

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 19-0003649 CAF**

<b>JOHN KUHN, Complainant</b>	§	<b>BEFORE THE OFFICE</b>
	§	
	§	
<b>v.</b>	§	<b>OF</b>
	§	
<b>GENERAL MOTORS LLC, Respondent</b>	§	<b>ADMINISTRATIVE HEARINGS</b>
	§	

**DECISION AND ORDER**

John Kuhn (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 does not show that the subject vehicle has a warrantable defect that qualifies for repurchase/replacement or warranty repair.

**I. Procedural History, Notice and Jurisdiction**

Matters of notice of hearing<sup>1</sup> 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 August 2, 2019, in San Antonio, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented and testified for himself. Sue (Susan) Kuhn, the Complainant’s spouse testified for the Complainant. Clifton Green, Business Resource Manager, represented and testified for the Respondent. Bobby Shreeve, field service engineer (FSE), testified for the Respondent.

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<sup>1</sup> TEX. GOV’T CODE § 2001.051.

## II. Discussion

### A. Applicable Law

#### 1. Repurchase/Replacement Relief Requirements

A vehicle qualifies for repurchase or replacement if the respondent cannot “conform a motor vehicle to an applicable express warranty by repairing or correcting a defect or condition that creates a serious safety hazard or substantially impairs the use or market value of the motor vehicle after a reasonable number of attempts.”<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

##### b. Substantial Impairment of Use or Value

###### i. Impairment of Use

In determining substantial impairment of use, the Department considers “whether a defect or nonconformity hampers the intended normal operation of the vehicle.” For instance, “while a vehicle with a non-functioning air conditioner would be available for use and transporting passengers, its intended normal use would be substantially impaired.”<sup>5</sup>

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<sup>2</sup> TEX. OCC. CODE § 2301.604(a).

<sup>3</sup> TEX. OCC. CODE § 2301.604(a).

<sup>4</sup> TEX. OCC. CODE § 2301.601(4).

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

**ii. Impairment of Value**

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

**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.<sup>7</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>8</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:

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<sup>6</sup> *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012) (“[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.”).

<sup>7</sup> TEX. OCC. CODE § 2301.605(a)(1)(A) and (B).

<sup>8</sup> TEX. OCC. CODE § 2301.605(a)(2).

[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.<sup>9</sup>

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.<sup>10</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>11</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>12</sup>

#### **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;<sup>13</sup> (2) the respondent was given an opportunity to cure the defect or nonconformity;<sup>14</sup> and (3) the Lemon Law complaint was filed within six months after the earliest

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<sup>9</sup> TEX. OCC. CODE § 2301.605(a)(3).

<sup>10</sup> TEX. OCC. CODE § 2301.605(c).

<sup>11</sup> *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.’”).

<sup>12</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>13</sup> TEX. OCC. CODE § 2301.606(c)(1). 43 TEX. ADMIN. CODE § 215.204 provides that “[u]pon receipt of a complaint for lemon law or warranty performance relief, the department will provide notification of the complaint to the appropriate manufacturer, converter, or distributor.” The Department’s notice of the complaint to the Respondent may satisfy the requirement to provide notice of the defect or nonconformity to the Respondent.

<sup>14</sup> A respondent may delegate its opportunity to cure to a dealer. A repair visit to a dealer satisfies the opportunity to cure requirement when the respondent allows a dealer to attempt repair after written notice to the 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.

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.<sup>15</sup>

## 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.<sup>16</sup> The manufacturer, converter, or distributor has an obligation to “make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty.”<sup>17</sup>

## 3. Burden of Proof

The law places the burden of proof on the Complainant.<sup>18</sup> 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.<sup>19</sup> Accordingly, the Complainant cannot prevail where the existence of any required fact appears equally likely or unlikely.

## 4. The Complaint Identifies the Issues in this Proceeding

The complaint identifies the issues to be addressed in this proceeding.<sup>20</sup> 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

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<sup>15</sup> TEX. OCC. CODE § 2301.606(d)(2).

<sup>16</sup> TEX. OCC. CODE § 2301.204; 43 TEX. ADMIN. CODE § 215.202(b)(3).

