TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 20-0014639 CAF

JOSE DIAZ,	§	**BEFORE THE OFFICE**
Complainant	§	
	§	
v.	§	**OF**
	§	
NISSAN NORTH AMERICA, INC.,	§	
Respondent	§	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Jose Diaz (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 manufactured by Nissan North America, Inc. (Respondent). A preponderance of the evidence shows that the subject vehicle has a warrantable defect that qualifies for repurchase/replacement relief.

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 January 26, 2021, by videoconference/telephone, before Hearings Examiner Andrew Kang, and the record closed on February 18, 2019. The Complainant, represented himself. Jessie Juan, Arbitration Specialist, represented the Respondent.

[1] TEX. GOV'T CODE § 2001.051.

II. Discussion

A. Applicable Law

1. Repurchase/Replacement Relief Requirements

Repurchase and replacement relief only apply to new vehicles.[2] 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."[3] 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.[4] 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.[5]

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

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[2] TEX. OCC. CODE § 2301.603.

[3] TEX. OCC. CODE § 2301.604(a).

[4] TEX. OCC. CODE § 2301.604(a).

[5] TEX. OCC. CODE § 2301.601(4).

vehicle with a non-functioning air conditioner would be available for use and transporting passengers, its intended normal use would be substantially impaired."[6]

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."[7]

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.[8]

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

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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).

[7] *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.").

[8] TEX. OCC. CODE § 2301.605(a)(1)(A) and (B).

> miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.[9]

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.[10]

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.[11]

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.[12] 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.[13]

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;[14] (2) the respondent was given an opportunity to cure the defect or

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[9] TEX. OCC. CODE § 2301.605(a)(2).

[10] TEX. OCC. CODE § 2301.605(a)(3).

[11] TEX. OCC. CODE § 2301.605(c).

[12] *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.'").

[13] *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.").

[14] 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).

nonconformity;[15] and (3) the Lemon Law complaint was filed within six months after the earliest of: the warranty's expiration date or the dates on which 24 months or 24,000 miles had passed since the date of original delivery of the motor vehicle to an owner.[16]

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.[17] The manufacturer, converter, or distributor has an obligation to "make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty."[18]

3. Burden of Proof

The law places the burden of proof on the Complainant.[19] 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.[20] Accordingly, the Complainant cannot prevail where the existence of any required fact appears unlikely or appears equally likely or unlikely.

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[15] 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 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. A respondent forgoes its opportunity to repair by replying to a written notice of defect with a settlement offer instead of arranging a repair attempt. *Id* at 2.

[16] TEX. OCC. CODE § 2301.606(d)(2).

[17] TEX. OCC. CODE § 2301.204; 43 TEX. ADMIN. CODE § 215.202(b)(3).

[18] TEX. OCC. CODE § 2301.603(a).

[19] 43 TEX. ADMIN. CODE § 215.66(d).

[20] *E.g., Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

4. The Complaint Identifies the Relevant Issues in this Case

The complaint identifies the relevant issues to address in this case.[21] The complaint must state "sufficient facts to enable the department and the party complained against to know the nature of the complaint and the specific problems or circumstances forming the basis of the claim for relief under the lemon law."[22] However, the parties may expressly or impliedly consent to hearing issues not included in the pleadings.[23] Implied consent occurs when a party introduces evidence on an unpleaded issue without objection.[24] Because the complaint determines the relevant issues, the Department cannot order relief for an issue not included in the complaint unless tried by consent.[25]

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.[26] 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

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[21] "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 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.").

[22] 43 TEX. ADMIN. CODE § 215.202(a)(3).

[23] 43 TEX. ADMIN. CODE § 215.42; TEX. R. CIV. P. 67.

[24] *See Gadd v. Lynch*, 258 S.W.2d 168, 169 (Tex. Civ. App.—San Antonio 1953, writ ref'd).

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

[26] TEX. OCC. CODE § 2301.604.

or similar written documents).[27] However, the Department's rules expressly exclude compensation for "any interest, finance charge, or insurance premiums."[28]

B. Summary of Complainant's Evidence and Arguments

On August 20, 2018, the Complainant, purchased a new 2019 Infiniti QX50 from Bert Ogden Infiniti, a franchised dealer of the Respondent, in Edinburg, Texas. The vehicle had 282 miles on the odometer at the time of purchase. The vehicle's limited warranty provides basic coverage for 48 months or 60,000 miles, whichever occurs first. On August 7, 2020, the Complainant provided a written notice of defect to the Respondent. On August 5, 2020, the Complainant filed a complaint with the Department alleging that the electronics system froze (including the air conditioning controls, radio, Bluetooth, and speedometer), and the front tires wore unusually and prematurely. The Complainant testified that the electronics freezing issue was successfully resolved, leaving only the tire wear issue still existing. However, the premature tire wear continued despite repeated repair visits following the dealer's instructions. In relevant part, the Complainant took the vehicle to a dealer for repair of the tire wear issue as follows:

Date	Miles	Issue
02/19/2019	7,063	Alignment
12/20/2019	15,797	Front tire uneven wear
06/01/2020	18,046	Premature wear out face
08/03/2020	18,970	Tires wearing down

The Complainant also took the vehicle to a Firestone repair facility for a wheel alignment on June 18, 2020, at 18,433 miles.

