TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 20-0009529 CAF

NEAL and BILLIE GARRETT,	**§**	**BEFORE THE OFFICE**
Complainants	**§**	
	§	
v.	**§**	**OF**
	§	
TESLA MOTORS, INC.,	**§**	
Respondent	**§**	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Neal Garrett and Billie Garrett (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 manufactured by Tesla Motors, Inc. (Respondent). A preponderance of the evidence does not show that the subject vehicle has a currently existing warrantable defect. Consequently, the Complainants' vehicle does not qualify for repurchase/replacement or warranty repair.

I. Procedural History, Notice and Jurisdiction

Matters of notice of hearing[1] and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law. The hearing in this case convened on October 8, 2020, by videoconference, before Hearings Examiner Andrew Kang, and the record closed on October 23, 2020. Neal Garrett represented himself and Billie Garrett. Matthew Needleman, analyst, represented the Respondent.

[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]

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[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]

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

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[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 satisfies the requirement to provide notice of the defect or nonconformity to the Respondent.

[14] 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

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 Complainants.[18] 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.[19] 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.[20] The complaint must state "sufficient facts to enable the department and the party complained against to know the

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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.

[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 Complainants 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 Complainants' Evidence and Arguments

On September 27, 2018, the Complainants, purchased a new 2018 Tesla Model 3 from the Respondent, in Fremont, California. The vehicle had 50 miles on the odometer at the time of purchase. The vehicle's limited warranty provides bumper to bumper coverage for four years or 50,000 miles, whichever occurs first.

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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).

On January 24, 2020, an attorney on behalf of the Complainants provided a written notice of defect to the Respondent. However, this notice did not specify any alleged defects. On March 31, 2020, the Complainants provided a written notice of the specific alleged defects to the Respondent. On March 28, 2020, the Complainants filed a complaint with the Department alleging that intermittent camera issues affected safety features like lane departure warning, blind spot detection, and auto pilot functionality. The Complainants took the vehicle to the Respondent for repair as shown below:

Date	Miles	Issue
January 7, 2019	9,058	Surround vehicle display limited
February 20, 2019	10,404	(no complaint issues)
September 9,2019	19,929	(no complaint issues)
October 17, 2019	24,431	Blind spot detection limited; lane departure avoidance limited
November 20, 2019	27,189	Lane departure avoidance limited
January 7, 2020	31,200	Auto pilot cameras are unavailable
January 22, 2020	31,714	Auto pilot cameras unavailable
March 16, 2020	34,005	Autopilot cameras unavailable
March 23, 2020	34,320	Autopilot cameras unavailable

Mr. Garrett testified that issues with the lane departure warning, blind spot detection, and autopilot functions were all symptoms of underlying camera issues. He first noticed an issue with the camera possibly in mid-December 2018. when the first repair occurred. He described that errors would pop up while driving. He would try to use autopilot and it would not work. When trying to change lanes with lane departure on, he would have to turn off autopilot, assuming an error did not make the function unavailable. The issue was very intermittent. The Complainant and not been able to determine what causes it. The last error message that stayed up was on March 19th of this year. He also had issues with the rear camera displaying black but not setting an error. The last time this occurred, the autopilot camera was unavailable. With the lane departure issue, he would see a message in pictures, which he last noticed on November 17, 2019. He last noticed a message/issue with the blind spot warning on that same day as the lane departure issue. Two messages popped up: lane departure avoidance limited and blind spot detection limited. Mr. Garrett added that since January, the Respondent asked him to document the occurrence of the issue and take photographs of the screens to help the Respondent repair the vehicle as opposed to proving something was wrong. Error messages were very intermittent, maybe weather related. The Respondent replaced the self-driving computer before troubleshooting the cameras. On cross-

examination, Mr. Garrett affirmed that Tesla offered to resolve the issues by paying half of the FSD (Full Self Driving) cost.

C. Summary of Respondent's Evidence and Arguments

Mr. Needleman asserted that the Complainant did not meet the Lemon Law's requirements for relief. He pointed out that the first reference to autopilot appeared in RO (repair order) 9100109802 (on January 7, 2019, at 9,058 miles). There were no other ROs for autopilot until 24,431 miles on October 17, 2019. Mr. Needleman explained that the Respondent views FSD as a convenience feature. The Respondent advises customers to stay behind the wheel with hands on. Though the occasional error notification may be annoying, the expectation is that the customer is driving the vehicle. FSD is an assist function not to be relied on as a total safety (substitute) function to travel between points. When the Respondent replaced the FSD unit, the issues went away. Accordingly, the Respondent offered to pay for half of the FSD because the Respondent believed the issues related to the FSD function and not to the vehicle itself. The FSD is a separately purchased feature in addition to the vehicle. The issues did not impair the use, safety, or value of the vehicle. The error messages appeared to be software issues addressed by the FSD upgrade. The Complainant has owned the vehicle for 24 to 25 months and driven about 1,600 miles a month. For comparison, drivers in Texas average 800 miles per month, reflecting no impairment of use.

