

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 20-0005590 CAF**

**EDDIE MARIE HEARLD,
Complainant**

v.

**NISSAN NORTH AMERICA, INC.,
Respondent**

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**BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS**

AMENDED DECISION AND ORDER

Eddie Marie Hearld (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 her vehicle manufactured by Nissan North America, Inc. (Respondent). A preponderance of the evidence shows that the subject vehicle has a warrantable defect that substantially impairs the vehicle’s use or market value after a reasonable number of repair attempts. Consequently, the Complainant’s vehicle qualifies for replacement.

I. Procedural History, Notice and Jurisdiction

Matters of notice of hearing¹ 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 August 25, 2020, by telephone, before Hearings Examiner Andrew Kang, and the record closed on the same day. Terry W. Vanderpool, attorney, represented the Complainant. Jesse Juan, arbitration specialist, represented the Respondent.

¹ TEX. GOV’T CODE § 2001.051.

II. Discussion

A. Applicable Law

1. Repurchase/Replacement Relief Requirements

A vehicle qualifies for repurchase or replacement if the respondent 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 currently 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 written notice of the defect to the respondent, (2) an opportunity to cure by the respondent, and (3) a deadline for filing a Lemon Law complaint.

a. Serious Safety Hazard

The Lemon Law defines “serious safety hazard” as a life-threatening malfunction or nonconformity that: (1) substantially impedes a person’s ability to control or operate a vehicle for ordinary use or intended purposes, or (2) creates a substantial risk of fire or explosion.⁴

b. Substantial Impairment of Use or Value

i. Impairment of Use

In determining substantial impairment of use, the Department considers “whether a defect or nonconformity hampers the intended normal operation of the vehicle.” For instance, “while a vehicle with a non-functioning air conditioner would be available for use and transporting passengers, its intended normal use would be substantially impaired.”⁵

² TEX. OCC. CODE § 2301.604(a).

³ TEX. OCC. CODE § 2301.604(a).

⁴ TEX. OCC. CODE § 2301.601(4).

⁵ *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012).

ii. Impairment of Value

The Department applies a reasonable purchaser standard for determining whether a defect substantially impairs the value of a vehicle. The reasonable purchaser standard “does not require an owner to present an expert witness or any technical or market-based evidence to show decreased value.” Instead, under this standard, “factfinders should put themselves in the position of a reasonable prospective purchaser of the subject vehicle and determine (based on the evidence presented) if the current condition of the vehicle would deter them from buying the vehicle or substantially negatively affect how much they would be willing to pay for the vehicle.”⁶

c. Reasonable Number of Repair Attempts

Generally, a rebuttable presumption is established that the vehicle had a reasonable number of repair attempts if:

[T]he same nonconformity continues to exist after being subject to repair four or more times by the manufacturer, converter, or distributor or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.⁷

Alternatively, for serious safety hazards, a rebuttable presumption is established that the vehicle had a reasonable number of repair attempts if:

[T]he same nonconformity creates a serious safety hazard and continues to exist after causing the vehicle to have been subject to repair two or more times by the manufacturer, converter, or distributor or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.⁸

⁶ *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012) (“We find that this interpretation of the standard required for demonstrating substantial impairment is reasonable and consistent with the statute’s plain language which requires a showing of loss in market value. . . . [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).

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:

[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 or someone on behalf of the owner, or the Department has provided written notice of the alleged defect or nonconformity to the respondent;¹³ (2) the respondent 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

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). 43 TEX. ADMIN. CODE § 215.204 provides that “[u]pon receipt of a complaint for lemon law or warranty performance relief, the department will provide notification of the complaint to the appropriate manufacturer, converter, or distributor.” The Department’s notice of the complaint to the Respondent may satisfy the requirement to provide notice of the defect or nonconformity to the Respondent.

