

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 22-0016372 CAF**

**DEREK BARR,**  
**Complainant**

**v.**

**BENNCHE LLC,**  
**Respondent**

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**BEFORE THE OFFICE**  
  
**OF**  
  
**ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Derek Barr (Complainant) filed a complaint with the Texas Department of Motor Vehicles (Department) seeking relief pursuant to Texas Occupations Code §§ 2301.601-.613 (Lemon Law) for alleged warrantable defects in a vehicle manufactured by Bennche, LLC (Respondent). A preponderance of the evidence shows that Complainant's vehicle qualifies for repurchase relief.

**I. PROCEDURAL HISTORY, JURISDICTION, AND NOTICE**

Notice and jurisdiction were not contested and are addressed only in the Findings of Fact and Conclusions of Law. The hearing in this case convened on January 26, 2023, in Tyler, Texas, before Chief Hearings Examiner Bennie Brown with the Department's Office of Administrative Hearings (OAH). The Complainant appeared and represented himself. Respondent appeared through its representative Charles Howell. The hearing concluded the same day.<sup>1</sup>

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<sup>1</sup> The record was held open until February 2, 2023, to allow inspection of the vehicle by Respondent. On March 31, 2023, the record was reopened to allow additional evidence, and the record closed on April 4, 2023.

## II. APPLICABLE LAW

The Texas Lemon Law and Warranty Performance Law require a manufacturer, converter, or distributor to make repairs necessary to conform a new motor vehicle to an applicable warranty.<sup>2</sup> If this cannot be accomplished, the owner of the vehicle may seek relief by filing a complaint with the Department.<sup>3</sup> The case may be referred to OAH for a hearing on the merits to determine which type of relief, if any, is warranted pursuant to statute.<sup>4</sup>

### A. Repurchase/Replacement Relief Requirements

Repurchase and replacement relief only apply to new vehicles.<sup>5</sup> A new vehicle may qualify for repurchase or replacement of the vehicle, along with reimbursement of incidental expenses resulting from the loss of use of the vehicle due to the defect(s).<sup>6</sup> A vehicle qualifies for repurchase or replacement if all the following conditions are met:

- 1) the vehicle has a defect covered by an applicable warranty (applicable 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” to repair the vehicle.<sup>7</sup>

The above terms are further defined by the Lemon Law statute and case law.

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<sup>2</sup> Tex. Occ. Code § 2301.603(a).

<sup>3</sup> Tex. Occ. Code § 2301.204(a); 43 Tex. Admin. Code § 215.202.

<sup>4</sup> Tex. Occ. Code § 2301.204(d); 43 Tex. Admin. Code § 215.202(b)(4).

<sup>5</sup> Tex. Occ. Code § 2301.603

<sup>6</sup> Tex. Occ. Code § 2301.604.

<sup>7</sup> Tex. Occ. Code § 2301.604(a).

## **1. Serious Safety Hazard**

The Lemon Law statute defines “serious safety hazard” as a life-threatening malfunction or non-conformity 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.<sup>8</sup>

## **2. Substantial Impairment of Use or Value**

### **a. Impairment of Use**

The Department applies a reasonable purchaser standard for determining whether a defect substantially impairs the use of a vehicle. 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.<sup>9</sup> For example, “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.”<sup>10</sup>

### **b. 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.”<sup>11</sup> 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

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<sup>8</sup> Tex. Occ. Code § 2301.601(4).

<sup>9</sup> *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App. – Austin 2012).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

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.”<sup>12</sup>

### **3. 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.<sup>13</sup>

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.<sup>14</sup>

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 days, and the attempts were made before the earlier of: (A) the date the express warranty

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<sup>12</sup> *Id.*

<sup>13</sup> Tex. Occ. Code § 2301.605(a)(1).

<sup>14</sup> Tex. Occ. Code § 2301.605(a)(2).

