TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 21-0003826 CAF

CLIFTON SCRIBNER,	§	**BEFORE THE OFFICE**
Complainant	§	
	§	
v.	§	**OF**
	§	
GENERAL MOTORS LLC,	§	
Respondent	§	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Clifton Scribner (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 General Motors LLC (Respondent). A preponderance of the evidence shows that the subject vehicle has a warrantable defect. Consequently, the Complainant's vehicle qualifies for replacement.

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 July 20, 2021, in Wichita Falls, Texas, before Hearings Examiner Andrew Kang, and the record closed on September 9, 2021. The Complainant, represented himself. Clifton Green, Business Resource Manager, 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

The Department applies a reasonable purchaser standard for determining whether a defect substantially impairs use. Under this standard, the factfinder considers "whether a defect or nonconformity hampers the intended normal operation of the vehicle" from the perspective of a reasonable prospective purchaser. For instance, "while a vehicle with a non-functioning air

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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).

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 authorizes 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 January 24, 2020, the Complainant, purchased a new 2020 GMC Sierra 2500 from Patterson Auto Group, a franchised dealer of the Respondent, in Wichita Falls, Texas. The vehicle had 405 miles on the odometer at the time of purchase. The vehicle's limited warranty provides bumper to bumper coverage for three (3) years or 36,000 miles, whichever occurs first.

On or about November 17, 2020, the Complainant or a person on behalf of the Complainant or the Department provided a written notice of defect to the Respondent. On December 4, 2020, the Complainant filed a complaint with the Department alleging that the vehicle will intermittently not allow the Bluetooth to make a phone call. The system will not understand commands from a speaker. Sometimes while in use, the system will call someone completely different than name spoken.

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

Date	Miles	Issue
03/24/20	4,090	The Bluetooth system does not respond to voice commands.
05/20/20	6,653	The Bluetooth system loses connection while using maps. The voice recognition system causes the vehicle to dial the wrong number.
06/01/20	7,313	The voice recognition system is not working properly.
07/01/20	7,714	The voice recognition system dials the wrong number and at times won't work.
07/08/20	7,729	The Bluetooth system is not working
07/10/20	7,834	The voice recognition system isn't working and always calls the same name. The radio asks for a password and resets to the home screen upon start up.
10/06/20	9,957	The voice recognition system is not working properly.
02/26/21	12,344	The voice recognition system will not make calls and an error message pops up and will not go away.

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

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

Chris Emery, employed at Patterson Auto Group, affirmed that he had been in the Complainant's vehicle when the Complainant made and received phone calls. Mr. Emery confirmed that he had ridden in several of the Complainant's vehicles and had never noticed a problem with the phone system except for the 2020 Sierra. Mr. Emery expressed that he noticed phone call problems most of the time that he has ridden in the 2020 Sierra. He affirmed that he had seen the voice recognition system call the wrong phone number several times. He added that he had seen the system respond that there was "no contact by that name" when he had personally observed the contact in the Complainant's phone. He acknowledged that when the Complainant tried to call through the system, the system would sometimes reply that there was no phone connected though the screen showed that the phone was connected. He clarified that manually calling from the phone did allow the call to go through the vehicle's speakers. He established that he had seen a phone call successfully go through the system but the phone was no longer connected to the system when a second call was attempted on the same drive. He added that this had happened three times in one trip.

On cross-examination, Mr. Emery stated that he first met the Complainant in 2016. Mr. Emery confirmed that the Complainant's phone was paired to the Bluetooth system when the issues he described occurred. Mr. Emery clarified that the issues occurred almost immediately after the Complainant had purchased the truck and has been ongoing since. Mr. Emery testified that he had last ridden in the truck a few weeks before the hearing and he noticed the issue during that trip. He explained that he had attempted to use the voice recognition system using his voice and the same issues occurred. He further clarified that the Complainant had used Android Auto and regular Bluetooth to connect his phone.

