

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 20-0000654 CAF**

**ANDRE and GINA EVANS,  
Complainants**

**v.**

**PORSCHE CARS NORTH AMERICA,  
INC.,  
Respondent**

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**BEFORE THE OFFICE  
  
OF  
  
ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Andre Evans and Gina Evans (Complainants) 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 their vehicle distributed by Porsche Cars North America, Inc. (Respondent). A preponderance of the evidence shows that the Complainants' vehicle does not qualify for any relief.

**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 September 15, 2020, by videoconference, before Hearings Examiner Andrew Kang, and the record closed on October 9, 2020. The Complainants, represented themselves. Paul Miller, attorney, represented 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

Repurchase and replacement relief only apply to new vehicles.<sup>2</sup> 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>3</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>4</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>5</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

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<sup>2</sup> TEX. OCC. CODE § 2301.603.

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

<sup>4</sup> TEX. OCC. CODE § 2301.604(a).

<sup>5</sup> TEX. OCC. CODE § 2301.601(4).

vehicle with a non-functioning air conditioner would be available for use and transporting passengers, its intended normal use would be substantially impaired.”<sup>6</sup>

**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>7</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>8</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

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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).

<sup>7</sup> *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.”).

<sup>8</sup> TEX. OCC. CODE § 2301.605(a)(1)(A) and (B).

miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.<sup>9</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 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>10</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>11</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>12</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>13</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>14</sup> (2) the respondent was given an opportunity to cure the defect or

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<sup>9</sup> TEX. OCC. CODE § 2301.605(a)(2).

<sup>10</sup> TEX. OCC. CODE § 2301.605(a)(3).

<sup>11</sup> TEX. OCC. CODE § 2301.605(c).

<sup>12</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>13</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>14</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 satisfies the requirement to provide notice of the defect or nonconformity to the Respondent.

nonconformity;<sup>15</sup> and (3) the Lemon Law complaint was filed within six months after the earliest of: the warranty's expiration date or the dates on which 24 months or 24,000 miles had passed since the date of original delivery of the motor vehicle to an owner.<sup>16</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>17</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>18</sup>

## 3. Burden of Proof

The law places the burden of proof on the Complainants.<sup>19</sup> The Complainants must prove all facts required for relief by a preponderance of the evidence. That is, the Complainants must present sufficient evidence to show that every required fact more likely than not exists.<sup>20</sup> Accordingly, the Complainants cannot prevail where the existence of any required fact appears unlikely or 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>21</sup> The complaint must state “sufficient facts to enable the department and the party complained against to know the

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<sup>15</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 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.

<sup>16</sup> TEX. OCC. CODE § 2301.606(d)(2).

<sup>17</sup> TEX. OCC. CODE § 2301.204; 43 TEX. ADMIN. CODE § 215.202(b)(3).

<sup>18</sup> TEX. OCC. CODE § 2301.603(a).

<sup>19</sup> 43 TEX. ADMIN. CODE § 215.66(d).

<sup>20</sup> *E.g.*, *Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

<sup>21</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,

nature of the complaint and the specific problems or circumstances forming the basis of the claim for relief under the lemon law.”<sup>22</sup> However, the parties may expressly or impliedly consent to hearing issues not included in the pleadings.<sup>23</sup> Implied consent occurs when a party introduces evidence on an unpleaded issue without objection.<sup>24</sup>

## 5. Incidental Expenses

When repurchase or replacement is ordered, the Lemon Law provides for reimbursing the Complainants for reasonable incidental expenses resulting from the vehicle’s loss of use because of the defect.<sup>25</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>26</sup> However, the Department’s rules expressly exclude compensation for “any interest, finance charge, or insurance premiums.”<sup>27</sup>

### B. Summary of Complainants’ Evidence and Arguments

On November 8, 2017, the Complainants, purchased a used 2016 Porsche Cayenne E-Hybrid from Porsche Melbourne, a franchised dealer of the Respondent, in Melbourne, Florida. The Complainants actually took delivery on November 24, 2017. The vehicle had 8,678 miles on the odometer at the time of purchase. On October 9, 2018, the Complainants provided a written

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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.”).