<sup>17</sup> TEX. OCC. CODE § 2301.603(a).

<sup>18</sup> 43 TEX. ADMIN. CODE § 215.66(d).

<sup>19</sup> *E.g.*, *Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

<sup>20</sup> “In a contested case, each party is entitled to an opportunity . . . for hearing after reasonable notice of not less than 10 days.” TEX. GOV'T CODE §§ 2001.051; “Notice of a hearing in a contested case must include . . . a short, plain statement of the factual matters asserted.” TEX. GOV'T CODE § 2001.052. *See* TEX. OCC. CODE § 2301.204(b) (“The complaint must be made in writing to the applicable dealer, manufacturer, converter, or distributor and must specify each defect in the vehicle that is covered by the warranty.”); TEX. OCC. CODE § 2301.204(d) (“A hearing may be scheduled on any complaint made under this section that is not privately resolved between the owner and the dealer, manufacturer, converter, or distributor.”).

for relief under the lemon law.”<sup>21</sup> However, the parties may expressly or impliedly consent to trying issues not included in the pleadings.<sup>22</sup> Implied consent occurs when a party introduces evidence on an unpleaded issue without objection.<sup>23</sup>

## 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.<sup>24</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 (for example, through receipts or similar written documents).<sup>25</sup> However, the Department’s rules expressly exclude compensation for “any interest, finance charge, or insurance premiums.”<sup>26</sup>

### B. Summary of Complainant’s Evidence and Arguments

On August 1, 2017, the Complainant, purchased a new 2017 Chevrolet Tahoe from Freedom Chevrolet, a franchised dealer of the Respondent, in San Antonio, Texas. The vehicle had two miles on the odometer at the time of purchase. The vehicle’s limited warranty provides bumper to bumper coverage for three years or 36,000 miles, whichever occurs first. On November 11, 2018, Mrs. Kuhn, on behalf of the Complainant, provided a written notice of defect to the Respondent. On November 29, 2018, the Complainant filed a complaint with the Department alleging the following conditions: extremely rough idle, poor (lack of) acceleration, jerking when driving up an incline, loud thump when braking suddenly and front fenders missing screws. The

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<sup>21</sup> 43 TEX. ADMIN. CODE § 215.202(a)(3).

<sup>22</sup> 43 TEX. ADMIN. CODE § 215.42; TEX. R. CIV. P. 67.

<sup>23</sup> See *Gadd v. Lynch*, 258 S.W.2d 168, 169 (Tex. Civ. App.—San Antonio 1953, writ ref’d).

<sup>24</sup> TEX. OCC. CODE § 2301.604.

<sup>25</sup> 43 TEX. ADMIN. CODE § 215.209(a).

<sup>26</sup> 43 TEX. ADMIN. CODE § 215.208(b)(1).

complaint elaborated that the extremely rough idle, jerking when driving up an incline and loud thump had not been resolved. On February 1, 2019, the Complainant amended the complaint to also allege a jerking and a bumping sound when turning the wheel to the left or the right going forward or in reverse.

The Complainant testified that the issues regarding rough idle, poor acceleration, and missing front fender screws were resolved. Mrs. Kuhn testified that she received a rental car every time her vehicle went to a dealer for service. The Complainant affirmed that the jerking driving up an incline, loud thump, jerking and bumping when turning were all part of the same issue. Mrs. Kuhn testified that she did not remember when the issue first occurred, but she felt concerned within two weeks (of purchasing the vehicle). She explained that their driveway was on a hill. When accelerating to go up hill, the vehicle jerked and made a loud sound as if running over something. Upon clarification questions, Mrs. Kuhn explained that the noise appeared to relate to the wheels and that she could feel jerking in the steering wheel when turning. She elaborated that she noticed the issue on wet surfaces and surfaces that were not smooth. She added that the issue also occurred on smooth surfaces but not 100% of the time. She also pointed out that the issue occurred frequently in her neighborhood and driveway, which had rocks and some pebbles. Mrs. Kuhn testified that she last noticed the issue pulling out of her garage to go to the hearing. She stated that the repairs improved the rough idle and acceleration. But affirmed that the repairs did not improve the jumping, jerking, bumping, and thumping. On cross-examination, Mrs. Kuhn acknowledged receiving loaner vehicles when taking the subject vehicle for repair, but the loaner vehicles were comparable on only two of the repair visits. Mrs. Kuhn noted that the loaner SUVs and pickups did not exhibit the complained of issues.

