear and tear, and the parties are unable to agree on an amount of an allowance for such damage or condition, either party may request reconsideration by the Office of Administrative Hearings of the repurchase price contained in the final order;
2. Respondent shall repurchase the subject vehicle in the amount of **\$28,566.48**. The refund shall be paid to Complainants and the vehicle lien holder as their interests require. If clear title to the vehicle is delivered to Respondent, then the full refund shall be paid to Complainants. At the time of the return, Respondent or its agent is entitled to receive clear title to the vehicle. If the above noted repurchase amount does not pay all liens in full, Complainants are responsible for providing Respondent with clear title to the vehicle;
3. Within 20 calendar days from the receipt of this order, the parties shall complete the return and repurchase of the subject vehicle. If the repurchase of the subject vehicle is not accomplished as stated above, barring a delay based on a party's exercise of rights in accordance with Texas Government Code § 2001.144, starting on the 31st calendar day from receipt of this order, Respondent is subject to a contempt charge and the assessment of civil penalties. However, if the Office of Administrative Hearings determines the failure to complete the repurchase as prescribed is due to Complainants' refusal or inability to deliver the vehicle with clear title, the Office of Administrative Hearings may deem the granted relief rejected by Complainants and the complaint closed pursuant to 43 Texas Administrative Code § 215.210(2);
4. Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall obtain a Texas title for the vehicle prior to resale and issue a disclosure statement provided by or approved by the Department's Enforcement Division – Lemon Law Section;
5. Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall affix the disclosure label to the reacquired vehicle in a conspicuous place, and upon the first retail

sale of the vehicle, the disclosure statement shall be completed and returned to the Department's Enforcement Division – Lemon Law Section; and

6. Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall provide the Department's Enforcement Division – Lemon Law Section, in writing, the name, address and telephone number of the transferee (wholesale purchaser or equivalent) of the vehicle within 60 calendar days of the transfer.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that Complainants' petition for repurchase relief pursuant to Texas Occupations Code §§ 2301.601-.613 is hereby **GRANTED**. It is further **ORDERED** that Respondent, FCA US LLC, shall repair the warrantable defect in the reacquired vehicle identified in this Decision.

SIGNED July 16, 2019



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