

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 20-0006271 CAF**

**ELIZABETH RODRIGUEZ and
JAMES JUSZCZAK,
Complainants**

v.

**GENERAL MOTORS LLC,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Elizabeth Rodriguez and James Juszczak (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 General Motors LLC (Respondent). A preponderance of the evidence shows that the subject vehicle has a warrantable defect that substantially impairs the vehicle's market value after a reasonable number of repair attempts. Consequently, the Complainants' vehicle qualifies for repurchase/replacement or warranty repair.

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 July 16, 2020, by telephone and videoconference, before Hearings Examiner Andrew Kang, and the record closed on July 31, 2020. The Complainants, represented themselves. Carlin Davis, business resource manager, 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 Complainants.¹⁸ 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.¹⁹ 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.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 Complainants 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 Complainants’ Evidence and Arguments

On December 14, 2018, the Complainants, purchased a new 2019 Cadillac Escalade ESV from Tom Peacock Cadillac, a franchised dealer of the Respondent, in Houston, Texas. The vehicle had 10 miles on the odometer at the time of purchase. However, the Complainants took delivery about December 21, 2018. The vehicle’s limited warranty provides bumper to bumper coverage for four years or 50,000 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 November 18, 2019, the Complainants provided a written notice of defect to the Respondent. On December 30, 2019, the Complainants filed a complaint with the Department alleging that Lane Keep Assist (LKA)/Lane Departure Warning (LDW) did not detect lanes and did not alert to drifting; the vehicle would not start; and the dash would not stay on (display problems) after turning off the vehicle.

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

Date	Miles	Issue
May 14, 2019	3,359	Service driver assist message
June 11, 2019	4,123	No remote detected message
July 11, 2019	5,150	Not reacting when attempting to start; takes several attempts to recognize remote
October 17, 2019	8,629	Will not react when attempting to start
January 10, 2020	11,881	Instrument cluster stays on long after vehicle shut down; remote not detected or press brake message; lane departure not pulling back or vibrating
March 9, 2020	12,567	Vehicle inspection by Respondent on 2-10-20

Ms. Rodriguez testified that the display was erratic, sometimes blank and unresponsive, displaying one color, having problems staying on, and showing different messages. She indicated that repairs did not successfully resolve the issues. After repair, the starting issue would reappear later. The Complainant first noticed the lane departure issue in May 2019. She had drifted onto the shoulder but did not get any alerts. The LKA/LDW only consistently displayed an amber warning indicator, but the system was also supposed to gently steer the vehicle back, play a sound, and vibrate the seat. The seat vibration only worked a few times and the vehicle would randomly beep. She stated that the seat cushion was replaced in June 2019. Ms. Rodriguez explained that the seat never vibrated to her recollection prior to the seat repair but she did not know for certain. But the seat did vibrate after the repair. She last noticed the LDW malfunction on April 10, 2020, at the time she recorded the videos (Complainants' Exhibit 11). Ms. Rodriguez first noticed the no-start issue a couple of days before texting a service agent at the dealership on June 3, 2019, about June 1st or May 31st. She explained the issue did not occur every day. However, the no-start was consistently associated with cold starts – with a foot on the brake, and the Remote Keyless Entry transmitter fob present, the vehicle will not start. Sometimes the vehicle will state no remote detected or place the fob in a certain place to start manually. She elaborated that she usually had the fob on the console, though in the past, she kept it in her purse until instructed to keep it out.

She last noticed the no-start issue on July 4, 2020. She added that the no-start issue occurred at least once a month. Upon clarification questions, Ms. Rodriguez affirmed that the vehicle eventually starts, but when it starts may vary, sometimes after eight attempts, sometimes after two attempts. Ms. Rodriguez noticed when the vehicle would not start, the screen (dash display) would be blank or sometimes blue. Also, the dash would stay on for a while. The dash stayed lit after leaving and coming back quite a few minutes later. She added that she believed the dash display issue related to the no-start issue. Ms. Rodriguez noted that she usually received a smaller loaner vehicle when leaving her vehicle for repair, though she would request an Escalade because she needed the cargo space. She stated that her vehicle was at the dealer for repairs for 49 days. Ms. Rodriguez added that with LKA/LDW, the seat will vibrate on the side the vehicle drifts towards. She noted that the LKA would steer the vehicle back only about 10% of the time.

