

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 19-0010510 CAF**

**MELINDA M. MCCUE,
Complainant**

v.

**JAGUAR LAND ROVER NORTH
AMERICA, LLC,
Respondent**

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**BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS**

AMENDED DECISION AND ORDER

Melinda M. McCue (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 her vehicle distributed by Jaguar Land Rover North America, LLC (Respondent). A preponderance of the evidence shows that the subject vehicle has a warrantable defect that qualifies for repurchase/replacement.

I. Procedural History, Notice and Jurisdiction

Matters of notice of hearing¹ and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law. The hearing in this case convened on January 14, 2020, in Carrollton, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. Michael McCue, attorney, represented the Complainant. John Chambless, attorney, represented the Respondent. On April 10, 2020, the Respondent filed a motion for rehearing. On April 28, 2020, Order No. 5 granted the motion for rehearing to address: (1) the vehicle's backup camera; (2) substantial impairment of the vehicle's market value; and (3) the repurchase calculations.

¹ TEX. GOV'T CODE § 2001.051.

II. Discussion

A. Applicable Law

1. Repurchase/Replacement Relief Requirements

A vehicle qualifies for repurchase or replacement if the respondent cannot “conform a motor vehicle to an applicable express warranty by repairing or correcting a defect or condition that creates a serious safety hazard or substantially impairs the use or market value of the motor vehicle after a reasonable number of attempts.”² In other words, (1) the vehicle must have a defect covered by an applicable warranty (warrantable defect); (2) the defect must either (a) create a serious safety hazard or (b) substantially impair the use or market value of the vehicle; and (3) the defect must currently exist after a “reasonable number of attempts” at repair.³ In addition, the Lemon Law imposes other requirements for repurchase/replacement relief, including (1) a written notice of the defect to the respondent, (2) an opportunity to cure by the respondent, and (3) a deadline for filing a Lemon Law complaint.

a. Serious Safety Hazard

The Lemon Law defines “serious safety hazard” as a life-threatening malfunction or nonconformity that: (1) substantially impedes a person’s ability to control or operate a vehicle for ordinary use or intended purposes, or (2) creates a substantial risk of fire or explosion.⁴

b. Substantial Impairment of Use or Value

i. Impairment of Use

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

² TEX. OCC. CODE § 2301.604(a).

³ TEX. OCC. CODE § 2301.604(a).

⁴ TEX. OCC. CODE § 2301.601(4).

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

ii. Impairment of Value

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

c. Reasonable Number of Repair Attempts

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

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

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

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

⁶ *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012) (“We find that this interpretation of the standard required for demonstrating substantial impairment is reasonable and consistent with the statute’s plain language which requires a showing of loss in market value. . . . [T]he Division’s interpretation that expert testimony or technical or market-based evidence is not required to show diminished value or use is consistent with the statute’s goal of mitigating manufacturers’ economic advantages in warranty-related disputes.”).

⁷ TEX. OCC. CODE § 2301.605(a)(1)(A) and (B).

⁸ TEX. OCC. CODE § 2301.605(a)(2).

Additionally, for vehicles out of service at least 30 days, a rebuttable presumption may be established that the vehicle had a reasonable number of repair attempts if:

[A] nonconformity still exists that substantially impairs the vehicle's use or market value, the vehicle is out of service for repair for a cumulative total of 30 or more days, and the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.⁹

The 30 days described above does not include any period when the owner has a comparable loaner vehicle provided while the dealer repairs the subject vehicle.¹⁰

The existence of a statutory rebuttable presumption does not preclude otherwise finding a reasonable number of attempts to repair the vehicle based on different circumstances and fewer attempts.¹¹ Furthermore, the Department adopted a decision indicating that if a consumer presents the vehicle to a dealer for repair and the dealer fails to repair the vehicle, then that visit would constitute a repair attempt unless the consumer was at fault for the failure to repair the vehicle.¹²

d. Other Requirements

Even if a vehicle satisfies the preceding requirements for repurchase/replacement relief, the Lemon Law prohibits repurchase or replacement unless: (1) the owner or someone on behalf of the owner, or the Department has provided written notice of the alleged defect or nonconformity to the respondent;¹³ (2) the respondent was given an opportunity to cure the defect or nonconformity;¹⁴ and (3) the Lemon Law complaint was filed within six months after the earliest

⁹ TEX. OCC. CODE § 2301.605(a)(3).