Wesley Tipton confirmed he was a technician for the Patterson Auto Group. He also affirmed that he had updated the software and replaced a module on the Complainant's vehicle. Mr. Tipton acknowledged that, at the Respondent's direction, they paired the Complainant's phone to a new truck on the lot and there were no problems with any of the systems. He recounted that after the test, he stated that it was not the phone that was the problem.

On cross-examination, Mr. Tipton stated that he could not replicate the issue using his own phone. The Complainant described an issue where the phone would only call one contact with the first name "Mike" no matter how he asked the system to call a different Mike. Mr. Tipton testified

that the did not know what software was in the vehicle they used to test the phone. He expressed that he was not sure if the system had the same software as the Complainants vehicle.

Jimmy Chancellor testified that he was a technician at Herb Easley Motors. The Complainant and Mr. Chancellor discussed how Bluetooth and voice recognition worked at a basic level. The Complainant explained that the Patterson dealership initially told him the issue was his phone so he bought a new phone. The Complainant noted that when he purchased a second phone, he asked for an LG, rather than a Samsung like his prior phone. Mr. Chancellor stated that, while on a test drive, the infotainment system was unpredictable and made phantom calls. In one instance, the navigation system popped up unprompted after being asked to make a call. When he restarted the vehicle, the Bluetooth worked properly. Mr. Chancellor described that the voice recognition system used two microphones: a primary that takes in everything and a secondary speaker that helps the primary speaker with recognition. Mr. Chancellor opined that he would look at the speakers first, then the radio receiver, the Internet, and GMLAN/CAN Bus.

The Complainant played several videos that demonstrated the voice recognition system not working. The Complainant explained that his phone was the only phone that had been connected but that several USB devices had been connected. Mr. Chancellor believed the microphones were not picking up the voice or were getting jumbled somehow. Several of the videos showed that the Complainant had not accepted all the permissions on his phone for the system. The videos also showed that the vehicle did not have a strong Bluetooth or 4G LTE signal in various instances. The Complainant noted that Mr. Iversen, a Danish friend, and Gloria Moore successfully made calls using voice commands.

Robert Goins confirmed that he was a service advisor for Patterson Auto Group. Mr. Goins confirmed that he had witnessed the issue but could not replicate it at the serviced department. Mr. Goins could not recall whether the menu shut down and the screen locked up when the Complainant pressed the (“talk”) button but added it was possible.

When asked if the Complainant believed the vehicle worked as designed during the inspection, the Complainant agreed. The Complainant affirmed that the vehicle had never broken down and left him stranded. The Complainant attested that the only accessories added to the vehicle were the running boards and they were installed after the issues started. The Complainant claimed that he did not notice any change after the running boards were installed. The Complainant

stated the Android Auto system would display an error stating "speech not available" and then lock up the display. The Complainant stated that he had received a loaner vehicle each time his vehicle was in the shop. The Complainant testified that he first noticed the problems the day he picked up the truck. He explained he typically drove the truck once a week. He indicated that the issue was intermittent. He stated that the last time he noticed the issue was on the way to the hearing. He explained he originally had a Samsung Galaxy S7 Edge, until he switched to an LG G8 ThinQ. He expressed a preference for replacement of the vehicle.

C. Inspection

During the inspection, the odometer read 16,794 miles. The vehicle had an aftermarket device, the running boards, plugged into the data link connector. The vehicle had two flash drives—which the Complainant stated that he used to store music—plugged into the USB ports. Irfaun Bacchus, a Field Service Engineer for the Respondent, explained that the vehicle had a data plan because the voice recognition system used information stored in the cloud. The Complainant stated that the running boards had only been on the vehicle for a few months. The privacy and permissions had not been approved on the system and they were needed for the data plan. During the inspection, the Bluetooth signal showed full strength and the voice recognition appeared to function normally.