On cross-examination, Ms. Rodriguez explained that she had intended to drive her vehicle to help her son move to New York. However, because of the vehicle's unpredictability, she rented what was available and rented a U-Haul. When asked if the no-start with the press brake to start message occurred about once a month, Ms. Rodriguez clarified that the vehicle displayed messages other than press brake to start, including insert key and no remote detected.

Ron Samples, service director at Tom Peacock Cadillac, affirmed that the dealership repaired the vehicle on June 11, 2019, including reprogramming the BCM (Body Control Module) and again on July 11, 2019. He explained that the BCM could only be reprogrammed if a new program existed. He also confirmed replacement of the brake position sensor on October 3, 2019. He acknowledged that a technician incorrectly noted on a repair order (RO) that the subject vehicle did not have LDW. Subsequently, the RO was corrected with an addendum. Mr. Samples corroborated that on March 10th, the vehicle did not start until the third attempt.

On cross-examination, Mr. Samples testified that he did not see Ms. Rodriguez press the brakes. He added that the technicians did what was in the best interest of fixing the vehicle and he could never find anything wrong. He averred that he saw a message to press the brake to start. However, he explained that the message could be made to come on anytime.

Nicole Juszczak testified that when she drove the subject vehicle on April 10, 2020, and released her grip slightly, allowing the vehicle to drift, the LKA did not pull the vehicle back into the lane. She stated that the display showed an indicator change from green to orange and

confirmed LKA was active. She also affirmed that she did not hear an alert. Ms. Juszczak affirmed that she recorded Ms. Rodriguez agreed that the vehicle steered back only once.

Mr. Juszczak testified that on June 29, 2019, in the vehicle, Ms. Rodriguez had trouble starting the vehicle while properly pressing the brake. On May 18, 2020 he also observed a no-start following the correct starting procedure with a foot on the brake.

On cross-examination, Mr. Juszczak confirmed that he had actively watched the feet and observed the brake being pressed.

On rebuttal, Ms. Rodriguez testified that in the video in Complainants' Exhibit 10, she noticed the stiffness of the brakes, and can be seen pressing the brake down. She attested she pressed the brake at least a half inch in every video.

C. Summary of Respondent's Evidence and Arguments

Mr. Davis testified that technicians had varying levels of knowledge and occasionally encounter an issue they cannot duplicate. Many cases require referral to a more experienced technician, a field service engineer(FSE), such as Bruce Morris. Mr. Davis noted that Mr. Morris was a GM World Class Technician, of which there were very few at dealerships and GM itself. At the January 30, 2020, inspection, Mr. Morris found the vehicle operated as designed and found no DTCs (diagnostic trouble codes) regarding starting or LKA. Likewise, the second inspection, on March 10, 2020, likewise revealed no DTCs or evidence of anything wrong. An FSE inspection is not a repair. Mr. Davis emphasized that LKA/LDW that will not operate if not all criteria for operation are met. However, such non-operation is not a malfunction but reflects the system's operation as design. The system will not operate if sensing anything intentional with the steering. He expounded that the system will not operate when the driver controls the vehicle. The system does not continually steer and may not keep the vehicle in the lane or give a warning because, for example, bug stains may obscure the camera on the windshield; the system may interpret a clear lane departure as the driver actively controlling the vehicle; the system may not detect lane markings or hilly roads. The system was not designed to take over the steering, just assist. The Respondent's documentation specifies that the LKA/LDW system may interpret trying to test the system's function as an active response (that actually prevents warnings), so that warnings do not occur as frequently as compared to the prior system.

On cross-examination, Mr. Davis responded that the documentation (Respondent's Exhibit 2) explains when the system engages. Driving with hands off the steering does not mean all criteria for LKA/LDW operation have been met.