### **C. Inspection**

Upon inspection at the hearing before the test drive, the subject vehicle had 35,923 miles on the odometer. The vehicle was driven on major arterial roads, freeways, service roads, and shopping center parking lots and driveways. The test drive included multiple attempts to duplicate the alleged issue on various inclines and dips. At the start of the test drive in the hearing location's parking lot, Mrs. Kuhn drove the vehicle in a tight circle over debris under a tree. While driving over the debris, Mrs. Kuhn explained that the complained of noise "sounds like you run something over." She commented that "that's exactly what it does," referring to driving over the debris as

compared to the complained of issue. Mrs. Kuhn subsequently drove the vehicle in a tight circle at a clear area of the parking lot and the tires could be felt slipping from “tire scrubbing” consistent with Mr. Shreeve’s explanation. During the test drive, Mrs. Kuhn explained that the thumping occurred when driving uphill to her gate and not at highway speeds or even 40 mph. She affirmed that she only noticed the issue at parking lot speeds. To try to duplicate the complained of issue, the vehicle was repeatedly driven up a smooth, debris-free driveway that Mrs. Kuhn believed to be comparable in slope to the driveway at her home. The vehicle did not exhibit the complained of issue when driven on the sloped driveway, other inclines, or any other surface, except for the debris-strewn area of the parking lot. The test drive ended with 35,942 miles on the odometer, for a total of 19 miles driven.

#### **D. Summary of Respondent’s Evidence and Arguments**

Mr. Green testified that slight noise was normal according to the warranty. Mr. Shreeve testified that he did not inspect the subject vehicle on January 23, 2019, but another (former) FSE, John Ferrell, performed the inspection. Mr. Shreeve reviewed the findings in the report based on the January 23, 2019, inspection. No abnormal vibrations were detected with a Pico Scope. The left front wheel liner was found to be rubbing the tire and was replaced. The shop foreman present during the inspection concluded that the sensation during sharp turns resulted from tire scrubbing, which may produce noise that varies depending on the road surface.

#### **E. Analysis**

##### **1. Substantial Impairment or Serious Safety Hazard**

To qualify for repurchase or replacement relief, a currently existing defect must substantially impair the use or value of the vehicle or create a serious safety hazard as defined by the Lemon Law. However, the evidence does not show any such substantial impairment or serious safety hazard. The evidence reflects that the alleged issue manifests itself as various noises and vibrations. However, the Department’s precedent holds that a noise by itself does not constitute a substantial impairment or a safety hazard.<sup>27</sup> When considering the vibration portion of the issue,

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<sup>27</sup> Texas Department of Transportation, *Alvarez v Ford Motor Company*, MVD Cause No. 08-0440, (Motor Vehicle Division Dec. 11, 2008) (final order denying § 2301.604 relief); State Office of Administrative Hearings *Alvarez v Ford Motor Company*, Docket No. 601-08-4215.CAF, (Oct. 9, 2008) (proposal for decision).

the evidence does not show that the use of the vehicle has been significantly impaired. The evidence reflects that any effect on performance is minor and only appears to occur under specific conditions most notably at the Complainant's driveway (driving at low speeds, uphill, on particular road surfaces, e.g., wet surfaces, surfaces that were not smooth, and surfaces with rocks and pebbles). Moreover, the vehicle performed without any loss of performance or abnormal vibration during the test drive over a variety of road surfaces, except for the initial tight circle over debris in the parking lot, which Mrs. Kuhn identified as exactly the same experience as with the complained of issue. Even under these narrow circumstances, the vehicle's operation was not significantly impaired – it performed as would be expected driving over debris with some minor vibration and noise. Further, any impact on the performance of the vehicle does not rise to the level of a serious safety hazard, which the law defines as a life-threatening malfunction/nonconformity that: substantially impedes a person's ability to control or operate a motor vehicle for ordinary use or intended purposes, or creates a substantial risk of fire or explosion. Additionally, under the reasonable prospective purchaser standard, the alleged defect would not substantially impair the vehicles, value. As previously noted the evidence shows that any effect on performance is minor and only appears to occur under particular conditions. Accordingly, the vehicle does not qualify for repurchase or replacement relief.