¹⁴ A respondent may delegate its opportunity to cure to a dealer. A repair visit to a dealer satisfies the opportunity to cure requirement when the respondent allows a dealer to attempt repair after written notice to the

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

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 before the warranty's expiration.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 of the evidence. That is, the Complainant must present sufficient evidence to show that every required fact more likely than not exists.¹⁹ Accordingly, the Complainant 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.²⁰ The complaint must state “sufficient facts to enable the department and the party complained against to know the

respondent. *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 221 and 226 (Tex. App.—Austin 2012); Texas Department of Transportation, *Kennemer v. Dutchman Manufacturing, Inc.*, MVD Cause No. 09-0091 CAF (Motor Vehicle Division Sept. 25, 2009) (Final Order Granting Chapter 2301, Subchapter M Relief). An opportunity to cure does not require an actual repair attempt but only a valid opportunity. *Id* at 2.

¹⁵ TEX. OCC. CODE § 2301.606(d)(2).

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

nature of the complaint and the specific problems or circumstances forming the basis of the claim for relief under the lemon law.”²¹ However, the parties may expressly or impliedly consent to hearing issues not included in the pleadings.²² Implied consent occurs when a party introduces evidence on an unpleaded issue without objection.²³

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 However, the Department’s rules expressly exclude compensation for “any interest, finance charge, or insurance premiums.”²⁶

B. Summary of Complainant’s Evidence and Arguments

On April 16, 2019, the Complainant, purchased a new 2019 Nissan Pathfinder from Fred Haas Nissan, a franchised dealer of the Respondent, in Tomball, Texas. The vehicle had 598 miles on the odometer at the time of purchase. The vehicle’s limited warranty provides basic coverage for 36 months or 36,000 miles, whichever occurs first, and powertrain coverage for 60 months or 60,000 miles, whichever occurs first.

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)(3).

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).

²⁴ TEX. OCC. CODE § 2301.604.

²⁵ 43 TEX. ADMIN. CODE § 215.209(a).

²⁶ 43 TEX. ADMIN. CODE § 215.208(b)(1).

On January 27, 2019, the Complainant provided a written notice of defect to the Respondent. On December 4, 2019, the Complainant filed a complaint with the Department alleging that: the air conditioning (AC) system required repair - a duct had to be installed; the AC made loud noise and vibrated; the radiator fan motor vibrated excessively; the vehicle lagged when trying to accelerate; the navigation display (center display) was defective; the vehicle squealed and squeaked when not turned on and parked on level ground (in garage); the vehicle squealed and squeaked when in motion (on takeoff and while driving at low speeds); the rear brake rotors were defective; air conditioning compressor/fan clutch was defective; the display went black; the CPU was defective and had to be replaced; ACS audio unit was defective and had to be replaced; power door and window switch stopped working; RPM intermittently goes high when at a constant speed and not accelerating; the Complainant received a safety recall notification in the mail regarding rear visibility; the vehicle squeaked when moving at low speed or at takeoff.

In relevant part, the warranty claim history shows that the Complainant took the vehicle to a dealer for service as follows:

Date	Miles	Issue
11/04/19	19,450	Rear brake rotor
10/24/19	18,086	Navigation display
10/14/19	17,161	Rear brake rotors
08/20/19	11,072	Radiator fan motor
08/01/19	8,635	AC duct

The Complainant testified that she purchased the subject vehicle on April 16, 2019, and her vehicle began having problems with fast revving after six weeks. The vehicle had subsequent problems with the AC, noise, and electrical issues. She estimated that she brought the vehicle for repair over 10 times in the first four months. The Complainant testified that some issues had been successfully resolved but the following issues remained, including the rear brake rotors, the navigation display, the power locks and windows, and the AC. She elaborated that the doors would not lock or unlock using the power lock panel but must be manually locked/unlocked or she would have to stop and wait for the power locks to operate, and the windows would not go up or down using the power keys. She considered the navigation system blacking out to be a safety problem. Additionally, the AC set at 60 degrees would cool but did not feel 60 degrees.

Upon clarifying questions, the Complainant explained that the brakes made a whining or squeaking noise, which occurred whether moving or staying still and regardless of whether

pressing the brake pedal. She noted that she had to press the brakes a little harder. Despite different repairs, the noise continued to exist. She last noticed issues with the brake noise, display malfunction, and AC the day before the hearing. The Complainant described the center display issue as random, occurring about two to three times a week. She confirmed that the display controlled the Bluetooth and phone functions and added that the display malfunction would shut down the doors, windows, AC, and other features controlled by the display. The complainant stated that the subject vehicle currently had 40,928 miles.