<sup>22</sup> 43 TEX. ADMIN. CODE § 215.202(a)(3).

<sup>23</sup> 43 TEX. ADMIN. CODE § 215.42; TEX. R. CIV. P. 67.

<sup>24</sup> *See Gadd v. Lynch*, 258 S.W.2d 168, 169 (Tex. Civ. App.—San Antonio 1953, writ ref’d).

<sup>25</sup> TEX. OCC. CODE § 2301.604.

<sup>26</sup> 43 TEX. ADMIN. CODE § 215.209(a).

<sup>27</sup> 43 TEX. ADMIN. CODE § 215.208(b)(1).

notice of defect to the Respondent, alleging problems with: constant check engine and other warning lights, poor or inoperable air conditioning, sporadic jerkiness, spasmodic sensor malfunctions causing involuntary braking, insufficient battery power based upon advertised battery capacity, USB and (12-volt outlet) device charging functions, and the vehicle's trunk cover/protector installation during which the dealership scratched the interior. On September 17, 2019, the Complainants filed a complaint with the Department referencing the issues in the notice of defect and also alleging: delays in cooling and heating; errant sensors caused the vehicle to go into park; the hybrid system fault warning continued to come on; the check engine light and other warning (reduced engine power) came on; and a discrepancy between the battery life and actual distance. In relevant part, as shown in the repair orders, the Complainants took the vehicle to a dealer for repair of the alleged issues as follows:

<b>Date</b>	<b>Miles</b>	<b>Issue</b>
May 21, 2018	19,194	Air conditioning (AC) stopped working
July 25, 2018	21,124	AC not cooling
August 31, 2018	23,852	Service engine light
November 15, 2018	27,832	AC takes a while to cool, heater takes a while to heat/heater blows cool, <i>cigarette lighter (12-volt outlet) not working, cargo cover installation</i>
January 25, 2019	30,999	Not heating or cooling intermittently
July 3, 2019	40,471	Hybrid system failure warning light, <i>park assist warning always activates</i>
May 11, 2020	55,746	<i>Front parking sensors going off randomly</i> , heating and AC delayed, hybrid sensor fault
July 28, 2020	56,426	AC slow to cool, heater slow to warm, <i>parking aid keeps going off</i> , hybrid system warning light

Mrs. Evans testified that the vehicle had 57,716 miles on the odometer on the day of the hearing. In addition to the issues in the complaint, Mr. Evans identified issues with sporadic jerking, USB and (12-volt outlet) device charging, and the (touch) screen going blank. The touchscreen went blank a number of times and stayed off for two days in one instance. He believed that the USB and 12-volt outlet issues were resolved. The sensor issues appeared to have improved. Previously, the vehicle would exhibit a sensor error every time the Complainants traveled.

Mr. Evans explained that the Complainants noticed the heater not warming up as quickly as other vehicles. The heater would take about 10 minutes to warm up. In the warmer months, the AC would take 10 minutes or so to start cooling. He explained that most of their travel was within

10 minutes. He last noticed issues with cooling about August or September and issues with heating about January. Mrs. Evans elaborated that taking her son to school took about two minutes and the AC would blow but not cool air.

Mr. Evans described the sensor problem causing the vehicle to go into park as two parts: (1) (parking) sensors that detect objects around the vehicle<sup>28</sup> and (2) sensors that relate to braking outside of normal operating standards. With respect to the first issue, he explained that when driving and then stopping, the sensors may make a warning sound about something in front or to the side of the vehicle with nothing there. This would happen almost every trip. Regarding the second issue, the car would engage the brakes and Mr. Evans would have to restart the car to move it. Even though he would think that pressing the gas pedal would move the car, it would not and he would have to either turn off the car (and restart) or disengage the parking brake. He understood that the car may shut down when opening a door but the braking would happen under normal operation. He clarified that the car would be stationary and would not engage the brake when in motion. Sometimes he would have to shift the car into park on the road, turn the ignition off and restart to drive. Mr. Evans testified that he last noticed the false sensor warnings around June or July, this year. Since then, he did not recall seeing an errant sensor warning or at least not as much since he had not driven as much because of the pandemic. He believed that he stopped seeing the sensor warning error after the July (2020) service visit. Mr. Evans stated that he last noticed the parking brake issue about mid-August (2020). He noted that he believed the braking issue related to the hybrid system fault.