D. Summary of Respondent's Evidence and Arguments

Mr. Bacchus pointed out that the circled number four on the infotainment display seen in the videos indicated a need to accept permissions for Android Auto and Bluetooth to access the phone. He noted that the Respondent gave the Complainant a free data plan to connect (to the Internet) without using the phone (for Internet). Nevertheless, the infotainment system still needed to use Bluetooth to access the information on the phone, so not having a good signal can affect it. Mr, Bacchus distinguished the 4G connection for cellular service (between the cellular network and the phone) from Bluetooth, which was only a point to point connection (e.g., between the vehicle and the phone). He added that Bluetooth operated at 2.4 GHz, an unlicensed channel, also used by baby monitors and other devices. Mr. Bacchus pointed out that the Respondent recommended using Android Auto because it was the industry leader in voice recognition and had a much larger database than the Respondent. Mr. Bacchus believed the freezing issue was

completely separate from the Bluetooth issue. He mentioned that the vehicle asked for permissions during the inspection. He indicated that the permissions were reset when the DCIM was replaced. Mr. Bacchus noted that there was an update for the vehicle released in the month before the hearing that the Complainant needed to apply.

Mr. Green stated he believed there was no substantial safety concern, no impairment of use, and no impairment of market value. Mr. Bacchus opined that the issues resulted from bad Bluetooth connectivity, weak signals, an unpaired phone at times, and accent recognition problems. He explained that the Complainant was provided two work arounds and he needed to activate them.

E. Analysis

The evidence shows that the subject vehicle more likely than not continues to have a defect that supports granting Lemon Law relief. As explained in the discussion of applicable law, the law imposes the burden of proof on the Complainant. Accordingly, the Complainant must affirmatively prove every Lemon Law element by a preponderance of the evidence. In this case, a preponderance of the evidence shows that the subject vehicle more likely than not has a defect covered under warranty (warrantable defect).

Lemon Law relief does not apply to all problems that may occur with a vehicle but only to warrantable defects that continue to exist (i.e., currently exist) after repairs.[29] In part, the subject vehicle's warranty states that: "The warranty covers repairs to correct any vehicle defect related to materials or workmanship occurring during the warranty period, excluding slight noise, vibrations, or other normal characteristics of the vehicle. Needed repairs will be performed using new, remanufactured, or refurbished parts."[30] According to these terms, the warranty only applies to defects in materials or workmanship (manufacturing defects).[31]

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

[30] Respondent's Ex. 6, New Vehicle Limited Warranty.

[31] 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

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.[32] 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.[33] In other words, a manufacturing defect is an isolated aberration, an unintended configuration occurring only in those vehicles not produced according to the manufacturer's specifications.[34] Stated another way, 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 characteristics, including design defects, 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 characteristic exists in all vehicles of the same design, but the vehicle's intended configuration may produce unintended and unwanted results.[37] Unlike manufacturing

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or workmanship to damages for repair or replacement value. No mention was made in the guarantee of remedies for design defects.").

[32] *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.").

[33] *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.).

[34] *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].").

[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].").

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 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.

Though most of the complained of malfunctions do not appear related to any warrantable defects,[38] the record reflects that the infotainment system could not find the phone, despite a strong Bluetooth signal. Specifically, the system failed to find the phone with a Bluetooth signal of four out of five bars.[39] The testimony shows that the same issues occurred with different phones, a Samsung and an LG, indicating that the phone itself did not cause the issues. Further, the record indicates that the issues occurred as recently as the day of the hearing. Under the reasonable prospective purchaser standard, the inability to find the phone, which prohibits the hands-free use of the phone, substantially impairs the value of the vehicle. In accordance with the Department's precedents, a defect in a vehicle's hands-free functionality substantially impairs the value of the vehicle, considering that "hands-free" laws restrict the use of hand-held devices while driving.[40] And as outlined in the repair history, the vehicle has had sufficient repair attempts. In sum, the available evidence supports the granting of replacement relief.