¹⁰ TEX. OCC. CODE § 2301.605(c).

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

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

¹³ 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.

¹⁴ 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

of: the warranty's expiration date or the dates on which 24 months or 24,000 miles had passed since the date of original delivery of the motor vehicle to an owner.¹⁵

2. Warranty Repair Relief

Even if repurchase or replacement relief does not apply, a vehicle may still qualify for warranty repair if the vehicle has a “defect . . . that is covered by a manufacturer's, converter's, or distributor's . . . warranty agreement applicable to the vehicle” and the vehicle owner notified the manufacturer, converter, distributor, or its authorized agent of the defect before the warranty's expiration.¹⁶ The manufacturer, converter, or distributor has an obligation to “make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty.”¹⁷

3. Burden of Proof

The law places the burden of proof on the Complainant.¹⁸ The Complainant must prove all facts required for relief by a preponderance of the evidence. That is, the Complainant must present sufficient evidence to show that every required fact more likely than not exists.¹⁹ Accordingly, the Complainant cannot prevail where the existence of any required fact appears equally likely or unlikely.

4. The Complaint Identifies the Issues in this Proceeding

The complaint identifies the issues to be addressed in this proceeding.²⁰ The complaint must state “sufficient facts to enable the department and the party complained against to know the

respondent. *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 221 and 226 (Tex. App.—Austin 2012); Texas Department of Transportation, *Kennemer v. Dutchman Manufacturing, Inc.*, MVD Cause No. 09-0091 CAF (Motor Vehicle Division Sept. 25, 2009) (Final Order Granting Chapter 2301, Subchapter M Relief). An opportunity to cure does not require an actual repair attempt but only a valid opportunity. *Id* at 2.

¹⁵ TEX. OCC. CODE § 2301.606(d)(2).

¹⁶ TEX. OCC. CODE § 2301.204; 43 TEX. ADMIN. CODE § 215.202(b)(3).

¹⁷ TEX. OCC. CODE § 2301.603(a).

¹⁸ 43 TEX. ADMIN. CODE § 215.66(d).

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

²⁰ “In a contested case, each party is entitled to an opportunity . . . 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

nature of the complaint and the specific problems or circumstances forming the basis of the claim for relief under the lemon law.”²¹ However, the parties may expressly or impliedly consent to hearing issues not included in the pleadings.²² Implied consent occurs when a party introduces evidence on an unpleaded issue without objection.²³

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.²⁴ 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).²⁵ However, the Department’s rules expressly exclude compensation for “any interest, finance charge, or insurance premiums.”²⁶

B. Summary of Complainant’s Evidence and Arguments

On September 12, 2018, the Complainant, purchased a new Jaguar F-Pace from Jaguar Land Rover Dallas, a franchised dealer of the Respondent, in Dallas, Texas. The vehicle had 22 miles on the odometer at the time of purchase. The vehicle’s limited warranty provides bumper to bumper coverage for five years or 60,000 miles, whichever occurs first. On or about May 29, 2019, the Complainant or a person on behalf of the Complainant provided a written notice of defect to the Respondent. On May 30, 2019, the Complainant filed a complaint with the Department alleging

be scheduled on any complaint made under this section that is not privately resolved between the owner and the dealer, manufacturer, converter, or distributor.”).

²¹ 43 TEX. ADMIN. CODE § 215.202(a)(3).

²² 43 TEX. ADMIN. CODE § 215.42; TEX. R. CIV. P. 67.

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

²⁴ TEX. OCC. CODE § 2301.604.

²⁵ 43 TEX. ADMIN. CODE § 215.209(a).