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.<sup>15</sup>

The 30 days described above do not include any period when the owner has a comparable loaner vehicle provided while the dealer repairs the subject vehicle.<sup>16</sup>

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.<sup>17</sup> 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.<sup>18</sup>

#### **4. Other Requirements for Repurchase/Replacement**

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;<sup>19</sup>

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<sup>15</sup> Tex. Occ. Code § 2301.605(a)(3).

<sup>16</sup> Tex. Occ. Code § 2301.605(c).

<sup>17</sup> *Ford Motor Company v. Texas Dep't 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.’”).

<sup>18</sup> *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.”).

<sup>19</sup> Tex. Occ. Code § 2301.606(c)(1); 43 Tex. Admin. Code § 215.204.

- (2) the respondent was given an opportunity to cure the defect or nonconformity;<sup>20</sup> and
- (3) the Lemon Law complaint was filed within 6 months after the earliest of:
  - (a) the warranty's expiration date; or
  - (b) 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.<sup>21</sup>

## 5. Incidental Expenses

When repurchase or replacement is ordered, the Lemon Law statute provides for reimbursing the Complainant for reasonable incidental expenses resulting from the vehicle's loss of use due to the defect.<sup>22</sup> 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.<sup>23</sup> However, the Department's rules expressly exclude compensation for "any interest, finance charge, or insurance premiums."<sup>24</sup>

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<sup>20</sup> 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 Dep't of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 221, 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. 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.

<sup>21</sup> Tex. Occ. Code § 2301.606(d).

<sup>22</sup> Tex. Occ. Code § 2301.604.

<sup>23</sup> 43 Tex. Admin. Code § 215.208(9)(a).

<sup>24</sup> 43 Tex. Admin. Code § 215.208(b)(1).

**B. Warranty Repair Relief**

If a vehicle does not qualify for repurchase or replacement, the vehicle may still qualify for warranty repair relief.<sup>25</sup> A vehicle may qualify for warranty repair relief if all the following conditions are met:

- 1) the vehicle has a “defect . . . that is covered by a manufacturer’s, converter’s, or distributor’s warranty agreement applicable to the vehicle;”<sup>26</sup>
- 2) the vehicle owner provided written notice of the defect to the manufacturer, converter, distributor, or its authorized agent before the warranty’s expiration;<sup>27</sup> and
- 3) the vehicle owner filed a complaint with the Department specifying the defect.<sup>28</sup>

**C. The Lemon Law Complaint Identifies the Relevant Issues in the Case**

The complaint filed with the Department identifies the relevant issues to address at the hearing. The complaint must state “sufficient facts to enable the [D]epartment 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.”<sup>29</sup> However, the parties may expressly or impliedly consent to hearing issues not included in the complaint or pleadings.<sup>30</sup> Implied consent occurs when a party introduces evidence on an unpleaded issue without objection.<sup>31</sup> Because the complaint determines the relevant issues, the Department cannot order relief for an issue not included in the complaint unless tried by consent.<sup>32</sup>

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<sup>25</sup> 43 Tex. Admin. Code § 215.208(e).

<sup>26</sup> Tex. Occ. Code § 2301.204(a).

<sup>27</sup> Tex. Occ. Code § 2301.204(b); 43 Tex. Admin. Code § 215.202(b)(1), (3).

<sup>28</sup> Tex. Occ. Code § 2301.204; 43 Tex. Admin. Code § 215.202(b)(1).

<sup>29</sup> 43 Tex. Admin. Code § 215.202(a)(3), (b)(1).

<sup>30</sup> 43 Tex. Admin. Code § 215.42; Tex. R. Civ. P. 67.

<sup>31</sup> *See Gadd v. Lynch*, 258 S.W.2d 168, 169 (Tex. Civ. App. – San Antonio 1953, writ ref’d).

<sup>32</sup> *See* Tex. Gov’t Code §§ 2001.051-.052, .141(b)-(c); Tex. R. Civ. P. 301.