Mrs. Evans added that turning on the car (ignition) did not turn it on completely. The car would sound as if only the hybrid (electric motor) came on and the (gas) engine did not. They would have to turn it off and restart. Mr. Evans elaborated that sometimes the engine sounded like it was running but the car would not move. He would have to shift to park, turn the car off and back on to proceed to drive. Mr. Evans testified that the hybrid system fault warning continued to come on, sometimes preventing the car from starting, despite being serviced for nearly a month. He explained that hybrid system fault issue was essentially, the issue he just previously described but with more intensity. When turning the key to start, this fault appears. He would try to restart and the car would not start. Starting took several tries and about 10 to 15 minutes. The car would

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<sup>28</sup> Sensors in the first part appear to refer to parking sensors as indicated in the repair orders.

show reduced engine power. Hybrid system fault was probably the most common warning. Whether driving and shutting off and turning on or trying to turn on, the warning would appear. Also, the warning would come on when driving car and (subsequently) he would have difficulty trying to start car. He last noticed this issue about September 2, 2020. The check engine light occurred the following week.

Mr. Evans described the check engine light as coming on about as often as the hybrid system fault. He could feel a difference in performance when the light came on. The check engine light last came on September 9th, after a hybrid system fault message. Mrs. Evans pointed out that the check engine light came on September 3rd. The check engine light would come on about every two months.

Regarding the discrepancy between the battery life (range) and actual mileage, Mr. Evans explained that the battery would get 12 miles but should get 13 miles. He believed the problem could be a charging issue. In actual driving, the vehicle would get a little over half the mileage shown. So, if the vehicle shows a 12 mile range, then the vehicle would actually get six or seven miles before the battery drained. He last noticed the issue on the hearing day.

Mr. Evans summarized that the vehicle has had issues from the beginning that still have not been resolved. He was notified that the issues were common for hybrid vehicles. The AC and heater worked better with the battery charged. He was not notified about these problems with hybrids at purchase. He added that in context of stopping, the vehicle exhibited an intermittent jerkiness. Mrs. Evans stated that they could not cool the car ahead of time so they had to just start the vehicle in temperatures that may reach over 100 degrees and they could not cool off. Mr. Evans understood that opening the car door would shut off the engine and the AC would stop cooling. Even if not a malfunction, this design was an error making the vehicle unfit for its intended purpose.

On cross-examination, Mr. Evans testified that he notified the dealer about the jerkiness in mid-2018. He did not know a specific date when he reported experiencing the jerkiness to a dealer. He stated that he notified the Respondent of the jerkiness and provided an opportunity to repair in May 2018 and again maybe in February 201. He acknowledged that the service records did not reflect the jerkiness complaint and he only had the notice letter showing the issue. He described the jerkiness as occurring about twice a month when coming to a stop, parking, reversing, and

