TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 20-0011088 CAF

JAMES SPRY,	**§**	**BEFORE THE OFFICE**
Complainant	**§**	
	§	
v.	**§**	**OF**
	§	
MERCEDES-BENZ USA, LLC,	**§**	
Respondent	**§**	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

James Spry (Complainant) filed a complaint with the Texas Department of Motor Vehicles (Department) seeking relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged warrantable defects in his vehicle distributed by Mercedes-Benz USA, LLC (Respondent). A preponderance of the evidence does not show that the subject vehicle has a warrantable defect. Consequently, the Complainant's vehicle does not qualify for repurchase/replacement or warranty repair.

I. Procedural History, Notice and Jurisdiction

Matters of notice of hearing[1] and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law. The hearing in this case convened on November 5, 2020, by videoconference, before Hearings Examiner Andrew Kang, and the record closed on November 20, 2020. The Complainant, represented himself. Collin Kennedy, attorney, 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]

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[2] TEX. OCC. CODE § 2301.604(a).

[3] TEX. OCC. CODE § 2301.604(a).

[4] TEX. OCC. CODE § 2301.601(4).

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

ii. Impairment of Value

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

c. Reasonable Number of Repair Attempts

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

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

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

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

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

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[9] TEX. OCC. CODE § 2301.605(a)(3).

[10] TEX. OCC. CODE § 2301.605(c).

[11] *Ford Motor Company v. Texas Department of Transportation*, 936 S.W.2d 427, 432 (Tex. App.—Austin 1996, no writ) ("[T]he existence of statutory presumptions does not forbid the agency from finding that different circumstances or fewer attempts meet the requisite 'reasonable number of attempts.'").

[12] *DaimlerChrysler Corporation v. Williams*, No. 03-99-00822-CV (Tex. App.—Austin, June 22, 2000, no writ) (not designated for publication) (Repair attempts include "those occasions when the fault for failing to repair the vehicle rests with the dealership." Conversely, "those occasions when failure to repair the vehicle was the fault of the consumer would not be considered a repair attempt under the statute.").

[13] 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 satisfies the requirement to provide notice of the defect or nonconformity to the Respondent. TEX. OCC. CODE § 2301.606(c)(1).

[14] TEX. OCC. CODE § 2301.606(c)(2). A respondent may delegate its opportunity to cure to a dealer. A repair visit to a dealer may satisfy the opportunity to cure requirement when the respondent allows a dealer to attempt repair

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 unlikely or appears equally likely or unlikely.

4. The Complaint Identifies the Relevant Issues in this Case

The complaint identifies the relevant issues to address in this case.[20] The complaint must state "sufficient facts to enable the department and the party complained against to know the nature

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after written notice to 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: (1) for hearing after reasonable notice of not less than 10 days; and (2) to respond and to present evidence and argument on each issue involved in the case." TEX. GOV'T CODE § 2001.051; "Notice of a hearing in a contested case must include . . . either: (A) a short, plain statement of the factual matters asserted; or (B) an attachment that incorporates by reference the factual matters asserted in the complaint or petition filed with the state agency." 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

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] Because the complaint determines the relevant issues, the Department cannot order relief for an issue not included in the complaint unless tried by consent.[24]

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.[25] 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).[26] However, the Department's rules expressly exclude compensation for "any interest, finance charge, or insurance premiums."[27]

B. Summary of Complainant's Evidence and Arguments

On March 7, 2019, the Complainant, purchased a new 2019 Mercedes S63 from Mercedes-Benz of San Antonio, a franchised dealer of the Respondent, in San Antonio, Texas. The vehicle

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specify each defect in the vehicle that is covered by the warranty."); TEX. OCC. CODE § 2301.204(d) ("A hearing may be scheduled on any complaint made under this section that is not privately resolved between the owner and the dealer, manufacturer, converter, or distributor.").

[21] 43 TEX. ADMIN. CODE § 215.202(a)(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] *See* TEX. GOV'T CODE §§ 2001.141(b)-(c), 2001.051-2001.052; TEX. R. CIV. P. 301.

[25] TEX. OCC. CODE § 2301.604.

[26] 43 TEX. ADMIN. CODE § 215.209(a).

[27] 43 TEX. ADMIN. CODE § 215.208(b)(1).

had 29 miles on the odometer at the time of purchase. The vehicle's limited warranty provides basic coverage for four years or 50,000 miles, whichever occurs first.