## **2. Warrantable Defect**

To qualify for any relief, whether warranty repair or repurchase/replacement, the law requires the vehicle to have a defect covered by the Respondent's warranty (warrantable defect).<sup>28</sup> The Lemon Law does not require that a manufacturer provide any particular warranty coverage nor does the Lemon Law impose any specific standards for vehicle characteristics. The Lemon Law only requires the manufacturer to conform its vehicles to whatever coverage the warranty provides. In part, the warranty generally states that:

The warranty covers repairs to correct any vehicle defect, not slight noise, vibrations, or other normal characteristics of the vehicle due to materials or workmanship occurring during the warranty period. Needed repairs will be performed using new, remanufactured, or refurbished parts.<sup>29</sup>

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<sup>28</sup> TEX. OCC. CODE §§ 2301.603(a), 2301.604(a); TEX. OCC. CODE § 2301.204.

<sup>29</sup> Complainant's Ex. 7, 2017 Chevrolet Limited Warranty and Owner Assistance Information.

According to these terms, the warranty only applies to defects in materials or workmanship (manufacturing defects).<sup>30</sup> Unlike manufacturing defects, issues that do not arise from manufacturing, such as design characteristics or design defects are not warrantable defects.<sup>31</sup> Additionally, the warranty expressly excludes slight noise and vibrations. In the present case, a preponderance of the evidence does not show that any existing conditions are warrantable defects that qualify for relief.

The Complainant's evidence reflects that jerking driving up an incline, loud thump, jerking and bumping when turning continued to exist after repair. As described by the Complainant these conditions were different aspects of the same underlying issue. Normal tire scrubbing during a tight turn explains some of the issue but not all, since the issue also occurred when driving straight up the Complainant's driveway. However, the record indicates that external factors appear more likely to have proximately caused the issue than any warrantable defect. Specifically, the evidence shows that the complained of issue occurred under specific conditions, driving at low speeds, uphill, on wet surfaces, surfaces that were not smooth, and surfaces with rocks and pebbles (conditions that may affect the tires' traction appears to be a significant factor). On the other hand, Mrs. Kuhn observed that the loaner SUVs and pickup trucks did not exhibit the same issue when driven on her driveway. However, the law imposes the burden of proof on the Complainant and the record does not include any evidence showing that these loaner vehicles shared the same design or the same tires as the subject vehicle to allow determining whether the issue arises from the subject vehicle's design or an aberrant manufacturing defect specific to the vehicle. In conclusion, record does not include sufficient evidence to prove, by a preponderance, that the alleged issue is a warrantable defect.

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<sup>30</sup> 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.").

<sup>31</sup> 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).

### III. Findings of Fact

1. On August 1, 2017, the Complainant, purchased a new 2017 Chevrolet Tahoe from Freedom Chevrolet, a franchised dealer of the Respondent, in San Antonio, Texas. The vehicle had two miles on the odometer at the time of purchase.
2. The vehicle's limited warranty provides bumper to bumper coverage for three years or 36,000 miles, whichever occurs first.
3. The warrant generally states that: "The warranty covers repairs to correct any vehicle defect, not slight noise, vibrations, or other normal characteristics of the vehicle due to materials or workmanship occurring during the warranty period. Needed repairs will be performed using new, remanufactured, or refurbished parts."
4. On November 11, 2018, Mrs. Kuhn, on behalf of the Complainant, provided a written notice of defect to the Respondent.
5. On November 29, 2018, the Complainant filed a complaint with the Department alleging the following conditions: extremely rough idle, poor (lack of) acceleration, jerking when driving up an incline, loud thump when braking suddenly and front fenders missing screws. The complaint elaborated that the extremely rough idle, jerking when driving up an incline and loud thump had not been resolved. On February 01, 2019, the Complainant amended the complaint to also allege a jerking and bumping sound when turning the wheel to the left or the right going forward or in reverse.
6. On March 5, 2019, 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 August 2, 2019, in San Antonio, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented and testified for himself. Sue (Susan) Kuhn, the Complainant's spouse, testified for the Complainant. Clifton Green, Business Resource Manager,

represented and testified for the Respondent. Bobby Shreeve, field service engineer, testified for the Respondent.