maybe infrequently in freeway driving. He was not certain the jerkiness was not communicated after February 2019, but he had not brought the vehicle in after February 2019 for this issue. He brought the vehicle in for jerkiness at 27,832 miles but he did not have a corresponding service record. He confirmed the successful repair of the USB charging. When asked if he knew what the owner's manual said about the battery charge, he answered that he read about recharging in limited parts and understood the maximum battery range to be 13 miles. The manual said to charge the vehicle every night and the Complainants tried to charge the vehicle every night. He was not initially aware of the need to charge nightly but was advised after complaining about the heater. He was not sure when he reported the battery range issue to the dealer but may have done so about February 2019. He also communicated with the dealer around October to November 2018, and mid-August 2019. He affirmed that the battery meter accuracy was part of the problem but so was the failure to reach a maximum charge (range) of 13 miles. He confirmed that the battery meter showed 12 miles though the maximum was 13 miles. He represented that someone at "the meeting" notified him of the maximum but was also informed that the vehicle was performing normally. Mr. Evans confirmed that paint was peeling off the front bumper when he bought it. The vehicle apparently had cosmetic repairs and the paint was not original. He recounted that he notified the dealer of the sensor concern and the dealer resolved the computer coding fault but the paint problem could cause the sensor issue. When asked if the sensors would set the brakes while driving, he explained that they did not. Rather, he thought the issue was a different, isolated issue where the parking brakes would improperly engage. The car would not go in drive. Even pressing the gas pedal would not move the vehicle. He would have to shift to park and back to drive to make the car go. When first taking the vehicle to a dealership for the issue in December 2017 or February 2018, the dealership indicated the issue was common and explained about its operation. He stated that the parking brake issue would occur (for example) when backing out of the driveway, without the door open or anything else to auto-engage the brake. The issue appeared to relate to slow driving, like parking. The brake did not engage in "full drive" or on the freeway. Mr. Evans did not know how the hill hold feature functioned. He elaborated that the vehicle would not move when the parking brake (spontaneously) engaged. In instances with the parking brake not engaged, he believed the immobility related to the hybrid system. The immobility was not replicated without the hybrid system fault warning. Symptoms of the hybrid system fault included not starting and the engine shutting off without cause. Mr. Evans affirmed that when the vehicle

shut off, a red warning indicator would appear with a message to see the dealer. After repairs, the yellow warning messages reappeared but not the red warning messages. Mr. Evans acknowledged that he may pre-condition the vehicle on cold days by turning the car on and letting it heat up. He confirmed being advised to use sports mode when pre-conditioning but could not recall if he did so. He was not aware if the vehicle came with a pre-condition option. He understood that in sports mode, the vehicle would shut off in 30 to 45 seconds. Mr. Evans reported the AC issue soon after taking delivery and the dealer acknowledged that hybrids would not perform to the same level as non-hybrid vehicles. Mr. Evans acknowledged the February 17, 2019, agreement (Respondent's Exhibit 3) but objected to characterizing it as a settlement. He affirmed that the Complainants signed the agreement and that the agreement settled claims up to that time. However, he explained that he understood the claims related to the service history but that he did not think the Complainants had an understanding or agreement that they could not raise claims regarding the problems with the vehicle.

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

Jimmy Hays, field technical manager, testified that he did not recall any complaints or documentation about jerkiness. The dealer verified that the sensors would activate without nearby objects. The dealer determined that paint was peeling on the front bumper, which could cause the false activation. Sensors were embedded in the bumper cover. He elaborated that the park assist system used ultrasonic sensors to detect objects around the vehicle, which may be influenced by different factors, such as paint peeling off, layers of cold and warm air, other vehicles, and dirt or ice on the sensors. Based on the most recent inspection, Mr. Hays affirmed that paint peeling around the sensor would result in false activation of the parking assist system. He confirmed that the paint issue was not a warranted defect in materials or workmanship of the Respondent. Mr. Hays averred that the issue regarding braking when driving slowly was not documented in the service records. Mr. Hays testified that the vehicle's hill hold function prevents the vehicle from rolling on an incline. There are two ways of holding the vehicle: (1) activating the electric parking brake and (2) holding the brake pedal and pushing the pedal further until the hold light turns on. If the driver's door is closed and seatbelt is buckled, pressing the accelerator releases the brakes. The hold can happen in situations like backing out of a driveway, if lightly touching the brake and shifting from reverse to neutral, the vehicle will activate the parking brake. If the seatbelt is not