On cross-examination, the Complainant testified that she provided information about the AC issue to the dealer. In response, the shop foreman rode in the vehicle to experience the AC issue. The Complainant noted that the vehicle had the AC issue from the beginning. She could not recall the last time she informed the dealer of the AC concern, but at last the oil change and tire rotations she had a multipoint inspection and had the technician check the AC. She subsequently recalled that she did have the date of that service visit: November 16, 2019. The Complainant affirmed that she did not make a service visit specifically for the AC issue. However, the dealership would ask whether the Complainant still had a problem with the AC and whether she still heard a noise. She affirmed that the navigation display and brake squeal issues still persisted. When asked if the Complainant specifically asked a dealer to look further into her concerns, she explained that she did not because Baker Nissan informed her that a representative from the Respondent would contact her for an inspection, which never happened.

On redirect-examination, the Complainant stated that she took the car in for routine maintenance but also took the vehicle for maintenance and concerns until the dealer notified her that the Respondent would send someone to inspect the vehicle. She elaborated that the vehicle had issues every time she took it for routine maintenance. She affirmed that she never took the vehicle in without also mentioning other ongoing issues. The Complainant confirmed that the Respondent had not inspected the vehicle.

On further clarifying questions, the Complainant affirmed raising the AC issue, as well as the power locks and windows, and display, issues at every visit.

C. Summary of Respondent's Evidence and Arguments

Mr. Juan stated that the Respondent did not believe that presumption for reasonable repair attempts had been met within the applicable mileage and time. The Respondent confirmed the AC concern – loud noise from the front, replacement of the cooling fan; replacement of the navigation display; and turning and subsequently replacing the rotors. However, there were not four repair attempts for the same concern. The vehicle has about 40,000 miles after about a year and four months, therefore indicating no substantial impairment of use of the vehicle.

On cross-examination, Mr. Juan elaborated that repair records show nine total visits but none of the concerns were subject to repair four times. Mr. Juan explained that the Respondent went by the repair orders (to determine the repair attempts).

D. Analysis

As detailed below, the vehicle has a defect that supports granting repurchase/replacement relief.

1. Warrantable Defect

As an initial matter, to qualify for any relief, whether warranty repair or repurchase/replacement, the law requires the vehicle to have a defect covered by the Respondent's warranty (warrantable defect)²⁷ that continues to exist, even after repair.²⁸ With respect to basic coverage, the warranty states:

The basic coverage period is 36 months or 36,000 miles, whichever comes first. This warranty covers any repairs needed to correct defects in materials or workmanship of all parts and components of each new Nissan vehicle supplied by Nissan subject to the exclusions listed under the heading "WHAT IS NOT COVERED" or, if the part is covered by one of the separate coverages described in the following sections of this warranty, that specific coverage applies instead of the basic coverage.

In this case, the record shows that the AC, power locks and windows, center display, and brake noise issues are warrantable defects that continue to exist.

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

²⁸ TEX. OCC. CODE § 2301.605.

2. Reasonable Repair Attempts

A preponderance of the evidence shows a reasonable number of repair attempts. The repair orders alone do not show a reasonable number of repair attempts. The Complainant's repair records show five repair visits by November 4, 2019, and 19,450 miles on the odometer, with only one visit for any issue, except for the brakes, which had two visits. However, the testimony reflects that the Complainant raised the AC, power locks and windows, center display, and brake noise issues at each of the service visits, including those for routine maintenance. The Complainant estimated she brought the vehicle in at least 10 times in the first four months. Under the Department's precedents, an actual repair need not occur for a repair attempt. As noted in the discussion of applicable law, if a complainant presents a vehicle to a dealership for repair, then that visit will constitute a repair attempt, unless the complainant was at fault for any failure to repair. In this case, the vehicle had at least five repair attempts within 18,852 miles and less than seven months after delivery for the AC, power locks and windows, center display, and brake noise issue. As outlined in the discussion of applicable law, the general presumption for reasonable repairs requires at least four attempts within 24 months or 24,000 miles, whichever occurs first.