On May 7, 2020, the Complainant provided a written notice of defect to the Respondent. On May 7, 2020, the Complainant filed a complaint with the Department alleging that the subject vehicle, when slowing to stop, would make a clunking sound from the drive train or transmission and slightly lurch forward.

The Complainant testified that he first noticed the issue within the first month when backing into his garage. He described the issue as feeling like running over something. He also heard a clunk noise. He did not notice any particular conditions when the issue occurred. The issue would occur about once every 350 miles. He explained that the vehicle would clunk then lurch within one or two seconds. Most of the time, the issue would occur when moving forward, not long before coming to a stop. The issue has not prevented the Complainant from driving the vehicle. The force of the lurching varied. Three or four times, the vehicle felt like the vehicle was hit from behind and moved forward. Other times, the lurching was more subtle but noticeable. In contrast, the clunk noise stayed the same. The Complainant last noticed the issue, slightly, within a month before the hearing when parking at the grocery store.

On cross-examination, the Complainant testified that he had not previously owned a vehicle capable of going 0 to 60 mph in three seconds. He affirmed that he had not driven another S63 AMG or a vehicle equipped with a wet clutch. He also confirmed that the Respondent offered to trade his vehicle for a new vehicle of his choice with $15,000 in trade assistance.

The Complainant stated that he took the vehicle to the dealer because of a clunk and a sensation like the vehicle ran over something and not anything about shifting. He added that slowing to a stop had nothing to do with the transmission shifting and that the transmission was not designed to make the vehicle feel rear-ended. He pointed out that the issue occurred at about 350 mile intervals as compared to the 111 miles test driven. He asserted that slowing to a stop was different from accelerating and was sure the vehicle was not designed to lurch when slowing to a stop. He explained that the concern at the first repair visit was backing into the garage and coming to a stop but the dealer addressed the transmission shifting, which was not his complaint. He suggested that dealer have a technician drive the vehicle like his own vehicle for a month, which the dealer did not do.

C. Summary of Respondent's Evidence and Arguments

Cody Ramer, a technician at Mercedes-Benz of Austin, testified that the complaint concerned a shifting characteristic of the car. The issue appeared to relate to the wet clutch engaging and disengaging at takeoff. Mr. Ramer test drove the subject vehicle 111 miles over a span of days focusing on the concern. He elaborated that they did not waste time driving highway miles but drove in the same situations as the Complainant (to duplicate the concern). He evaluated the vehicle in cold, medium and warm cycles, in all situations the vehicle may operate, including stop and go scenarios. Based on the multiple test drives and the data obtained, Mr. Ramer concluded that the vehicle operated as designed. He explained that the Complainant's previous car had a V8 and a nine-speed transmission with a torque converter, which smooths feedback. He affirmed that the subject vehicle accelerates from 0 to 60 mph in 3.4 seconds, like Porsches, Ferraris and other supercars. He explained that the vehicle employed a multi-clutch system coupling the engine and transmission. This system worked faster at engaging and disengaging the transmission and was more "snappy" than a torque converter using hydraulics. He elaborated that when the vehicle slows down, the transmission will down shift, using engine braking to help slow the vehicle, and load the next gear. The downshift can be felt because it happens so fast. Upon clarification questions, Mr. Ramer explained that the subject vehicle's mechanical clutch couples the engine and transmission using friction materials as opposed to a hydraulic torque converter which uses a fluid coupling that dampens the shifting sensations.

Matthew Miller, the Respondent's field service engineer for Texas, testified that he asked the dealer for data about the transmission, as well as torque, the wet clutch, and adaptations. The adaptation data would identify whether the vehicle had an issue with the clutch or other mechanical issue. He could not identify any issues with the data and the dealer could not duplicate the issue. He concluded that the vehicle did not have a defect/substantial impairment. Based on the data from the vehicle, it was operating as designed.

D. Analysis

As detailed below, a preponderance of the evidence does not show that the subject vehicle has a defect that supports granting relief. As explained in the discussion of applicable law, the law requires the Complainant to prove every element under the Lemon Law (or Warranty Performance

Law for repair relief) by a preponderance. In other words, the Complainant must prove that every required fact is more likely than not true.

