



**STATE OF CONNECTICUT  
DEPARTMENT OF CONSUMER PROTECTION  
Automobile Dispute Settlement Program**



Pursuant to Connecticut General Statutes Chapter 743b, the undersigned arbitrators, having been duly sworn and having given due consideration to the proofs and allegations of the parties, hereby decide the following in regard to the above captioned matter:

**I. FINDINGS OF FACT**

**Ernest J. Byar** (the "Consumer") purchased a **2017 Ford Fusion Sport** (the "vehicle") from **Monaco Ford** located at **767 New London Turnpike in Glastonbury, Connecticut, 06033** (the "Dealer"). The Consumers took delivery of this vehicle on **October 28, 2016**. The registration is "passenger," "combination," or "motorcycle," as defined in section 14-1 of the Connecticut General Statutes, or the equivalent.

After reviewing the allegations, these arbitrators deemed this case eligible for an arbitration hearing pursuant to Connecticut General Statutes Chapter 743b. **Ford Motor Company** (the "Manufacturer") did not contest the initial eligibility of the vehicle in this case. Said hearing was held on **Thursday, April 20, 2017**. Mr. Tim Clark served as the State's Technical Expert. Also appearing at the hearing were the Consumer Mr. Ernest Byar (the "Consumer") and his wife, Genafa Byar, and Samuel R. Hoff, Esq., attorney for the Manufacturer.

**Eligibility under § 42-179 (f)**

Two repair attempts during the first 12 months and defects still exist that are life threatening or likely to cause serious bodily injury, if the vehicle is driven. The defects occur as follows: intermittently, under acceleration on the highway, the check coolant light comes on, the engine temperature gauge spikes to maximum, dashboard warning indicators show coolant temperature too high, and the engine loses power for approximately 10 to 15 seconds.

Repair Date	Miles	Defect
Jan 25, 2017 – Jan 27, 2017	2454	When accelerating on highway, the vehicle loses engine power for 10 to 15 seconds
Jan 28, 2017 – Feb 22, 2017	2512	When accelerating on highway, the vehicle loses engine power for 10 to 15 seconds

## **II. REASONING**

### **Nonconformity**

The Consumer complained of the following nonconformities with the subject vehicle: under acceleration on the highway, the check coolant light comes on, the engine temperature gauge spikes to maximum, dashboard warning indicators show coolant temperature too high, and the engine loses power for approximately 10 to 15 seconds.

### **Eligibility and Reasonable Repair Attempts**

The Consumer appeared and testified at the arbitration hearing. The Request for Arbitration, the written repair records, and the oral testimony provided at the hearing detailed the vehicle nonconformity experienced by the Consumer and the two unsuccessful repair attempts by the Dealer.

The Consumer testified that the nonconformity occurred on four occasions between November 27, 2016 and January 27, 2017. The first incident occurred on November 27, 2016, while returning from a trip to North Carolina, as the vehicle was accelerating on the highway to get out from in between two trucks. The issue reoccurred on or around January 25, 2017, again as the vehicle was accelerating on the highway. The Consumer took the vehicle to the Dealer who confirmed the Consumer's concern with a road test, and identified engine code P1285 (the State's Technical Expert advised that this code indicated cylinder head overheating on the left hand side of the engine block). The Dealer replaced the cylinder temperature sensor. The Consumer picked up the vehicle on January 27, 2017 but the problem reoccurred on the way home, and again on the way back to the shop.

The repair order for the second repair attempt indicates that the powertrain assembly was removed and the engine disassembled. The thermostat, coolant pumps and cylinder heads were removed and inspected but no abnormalities found. The left hand cylinder head was replaced with a new head gasket and the engine reassembled. The vehicle was returned to the Consumer on February 22, 2017. The Consumer testified that he was told that the cause of the problem could not be identified, and that he should drive the car to see if the problem reoccurred. The Consumer acknowledges that the problem has not reoccurred since the vehicle was returned, but states that he is too afraid to use the vehicle on the highway and that he has not done so. An internal report included in the Manufacturer's statement refers to a telephone conversation between the Dealer and the Consumer on February 28, 2017 in which the Consumer was said to be "satisfied with repairs at that time." The Consumer testifies that he did not tell the Dealer that he was satisfied with the repairs, only that the problem had not reoccurred and that he did not feel comfortable driving the vehicle other than on short trips around town. The Dealer did not provide any additional evidence at the hearing.