## **D. Burden of Proof**

The Complainant has the burden of proof to prove, by a preponderance of the evidence, all facts required for relief.<sup>33</sup> That is, the Complainant must present sufficient evidence to show that it is more likely than not that every required fact for relief exists.<sup>34</sup> In this case, Complainant is seeking repurchase of the subject vehicle.

## **III. DISCUSSION**

### **A. Summary of Complainant's Evidence and Arguments**

On October 7, 2021, Complainant purchased a new 2020 X4 800cc ST utility terrain vehicle (UTV)<sup>35</sup> from 5 Star Customs, an authorized dealer of Respondent, in Quinlan, Texas. The vehicle had one mile on the odometer at the time of purchase.<sup>36</sup>

The vehicle's limited warranty provided basic coverage for 12 months, and Complainant purchased an extended warranty for 36 months. In part, the vehicle's limited warranty provided coverage for "any repairs needed to correct defects in materials or workmanship under normal use and maintenance."<sup>37</sup>

On June 17, 2022, the Complainant filed a Lemon Law complaint with the Department alleging that, on various occasions, the vehicle would slip out of gear into neutral, shut down, and

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<sup>33</sup> 43 Tex. Admin. Code § 206.66(d); see *Vance v. My Apartment Steak House, Inc.*, 677 S.W. 2d 480, 482 (Tex. 1984) ("[A] civil litigant who asserts an affirmative claim of relief has the burden to persuade the finder of fact of the existence of each element of his cause of action.").

<sup>34</sup> E.g., *Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

<sup>35</sup> Utility terrain vehicles meet the definition of "motor vehicle." See Tex. Occ. Code § 2301.002(23); Tex. Transp. Code §§ 501.002(17), 502.001(1).

<sup>36</sup> Complainant Ex. 1. Complainant testified that the vehicle had 15 miles on the odometer at the time of purchase. However, the Buyer's Order indicates that the odometer reading was 1 mile at the time of purchase.

<sup>37</sup> *Id.*



fail to start. On or about June 17, 2022, the Department sent a copy of the complaint to Respondent, providing written notice of the alleged defects.

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

Date	Issue
02/28/2022 – 06/16/2022	Slipping out of gear; shut down and would not start
06/17/2022 – mid-July 2022	Vehicle shut down; stuck in gear and unable to shift
07/18/2022 – 08/18/2022	Slipping out of gear; vehicle shut down

Complainant first started having problems with the vehicle around 65-70 miles. Complainant explained that when driving around 16 mph, the vehicle would slip out of gear into neutral. This happened several times. Complainant testified that the owner's manual recommended driving the vehicle below 20 mph for the first 100 miles. Complainant drove the vehicle in low gear per the manual. However, once the vehicle reached 100 miles, the vehicle continued to slip out of gear if the speed was above 20 mph.

Between 90-115 miles, another issue arose. Specifically, the vehicle would shut down and would not restart. At around 100 miles, the vehicle would slip out of low gear into high gear and then into neutral. The vehicle shifted downward into neutral by itself. The vehicle would also shut off while driving.

At 115 miles, the vehicle would not start anymore. Complainant called Respondent who advised Complainant to take the vehicle to a certified dealer mechanic. Complainant confirmed that 5 Star Customs was a certified dealer mechanic, and he took the vehicle there for repair of the gear slippage and inability to start. Complainant noted that they were unable to start the vehicle when attempting to unload it off the trailer. The vehicle had to be put vehicle into neutral and rolled off the trailer.

Five Star Customs had the vehicle from the beginning of February 2022 until approximately mid-July 2022. During that time, Complainant followed up with several text

messages seeking a status on the vehicle repair.<sup>38</sup> Five Star Customs advised that they had difficulty reaching Respondent and getting a technician to come out. They took the vehicle to another repair shop and were able to get it running. The wiring harness, fuel filter, and fuel pump were replaced. Work was also performed on the gear shifting box and chain.<sup>39</sup> Five Star Customs returned the vehicle to Complainant on June 16, 2022. Complainant test drove the vehicle in low gear, and it shut down. He turned it back on, but the vehicle was stuck in gear and would not shift. It could not be driven. Complainant called 5 Star Customs and advised them of the situation. They came and took the vehicle back the next day. The vehicle was returned to Complainant again between July 15-17, 2022. However, Complainant experienced the same issues as before when the vehicle was test driven.