The Complainant testified that on February 19, 2019, his wife took the subject vehicle to the dealer for an oil change and mentioned the tire wear and the dealer performed a wheel alignment for the excessive tire wear at about 7,000 miles. In December 2019, the dealer recommended replacing the front tires. Additionally, another tire was destroyed, so the Complainant had to replace three tires at about 15,000 miles. The Complainant asserted that the dealer basically blamed the driver for the tire wear. He pointed out that he used a map to track his wife's driving, which was very conservative. On June 18, 2020, Wendy Martin, a representative of the Respondent, contacted the Complainant to have the wheels aligned at a dealer in Corpus

[27] 43 TEX. ADMIN. CODE § 215.209(a).

[28] 43 TEX. ADMIN. CODE § 215.208(b)(1).

Christi. The Complainant had the wheels aligned at a Firestone repair facility on June 18, 2020, and the Respondent reimbursed the Complainant for the alignment. On August 3, 2020, (at 18,970 miles) the dealer found that the vehicle needed the wheels realigned. The Complainant asserted that the tires were currently wearing excessively. He last noticed the excessive wear before taking the vehicle to the dealer in August 2020. In comparison, he changed the tires on his other Infiniti after 50,000 miles. He elaborated that he believed the vehicle itself had a problem, possibly with the all-wheel drive, rather than the tires. The Complainant clarified that his wife was the primary driver and her office was five minutes from home and he only drove the vehicle occasionally. The Complainant did not notice any pulling or drifting. The only complaint was the tire wear. He added that he always checked the tire pressure. He also represented that the vehicle had not gone over any potholes or hit a curb but the dealer replaced one of the tires due to an accident[29]. The vehicle currently had 21,478 miles on the odometer.

C. Summary of Respondent's Evidence and Arguments

Mr. Juan posited that the tire wear and alignment concerns did not qualify for Lemon Law relief. He pointed out that the Respondent's warranty did not cover tires or alignment. He elaborated that the warranty provided adjustment coverage for 12 months or 12,000 miles. After this time, wheel alignment was considered customer paid maintenance. The Respondent's warranty did not cover tires but the tires did come with a warranty from the tire manufacturer. In sum, the issues were beyond the coverage period and not a warrantable concern.

On cross-examination, Mr. Juan clarified that the Respondent did not point to the tires as causing the issue, rather the Respondent claimed that the issue did not qualify for Lemon Law relief. He also explained that the dealer may have recommended certain tires but the Respondent did not have anything to do with the dealer's recommendation. The Respondent concluded that the vehicle did not have a defect and the tire wear was normal.

D. Analysis

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

[29] The repair history indicates that a flat tire occurred during a test drive by the dealer's technician.

preponderance. In other words, the Complainant must prove that every required fact is more likely than not true. In this case, the record reflects that the vehicle currently has a defect covered under warranty (warrantable defect).

Lemon Law relief only applies to warrantable defects that continue to exist (i.e., currently exist) after repairs.[30] The Lemon Law does not require that a respondent provide any particular warranty coverage nor does the Lemon Law impose any specific standards for vehicle characteristics. The Lemon Law only requires a respondent to conform its vehicles to whatever coverage the warranty provides. In part, the subject vehicle's warranty states that:

> The warranty covers any repairs needed to correct defects in materials or workmanship of all parts and components of each new Infiniti vehicle supplied by Infiniti 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.
>
> . . . .
>
> Service adjustments not usually associated with the replacement of parts, such as wheel alignment, and wheel balancing are covered only during the first 12 months or 12,000 miles, whichever comes first.
>
> . . . .
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> Seat belts, tires and the emission control system are covered by separate warranties.[31]

According to these terms, the warranty only applies to defects in materials or workmanship (manufacturing defects).[32] Additionally, the warranty only covers service adjustments for 12

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

[31] Complainant's Ex. 11, 2019 Warranty Information Booklet.

[32] 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.").

months or 12,000 miles and the tires have a separate warranty from the tire manufacturer instead of coverage under the new vehicle limited warranty.

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.[33] 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.[34] 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.[35] Design defects/characteristics exist in the vehicle's specifications, before the vehicle is even manufactured, and do not arise from any error during manufacturing.[36] 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.[37] Unlike manufacturing defects, issues that do not arise from manufacturing, such as the vehicle's design characteristics (which exist before manufacturing) or dealer representations and improper dealer repairs (which occur after 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

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[33] *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.").

[34] *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.).

[35] *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.").

[36] 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).

[37] *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].").

other non-manufacturing problem. Even though an issue may be unintended and unwanted, the Lemon Law provides no relief unless the issue constitutes a warrantable defect.