Mr. Morris testified that he had set a DTC, which he can do on every Escalade. He pointed out that he had inadvertently omitted this from his report. He explained that he wrote that he found no DTCs because the only DTC was the one he set. Notes stated that the no-start issue has not reoccurred since filing of this claim. He pointed out that the lights staying on was normal. The backlight takes about 10 minutes to turn off in relation to the last module going to sleep. In relation to LKA/LDW, he compared a like vehicle with the subject vehicle and concluded that it operated as designed. He elaborated that the system assumes that touching the brakes or throttle or turning is intentional and will not present a warning. He pointed out that the vehicles would either vibrate or beep, as set in the menu, but not both. Mr. Morris drove the subject vehicle for 50 miles and experienced nudges but stated that letting go without touching the wheel was difficult and the vehicle did not beep. He also did the same with a loaner vehicle. Mr. Samples also drove Escalades and reached the same conclusion. Mr. Morris described that light pressing the wheel will turn off LDW. Regarding the no-start issue, Mr. Morris indicated that he did not see the "push brake to start" message after repair. He expounded that the brake pedal had to move at least half an inch, at least a 5% change, to activate the brake light and start. More pressure may be needed if the vacuum assist is depleted. With no key detected, if there is RF (radio frequency) interference, the vehicle has a backup that can read the fob. There were no fob not detected messages since the repair. Two comparison vehicles would not start with less than a 5% pressure change on the brake. Additionally, for LDW, road must have clear lane markings. For instance, going through intersections without lane markings may cause confusion with the system, as can black tar marks. He noted that between 2015 and 2016, the Respondent changed LKA/LDW because of customers that did not want beeping when crossing lanes without the turn signal on. In response, the respondent modified LKA/LDW so that even a gentle push will turn the system off. Moreover, environmental conditions can affect LKA/LDW - the system is not foolproof.

On cross-examination, Mr. Morris elaborated that the no fob detected concern did not reappear on the ROs after repair. He noted that radio interference can cause the message. For example, a building's sliding doors or cars parked nearby on the same radio frequency as the subject vehicle may cause an interruption. He also suggested the possibility of interference from

RF sprinklers. Mr. Morris explained that the display, when going through the wake up cycle, will change colors. He pointed out that radio waves from the same frequency (as the fob) can cause the wake up sequence to start. He indicated that RF sprinklers waking up may cause a battery draw from waking up. He clarified that the electronics had nothing to do with the mechanical brake system. With vacuum assist, the brakes would be soft and hard without. Mr. Morris elaborated that green lights indicate that the vehicle is between the lane markers and would turn yellow when crossing over. However, touching the steering will prevent the alarms because the system sees this as a conscience decision.

D. Analysis

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) that continues to exist after repairs.²⁷ The Lemon Law does not require that a manufacturer provide any particular warranty coverage nor does the Lemon Law impose any specific standards for vehicle characteristics. The Lemon Law only requires the manufacturer to conform its vehicles to whatever coverage the warranty provides. In part, the warranty generally states that:

The warranty covers repairs to correct any vehicle defect, not slight noise, vibrations, or other normal characteristics of the vehicle due to materials or workmanship occurring during the warranty period. Needed repairs will be performed using new, remanufactured, or refurbished parts.

According to these terms, the warranty only applies to defects in materials or workmanship (manufacturing defects).²⁸ A defectively manufactured vehicle has a flaw because of some error in making it at the factory, such as incorrect assembly or the use of a broken part. Manufacturing defects exist when the vehicle leaves the manufacturing plant. Unlike manufacturing defects,

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

²⁸ Courts have affirmed that warranty language covering “defects in material or workmanship” do not cover design issues. *E.g.*, *Whitt v. Mazda Motor of America*, 5th Dist. Stark No. 2010CA00343, 211-Ohio-3097, ¶¶ 18-21 (“The manufacturer’s express warranty in the case sub judice provides: ‘Mazda warrants that your new Mazda Vehicle is free from defects in material or workmanship’ The trial court found the warranty did not cover claims of design defects. . . . The problems about which Appellants complained did not fall within the applicable expressed warranty.”); *see GT & MC, Inc. v. Texas City Refining, Inc.*, 822 S.W.2d 252, 257 (Tex. App.—Houston [1st Dist.] 1991, writ denied) (“the language in the contract of May 12, 1980, expressly limited TCR’s recovery only for defects in materials or workmanship to damages for repair or replacement value. No mention was made in the guarantee of remedies for design defects.”).

issues that do not arise from manufacturing, such as design characteristics or design defects are not warrantable defects.

1. Lane Keep Assist (LKA)/Lane Departure Warning (LDW)

The Lane Keep Assist (LKA)/Lane Departure Warning (LDW) issue does not appear to be a defect. Rather, the operation of LKA and LDW comports with the design. The apparent failure to operate described by the complaint appear consistent with the vehicle's design. The evidence shows the Respondent actually modified the design to provide fewer alerts due to customers dissatisfaction with the alerts, so that driver input would actually suppress LKA/LDW. As shown in the Respondent's documentation (Respondent's Exhibit 2), LKA will not activate, even when the vehicle crosses lanes, until five criteria are met:

- Vehicle speed between 38 mph and 111 mph
- Lane markings are clearly visible
- Lane Keep Assist is turned "on" via the enable/disable button located on the dash. When enabled, the LED on the button will illuminate.
- Lane marker width meets Lane Keep Assist criteria (not too wide or narrow)
- Lane marker radius meets Lane Keep Assist criteria (curve is not too tight)

Even when the LKA criteria are met, driver input can suppress/override LKA. Such input includes: turning the steering wheel; braking; accelerating; and activating turn signal in the direction of the lane crossing. Furthermore, attempts to test LDW and LKA may actually suppress their operation:

If the driver tries to "test" the Lane Departure Warning alert and over comes the Lane Keep Assist correction so the vehicle intentionally crosses the lane marker, the system may interpret this as an active response, and in many cases, the system will NOT provide an alert. Therefore, alerts do NOT occur as often with Lane Keep Assist when compared to the Lane Departure Warning system used in the previous model year vehicles.

In addition, external factors may affect the operation of LKA/LDW, including: nearby vehicles ahead (tailgating); sudden lighting changes, such as going through a tunnel; banked roads; poor lane markings, such as on some two-lane roads; snow, frost, ice, dirt, mud, bugs, etc. on the windshield that are blocking the front camera; tar marks, cracks, shadows, temporary lane markings and other road imperfections; lane markings on one side of the road only (Lane Keep Assist provides assist only on the side with markings). However, the impact of such external influences is a design issue not covered by warranty. In sum, the vehicle's LKA and LDW issues

do not support any relief, since issues arising from the vehicle's design do not constitute warrantable manufacturing defects.

2. No-Start

A preponderance of the evidence shows that the no-start issue qualifies for Lemon Law relief. The repair history shows at least four repair visits for the no-start issue (which encompasses the failure to detect the fob) within two years and 24,000 miles after purchase. The last repair visit for this issue occurred on January 10, 2020, at 11,881 miles. Ms. Rodriguez last noticed the no-start issue on July 4, 2020, after the last actual repair attempt and after the January 30, 2020, and March 10, 2020, inspections (opportunities to repair) by the Respondent. The record reflects that the vehicle would not start with the fob on the console, with the brake depressed, while pushing the engine start button. Further, the record contains no evidence of any discernable sources of RF interference that may prevent the vehicle from detecting the fob. Additionally, the video in Complainant's Exhibit 10 demonstrates that Ms. Rodriguez can sufficiently and consistently press the brake pedal to start the vehicle, so failing to depress the brake by a half inch/5% does not appear to factor into the no-starts. Accordingly, a preponderance of the evidence indicates that the No-Start issue arises from a manufacturing defect. Under the reasonable prospective purchaser standard, the no-start problem would deter a reasonable purchaser from buying the vehicle or would substantially negatively affect the purchase price for the vehicle. In conclusion, the no-start issue qualifies for repurchase relief.

3. Dash/Instrument Panel

The record does not contain sufficient evidence to show by a preponderance that the dash/instrument panel has a warrantable defect. The evidence shows that characteristics described by the Complainants may occur normally, including the time for the display to turn on or off and the changes in color. Accordingly, this issue does not support any relief.

III. Findings of Fact

1. On December 14, 2018, the Complainants, purchased a new 2019 Cadillac Escalade ESV from Tom Peacock Cadillac, a franchised dealer of the Respondent, in Houston, Texas. The vehicle had 10 miles on the odometer at the time of purchase. However, the Complainants took delivery about December 21, 2018.

2. The vehicle's limited warranty provides bumper to bumper coverage for four years or 50,000 miles, whichever occurs first.
3. The Complainants took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
May 14, 2019	3,359	Service driver assist message
June 11, 2019	4,123	No remote detected message
July 11, 2019	5,150	Not reacting when attempting to start; takes several attempts to recognize remote
October 17, 2019	8,629	Will not react when attempting to start
January 10, 2020	11,881	Instrument cluster stays on long after vehicle shut down; remote not detected or press brake message; lane departure not pulling back or vibrating
<i>March 9, 2020</i>	12,567	Vehicle inspection by Respondent on 2-10-20

4. On November 18, 2019, the Complainants provided a written notice of defect to the Respondent.
5. On December 30, 2019, the Complainants filed a complaint with the Department alleging that Lane Keep Assist (LKA)/Lane Departure Warning (LDW) did not detect lanes and did not alert to drifting; the vehicle would not start; and the dash would not stay on (display problems) after turning off the vehicle.
6. On April 20, 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 July 16, 2020, by telephone and videoconference, before Hearings Examiner Andrew Kang, and the record closed on July 31, 2020. The Complainants, represented themselves. Carlin Davis, business resource manager, represented the Respondent.
8. The vehicle's odometer displayed 13,339 miles at the time of the hearing.
9. The vehicle's warranty was in effect at the time of the hearing.