8. The vehicle's warranty was in effect at the time of the hearing.
9. Upon inspection at the hearing before the test drive, the subject vehicle had 35,923 miles on the odometer. The vehicle was driven on major arterial roads, freeways, service roads, and shopping center parking lots and driveways. The test drive included multiple attempts to duplicate the alleged issue on various inclines and dips. At the start of the test drive in the hearing location's parking lot, Mrs. Kuhn drove the vehicle in a tight circle over debris under a tree. While driving over the debris, Mrs. Kuhn explained that she complained of noise "sounds like you run something over." She commented that "that's exactly what it does," referring to driving over the debris as compared to the complained of issue. Mrs. Kuhn subsequently drove the vehicle in a tight circle at a clear area of the parking lot and the tires could be felt slipping from "tire scrubbing" consistent with Mr. Shreeve's explanation. During the test drive, Mrs. Kuhn explained that the thumping occurred when driving uphill to her gate and not at highway speeds or even 40 mph. She affirmed that she only noticed the issue at parking lot speeds. To try to duplicate the complained of issue, the vehicle was repeatedly driven up a smooth, debris-free driveway that Mrs. Kuhn believed to be comparable in slope to the driveway at her home. The vehicle did not exhibit the complained of issue when driven on the sloped driveway, other inclines, or any other surface, except for the debris-strewn area of the parking lot. The test drive ended with 35,942 miles on the odometer, for a total of 19 miles driven.
10. The complained of issue most frequently occurred under specific conditions: driving at low speeds, uphill, on particular surfaces (wet surfaces, surfaces that were not smooth, and surfaces with rocks and pebbles).

#### **IV. Conclusions of Law**

1. The Texas Department of Motor Vehicles has jurisdiction over this matter. TEX. OCC. CODE §§ 2301.601-2301.613 and 2301.204.
2. A hearings examiner of the Department's Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including

- the preparation of a decision with findings of fact and conclusions of law, and the issuance of a final order. TEX. OCC. CODE § 2301.704.
3. The Complainant filed a sufficient complaint with the Department. 43 TEX. ADMIN. CODE § 215.202.
  4. The parties received proper notice of the hearing. TEX. GOV'T CODE §§ 2001.051, 2001.052. 43 TEX. ADMIN. CODE § 215.206(2).
  5. The Complainant bears the burden of proof in this matter. 43 TEX. ADMIN. CODE § 206.66(d).
  6. The Complainant's vehicle does not qualify for replacement or repurchase. The Complainant did not prove that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.603 and 2301.604(a).
  7. A noise by itself does not constitute a substantial impairment or a safety hazard. Texas Department of Transportation, *Alvarez v Ford Motor Company*, MVD Cause No. 08-0440, (Motor Vehicle Division Dec. 11, 2008) (final order denying § 2301.604 relief); State Office of Administrative Hearings *Alvarez v Ford Motor Company*, Docket No. 601-08-4215.CAF, (Oct. 9, 2008) (proposal for decision).
  8. The Complainant's vehicle does not qualify for replacement or repurchase. The Complainant did not prove that the vehicle has a warrantable defect that creates a serious safety hazard or substantially impairs the use or market value of the vehicle. TEX. OCC. CODE § 2301.604(a).
  9. The Complainant does not qualify for reimbursement of incidental expenses because the vehicle does not qualify for replacement or repurchase. TEX. OCC. CODE §§ 2301.603, 2301.604(a); 43 TEX. ADMIN. CODE § 215.209.
  10. If the Complainant's vehicle does not qualify for replacement or repurchase, this Order may require repair to obtain compliance with the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603; 43 TEX. ADMIN. CODE § 215.208(e).
  11. The Complainant's vehicle does not qualify for warranty repair. The Complainant did not prove that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603.

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

**V. Order**

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

**SIGNED October 1, 2019**



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