Under Connecticut General Statutes Section 42-179(f), it shall be presumed, in the case of a nonconformity which results in a condition which is likely to cause death or serious bodily injury if the vehicle is driven, that a reasonable number of repair attempts have been undertaken if the nonconformity has been subject to repair at least twice in the period of one year following the date of original delivery, and the nonconformity continues to exist.

There have been two repair attempts since the vehicle was delivered to the Consumer on October 28, 2016. We are satisfied that the nonconformity results in a condition that is likely to cause death or serious bodily injury if the vehicle is driven. The intermittent loss of engine power for a period of 10 to 15 seconds while accelerating on the highway involves a loss of control that increases the risk of a serious

accident. We also find that it is more likely than not that the nonconformity continues to exist. The Dealer confirmed the Consumer's concern during a road test but could not identify the cause of the problem. Having been unable to identify the cause of the problem the Dealer could not confirm to the Consumer that the problem had been repaired. The State's Technical Expert agreed that the nonconformity likely continues to exist, and expressed concern about the Dealer's inability to identify the root of the defect. The Consumer is unwilling to continue to drive the car on the highway in order to find out if the problem has been fixed. The Consumer's position is not unreasonable. In this case, the fact the problem has not reoccurred cannot be dispositive. We find that the Consumer has met the eligibility requirements of Connecticut General Statutes Section 42-179(f).

Even if the presumption in Connecticut General Statutes Section 42-179(f) were not met, we find that a reasonable number of repair attempts have nevertheless been made. The vehicle was under repair for a total of 29 days. The Consumer visited the Dealer on or around February 20, 2017 and photographed the powertrain out of the vehicle. He filed the application for this arbitration on February 21, 2017. The vehicle was returned to him on February 22, 2017. As noted, the Dealer informed the Consumer that it had confirmed the Consumer's concern but was unable to identify its cause after extensive investigation, and returned the vehicle to the Consumer to see if the defect would reoccur. We find that there have been reasonable attempts to repair the vehicle for the purposes of Connecticut General Statutes Section 42-179(d).

#### **Substantial Impairment and Factual Discussion**

We hold that a substantial impairment to use and safety exists in the form of a defect that meets the requirements of Connecticut General Statutes Section 42-179.

We find that the Consumer's use of the vehicle has been substantially impaired. The Consumer testified that he purchased the vehicle for the purpose of using it on long road trips to visit family in other parts of the country. The Consumer says that he is no longer willing to take the vehicle on the highway or on long trips because he has no confidence that the defect has been fixed. When the Consumer and his wife went on a recent trip to Florida they took his wife's smaller vehicle rather than the subject vehicle, which they had bought to use on such trips. The Consumer acknowledged that he has been able to use the vehicle for occasional short trips around town, but testified that he has driven it only a few hundred miles since it was returned in February. The Manufacturer submitted that the use of the vehicle on these short trips demonstrated that any impairment to use was less than substantial. We reject that submission. A defect does not need to impair every use of a vehicle for it to be substantial. In this case, the Consumer has been largely unable to use the vehicle, particularly for the primary purpose for which it was bought – taking it on long road trips on the highway – and this amounts to a substantial impairment to the use of the vehicle.

We also find that the safety of the vehicle is substantially impaired. The loss of engine power on the highway, particularly during maneuvers requiring acceleration, increases the risk of an accident and injury. The Consumer testified that he does not feel safe in car because the cause of the problem has not been identified and for that reason he cannot be confident that it has been repaired. He is concerned that the problem could reoccur if the vehicle is taken on the highway. The Consumer's wife expressed the same concerns, and testified that she did not feel it was safe to have her children or grandchildren as passengers in the vehicle in case the engine lost power. We find that the impairment to the safety of the vehicle is substantial.

Having found the defect to amount to a substantial impairment to the use and safety of the vehicle, we find in favor of the Consumer and hold that a refund is appropriate in this case.