10. Ms. Rodriguez last noticed the no-start issue on July 4, 2020, after the last actual repair attempt and after the January 30, 2020, and March 10, 2020, inspections (opportunities to repair) by the Respondent
11. The record reflects that the vehicle would not start with the fob on the console, with the brake depressed, while pushing the engine start button. Further, the record contains no evidence of any discernable sources of RF interference that may prevent the vehicle from detecting the fob. Additionally, the video in Complainant's Exhibit 10 demonstrates that Ms. Rodriguez can sufficiently and consistently press the brake pedal to start the vehicle, so failing to depress the brake by a half inch/5% does not appear to factor into the no-starts.
12. Under the reasonable prospective purchaser standard, the no-start problem would deter a reasonable purchaser from buying the vehicle or would substantially negatively affect the purchase price for the vehicle

13. The appropriate calculations for repurchase are:

Purchase price, including tax, title, license & registration	\$86,554.01
Delivery mileage	10
Mileage at first report of defective condition	4,123
Mileage on hearing date	13,339
Useful life determination	120,000

Purchase price, including tax, title, license & registration	\$86,554.01		
Mileage at first report of defective condition	4,123		
Less mileage at delivery	-10		
Unimpaired miles	4,113		
Mileage on hearing date	13,339		
Less mileage at first report of defective condition	-4,123		
Impaired miles	9,216		
<i>Reasonable Allowance for Use Calculations:</i>			
Unimpaired miles	4,113	÷ 120,000	× \$86,554.01 = \$2,966.64
Impaired miles	9,216	÷ 120,000	× \$86,554.01 × 50% = \$3,323.67
Total reasonable allowance for use deduction			\$6,290.31
Purchase price, including tax, title, license & registration	\$86,554.01		
Less reasonable allowance for use deduction	-\$6,290.31		
Plus filing fee refund	\$35.00		
Plus incidental expenses ²⁹	\$123.40		
TOTAL REPURCHASE AMOUNT	\$80,422.10		

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.

²⁹ The Avis rentals and Uber fares do not qualify as incidental expenses incurred from the loss of use of the subject vehicle. Loss of use includes the time deprived of the vehicle while under repair or the time reasonably necessary to obtain a replacement vehicle. See e.g., *J&D Towing, LLC v. Am. Alternative Ins. Corp.*, 478 S.W.3d 649 (Tex. 2016).

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 or a person on behalf of the Complainants provided sufficient notice of the alleged defect(s) to the Respondent. TEX. OCC. CODE § 2301.606(c)(1).
7. The Respondent had an opportunity to cure the alleged defect(s). TEX. OCC. CODE § 2301.606(c)(2).
8. The Complainants timely filed the complaint commencing this proceeding. TEX. OCC. CODE § 2301.606(d).
9. The Complainants' vehicle qualifies for replacement or repurchase. A warrantable defect that substantially impairs the market value of the vehicle continues to exist after a reasonable number of repair attempts. TEX. OCC. CODE § 2301.604(a).
10. 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 **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:

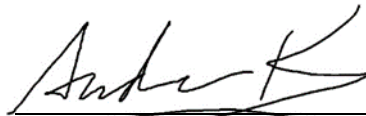
1. The Respondent shall accept the return of the vehicle from the Complainants. The Respondent shall have the right to have its representatives inspect the vehicle upon the return by the Complainants. If from the date of the hearing to the date of repurchase the vehicle is substantially damaged or there 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. The Respondent shall repurchase the subject vehicle in the amount of **\$80,422.10**. The refund shall be paid to the Complainants 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 Complainants. 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 Complainants 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 Complainants' refusal or inability to deliver the vehicle with clear title, the Office of Administrative Hearings may deem the granted relief rejected by the Complainants and the complaint closed pursuant to 43 Texas Administrative Code § 215.210(2);
 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,

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.

address and telephone number of the transferee (wholesale purchaser or equivalent) of the vehicle within 60 days of the transfer.

SIGNED October 6, 2020

A handwritten signature in black ink, appearing to read "Andrew Kang", written over a horizontal line.

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