²⁶ 43 TEX. ADMIN. CODE § 215.208(b)(1).

that: (1) the vehicle would not start; (2) the radio (media system) would not work; (3) navigation would not work; and (4) Bluetooth would not work. On December 3, 2019, the Complainant filed an amended complaint stating that: the vehicle will not start on the first try; the media did not work properly; Bluetooth worked occasionally; the backup camera will not turn on; and the tailgate will not open remotely. Additionally, the amended complaint noted that the navigation issue had been resolved. In relevant part, the Complainant took the vehicle to a dealer for repair of the alleged issues as follows:

Date	Miles	Issue
10/04/18	878	No start; radio will not work
11/27/18 11/30/18	3,017	No start; entertainment system will not work; backup camera will not work
12/11/18	3,421	Will not start properly; Bluetooth cuts out
01/10/19	4,441	Intermittent no start; Bluetooth issues
02/22/19	6,158	Sound system cuts out
03/18/19 03/18/19	6,538	Bluetooth disconnects; infotainment system grayed
05/08/19	9,326	No start; radio freezes
09/17/19	14,596	Tailgate inoperative; rearview camera inoperative; Bluetooth audio inoperable
10/25/19	15,261	Infotainment concerns

The Complainant testified that the final repair attempt on October 25, 2019, addressed all issues except for the tailgate, which no longer presented an issue. Regarding the no start issue, the Complainant explained that she would push the start button but nothing would happen. But after waiting 30 seconds, the vehicle would start. The vehicle would fail to start about one out of 30 times. Initially, the Bluetooth connection would drop constantly. The connection does not drop as often (currently). However, the song displayed will not be the song playing on the media system (when streaming over Bluetooth). The Bluetooth would have to be unpaired and paired or the vehicle restarted. After sitting 10 minutes, the Bluetooth connection would be normal. The Bluetooth issue last occurred the weekend before the hearing. With the backup camera, either Jaguar screen appears or nothing appears and the camera would not come on. The Complainant confirmed that the no start, the media system unresponsiveness, and backup camera issues were not resolved by repair. Moreover, repairs did not resolve the Bluetooth connectivity issue. The Complainant noted that for the November 27, 2018, service visit, she returned the vehicle for further repair on the same day she picked up the vehicle because the Bluetooth connection dropped

a half mile after leaving the dealership. The Complainant added that for the March 18, 2019, service visit, she returned the vehicle for further repair on the same day she picked up the vehicle because the touchscreen turned gray when attempting to pair her phone. She elaborated that the Bluetooth dropping prevented hands-free use.

On cross-examination, the Complainant explained that the vehicle hesitated to start: she would push the start button and the vehicle would do nothing. But the vehicle would start when pushing the button 30 seconds later. Sometimes when pushing the start button, the vehicle will make noise but not start. She reiterated that the media system will show a certain song playing but will not actually play that song. She also stated that radio would not work either. She affirmed that the media system would freeze. The weekend before the hearing, the media system displayed a different song than what played. The Bluetooth connection last dropped about a week before the hearing and would occur about every two weeks. The discrepancy between the music displayed and the music played will occur when driving any significant distance, 50 or so miles, and would occur every time driving to Granbury. When the discrepancy in the music displayed occurred, the touchscreen would remain frozen until turning the vehicle on and off or otherwise reset. The vehicle last failed/hesitated to start two weeks before the hearing and would fail to start at least twice a week. In addition to when listening to music, the Bluetooth connection would also drop with the Complainant on the phone. She could tell the Bluetooth had dropped because the display will no longer show a Bluetooth connection and the Bluetooth will not connect until turning the vehicle off. The Complainant confirmed that the no one at the dealer duplicated the no start issue.

Upon clarification questions, the Complainant confirmed that she was provided a loaner vehicle for all but the last service visit. The Respondent was to reimburse the Complainant for the rental car for the last visit. The Complainant elaborated that playing music from iTunes, Pandora, or even the radio had problems. She confirmed that the Bluetooth-phone functions were controlled through the touchscreen. She pointed out that when the controls stopped working, she would have to stop and restart.