Mr. Howell contacted Complainant and picked up vehicle on July 18, 2022. Mr. Howell test drove the vehicle at Complainant's home. He took the vehicle, performed repairs, and brought the vehicle back in August. Mr. Howell test drove the vehicle with Complainant and provided instructions for proper use. No issues were observed for approximately 15-20 days, then the vehicle began slipping out of high gear almost immediately after shifting into high gear.

Complainant can now only drive the vehicle in low gear because it continues to slip out of high gear. It has shut off a few times while driving in low gear and has slipped out of gear as well. The vehicle's current mileage is 195 miles.

Complainant explained that the vehicle was purchased to clear land and to transport things around his property. He and his family have been stranded at the back of the property due to the vehicle shutting down. Complainant needs a reliable vehicle that can be driven above 20 mph and operates as intended. He opined that the vehicle has less than 200 miles on it and is not reliable. He is requesting repurchase of the vehicle.

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<sup>38</sup> Complainant Ex. 3.

<sup>39</sup> Complainant Ex. 2.

**B. Vehicle Inspection**

The vehicle was not present for inspection at the hearing because Complainant did not have a means to transport the vehicle. The parties agreed to inspect the vehicle at Complainant's home after the hearing. Mr. Howell filed a summary of the inspection and advised that the vehicle shifting functioned normally during most of the inspection. There were two occurrences, however, when shifting the vehicle into high gear felt normal, but the gear engagement was not complete. A grinding noise was observed while attempting to accelerate. No issues were observed in low gear or in Reverse. Mr. Howell was unable to duplicate the vehicle shutting down and was unable to determine if there was a problem with that issue. He noted that it was not uncommon for UTVs to shut down if the engine is not completely warmed in cold weather.<sup>40</sup>

**C. Summary of Respondent's Evidence and Arguments**

Mr. Howell test drove the vehicle at Complainant's home on July 18, 2022, and experienced the vehicle jumping out of gear. He took the vehicle to a facility in Dallas, Texas, and reviewed the repairs performed by 5 Star Customs. He did not experience any problems with the vehicle failing to start. He explained that belts have a tendency to wear if a vehicle is driven in high gear. His team replaced the CVT belt on the vehicle and replaced the shift plate, which was found to have significant, premature wear due to a poor adjustment setting and would not allow the shift to lock into position. As a courtesy, a door strap and driver side mirror were replaced. A door latch was also repaired.<sup>41</sup> Mr. Howell test drove the vehicle on concrete and attempted to mimic the scenarios experienced by Complainant, but he did not observe any issues or problems with the vehicle.

The vehicle was returned to Complainant on August 18, 2022. Mr. Howell and Complainant test drove the vehicle. The first time the vehicle was shifted into gear, it had a little grind, did not fully engage, and jumped out of gear. On the second attempt, no issues were

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<sup>40</sup> Respondent Ex. 2.

<sup>41</sup> Respondent Ex. 1.

observed. They drove the vehicle about 10 minutes, and the gears were holding well. Mr. Howell left the vehicle with Complainant and later received notice of the Lemon Law complaint. Respondent does not contest that the issues with the vehicle are covered by warranty.

Mr. Howell also submitted information regarding the useful life of UTVs and stated that UTV lifespans can vary dramatically based on use and how well the vehicle is maintained. In his personal experience, he has seen the useful life of UTVs vary from 3,000 miles to 9,000 miles, depending on the above-mentioned factors.<sup>42</sup>

#### **D. Analysis**

The Complainant had the burden of proof to show that the subject vehicle qualified for repurchase relief. To qualify for relief, the Complainant must prove the required elements by a preponderance of the evidence. Failure to prove even one of the required facts, causes the vehicle to be ineligible for relief. Based on the evidence presented, the Complainant established the facts necessary for repurchase relief.

