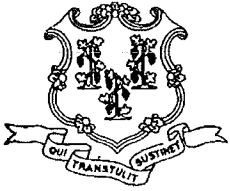


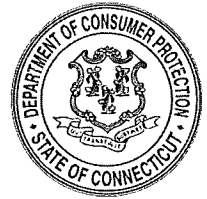
In the matter of arbitration entitled:

**Hirtenstein vs. Ford Motor Company**

**Case Number: 2017-1182**



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



Pursuant to Connecticut General Statutes Chapter 743b, the undersigned arbitrator, Dennis J. Plevyak, having been duly sworn and having given due consideration to the proofs and allegations of the parties, hereby decides the following in regard to the above captioned matter:

**I. FINDINGS OF FACT**

**James Hirtenstein** ( the "Consumer") leased a **2015 Lincoln MKX** (the "Vehicle") from **Stamford Ford Lincoln** located at **212 Magee Avenue in Stamford, Connecticut 06902** (the "Dealer"). The Consumer took delivery of this Vehicle on **October 31, 2015**. The registration is "passenger," "combination," or "motorcycle," as defined in section 14-1 of the Connecticut General Statutes.

After reviewing the allegations, this arbitrator deemed this case eligible for an arbitration hearing pursuant to Connecticut General Statutes Chapter 743b. Said hearing was held on **Thursday, July 20, 2017**. The Consumer was represented by Attorney Kevin T. Duffy, Jr. Mr. Timothy Clark served as the State's Technical Expert. **Ford Motor Company**, (the "Manufacturer") was represented by Attorney Curtis A. Berglund. The Manufacturer did not contest the Vehicle's eligibility. The Manufacturer instead stipulated that a refund was warranted in this case, but reserved its right to contest the Consumer's alleged damages (see the Manufacturer's Assessment at page 10). The lessor, Ford Motor Credit, was also notified by the Consumer of the Consumer's Chapter 743b filing by a letter to Ford Motor credit dated June 19, 2017.

- A.** The Consumer reported to the Manufacturer, its authorized dealer, or its agent defects pertaining to presence of mold in the Vehicle's interior along with an oppressive odor of mold at the following times:

<u>Repair Date</u>	<u>Miles</u>	<u>Defect/Repair Work Performed</u>
<u>03-01-2016</u>	<u>2,918</u>	<u>Rear hatch did not operate correctly; Switch replaced</u>
<u>06-17-2016</u>	<u>8,845</u>	<u>Mold odor interior of Vehicle; Interior detailed</u>
<u>10-18-2016</u>	<u>17,379</u>	<u>Mold odor interior of Vehicle; Replaced carpet</u>
<u>02-23-2017</u>	<u>21,029</u>	<u>Mold odor interior of Vehicle; Confirmed water leak, replaced luggage area insulator</u>
<u>04-05-2017</u>	<u>21,170</u>	<u>Mold odor interior of Vehicle</u>

The above defect or defects continued to exist as of the date of the hearing.

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- B. The Vehicle has been out of service by reason of repair for a cumulative total of **OVER 100** calendar days during the statutory eligibility period (the earlier of: two years from the date of purchase or 24,000 miles driven).
- C. Three repair attempts during the first 12 months and the defect still exists that is likely to cause bodily injury, if the vehicle is driven. The defects occurred as follows:

<u>Date</u>	<u>Miles</u>	<u>Defect</u>
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(see repairs listed above)

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## II. REASONING

### Nonconformity

The Consumer complained of the following nonconformities with the subject Vehicle: Presence of mold in the Vehicle's interior along with an oppressive odor of mold. The Consumer claimed that these defects continued to exist as of the date of the hearing. The record will indicate the Vehicle was out of service by way of repair for over one hundred (100) days during the first two years or 24,000 miles of ownership. The Vehicle has remained at the Dealer since April 5, 2017 through the date of this arbitration hearing.