3. Substantial Impairment

The center display issue is determinative of this case, so the AC, power locks and windows, and brake noise issues are not addressed here. The Lemon Law requires a substantial impairment of use or value or a serious safety hazard to qualify for repurchase/replacement. In the present case, under the prospective purchaser standard, the center display malfunction substantially impairs the vehicle's value. The record reflects that the center display controls Bluetooth and phone functions in addition to navigation. The Department's precedents hold that a defect in a vehicle's phone functionality substantially impairs the value of the vehicle, considering that "hands-free" laws restrict the use of hand-held devices while driving.²⁹ Consequently, the vehicle qualifies for repurchase/replacement relief.

²⁹ *Johnston v. BMW of North America, LLC*, Case No. 15-0262 CAF (Office of Administrative Hearings Mar. 3, 2016) (Decision and Order) (“[U]nder the reasonable prospective purchaser standard, the nonconformity substantially impairs the market value of the vehicle, especially when considering that more and more jurisdictions prohibit the use of mobile devices unless hands-free.”); e.g., TEX. TRANSP. CODE § 545.4251.

III. Findings of Fact

1. On April 16, 2019, the Complainant, purchased a new 2019 Nissan Pathfinder from Fred Haas Nissan, a franchised dealer of the Respondent, in Tomball, Texas. The vehicle had 598 miles on the odometer at the time of purchase.
2. The vehicle's limited warranty provides basic coverage for 36 months or 36,000 miles, whichever occurs first.
3. The Complainant took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
11/04/19	19,450	Rear brake rotor
10/24/19	18,086	Navigation display
10/14/19	17,161	Rear brake rotors
08/20/19	11,072	Radiator fan motor
08/01/19	8,635	AC duct

4. On January 27, 2019, the Complainant provided a written notice of defect to the Respondent.
5. On December 4, 2019, the Complainant filed a complaint with the Department alleging that: the air conditioning (AC) system required repair - a duct had to be installed; the AC made loud noise and vibrated; the radiator fan motor vibrated excessively; the vehicle lagged when trying to accelerate; the navigation display was defective; the vehicle squealed and squeaked when not turned on and parked on level ground (in garage); the vehicle squealed and squeaked when in motion (on takeoff and while driving at low speeds); the rear brake rotors were defective; air conditioning compressor/fan clutch was defective; the display went black; the CPU was defective and had to be replaced; ACS audio unit was defective and had to be replaced; power door and window switch stopped working; RPM intermittently goes high when at a constant speed and not accelerating; the Complainant received a safety recall notification in the mail regarding rear visibility; the vehicle squeaked when moving at low speed or at takeoff.
6. On May 19, 2020, the Department's Office of Administrative Hearings issued a notice of hearing directed to all parties, giving them not less than 10 days' notice of hearing and their rights under the applicable rules and statutes. The notice stated the time, place and nature

of the hearing; the legal authority and jurisdiction under which the hearing was to be held; particular sections of the statutes and rules involved; and the factual matters asserted.

7. The hearing in this case convened on August 25, 2020, by telephone, before Hearings Examiner Andrew Kang, and the record closed on the same day. Terry W. Vanderpool, attorney, represented the Complainant. Jesse Juan, arbitration specialist, represented the Respondent.
8. The vehicle's odometer displayed 40,928 miles at the time of the hearing.
9. The warranty's basic coverage expired at 36,000 miles.
10. The warranty generally provides that:

This warranty covers any repairs needed to correct defects in materials or workmanship of all parts and components of each new Nissan vehicle supplied by Nissan subject to the exclusions listed under the heading "WHAT IS NOT COVERED" or, if the part is covered by one of the separate coverages described in the following sections of this warranty, that specific coverage applies instead of the basic coverage.
11. The Complainant raised the AC, power locks and windows, center display, and brake noise issues at each of the service visits, including those for routine maintenance. The Complainant brought the vehicle in for service about 10 times in the first four months after delivery.
12. The vehicle had at least five repair attempts within 18,852 miles and less than seven months after delivery for the AC, power locks and windows, center display, and brake noise issues.
13. The dealer, Fred Haas Nissan, notified the Complainant that the Respondent would have a representative inspect the vehicle; however, the Respondent did not contact the Complainant to arrange the inspection.
14. The center display controls Bluetooth and phone functions in addition to navigation. The center display malfunction substantially impairs the vehicle's value.