It is uncontested that the vehicle has a warrantable defect. The warrantable defect substantially impairs the market value of the vehicle. The evidence shows that the vehicle can only be reliably driven in low gear. The vehicle continues to slip out of high gear and randomly shuts down. Under the reasonable prospective purchaser standard, the condition of the vehicle would deter a purchaser from buying the vehicle or substantially negatively affect how much the purchaser would be willing to pay.

Further, the defect continues to exist after a reasonable number of repair attempts. The repair history shows that the vehicle was out of service for repair well over 30 days. In addition, notice of the defect was provided to Respondent, and Respondent was given an opportunity to cure the defect. The Lemon Law complaint was timely filed. Accordingly, repurchase relief applies in this case.

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<sup>42</sup> Respondent Exhibit # 3.

The Department's rules list the appropriate calculations for repurchase.<sup>43</sup> For useful life determination, the Hearings Examiner will utilize the average number of miles from the range submitted by Respondent.<sup>44</sup> The specific calculations are applied as follows:

Purchase price, including tax, title, license & registration	\$16,024.34
Delivery mileage	1
Mileage at first report of defective condition	115
Mileage on hearing date	195
Useful life determination	6,000
Purchase price, including tax, title, license & registration	\$16,024.34
Mileage at first report of defective condition	115
Less mileage at delivery	-1
<b>Unimpaired miles</b>	114
Mileage on hearing date	195
Less mileage at first report of defective condition	-115
<b>Impaired miles</b>	80
<i>Reasonable Allowance for Use Calculations:</i>	
Unimpaired miles	$114 \div 6,000 \times \$16,024.34 = \$304.46$
Impaired miles	$80 \div 6,000 \times \$16,024.34 \times 50\% = \$106.83$
<b>Total reasonable allowance for use deduction</b>	<b>\$411.29</b>
Purchase price, including tax, title, license & registration	\$16,024.34
Less reasonable allowance for use deduction	-\$411.29
Plus filing fee refund	\$35.00
Plus incidental expenses	\$0.00
<b>TOTAL REPURCHASE AMOUNT</b>	<b>\$15,648.05</b>

Based on the above calculations, Respondent shall repurchase the subject vehicle in the amount of **\$15,648.05**.

<sup>43</sup> 43 Tex. Admin. Code § 215.208(b)(1),(2).

<sup>44</sup> Respondent submitted a range of 3,000-9,000 miles for UTV useful life, depending on use and maintenance. The average of that range is 6,000 miles.

#### IV. FINDINGS OF FACT

1. On October 7, 2021, Derek Barr (Complainant) purchased a new 2020 X4 800cc ST utility terrain vehicle (UTV) from 5 Star Customs, an authorized dealer of Bennche, LLC (Respondent), in Quinlan, Texas. The vehicle had one mile on the odometer at the time of purchase.
2. The vehicle's limited warranty provided basic coverage for 12 months, and Complainant purchased an extended warranty for 36 months.
3. In part, the vehicle's limited warranty provided coverage for any repairs needed to correct defects in materials or workmanship under normal use and maintenance.
4. The Complainant took the vehicle for repair as shown below:

Date	Issue
02/28/2022 – 06/16/2022	Slipping out of gear; shut down and would not start
06/17/2022 – mid July 2022	Vehicle shut down; stuck in gear and unable to shift
07/18/2022 – 08/18/2022	Slipping out of gear; vehicle shut down