Lemon Law relief does not apply to all problems that may occur with a vehicle but only to defects covered by warranty (warrantable defects) that continue to exist after repairs.[28] 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 subject vehicle's warranty states that: "Mercedes-Benz USA, LLC (MBUSA) warrants to the original and each subsequent owner of a new Mercedes-Benz vehicle that any authorized Mercedes-Benz Dealership will make any repairs or replacements necessary to correct defects in material or workmanship, but not design, arising during the warranty period."[29] According to these terms, the warranty only applies to defects in materials or workmanship (manufacturing defects).[30]

A defectively manufactured vehicle has a flaw so that it does not conform to the manufacturer's specifications, and is not identical to other same model vehicles.[31] A manufacturing defect occurs when the vehicle varies from the manufacturer's design standards, causing that vehicle to differ from other vehicles of the same kind.[32] In other words, a manufacturing defect is an isolated aberration, an unintended configuration occurring only in those

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

[29] Complainant's Ex. 1, Service and Warranty Information 2019.

[30] 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.").

[31] *Ford Motor Co. v. Pool*, 688 S.W.2d 879, 881 (Tex. App.--Texarkana 1985), aff'd in part on other grounds, rev'd in part on other grounds, 715 S.W.2d 629 (Tex. 1986) ("Manufacturing defect cases involve products which are flawed, i.e., which do not conform to the manufacturer's own specifications, and are not identical to their mass-produced siblings.").

[32] *Ridgway v. Ford Motor* Co., 82 S.W.3d 26, 31-32 (Tex. App.—San Antonio 2002), *rev'd on other grounds*, 135 S.W.3d 598 (Tex. 2004) ("A manufacturing defect may be distinguished from a design defect. A manufacturing defect occurs when the product varies from the manufacturer-established design standards, causing that product to deviate from the normal safety of other products of its kind.).

vehicles not produced according to the manufacturer's specifications.[33] A defectively manufactured vehicle has a flaw because of some error in making it, such as incorrect assembly or the use of a broken part. Accordingly, manufacturing defects occur during manufacturing and exist when the vehicle leaves the manufacturing plant. In contrast, design issues result from the manufacturer's design of the vehicle, even though manufactured without any flaws.[34] Design defects/characteristics exist in the vehicle's specifications, before the vehicle is even manufactured, and do not arise from any error during manufacturing.[35] Accordingly, a design defect/characteristic exists in all vehicles of the same design, but the vehicle's intended configuration may produce unintended and unwanted results.[36] Unlike manufacturing defects, issues that do not arise from manufacturing, such as the vehicle's design characteristics (which exist before manufacturing) are not warrantable defects. Because the warranty only covers manufacturing defects, the Lemon Law does not provide relief for design characteristics, design defects, or any other non-manufacturing problem. Even though an issue may be unintended and unwanted, the Lemon Law provides no relief unless the issue constitutes a manufacturing defect.

In the present case, the evidence reflects that the complained of issue arises from the design of the vehicle and not from any warranted manufacturing defect. In essence, the vehicle's design sacrifices comfort and smoothness in favor or performance. Specifically, the vehicle employs a mechanical clutch that couples the engine and transmission using friction surfaces as opposed to a hydraulic torque converter, which uses fluid to transfer power between the engine and transmission. The fluid coupling of the torque converter dampens the sensations from shifting.

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[33] *Harduvel v. Gen. Dynamics Corp.,* 878 F.2d 1311, 1317 (11th Cir. 1989) ("This distinction between 'aberrational' defects and defects occurring throughout an entire line of products is frequently used in tort law to separate defects of manufacture from those of design. . . . Stated another way, the distinction is between an unintended configuration [a manufacturing defect], and an intended configuration that may produce unintended and unwanted results [a design defect].").

[34] *Ford Motor Co. v. Pool,* 688 S.W.2d 879, 881 (Tex. App.--Texarkana 1985), aff'd in part on other grounds, rev'd in part on other grounds, 715 S.W.2d 629 (Tex. 1986) ("Defective design cases, however, are not based on consumer expectancy, but on the manufacturer's design of a product . . . even though not flawed in its manufacture.").

[35] In contrast to manufacturing defects, "[a] design defect exists where the product conforms to the specification but there is a flaw in the specifications themselves." *Torres v. Caterpillar, Inc.,* 928 S.W.2d 233, 239 (Tex. App.—San Antonio 1996), *writ denied*, (Feb. 13, 1997).