The subject vehicle's tire wear appears excessive. However, the relevant issue is whether such wear arises from a warrantable defect. In this case, the vehicle's warranty does not cover the tires and no longer covers wheel alignments.[38] Nevertheless, the Complainant explained that he did not assert that the tires had a defect but instead claimed that some underlying issue with the vehicle itself, possibly related to the all-wheel drive system, had caused the tire wear. The repair history shows that the dealer found no abnormalities with the suspension and struts but the history does not address all-wheel drive. Instead, the dealership concluded that the tire wear probably resulted from driving habits. On the other hand, the record reflects that the primary driver drove conservatively and had a short commute to work. Additionally, the Complainant "always" monitored the air pressure in the tires. When considering the balance of the evidence, the vehicle more likely than not has a warrantable defect causing the excessive tire wear. Further, under the reasonable prospective purchaser standard, the nonconformity substantially impairs the value of the vehicle, given that the trouble and expense of relatively frequent tire replacement may deter a prospective purchaser from buying the vehicle or substantially negatively affect how much the purchaser would pay.

III. Findings of Fact

1. On August 20, 2018, the Complainant, purchased a new 2019 Infiniti QX50 from Bert Ogden Infiniti, a franchised dealer of the Respondent, in Edinburg, Texas. The vehicle had 282 miles on the odometer at the time of purchase.

2. The vehicle's limited warranty provides basic coverage for 48 months or 60,000 miles, whichever occurs first.

3. In part, the vehicle's warranty states that:

> The warranty covers any repairs needed to correct defects in materials or workmanship of all parts and components of each new Infiniti vehicle supplied by Infiniti 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

[38] The adjustment coverage, which includes wheel alignments, expired on August 20, 2019, or at 12,282 miles on the odometer, whichever came first.

the following sections of this warranty, that specific coverage applies instead of the basic coverage.

. . . .

Service adjustments not usually associated with the replacement of parts, such as wheel alignment, and wheel balancing are covered only during the first 12 months or 12,000 miles, whichever comes first.

. . . .

Seat belts, tires and the emission control system are covered by separate warranties.

4. The Complainant took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
02/19/2019	7,063	Alignment
12/20/2019	15,797	Front tire uneven wear
06/01/2020	18,046	Premature wear out face
08/03/2020	18,970	Tires wearing down

5. On June 18, 2020, Wendy Martin, a representative of the Respondent, contacted the Complainant to have the wheels aligned at a dealer in Corpus Christi. The Complainant took the vehicle to a Firestone repair facility for a wheel alignment on June 18, 2020, at 18,433 miles.

6. Two worn tires required replacement on December 20, 2019, at 15,797 miles.

7. The front tires continued to wear prematurely after the repair visits and despite following the dealer's instructions.

8. On August 5, 2020, the Complainant filed a complaint with the Department alleging that the electronics system froze (including the air conditioning controls, radio, Bluetooth, and speedometer), and the front tires wore unusually and prematurely. The electronics freezing issue was successfully resolved, leaving only the tire wear issue to be addressed.

9. On August 7, 2020, the Complainant provided a written notice of defect to the Respondent.

10. On October 5, 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.

11. The hearing in this case convened on January 26, 2021, by videoconference/telephone, before Hearings Examiner Andrew Kang, and the record closed on February 18, 2019. The Complainant, represented himself. Jessie Juan, Arbitration Specialist, represented the Respondent.

12. The vehicle's odometer displayed 21,478 miles at the time of the hearing.

13. The vehicle's warranty was in effect at the time of the hearing.

14. The appropriate calculations for repurchase are:

Purchase price, including tax, title, license & registration	$37,470.39
Delivery mileage	282
Mileage at first report of defective condition	7,063
Mileage on hearing date	21,478
Useful life determination	120,000

Purchase price, including tax, title, license & registration					$37,470.39			
Mileage at first report of defective condition	7,063							
Less mileage at delivery	-282							
Unimpaired miles	6,781							
Mileage on hearing date	21,478							
Less mileage at first report of defective condition	-7,063							
Impaired miles	14,415							
Reasonable Allowance for Use Calculations:								
Unimpaired miles	6,781	÷	120,000	×	$37,470.39	×	=	$2,117.39
Impaired miles	14,415	÷	120,000	×	$37,470.39	50%	=	$2,250.57
Total reasonable allowance for use deduction								$4,367.95
Purchase price, including tax, title, license & registration					$37,470.39			
Less reasonable allowance for use deduction					-$4,367.95			
Plus filing fee refund					$35.00			
Plus incidental expenses					$0.00			
TOTAL REPURCHASE AMOUNT					**$33,137.44**			

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 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).

7. The Respondent had an opportunity to cure the alleged defect(s). TEX. OCC. CODE § 2301.606(c)(2).

8. The Complainant timely filed the complaint commencing this proceeding. TEX. OCC. CODE § 2301.606(d).

9. 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).

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 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 **$33,137.44**. 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.[39] 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);

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[39] 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.

SIGNED April 19, 2021

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