Given the ongoing, unresolved issue discovered early in the vehicle's ownership, a mileage deduction

shall be awarded in favor of the Manufacturer, but only up through the date of the first repair.

### **III. CONCLUSION**

Given that the Consumer presented substantial evidence that the vehicle is not able to function normally, we hold for the Consumer in this case. A refund and exchange, as noted in Part IV of this decision, is appropriate given the facts presented.

The decision of these arbitrators does not replace any other remedies available under the applicable warranties, Connecticut General Statutes Chapter 743b, or the Magnuson-Moss Warranty Federal Trade Commission Improvement Act, 88 Stat. 2183 (1975), 15 USC 2301 et seq., as in effect on October 1, 1982.

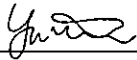
Either party to the dispute may apply to the Superior Court within 30 days receiving this decision to have the decision vacated, modified, or corrected or within one year to have it confirmed as provided in Sections 42-181, 52-417, 52-418, and 52-420 of the Connecticut General Statutes.



April 28, 2017

David Bullock, Arbitrator

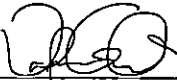
Date



April 28, 2017

Yu Chen Xue, Arbitrator

Date



April 28, 2017

Valerie Comenencia Ortiz, Arbitrator

Date

*(See Section IV of this decision, entitled "Refund Award," on the following page.)*

#### **IV. REFUND AWARD**

The arbitrators find that the Consumer is entitled to a **refund of the contract price**, including charges for any undercoating, dealer preparation and transportation, and dealer installed options, if applicable. (The contract price is less the \$750.00 credit/rebate given to the purchaser.) The total vehicle price, as delivered, was \$32,720.00.

##### **Allowance for use**

- The contract price shall not be reduced by taking into account the mileage on the vehicle.
- The contract price **shall be** reduced by an allowance for the Consumer's use of the vehicle. It shall be calculated using the total mileage driven **at the time of the first repair attempt** (at 2,454 miles), minus the mileage at the time of delivery (16 miles) yielding a mileage credit as follows:

$$\frac{\text{Contract Price } \$32,720.00 \times 2,438 \text{ miles } (2,454 \text{ miles} - 16 \text{ miles})}{120,000 \text{ miles}}$$

The allowance (reduction from the contract price) for the Consumer's use of the vehicle shall be: **\$664.76**.

##### **Finance Charges to be Reimbursed by Manufacturer**

- The Consumer shall be reimbursed for finance charges incurred on the following dates:
- The Consumer shall be reimbursed for finance charges incurred from: \_\_\_\_\_ to \_\_\_\_\_.
- The Consumer shall be reimbursed for all finance charges incurred.
- The Consumer **shall not be** reimbursed for finance charges.

##### **Additional Expenses to be Reimbursed by Manufacturer**

Conn. State Sales Tax: \$2109.41  
License & Title Fee: \$175.00  
Dealer Conveyance Fee: \$499.00  
Title & Regis. Fees: \$44.20  
Greenhouse Gas Fee: \$5.00  
Administration Fee: \$10.00  
Clean Air Act Fee: \$10.00  
Emissions 4-Year Exempt Fee: \$40.00  
Vehicle Transfer Fee: \$21.00  
Lemon Law Filing Fee: \$50.00

**Total Additional Expenses: \$2,963.61**

##### **Total Refund Award and Conditions**

The total refund amount is **\$35,018.85** (thirty five thousand eighteen dollars and eighty five cents) (contract price (\$32,720.00) – use allowance (\$664.76) + additional expenses (\$2,963.61). As the vehicle is not financed, the Consumer shall surrender the vehicle's title to the Manufacturer at the time of receipt of the refund set forth in this decision.

The Manufacturer shall provide the total refund to the Consumer within **30** days of the Manufacturer's receipt of this arbitration decision. The Consumer shall surrender the vehicle to the manufacturer upon receipt of the refund, but if the vehicle is in the possession of the Manufacturer or their agent, the vehicle

title shall be so surrendered when the refund is provided. The exchange shall occur at: **Monaco Ford** located at **767 New London Turnpike in Glastonbury, Connecticut, 06033, OR** at the local **manufacturer-authorized dealership of the Consumers' choice.**