Jimmy Turnbow, a former service advisor of the servicing dealership, testified that the dealership provided loaner vehicles of the same model as the subject vehicle. The Complainant could use the technology, such as the backup camera and Bluetooth, in the loaner vehicles but not her own vehicle. As of the time he left the dealership as a service advisor, the starting, media

system, Bluetooth, and backup camera issues were never completely resolved. On cross-examination, Mr. Turnbow stated that the subject vehicle started for him every time. He explained that phones often caused issues, so the dealership would provide same model loaners to eliminate the customer's phone paired with the vehicle as the problem. He duplicated the Bluetooth dropping probably twice.

C. Inspection

Upon inspection at the hearing, before the test drive, the odometer displayed 17,149 miles. The test drive ended with 17,150 miles on the odometer. The vehicle appeared to operate normally during the test drive.

D. Summary of Respondent's Evidence and Arguments

Brandon Sangster, customer satisfaction senior technical specialist, affirmed that the Respondent did not necessarily get all repair orders and would not know about it. He testified that he connected his work phone and personal phone to the vehicle. He streamed music and switched music on the phone. He drove the vehicle on the expressway and the music never dropped. Mr. Sangster could not duplicate the concerns. He explained the vehicle would not accept an update to allow over-the-air updates because an imc module did not have the VIN stored. A replacement module also would not accept the update. The Respondent's technical support recommend installing a central configuration file, which, however, was corrupted. So, a new file was provided and installed to allow the update. The no start had not caused stranding yet. Mr. Sangster checked the battery, which was fine. He could not replicate the no start issue. He explained that because of the key fob, connectivity with the fob and transmitter/receiver could be an issue. A cell phone could block the signal from the fob to the car and prevent starting. He did not believe any of the issues would affect the value of the vehicle.

E. Analysis

A preponderance of the evidence shows that the subject vehicle continues to have defects that qualify for relief. Specifically, the Bluetooth issue supports repurchase/replacement and the backup camera issue supports warranty repair relief. However, the Bluetooth issue is determinative in this case since the repurchase relief granted by this order makes repair relief immaterial.

1. Bluetooth Connectivity

The last repair attempt occurred on October 25, 2019. Testimony shows that the Bluetooth connectivity malfunctioned a week before the January 14, 2020, hearing. The repair history shows at least four repair attempts for this issue within two years and 24,000 miles. The Bluetooth connectivity problem not only affected streaming music from the phone but also prevented the use of hands-free features. Significantly, the evidence shows that the Complainant used her phone with multiple same-model loaner vehicles without the problems associated with the subject vehicle, reinforcing that a manufacturing defect exists in the subject vehicle's Bluetooth electronics that does not exist in the other same-model vehicles.²⁷ As described in the discussion of applicable law, under the reasonable purchaser standard, the factfinder considers the current condition of the vehicle to address the impairment of value issue. Specifically, the Motor Vehicle Division explained that:

It is the duty of the factfinders to apply a reasonable person analysis to this issue. In essence, they 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.²⁸

The Motor Vehicle Division did not make any exceptions to the reasonable purchaser standard for analyzing impairment of value. Moreover, the courts have determined that the reasonable purchaser standard complies with the Lemon Law's requirement for showing loss of market value.²⁹ In this case, the malfunction in Bluetooth connectivity, which prevents hands-free phone use, among other things, would deter a reasonable purchaser from buying the vehicle or substantially negatively affect the purchase price. Further, Department precedents have held that

²⁷ The Respondent appears to narrowly construe Bluetooth connectivity as equating to the electromagnetic radio waves transmitted between the vehicle's Bluetooth electronics and the user's phone. Jaguar Land Rover's Motion for Rehearing at 3 (Apr. 10, 2020). However, Bluetooth connectivity as used here refers to the function of the Bluetooth electronics manufactured by the Respondent used to transmit voice and data between the user's phone and the vehicle. Accordingly, a failure of Bluetooth connectivity as described here refers to a malfunction of the Bluetooth electronics.

²⁸ Texas Department of Transportation, *Sherman v. Gulf Stream Coach, Inc.*, MVD Cause No. 08-0260 CAF, (Motor Vehicle Division Dec. 5, 2008) (Final Order Granting Chapter 2301, Subchapter M Relief).