latched, the brake will need to be manually released. The Complainant did not raise the braking issue so the Respondent did not have an opportunity to address the issue. Mr. Hays explained that the battery meter shows a calculated value based on actual previous driving. The vehicle's may or may not achieve the mileage shown based on how the vehicle is driven. Stop and go driving or aggressive driving will consume more energy than driving constant speeds, so the range will decrease like a gasoline vehicle. Additionally, a 110V circuit will take twice as long to charge the vehicle than a 220V circuit. The service history did not include any concerns regarding the battery meter. Mr. Hays affirmed that the vehicle did not have a heating or cooling problem. When tested in December 2019, the subject vehicle performed similarly to a comparison vehicle, another Cayenne hybrid, whether in purely electric mode or hybrid mode with the gas engine running. This vehicle can heat with either the combustion engine or electric heater and can cool quickly as compared to a gas engine, which depends on the compressor's speed. The subject vehicle did not have the preconditioning feature, which allows turning on the heat/AC through the Porsche Connect App. Manual preconditioning requires remaining inside the car. He notified Mr. Evans about using sport mode to keep the gas engine operating. However, leaving the vehicle will shut the engine off. In July, the AC began producing cold air almost immediately (10 seconds after turning on). Mr. Hays confirmed that the panoramic sunroof increases the thermal load and would increase the time to cool down. Mr. Hays found a warning light or hybrid system fault issue documented four times. He confirmed that the battery warning light was separate from the hybrid system fault. Two repairs involved issues with the battery control unit and purge valve, which have not recurred. The other repairs involved a fault with an electric motor sensor. The service history includes no documentation of a hybrid system fault between May 2018 and May 2020. Mr. Hays believed that replacement of the electronic motor and high voltage power electronics would resolve the hybrid system fault.

On cross-examination, Mr. Hays testified that he met, via telephone, with Mr. Evans on July 28th (2020). He confirmed that he was not aware of the jerkiness. He noted that one of the repair orders was for a new car pre-delivery inspection. He recalled that when the battery has a low charge, the cooling to the cabin may be bypassed. A battery in low charge state must recharge, which requires lots of energy and cooling. The vehicle uses AC to cool high voltage components when needed, which may reduce the cooling to the passenger compartment. He explained that if a plug-in hybrid vehicle is never plugged in, it will remain in a low state of charge. Regarding the

braking, Mr. Hays elaborated that it may happen if rolling forward and shifting into neutral. He affirmed that the brakes would not engage if not shifting to neutral or other gear, if the seatbelt is fastened and the door is closed. Mr. Hays clarified that the calculated value reflects past driving, the same principle as a gas vehicle taking past consumption and calculating the distance to empty. However, the range can change in colder weather because fluids need to warm up. Additionally, heavy acceleration will decrease the range. More acceleration uses more energy but does not degrade the battery, though every battery ages from use. Mr. Hays affirmed that the calculated range value has no effect on the life of the battery. Though he did not physically inspect the subject vehicle in 2020, he diagnosed the cooling/heating issue based on data provided to him.

Jason Whitehead, the shop foreman of Porsche West Houston, testified that he worked with Mr. Hays in the diagnosis of the vehicle in July this year. Mr. Whitehead elaborated that he provided information to Mr. Hays, who advise what paths to pursue. At the July 28, 2020, service visit, the vehicle exhibited a fault for the rotor positions sensor. They determined that replacement of the e-machine (electric motor) would resolve the hybrid system fault warning.

#### **D. Analysis**

As explained below, the subject vehicle does not qualify for any relief, whether repurchase or replacement under the Lemon Law or repair under the Warranty Performance Law.

##### **1. Repurchase/Replacement**

As an initial matter, the subject vehicle cannot qualify for repurchase or replacement since repurchase and replacement relief only apply to new vehicles.<sup>29</sup>

##### **2. Settlement and Release**

The settlement agreement signed by the Complainants on February 17, 2019, bars relief for those issues shown in the repair history up to the date of the agreement. The Lemon Law expressly allows settlement agreements to exclude or modify Lemon Law relief.<sup>30</sup> Additionally,

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<sup>29</sup> TEX. OCC. CODE § 2301.603. TEX. OCC. CODE § 2301.002(24) (“‘New motor vehicle’ means a motor vehicle that has not been the subject of a retail sale regardless of the mileage of the vehicle.”).