D. Analysis

As explained below, the subject vehicle does not meet the Lemon Law's requirements for repurchase or replacement relief or the Warranty Performance Law's requirements for repair relief.

1. Reasonable Repair Attempts

In relevant part, the Lemon Law's presumption for reasonable repairs requires four repair attempts in the earlier of two years or 24,000 miles after purchase (in this case, the 24,000-miles passed earlier). However, the vehicle only had one repair attempt for the alleged issue in the first 24,000 miles after purchase. Although the presumption does not preclude otherwise finding a reasonable number of attempts to repair the vehicle based on different circumstances and fewer attempts, the facts in this case do not warrant varying from the presumption. Accordingly, the vehicle cannot 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) that continues to exist after repairs.[27] 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:

> Subject to separate coverage for certain parts and exclusions and limitations described in this New Vehicle Limited Warranty, the Basic Vehicle Limited Warranty covers the repair or replacement necessary to correct defects in the materials or workmanship of any parts manufactured or supplied by Tesla under normal use for a period of 4 years or 50,000 miles (80,000 km), whichever comes first.[28]

According to these terms, the warranty only applies to defects in materials or workmanship (manufacturing defects).[29] A manufacturing defect is generally an isolated aberration occurring only in those vehicles not produced according to the manufacturer's specifications. A defectively manufactured vehicle has a flaw because of some error in making it at the factory, such as incorrect assembly or the use of a broken part. Manufacturing defects exist when the vehicle leaves the manufacturing plant. Unlike manufacturing defects, issues that do not arise from manufacturing, such as design characteristics or design defects are not warrantable defects. Design characteristics result from the vehicle's specified design, which exists before the vehicle is manufactured, and not

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

[28] Complainant's Ex. 1, New Vehicle Limited Warranty.

[29] 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.").

from any error during manufacturing.[30] Because the warranty only covers manufacturing defects, any flaws in the design, or other non-manufacturing problems, do not qualify for relief.

In this case, the evidence does not show that the alleged issue continued to exist after repairs. The last warning message for the autopilot cameras appeared on March 19, 2020, and the last warning messages for lane departure avoidance and the blind spot warning appeared on November 17, 2019. However, the last repair visit occurred on March 23, 2020, after the last indication of a malfunction. In other words, the record does not reflect any issues existing after the last repair. Additionally, the error messages appeared to stem from software issues resolved by the FSD upgrade, and software programming by nature is a design issue and not a manufacturing defect. Consequently, the vehicle cannot qualify for any relief.

III. Findings of Fact

1. On September 27, 2018, the Complainants, purchased a new 2018 Tesla Model 3 from the Respondent, in Fremont, California. The vehicle had 50 miles on the odometer at the time of purchase.

2. The vehicle's limited warranty provides bumper to bumper coverage for four years or 50,000 miles, whichever occurs first.

3. The Complainants took the vehicle to the Respondent for repair as shown below:

Date	Miles	Issue
January 7, 2019	9,058	Surround vehicle display limited
February 20, 2019	10,404	(no complaint issues)
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March 16, 2020	34,005	Autopilot cameras unavailable
March 23, 2020	34,320	Autopilot cameras unavailable

[30] 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).

4. On January 24, 2020, an attorney on behalf of the Complainants provided a written notice of defect to the Respondent. However, this notice did not specify any alleged defects. On March 31, 2020, the Complainants provided a written notice of the specific alleged defects to the Respondent.

5. On March 28, 2020, the Complainants filed a complaint with the Department alleging that intermittent camera issues affected safety features like lane departure warning, blind spot detection, and auto pilot functionality.

6. On June 25, 2020, 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 October 8, 2020, by videoconference, before Hearings Examiner Andrew Kang, and the record closed on October 23, 2020. Neal Garrett represented himself and Billie Garrett. Matthew Needleman, analyst, represented the Respondent.

8. The vehicle's odometer displayed 39,647 miles at the time of the hearing.

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

10. The vehicle only had one repair attempt within the earlier of the first 24 months or 24,00 miles after delivery of the vehicle.

11. The last error message for the autopilot cameras appeared on March 19, 2020, and the last error messages for lane departure avoidance and the blind spot warning appeared on November 17, 2019.

12. The last repair visit occurred on March 23, 2020.

13. The error messages appeared to result from a software issue, which the FSD (Full Self Driving) upgrade appeared to resolve.

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 bears the burden of proof in this matter. 43 TEX. ADMIN. CODE § 206.66(d).

6. The Complainants' vehicle does not qualify for replacement or repurchase. The Complainants 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. The Complainants' vehicle does not qualify for replacement or repurchase. The Complainants did not meet the requirement for a reasonable number of repair attempts. TEX. OCC. CODE §§ 2301.604(a) and 2301.605(a).

8. The Complainants 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.

9. The Complainants' vehicle does not qualify for warranty repair. The Complainants did not prove that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603.

10. 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 Complainants' petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is **DISMISSED**.

SIGNED December 22, 2020

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