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. Reimbursement of attorney's fees does not apply in this case. The Respondent was not represented by counsel. 43 TEX. ADMIN. CODE § 215.209(a)(6).
7. The Complainant or a person on behalf of the Complainant provided sufficient notice of the alleged defect(s) to the Respondent. TEX. OCC. CODE § 2301.606(c)(1).
8. The Respondent had an opportunity to cure the alleged defect(s). TEX. OCC. CODE § 2301.606(c)(2).
9. The Complainant timely filed the complaint commencing this proceeding. TEX. OCC. CODE § 2301.606(d).
10. The Complainant's vehicle qualifies for replacement or repurchase. A warrantable defect that creates a serious safety hazard or substantially impairs the use or market value of the vehicle continues to exist after a reasonable number of repair attempts. TEX. OCC. CODE § 2301.604(a).
11. The Respondent remains responsible to address and repair or correct any defects that are covered by the Respondent's warranty. TEX. OCC. CODE § 2301.603.

V. Order

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that the Complainant's petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613

is **GRANTED**. It is further **ORDERED** that the Respondent shall repair the warrantable defect(s) in the reacquired vehicle identified in this Order. **IT IS THEREFORE ORDERED** that:

1. The Respondent shall accept the return of the vehicle from the Complainant. The Respondent shall have the right to have its representatives inspect the vehicle upon the return by the Complainant. 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. The Respondent shall repurchase the subject vehicle in the amount of **\$26,416.03**. The refund shall be paid to the Complainant and the vehicle lien holder as their interests require. If clear title to the vehicle is delivered to the Respondent, then the full refund shall be paid to the Complainant. At the time of the return, the 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, the Complainant is responsible for providing the Respondent with clear title to the vehicle;
3. The parties shall complete the return and repurchase of the subject vehicle within **20 days** after the date this Order becomes final under Texas Government Code § 2001.144.³⁰ However, if the Office of Administrative Hearings determines the failure to complete the repurchase as prescribed is due to the Complainant's refusal or inability to deliver the vehicle with clear title, the Office of Administrative Hearings may deem the granted relief rejected by the Complainant and the complaint closed pursuant to 43 Texas Administrative Code § 215.210(2);

³⁰ 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.

4. The 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. The 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. The 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 days of the transfer.

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 **GRANTED**. It is further **ORDERED** that the Respondent shall repair the warrantable defect in the reacquired vehicle identified in this Order. **IT IS THEREFORE ORDERED** that:

7. The Respondent shall, in accordance with Texas Administrative Code § 215.208(d)(1)(A), promptly authorize the exchange of the Complainant's vehicle (the reacquired vehicle) with the Complainant's choice of any comparable motor vehicle.
8. The Respondent shall instruct the dealer to contract the sale of the selected comparable vehicle with the Complainant under the following terms:
 - a. The sales price of the comparable vehicle shall be the vehicle's Manufacturer's Suggested Retail Price (MSRP);
 - b. The trade-in value of the Complainant's vehicle shall be the MSRP at the time of the original transaction, less a reasonable allowance for the Complainant's use of the vehicle;
 - c. The use allowance for replacement relief shall be calculated in accordance with the formula outlined in Texas Administrative Code § 215.208(b)(2) (the use allowance is \$6,658.41);
 - d. The use allowance paid by the Complainant to the Respondent shall be reduced by \$35.00 (the refund for the filing fee) (after deducting the filing fee, the use allowance is reduced to **\$6,623.41**, which is the amount that the Complainant must be responsible for at the time of the vehicle exchange).