5. On June 17, 2022, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) alleging that, on various occasions, the vehicle would slip out of gear into neutral, shut down, and fail to start.
6. On or about June 17, 2022, the Department sent a copy of the Lemon Law complaint to Respondent, providing written notice of the alleged defects.
7. On September 27, 2022, the Department's Office of Administrative Hearings (OAH) issued a Notice of Hearing directed to all parties, providing not less than 10 days' notice of the hearing date and advising the parties of their rights under the applicable rules and statutes.
8. The Notice of Hearing advised the parties of the time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the factual matters asserted or an attachment that incorporated by reference the factual matters asserted in the complaint or petition filed with the Department.
9. On January 26, 2023, a hearing on the merits was convened in Tyler, Texas, before OAH Chief Hearings Examiner Bennie Brown. The Complainant appeared and represented himself. Respondent appeared through its representative Charles Howell. The hearing concluded the same day.

10. The record was held open until February 2, 2023, to allow inspection of the vehicle by Respondent. On March 31, 2023, the record was reopened to allow additional evidence, and the record closed on April 4, 2023.
11. The vehicle's odometer displayed 195 miles at the time of the hearing.
12. The vehicle's warranty was in effect at the time of the hearing.
13. The vehicle continues to slip out of gear and randomly shuts down.
14. The vehicle does not operate as intended and has a defect covered by an applicable warranty.
15. The vehicle continues to have a warrantable defect that substantially impairs the market value of the vehicle.
16. The vehicle's repair history shows that the problem continues to exist after being out of service for repair for a total of 30 days or more.
17. The repair attempts were made during the applicable warranty period.
18. Respondent was given an opportunity to cure the defect after being provided notice.
19. The Lemon Law complaint was timely filed.
20. The vehicle qualifies for repurchase relief.
21. The appropriate calculations for repurchase are as follows:

Purchase price, including tax, title, license & registration	\$16,024.34
Delivery mileage	1
Mileage at first report of defective condition	115
Mileage on hearing date	195
Useful life determination	6,000

Purchase price, including tax, title, license & registration		\$16,024.34
Mileage at first report of defective condition	115	
Less mileage at delivery	-1	
<b>Unimpaired miles</b>	<b>114</b>	
Mileage on hearing date	195	
Less mileage at first report of defective condition	-115	
<b>Impaired miles</b>	<b>80</b>	
<i>Reasonable Allowance for Use Calculations:</i>		
Unimpaired miles	114 ÷ 6,000 × \$16,024.34	= \$304.46
Impaired miles	80 ÷ 6,000 × \$16,024.34	× 50% = \$106.83
<b>Total reasonable allowance for use deduction</b>		<b>\$411.29</b>
Purchase price, including tax, title, license & registration		\$16,024.34
Less reasonable allowance for use deduction		-\$411.29
Plus filing fee refund		\$35.00
Plus incidental expenses		\$0.00
<b>TOTAL REPURCHASE AMOUNT</b>		<b>\$15,648.05</b>

## V. CONCLUSIONS OF LAW

1. The Texas Department of Motor Vehicles has jurisdiction over this matter. Tex. Occ. Code §§ 2301.204, 601-.613.
2. A Hearings Examiner with 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. Proper and timely notice of the hearing was provided. Tex. Gov't Code ch. 2001.051-.052; 43 Tex. Admin. Code § 215.206(2).
5. The Complainant bears the burden of proof in this proceeding. 43 Tex. Admin. Code § 206.66(d).
6. The Complainant, or a person on behalf of the Complainant, or the Department 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's vehicle qualifies for 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).

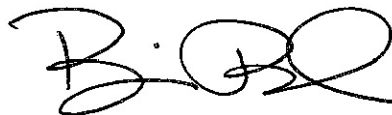
## VI. ORDER

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-.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 **\$15,648.05**. 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 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.<sup>45</sup> 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);
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 13, 2023**



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**BENNIE BROWN  
CHIEF HEARINGS EXAMINER  
OFFICE OF ADMINISTRATIVE HEARINGS  
TEXAS DEPARTMENT OF MOTOR VEHICLES**

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<sup>45</sup> 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.