### Eligibility and Reasonable Repair Attempts

The Consumer's Request for Arbitration indicated that the Consumer experienced the presence of mold in the Vehicle's interior along with an oppressive odor of mold. The claimed defects began, and the Vehicle was first brought in for repair, with 8,845 miles on the odometer. It is noted the Vehicle was brought in at 2,918 miles for complaint of the rear hatch not operating correctly and this may have contributed to water intrusion. The repair attempts noted previously in this arbitration decision along with the Vehicle presently remaining at the Dealer since April 5, 2017 place the Vehicle out of service for over 100 days within the statutory eligibility period (within the first two years or 24,000 miles) for the nonconformity. The Consumer has therefore met the eligibility requirements of the statute. The Manufacturer did not contest the Vehicle's eligibility and instead stipulated that a refund was warranted in this case, but reserved its right to contest the Consumer's alleged damages.

### Substantial Impairment and Factual Discussion

This arbitrator holds that a substantial impairment exists in the form of a defect or defects which meet the requirements of Connecticut General Statutes Section 42-179. As the record in this matter will indicate, (the Manufacturer's Assessment at page 10) the Manufacturer did not contest the vehicle's eligibility, stipulating that a refund was warranted in this case. Therefore, this arbitration decision will not rehash the Vehicle defects at length, but rather concern itself with examination of the Consumer's request for compensation for damages.

The Customer testified he is the owner of his own business and the Vehicle was crucial in his ability to operate his business. The Consumer's request for arbitration, the repair records, and the oral testimony

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offered at the arbitration hearing indicate the Vehicle had a substantial problem with mold growth in the interior of the Vehicle and subsequent strong mold odor, preventing him from utilizing the Vehicle for the purpose for which he had acquired the Vehicle. In addition to the odor, the Consumer testified to his concern that the continued exposure to mold would have detrimental effects on his health and well-being. Although the Consumer did not submit medical documentation to support this contention, the effects of mold on health are well known and documented.

A discussion of damages in this matter focuses on two main aspects: 1) Incurred expenses and damages; and 2) Attorney's fees.

The Consumer's counsel, Kevin T. Duffy, Jr., sought reimbursement of all lease payments, Vehicle down payment, taxes and all fees paid in entering into the lease agreement, and insurance on the Vehicle. This arbitrator finds these requests reasonable and makes note of them in Section IV of this decision. Attorney Duffy additionally sought reimbursement for rental cars costs incurred. Given the importance of the Vehicle to the Consumer's ability to conduct his business, these expenses are a reasonable request and reimbursement is so ordered. Because of the nature of the Consumer's business and his vehicle functioning as a de facto office, the rental of a suitability sized substitute vehicle was warranted. In an initial effort to address the odor issue the Consumer had the Vehicle's interior professional cleaned. This too is a documented and reasonable expense, as are requests for postage and the arbitration filing fee. Attorney Duffy sought \$400.00 in incidental expenses such as a train ticket to return to New York City from Stamford, gas, tolls and other incidentals. The Manufacturer's counsel, Attorney Berglund stated the Manufacturer would willingly reimburse reasonable costs to the Consumer and documented damages. These incidental costs cannot readily be documented. With the distance from New York City to Stamford being a total of approximately eighty miles round trip and a possible route requiring using a toll bridge, a reasonable cost per trip is estimated to be \$30.00. The Consumer shall therefore be reimbursed \$150.00 for his five roundtrips to the Dealer.

On the matter of legal fees, the Consumer is certainly entitled to reimbursement of reasonable fees. Attorney Duffy submitted into evidence (Consumer #4) a work history of 26.10 hours, along with an invoice for \$3,480.00, along with a second invoice in the amount of \$600.00 for a total of \$4,080.00. Attorney Berglund stated the Manufacturer considered \$1,500.00-\$2,000.00 to be reasonable and customary in a matter where the Manufacturer did not contest liability, and had made a settlement offer with \$2,000.00 in legal fees. In examining the work history in this matter it should be noted that the Consumer counsel's original request for arbitration was deemed insufficient by the DCP and he was required to submit a second request. This arbitrator is in agreement with Manufacturer's counsel that the Manufacturer should not pay the expense of time billed for this second submission nor for familiarization with the Lemon Law arbitration process.

Attorney Duffy stated that had the Manufacturer been cooperative, the matter could have been settled in a simpler fashion, stating the Manufacturer's legal staff was unresponsive and "passed the buck." Attorney Berglund stated that as a large corporation, the Manufacturer has legal staff with varied degrees of responsibility and often matters are reassigned as a result. Attorney Berglund stated the Manufacturer had made good faith offers of settlement and was stymied by the Consumer (via counsel) failing to provide documentation of expenses until the day of this arbitration hearing.