[36] *Harduvel v. Gen. Dynamics Corp.,* 878 F.2d 1311, 1317 (11th Cir. 1989) ("This distinction between 'aberrational' defects and defects occurring throughout an entire line of products is frequently used in tort law to separate defects of manufacture from those of design. . . . Stated another way, the distinction is between an unintended configuration [a manufacturing defect], and an intended configuration that may produce unintended and unwanted results [a design defect].").

Unlike the fluid coupling of a torque converter, the subject vehicle's clutch employs friction surfaces to connect the engine to the transmission, which enhances shifting performance at the expense of shifting smoothness, leading to the complained of clunk noise and lurching sensation when the friction surfaces engage. Although the complaint concerned clunking and lurching, the record shows that the transmission will downshift when slowing, which corresponds to the situations when the complained of clunking and lurching occur. Although the clunking and lurching themselves may not be intended by design, they are byproducts of the intended design of the vehicle. That is, the vehicle's intended configuration employing a clutch produces the clunking and lurching. In this case, the relevant inquiry for determining warrantability is whether the vehicle's configuration conforms to the intended design, not whether the vehicle is expressly designed to clunk and lurch. Although the clunking and lurching may not be intended, the configuration that produces the clunking and lurching is intended. Because the complained of issue arises from the vehicle's intended design and not from a manufacturing defect, no relief applies.

III. Findings of Fact

1. On March 7, 2019, the Complainant, purchased a new 2019 Mercedes S63 from Mercedes-Benz of San Antonio, a franchised dealer of the Respondent, in San Antonio, Texas. The vehicle had 29 miles on the odometer at the time of purchase.

2. The vehicle's limited warranty provides basic coverage for four years or 50,000 miles, whichever occurs first.

3. The vehicle's warranty states that: "Mercedes-Benz USA, LLC (MBUSA) warrants to the original and each subsequent owner of a new Mercedes-Benz vehicle that any authorized Mercedes-Benz Dealership will make any repairs or replacements necessary to correct defects in material or workmanship, but not design, arising during the warranty period.".

4. On May 7, 2020, the Complainant filed a complaint with the Department alleging that the subject vehicle, when slowing to stop, would make a clunking sound from the drive train or transmission and slightly lurch forward.

5. On May 7, 2020, the Complainant provided a written notice of defect to the Respondent

6. On August 4, 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 November 5, 2020, by videoconference, before Hearings Examiner Andrew Kang, and the record closed on November 20, 2020. The Complainant, represented himself. Collin Kennedy, attorney, represented the Respondent.

8. By design, the vehicle employs a mechanical clutch that couples the engine and transmission using friction surfaces as opposed to a hydraulic torque converter, which uses fluid to transfer power between the engine and transmission.

9. The fluid coupling of the torque converter dampens sensations from shifting. Unlike the fluid coupling of a torque converter, the subject vehicle's clutch employs friction surfaces to connect the engine to the transmission, which enhances shifting performance at the expense of shifting smoothness, leading to the clunk noise and lurching sensation when the friction surfaces engage.

IV. Conclusions of Law

1. The Texas Department of Motor Vehicles has jurisdiction over this matter. TEX. OCC. CODE §§ 2301.601-2301.613 and 2301.204.

2. A hearings examiner of the Department's Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a decision with findings of fact and conclusions of law, and the issuance of a final order. TEX. OCC. CODE § 2301.704.

3. The Complainant filed a sufficient complaint with the Department. 43 TEX. ADMIN. CODE § 215.202.

4. The parties received proper notice of the hearing. TEX. GOV'T CODE §§ 2001.051, 2001.052. 43 TEX. ADMIN. CODE § 215.206(2).

5. The Complainant bears the burden of proof in this matter. 43 TEX. ADMIN. CODE § 206.66(d).

6. The Complainant's vehicle does not qualify for replacement or repurchase. The Complainant did not prove that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.603 and 2301.604(a).

7. The Complainant does not qualify for reimbursement of incidental expenses because the vehicle does not qualify for replacement or repurchase. TEX. OCC. CODE §§ 2301.603, 2301.604(a); 43 TEX. ADMIN. CODE § 215.209.

8. The Complainant's vehicle does not qualify for warranty repair. The Complainant did not prove that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603.

9. The Respondent remains responsible to address and repair or correct any defects that are covered by the Respondent's warranty. TEX. OCC. CODE § 2301.603.

V. Order

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

SIGNED January 22, 2021

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