<sup>30</sup> TEX. OCC. CODE § 2301.607(g).

under Texas law, “[a] release extinguishes a claim or cause of action and bars recovery on the released matter.”<sup>31</sup> The parties’ settlement agreement states in salient part that:

I understand that this offer is based upon the service history of the vehicle to this point and my acceptance of this offer is in settlement of any and all claims based upon that portion of the service history. In consideration of the goodwill payment described above, I release Porsche Cars North America, Inc. and its affiliates from all claims pertaining to the specific subject matter of this offer.<sup>32</sup>

When interpreting contracts, the rules of contract construction require ascertaining the parties’ intent as expressed in the contract terms themselves. The contract terms are given their plain, ordinary, and generally accepted meaning unless the contract shows that the parties used them in a technical or different sense.<sup>33</sup>

Here, the agreement plainly states that it settles “all claims based upon that portion of the service history [up to February 17, 2019]” and that the Complainants release the Respondent from “all claims pertaining to the specific subject matter of this offer.” Significantly, the agreement broadly covers “all claims” with no exceptions or qualifications so that the agreement applies to Lemon Law and Warranty Performance Law claims based on the service history through February 17, 2019. The service history up to February 17, 2019 (as shown in the repair orders), includes the following complaint issues: the delays in cooling and heating, the check engine light, the cigarette lighter (12-volt outlet) not working,<sup>34</sup> and the cargo cover installation. Accordingly, any claims based on these issues are extinguished by the release. The repair orders up to February 17, 2019, do not mention the following complaint issues: errant sensors causing involuntary braking/causing the vehicle to go into park; hybrid system error warning; other (reduced engine power) warning; the discrepancy between the battery life and actual distance; sporadic jerkiness; and USB charging function.<sup>35</sup> Therefore, the release does not affect these issues. Additionally, Mr. Evans testimony mentioned issues with the touchscreen going blank and peeling paint, which the complaint did not include. However, as elaborated below, the touchscreen and paint issues cannot support any relief.

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<sup>31</sup> *Ysasaga v. Nationwide Mut. Ins. Co.*, 279 S.W.3d 858, 867 (Tex. App.—Dallas 2009) citing *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993).

<sup>32</sup> Respondent’s Exhibit 3, Settlement.

<sup>33</sup> *E.g., Lopez v. Munoz, Hockema & Reed*, 22 S.W.3d 857, 864 (Tex. 2000).

<sup>34</sup> Note: Mr. Evans testified that the cigarette lighter/12-volt outlet issue was resolved.

<sup>35</sup> Note: Mr. Evans testified that the USB issue was resolved.

### 3. Warranty Performance Law

The Warranty Performance Law provides for repair relief when the vehicle has an existing defect covered by warranty and specified in the complaint.<sup>36</sup> The touchscreen and paint issues cannot support any relief because they were not included in the complaint. Likewise, the false sensor warning issue was not included in the complaint. Rather, the complaint only identified a sensor issue causing involuntary braking or parking.<sup>37</sup> Moreover, testimony shows that the false sensor warnings stopped after the July 2020 service visit. Consequently, the false sensor warnings cannot support any relief.

### 4. Warranty

The absence of proof of the vehicle's warranty coverage precludes any relief in this case. On September 16, 2020, Order No. 5 required the Complainants to file a copy of the Respondent's warranty applicable to the subject vehicle by October 2, 2020. The Complainants did not submit the required warranty and the record does not otherwise include evidence of the vehicle's warranty. However, both the Lemon Law and the Warranty Performance Law require a warranty that covers the alleged defects.<sup>38</sup> Critically, without the warranty terms, whether the warranty covers a condition cannot be determined. Consequently, relief cannot be granted without proof of the warranty terms.

## III. Findings of Fact

1. On November 8, 2017, the Complainants, purchased a used 2016 Porsche Cayenne E-Hybrid from Porsche Melbourne, a franchised dealer of the Respondent, in Melbourne, Florida. The vehicle had 8,678 miles on the odometer at the time of purchase.
2. The Complainants took the vehicle to a dealer for repair of the alleged issues as follows:

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<sup>36</sup> TEX. OCC. CODE § 2301.204.

<sup>37</sup> Although Mr. Evans characterized the issue of errant sensors causing the vehicle to go into park as one issue with two parts—(1) parking sensors giving false warnings and (2) sensors causing involuntary braking or parking—his testimony reflects that these two parts are actually two different issues and the braking issue does not relate to the sensors.