²⁹ "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." *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012). Neither the

a problem with a vehicle's hands-free functionality substantially impairs the value of the vehicle, because of requirements imposed by "hands-free" laws.³⁰ In sum, the Bluetooth connectivity issue supports granting of repurchase relief.³¹

2. Backup Camera

The evidence shows that the backup camera failed to function the week before the hearing, whereas the last repair attempt for this issue occurred on September 17, 2019. Accordingly, the record reflects that this nonconformity continues to exist. Moreover, The Department's precedents hold that a defect in a safety feature substantially impairs the market value of a vehicle.³² However, the repair history only shows two repair attempts for the backup camera issue. Consequently, the backup camera issue supports warranty repair relief but does not support the repurchase relief granted here.

3. Incidental Expenses

The Complainant does not qualify for reimbursement of attorney's fees but does qualify for reimbursement of car rental expenses. The Respondent's attorney filed a notice of appearance on September 6, 2019, and an attorney for the Complainant filed a notice of appearance on August 26, 2019. However, as noted in the discussion of applicable law, reimbursement of attorney's fees only applies if the Complainant retains an attorney after notice that the Respondent has an attorney. With respect to the \$303.62 car rental charges, the evidence reflects that the Respondent the Department's rules expressly include costs of alternate transportation as a reimbursable expense.³³

³⁰ *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.

³¹ Because the repurchase relief forms the basis of the repurchase relief, the date of the first repair visit for the Bluetooth issue (December 11, 2018) is the correct date of first report for calculating the repurchase amount.

³² *Mullens v. American Honda Motor Co., Inc.*, Case No. 19-0004709 CAF (Office of Administrative Hearings July 22, 2019) (Decision and Order); *Boren v. Ford Motor Company*, Case No. 16-0345 CAF (Office of Administrative Hearings Nov. 14, 2016) (Amended Decision and Order).

³³ Complainant's Ex. 4, Summary of Charges.

III. Findings of Fact

1. On September 12, 2018, the Complainant, purchased a new Jaguar F-Pace from Jaguar Land Rover Dallas, a franchised dealer of the Respondent, in Dallas, Texas. The vehicle had 22 miles on the odometer at the time of purchase.
2. The vehicle's limited warranty provides bumper to bumper coverage for five years or 60,000 miles, whichever occurs first.
3. The warranty provides that "if a 2018 Model Year Jaguar vehicle is properly operated and maintained, repairs required to correct defects in factory-supplied material's or factory workmanship will be performed without charge upon presentment for service at an authorized Jaguar retailer."
4. The Complainant took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
10/04/18	878	No start; radio will not work
11/27/18		No start; entertainment system will not work; backup camera will not work
11/30/18	3,017	
12/11/18	3,421	Will not start properly; Bluetooth cuts out
01/10/19	4,441	Intermittent no start; Bluetooth issues
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03/18/19	6,538	Bluetooth disconnects; infotainment system grayed
05/08/19	9,326	No start; radio freezes
09/17/19	14,596	Tailgate inoperative; rearview camera inoperable; Bluetooth audio inoperable
10/25/19	15,261	Infotainment concerns

5. On or about May 29, 2019, the Complainant or a person on behalf of the Complainant provided a written notice of defect to the Respondent.
6. On May 30, 2019, the Complainant filed a complaint with the Department alleging that: (1) the vehicle would not start; (2) the radio would not work; (3) navigation would not work; and (4) Bluetooth would not work. On December 3, 2019, the Complainant filed an amended complaint stating that: the vehicle will not start on the first try; the media did not work properly; Bluetooth worked occasionally; the backup camera will not turn on; and the tailgate will not open remotely. Additionally, the Complainant noted that the navigation issue had been resolved.