9. The Respondent's communications with the Complainant finalizing replacement of the reacquired vehicle shall be reduced to writing, and a copy thereof shall be provided to the Department within twenty (20) days of completion of the replacement.
10. The Respondent shall obtain a Texas title for the reacquired vehicle prior to resale and issue a disclosure statement on a form provided or approved by the Department.³¹
11. The Respondent shall affix the disclosure label to the reacquired vehicle in a conspicuous location (e.g., hanging from the rear view mirror). Upon the Respondent's first retail sale of the reacquired vehicle, the disclosure statement shall be completed and returned to the Department.
12. Within sixty (60) days of transfer of the reacquired vehicle, the Respondent shall provide to the Department written notice of the name, address and telephone number of any transferee (wholesaler or equivalent), regardless of residence.
13. The Respondent shall repair the defect or condition that was the basis of the vehicle's reacquisition and issue a new 12 month/12,000 mile warranty on the reacquired vehicle.
14. Upon replacement of the Complainant's vehicle, the Complainant shall be responsible for payment or financing of the usage allowance of the reacquired vehicle, any outstanding liens on the reacquired vehicle, and applicable taxes and fees associated with the new sale, excluding documentary fees. Further, in accordance with 43 Tex. Administrative Code § 215.208(d)(2):
 - a. If the comparable vehicle has a higher MSRP than the reacquired vehicle, the Complainant shall be responsible at the time of sale to pay or finance the difference in the two vehicles' MSRPs to the manufacturer, converter or distributor; and
 - b. If the comparable vehicle has a lower MSRP than the reacquired vehicle, the Complainant will be credited the difference in the MSRP between the two vehicles. The difference credited shall not exceed the amount of the calculated usage allowance for the reacquired vehicle.
15. The Complainant shall be responsible for obtaining financing, if necessary, to complete the transaction.

³¹ Correspondence and telephone inquiries regarding disclosure labels should be addressed to: Texas Department of Motor Vehicles, Enforcement Division-Lemon Law Section, 4000 Jackson Avenue Building 1, Austin, Texas 78731, (512) 465-4076.

16. The parties shall complete the replacement of the subject vehicle within **20 days** after the date this Order becomes final under Texas Government Code § 2001.144.³² If the replacement cannot be accomplished within the ordered time period, the parties shall instead complete the return and repurchase of the subject vehicle, within **20 days** after the date this Order becomes final under Texas Government Code § 2001.144, pursuant to the repurchase provisions in 43 Texas Administrative Code § 215.208(b)(1) and (2). The repurchase price shall be **\$26,416.03**. The refund shall be paid to the Complainant and the lien holder, if any, as their interests appear. If clear title is delivered, the full refund shall be paid to the Complainant. At the time of the repurchase, the 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, the Complainant is responsible for providing the Respondent with clear title to the vehicle. However, if the Office of Administrative Hearings determines the failure to complete the repurchase as prescribed is due to the Complainant's refusal or inability to deliver the vehicle with clear title, the Office of Administrative Hearings may deem the granted relief rejected by the Complainant and the complaint closed pursuant to 43 Texas Administrative Code § 215.210(2). The calculations for the repurchase price are as follows:

Purchase price, including tax, title, license & registration	\$33,039.44
Delivery mileage	598
Mileage at first report of defective condition	8,635
Mileage on hearing date	40,928
Useful life determination	120,000

³² 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.

Purchase price, including tax, title, license & registration						\$33,039.44
Mileage at first report of defective condition	8,635					
Less mileage at delivery	-598					
Unimpaired miles	8,037					
Mileage on hearing date	40,928					
Less mileage at first report of defective condition	-8,635					
Impaired miles	32,293					
<i>Reasonable Allowance for Use Calculations:</i>						
Unimpaired miles	8,037	÷	120,000	×	\$33,039.44	= \$2,212.82
Impaired miles	32,293	÷	120,000	×	\$33,039.44	× 50% = \$4,445.59
Total reasonable allowance for use deduction						\$6,658.41
Purchase price, including tax, title, license & registration						\$33,039.44
Less reasonable allowance for use deduction						-\$6,658.41
Plus filing fee refund						\$35.00
Plus incidental expenses						\$0.00
TOTAL REPURCHASE AMOUNT						\$26,416.03

17. If the Complainant's vehicle is substantially damaged or there is an adverse change in its condition, beyond ordinary wear and tear, from the date of the hearing to the date of the Respondent's reacquisition of the vehicle, and the parties are unable to agree on an amount allowed for such damage or condition, either party may request reconsideration by the final order authority of the trade-in value of the Complainant's vehicle.

SIGNED December 7, 2020



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