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[38] The successful operation of the voice recognition system by persons other than the Complainant supports the Respondent's contention that the system had difficulty analyzing the Complainant's voice; in a video when the voice recognition failed, the infotainment display showed a low 4G LTE signal strength (Complainant's Ex. 2, Can't Find, Manually Calls-1.mp4; Complainant's Ex. 3, Calls Wrong Name Twice.mp4); in multiple videos where the infotainment system cannot find a phone and the Bluetooth signal strength is legible, the signal strength is either non-existent, low, or fluctuating between a weak and stronger signal (Complainant's Ex. 2, Can't Find Phone Several Trys.mp4, Can't Find Phone, Several Trys-1.mp4, Can't Find Phone, Several Trys-2.mp4)

[39] Complainant's Ex. 2, Can't Find, Manually Calls.mp4

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

III. Findings of Fact

1. On January 24, 2020, the Complainant, purchased a new 2020 GMC Sierra 2500 from Patterson Auto Group, a franchised dealer of the Respondent, in Wichita Falls, Texas. The vehicle had 405 miles on the odometer at the time of purchase.

2. The vehicle's limited warranty provides bumper to bumper coverage for three (3) years or 36,000 miles, whichever occurs first.

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

Date	Miles	Issue
03/24/20	4,090	The Bluetooth system does not respond to voice commands.
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07/01/20	7,714	The voice recognition system dials the wrong number and at times won't work.
07/08/20	7,729	The Bluetooth system is not working
07/10/20	7,834	The voice recognition system isn't working and always calls the same name. The radio asks for a password and resets to the home screen upon start up.
10/06/20	9,957	The voice recognition system is not working properly.
02/26/21	12,344	The voice recognition system will not make calls and an error message pops up and will not go away.

4. On or about November 17, 2020, the Complainant or a person on behalf of the Complainant or the Department provided a written notice of defect to the Respondent.

5. On December 4, 2020, the Complainant filed a complaint with the Department alleging that the vehicle will intermittently not allow the Bluetooth to make a phone call. The system will not understand commands from a speaker. Sometimes while in use, the system will call someone completely different than name spoken.

6. On March 3, 2021, 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 20, 2021, in Wichita Falls, Texas, before Hearings Examiner Andrew Kang, and the record closed on September 9, 2021. The Complainant, represented himself. Clifton Green, Business Resource Manager, represented the Respondent.

8. The vehicle's odometer displayed 16,794 miles at the time of the hearing.

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

10. The vehicle operated normally during the test drive at the hearing.

11. The infotainment system could not find the phone, despite a strong Bluetooth signal.

12. The same issues occurred with different phones, a Samsung S7 and an LG ThinQ, indicating that the phone itself did not cause the issues.

13. The issues occurred as recently as the day of the hearing.

14. Under the reasonable prospective purchaser standard, the inability to find the phone, which prohibits the hands-free use of the phone, substantially impairs the value of the vehicle.

15. The appropriate calculations for repurchase are:

Purchase price, including tax, title, license & registration	$71,695.64
Delivery mileage	405
Mileage at first report of defective condition	4,090
Mileage on hearing date	16,794
Useful life determination	120,000

Purchase price, including tax, title, license & registration				$71,695.64				
Mileage at first report of defective condition	4,090							
Less mileage at delivery	-405							
Unimpaired miles	3,685							
Mileage on hearing date	16,794							
Less mileage at first report of defective condition	-4,090							
Impaired miles	12,704							
Reasonable Allowance for Use Calculations:								
Unimpaired miles	3,685	÷	120,000	×	$71,695.64		=	$2,201.65
Impaired miles	12,704	÷	120,000	×	$71,695.64	× 50%	=	$3,795.09
Total reasonable allowance for use deduction								$5,996.74
Purchase price, including tax, title, license & registration					$71,695.64			
Less reasonable allowance for use deduction					-$5,996.74			
Plus filing fee refund					$35.00			
Plus incidental expenses					$0.00			
TOTAL REPURCHASE AMOUNT					**$65,733.90**			

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 substantially impairs the market value of the vehicle continues to exist after a reasonable number of repair attempts. TEX. OCC. CODE § 2301.604(a).

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 in the reacquired vehicle identified in this Order. **IT IS THEREFORE ORDERED** that:

1. The Respondent shall, in accordance with Texas Administrative Code § 215.208(d)(1)(A), promptly authorize the exchange of the Complainant's vehicle (the reacquired vehicle) with the Complainant's choice of any comparable motor vehicle.