7. On August 28, 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.
8. The hearing in this case convened on January 14, 2020, in Carrollton, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. Michael McCue, attorney, represented the Complainant. John Chambless, attorney, represented the Respondent. On April 10, 2020, the Respondent filed a motion for rehearing. On April 28, 2020, Order No. 5 granted the motion for rehearing to address: (1) the vehicle's backup camera; (2) substantial impairment of the vehicle's market value; and (3) the repurchase calculations.
9. The Respondent's attorney filed a notice of appearance on September 6, 2019, and an attorney for the Complainant filed a notice of appearance on August 26, 2019.
10. The Bluetooth connectivity continued to malfunction after the last repair attempt. The Complainant testified that the subject vehicle's Bluetooth malfunctioned the week before the hearing. In contrast, the Bluetooth function in same-model loaner vehicles did not malfunction when used by the Complainant.
11. The failure of Bluetooth to function prevents the hands-free operation of a connected phone.
12. The vehicle's odometer displayed 17,149 miles at the time of the hearing.
13. The vehicle's warranty was in effect at the time of the hearing.
14. Upon inspection at the hearing, before the test drive, the odometer displayed 17,149 miles. The test drive ended with 17,150 miles on the odometer. The vehicle appeared to operate normally during the test drive.
15. The appropriate calculations for repurchase are:

Purchase price, including tax, title, license & registration	\$58,997.36
Delivery mileage	22

Mileage at first report of defective condition	3,421
Mileage on hearing date	17,149
Useful life determination	120,000

Purchase price, including tax, title, license & registration	\$58,997.36			
Mileage at first report of defective condition	3,421			
Less mileage at delivery	-22			
Unimpaired miles	3,399			
Mileage on hearing date	17,149			
Less mileage at first report of defective condition	-3,421			
Impaired miles	13,728			
<i>Reasonable Allowance for Use Calculations:</i>				
Unimpaired miles	3,399	÷	120,000	× \$58,997.36 = \$1,671.10
Impaired miles	13,728	÷	120,000	× \$58,997.36 ×50% = \$3,374.65
Total reasonable allowance for use deduction	\$5,045.75			
Purchase price, including tax, title, license & registration	\$58,997.36			
Less reasonable allowance for use deduction	-\$5,045.75			
Plus filing fee refund	\$35.00			
Plus incidental expenses	\$303.62			
TOTAL REPURCHASE AMOUNT	\$54,290.23			

Note: the purchase price excludes any interest, finance charge, or insurance premiums (including road hazard and paintless dent repair coverage). The amended calculations: include the window tint and nitrogen in the purchase price; correct the mileage at first report of the applicable defective condition; and include the rental car charges in the incidental expenses.

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 reasonable purchaser standard applies to the determination of impairment of market value. *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012).
10. The Complainant's vehicle qualifies for replacement or repurchase. A warrantable defect, the Bluetooth malfunction, substantially impairs the market value of the vehicle and continues to exist after a reasonable number of repair attempts. TEX. OCC. CODE § 2301.604(a).
11. The Complainant qualifies for reimbursement of incidental expenses. However, the Complainant does not qualify for reimbursement of attorney's fees because the Complainant retained an attorney before notice that the Respondent had retained an attorney. TEX. OCC. CODE §§ 2301.603, 2301.604(a); 43 TEX. ADMIN. CODE § 215.209.

V. Order

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that the Complainant's petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is **GRANTED**. It is further **ORDERED** that the Respondent shall repair the warrantable defect(s) in the reacquired vehicle identified in this Order. **IT IS THEREFORE ORDERED** that:

1. The Respondent shall accept the return of the vehicle from the Complainant. The Respondent shall have the right to have its representatives inspect the vehicle upon the return by the Complainant. If from the date of the hearing to the date of repurchase the vehicle is substantially damaged or there is an adverse change in its condition beyond

ordinary wear and tear, and the parties are unable to agree on an amount of an allowance for such damage or condition, either party may request reconsideration by the Office of Administrative Hearings of the repurchase price contained in the final order;

2. The Respondent shall repurchase the subject vehicle in the amount of **\$54,290.23**. The refund shall be paid to the Complainant and the vehicle lien holder as their interests require. If clear title to the vehicle is delivered to the Respondent, then the full refund shall be paid to the Complainant. At the time of the return, the Respondent or its agent is entitled to receive clear title to the vehicle. If the above noted repurchase amount does not pay all liens in full, the Complainant is responsible for providing the Respondent with clear title to the vehicle;
3. The parties shall complete the return and repurchase of the subject vehicle within **20 days** after the date this Order becomes final under Texas Government Code § 2001.144.³⁴ 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

³⁴ 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.

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 June 1, 2020



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