<sup>38</sup> TEX. OCC. CODE §§ 2301.603-2301.604; TEX. OCC. CODE § 2301.204(a).

Date	Miles	Issue
May 21, 2018	19,194	Air conditioning (AC) stopped working
July 25, 2018	21,124	AC not cooling
August 31, 2018	23,852	Service engine light
November 15, 2018	27,832	AC takes a while to cool, heater takes a while to heat/heater blows cool, <i>cigarette lighter (12-volt outlet) not working, cargo cover installation</i>
January 25, 2019	30,999	Not heating or cooling intermittently
July 3, 2019	40,471	Hybrid system failure warning light, <i>park assist warning always activates</i>
May 11, 2020	55,746	<i>Front parking sensors going off randomly</i> , heating and AC delayed, hybrid sensor fault
July 28, 2020	56,426	AC slow to cool, heater slow to warm, <i>parking aid keeps going off</i> , hybrid system warning light

3. On October 9, 2018, the Complainants provided a written notice of defect to the Respondent, alleging problems with: constant check engine and other warning lights, poor or inoperable air conditioning, sporadic jerkiness, spasmodic sensor malfunctions causing involuntary braking, insufficient battery power based upon advertised battery capacity, USB and (12-volt outlet) device charging functions, and the vehicle's trunk cover/protector installation during which the dealership scratched the interior.
4. On September 17, 2019, the Complainants filed a complaint with the Department referencing the issues in the notice of defect and also alleging: delays in cooling and heating; errant sensors caused the vehicle to go into park; the hybrid system fault warning continued to come on; the check engine light and other warning (reduced engine power) came on; and a discrepancy between the battery life and actual distance.
5. On December 13, 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.

6. The hearing in this case convened on September 15, 2020, by videoconference, before Hearings Examiner Andrew Kang, and the record closed on October 9, 2020. The Complainants, represented themselves. Paul Miller, attorney, represented the Respondent.
7. The vehicle had 57,716 miles on the odometer on the day of the hearing.
8. On February 17, 2019, the Complainants executed a settlement agreement stating that:

I understand that this offer is based upon the service history of the vehicle to this point and my acceptance of this offer is in settlement of any and all claims based upon that portion of the service history. In consideration of the goodwill payment described above, I release Porsche Cars North America, Inc. and its affiliates from all claims pertaining to the specific subject matter of this offer.
9. The service history up to February 17, 2019 (as shown in the repair orders), includes the following complaint issues: the delays in cooling and heating, and the check engine light.
10. On September 16, 2020, Order No. 5 required the Complainants to file a copy of the Respondent's warranty applicable to the subject vehicle by October 2, 2020. However, the Complainants did not file the required warranty or otherwise show the terms of the warranty.

#### **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 Complainants 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 Complainants bear the overall burden of proof in this matter. 43 TEX. ADMIN. CODE § 206.66(d).
6. The Complainants' vehicle cannot qualify for replacement or repurchase. Replacement and repurchase relief only apply to new vehicles. TEX. OCC. CODE § 2301.603.
7. A settlement agreement between the Complainants and the Respondent may exclude or modify a remedy provided by the Lemon Law. TEX. OCC. CODE § 2301.607(g).
8. A release extinguishes a claim or cause of action and bars recovery on the released matter. *Ysasaga v. Nationwide Mut. Ins. Co.*, 279 S.W.3d 858, 867 (Tex. App.—Dallas 2009) citing *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993).
9. Release is an affirmative defense. TEX. R. CIV. P. 94.
10. The Respondent proved the Complainants agreed to a settlement releasing their claims for the delays in cooling and heating and the check engine light. *Ysasaga v. Nationwide Mut. Ins. Co.*, 279 S.W.3d 858, 867 (Tex. App.—Dallas 2009) citing *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993); TEX. R. CIV. P. 94.
11. The Complainants' vehicle does qualify for replacement or repurchase or warranty repair relief. The Complainants failed to prove that an express warranty by the Respondent covered the alleged defects. TEX. OCC. CODE §§ 2301.603-2301.604; TEX. OCC. CODE § 2301.204(a).

**V. Order**

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

**SIGNED December 7, 2020**



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