A finding on legal fees must rest on a reasonable hourly rate multiplied by a reasonable number of hours expended. A line by line examination of the work history is beyond the scope of this decision. When balancing what may be considered reasonable and customary in Connecticut, along with examination of findings from other jurisdictions, this arbitrator finds the Consumer entitled to

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reimbursement of \$3,000.00 in legal fees. The Consumer's counsel has documented considerable justifiable expenditure of time in this matter. Testimony does indicate, however, that this matter could have reached resolution prior to this hearing.

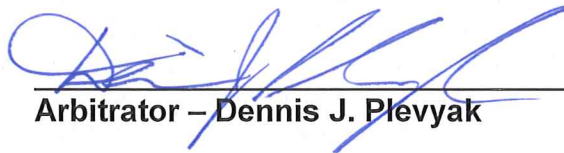
This arbitrator holds that both a substantial impairment to use and a substantial impairment to safety exists in the form of a defect or defects which meet the requirements of Connecticut General Statutes Section 42-179. The documents in the record and the testimony presented at the arbitration hearing indicate a violation of Connecticut General Statutes Chapter 743b.

The Consumer's preference is to be awarded a buyback of the Vehicle by the Manufacturer. Awarding a buyback of the Vehicle is appropriate in this case.

### **III. CONCLUSION**

Given that the Consumer presented substantial evidence that the Vehicle is not able to function normally due to water intrusion and subsequent growth of mold, as well as the number of days the Vehicle was out of service due to repair attempts, I hold for the Consumer in this case. A refund of the contract price, as noted in Part IV of this decision, is appropriate given the facts presented.

The decision of this arbitrator 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 of 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.



**Arbitrator – Dennis J. Plevyak**

**08-15-2017**

Date

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

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#### **IV. REFUND AWARD FOR LEASED VEHICLE**

This arbitrator finds in favor of the Consumer, and holds that the Consumer and lease holder are entitled to a refund based upon the terms of the Vehicle lease agreement and this decision, as set forth below:

##### **For The Consumer:**

The Manufacturer shall refund to the Consumer the total of all amounts detailed below:

- 1) All lease payments made by the Consumer since October 31, 2015 (the date of the lease agreement);
- 2) All lease costs paid, including down payment of \$8,282.30; and acquisition fee of \$645.00
- 3) State Sales/Use Tax due at signing in the amount of \$2,205.19;
- 4) Vehicle title, registration, Lemon Law, and Clean Air Act fees in the amount of \$94.00;
- 5) Documentation fees in the amount of \$399.00;
- 6) Certified mailing fees in the amount of \$8.90; and
- 7) The Department of Consumer Protection Lemon Law filing fee of \$50.00;
- 8) GEICO insurance premium of \$538.35;
- 9) Budget rental fee of \$68.39;
- 10) Avis rental fee of \$1,655.33;
- 11) Enterprise rental fee of \$2,620.49;
- 12) Interior auto detailing \$225.00; and
- 13) Incidental expenses for travel to the Dealer \$150.00

##### **Other Reimbursements by the Manufacturer:**

The Consumer shall be reimbursed legal fees in the amount of \$3,000.00.

##### **For the Leasing Company:**

The Manufacturer shall pay the leasing company “**Ford Motor Credit**” the balance necessary to terminate the lease and release the Consumer from any further obligation of the lease. The Manufacturer shall also pay the leasing company the “purchase option,” and therefore ownership shall

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revert to the Manufacturer. The Manufacturer shall be responsible for any early termination or disposition fees, if applicable.

Other Reimbursements by the Manufacturer:

The Manufacturer shall reimburse to the leasing company all of the following fees or expenses:  
**NONE**

**Vehicle Exchange:**

The Manufacturer shall provide the total refund to the Consumer and the leasing company, as their interests may appear. The exchange shall occur at **Stamford Ford Lincoln** located at **212 Magee Avenue in Stamford, Connecticut 06902** within **thirty (30) days** of the Manufacturer's receipt of this arbitration decision. Payment of the refund shall be conditional upon the assignment of any right, title, and interest in the Vehicle by the leasing company and the Consumer, to the Manufacturer. The Consumer and the leasing company shall surrender the Vehicle at the time of receipt of the refund.