2. The Respondent shall instruct the dealer to contract the sale of the selected comparable vehicle with the Complainant under the following terms:

    a. The sales price of the comparable vehicle shall be the vehicle's Manufacturer's Suggested Retail Price (MSRP);

    b. The trade-in value of the Complainant's vehicle shall be the MSRP at the time of the original transaction, less a reasonable allowance for the Complainant's use of the vehicle;

c. The use allowance for replacement relief shall be calculated in accordance with the formula outlined in Texas Administrative Code § 215.208(b)(2) (the use allowance is $5,996.74);

d. The use allowance paid by the Complainant to the Respondent shall be reduced by $35.00 (the refund for the filing fee) (after deducting the filing fee, the use allowance is reduced to $5,961.74, which is the amount that the Complainant must be responsible for at the time of the vehicle exchange).

3. The Respondent's communications with the Complainant finalizing replacement of the reacquired vehicle shall be reduced to writing, and a copy thereof shall be provided to the Department within twenty (20) days of completion of the replacement.

4. The Respondent shall obtain a Texas title for the reacquired vehicle prior to resale and issue a disclosure statement on a form provided or approved by the Department.[41]

5. The Respondent shall affix the disclosure label to the reacquired vehicle in a conspicuous location (e.g., hanging from the rear view mirror). Upon the Respondent's first retail sale of the reacquired vehicle, the disclosure statement shall be completed and returned to the Department.

6. Within sixty (60) days of transfer of the reacquired vehicle, the Respondent shall provide to the Department written notice of the name, address and telephone number of any transferee (wholesaler or equivalent), regardless of residence.

7. The Respondent shall repair the defect or condition that was the basis of the vehicle's reacquisition and issue a new 12 month/12,000 mile warranty on the reacquired vehicle.

8. Upon replacement of the Complainant's vehicle, the Complainant shall be responsible for payment or financing of the usage allowance of the reacquired vehicle, any outstanding liens on the reacquired vehicle, and applicable taxes and fees associated with the new sale, excluding documentary fees. Further, in accordance with 43 Tex. Administrative Code § 215.208(d)(2):

a. If the comparable vehicle has a higher MSRP than the reacquired vehicle, the Complainant shall be responsible at the time of sale to pay or finance the difference in the two vehicles' MSRPs to the manufacturer, converter or distributor; and

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

b. If the comparable vehicle has a lower MSRP than the reacquired vehicle, the Complainant will be credited the difference in the MSRP between the two vehicles. The difference credited shall not exceed the amount of the calculated usage allowance for the reacquired vehicle.

9. The Complainant shall be responsible for obtaining financing, if necessary, to complete the transaction.

10. The parties shall complete the replacement of the subject vehicle within **20 days** after the date this Order becomes final under Texas Government Code § 2001.144.[42] If the replacement cannot be accomplished within the ordered time period, the parties shall instead complete the return and repurchase of the subject vehicle, within **20 days** after the date this Order becomes final under Texas Government Code § 2001.144, pursuant to the repurchase provisions in 43 Texas Administrative Code § 215.208(b)(1) and (2). The repurchase price shall be **$65,733.90**. The refund shall be paid to the Complainant and the lien holder, if any, as their interests appear. If clear title is delivered, the full refund shall be paid to the Complainant. At the time of the repurchase, the Respondent or its agent is entitled to receive clear title to the vehicle. If the above noted repurchase amount does not pay all liens in full, the Complainant is responsible for providing the Respondent with clear title to the vehicle. However, if the Office of Administrative Hearings determines the failure to complete the repurchase as prescribed is due to the Complainant's refusal or inability to deliver the vehicle with clear title, the Office of Administrative Hearings may deem the granted relief rejected by the Complainant and the complaint closed pursuant to 43 Texas Administrative Code § 215.210(2). The calculations for the repurchase price are as follows:

[42] 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.

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Plus filing fee refund					$35.00			
Plus incidental expenses					$0.00			
TOTAL REPURCHASE AMOUNT					**$65,733.90**			

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

SIGNED November 9, 2021

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