

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 15-0028 CAF**

ANGELINA B. CALDERON,
Complainant

v.

FCA US LLC,
Respondent

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**BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Angelina B. Calderon (“Complainant”) seeks relief pursuant to Texas Occupations Code § 2301.601-2301.613 (Lemon Law) for alleged defects in her 2013 Dodge Durango. Complainant asserts that the vehicle shakes and won’t start. FCA US LLC (“Respondent”) argued that the vehicle does not have a defect that needs repair. The hearings examiner concludes that the vehicle does not have a currently existing warrantable defect, and Complainant is not eligible for relief.

I. PROCEDURAL HISTORY, NOTICE AND JURISDICTION

Matters of notice and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law. The hearing in this case convened and the record closed on April 22, 2015, in Houston, Texas before Hearings Examiner Edward Sandoval. Complainant represented herself at the hearing. Also present as a witness for Complainant was Roman Lopez, her son-in-law. Respondent was represented by Jan Kershaw, Early Resolution Case Manager. Present as a witness for Respondent was Stuart Ritchey, Technical Advisor. Gerardo Barchielli, interpreter, was present to provide Spanish interpretive services for Complainant.

II. DISCUSSION

A. Applicable Law

The Texas Lemon Law provides that a manufacturer of a motor vehicle must repurchase or replace a vehicle complained of under the Texas Occupations Code with a comparable vehicle if five conditions are met. First, the manufacturer has not conformed the vehicle to an applicable express warranty because the manufacturer cannot repair or correct a defect or condition in the vehicle. Second, the defect or condition in the vehicle creates a serious safety hazard or substantially impairs the use or market value of the vehicle. Third, the manufacturer has been given a reasonable number of attempts to repair or correct the defect or condition.¹ Fourth, the owner must have mailed written notice of the alleged defect or nonconformity to the

¹ Tex. Occ. Code § 2301.604(a)(1) and (2).

manufacturer.² Lastly, the manufacturer must have been given an opportunity to cure the defect or nonconformity.³

In addition to the five conditions, a rebuttable presumption exists that a reasonable number of attempts have been undertaken to conform a motor vehicle to an applicable express warranty if the same nonconformity continues to exist after being subject to repair four or more times and: (1) two of the repair attempts were made in the 12 months or 12,000 miles, whichever comes first, following the date of original delivery to the owner; and (2) the other two repair attempts were made in the 12 months or 12,000 miles, whichever comes first, immediately following the date of the second repair attempt.⁴

B. Complainant's Evidence and Arguments

Complainant purchased a new 2013 Dodge Durango from Clear Lake Chrysler–Jeep–Dodge (Clear Lake Dodge) in Webster, Texas on May 28, 2013. The vehicle's mileage was 1,342 at the time of purchase.⁵ At this time, Respondent's basic express warranty for the vehicle has expired. Respondent's original warranty provided coverage for three (3) years or 36,000 miles, whichever comes first. In addition, Respondent also provided a powertrain warranty for five (5) years or 100,000 miles. On the date of hearing the vehicle's mileage was 51,829.

1. Angelina Calderon's Testimony

Claimant testified that she had taken the vehicle to Respondent's authorized dealer for repairs on a number of occasions because a warning light was coming on. In addition, the vehicle would shake and would not start. She felt that it was dangerous because it would shake and she felt that it was a defect. In addition, she received a document from Respondent advising her to take the vehicle to the dealer to be checked because of a defect. Then she received another document that the vehicle needed to be checked because it might catch fire in the glass panes.

Complainant testified that she began having trouble with the vehicle almost immediately after purchase. However, she could not remember the date that she first noticed any issues. Complainant testified that the vehicle jerked. Complainant stated that she signed the contract to purchase the vehicle for her son-in-law to drive, since he and his wife do not have good credit.

² Tex. Occ. Code § 2301.606(c)(1).

³ Tex. Occ. Code § 2301.606(c)(2).

⁴ Tex. Occ. Code § 2301.605(a)(1)(A) and (B). Texas Occupations Code § 2301.605(a)(2) and (a)(3) provide alternative methods for a complainant to establish a rebuttable presumption that a reasonable number of attempts have been undertaken to conform a vehicle to an applicable express warranty. However, § 2301.605(a)(2) applies only to a nonconformity that creates a serious safety hazard, and § 2301.605(a)(3) requires that the vehicle be out of service for repair for a total of 30 or more days in the 24 months or 24,000 miles, whichever occurs first, following the date of original delivery to the owner.

⁵ Complainant Ex. 1, Motor Vehicle Buyer's Order dated May 28, 2013.

Complainant stated that she took the vehicle to the dealer for repair on three occasions. She indicated that the dealer's representatives would ignore her when she took the vehicle in for repairs. Complainant indicated that she took the vehicle in for repair to Clear Lake Dodge on July 19, 2013. She testified that she informed the service advisor that the vehicle was not working properly and that it felt like a rocking chair and that it was dangerous. The vehicle's mileage on this repair visit was 4,832.⁶ No repairs were done to address Complainant's concerns. Complainant stated that she was told by the dealer's representative that they had no room for the vehicle. So no repairs were done for this complaint.

On July 29, 2013, Complainant took the vehicle back to Clear Lake Dodge because the vehicle had died and the check engine light and the tire pressure warning light had illuminated.⁷ Complainant testified that the vehicle died once when she was driving it and once or twice when her daughter or her son-in-law were driving it. No repairs were performed on the vehicle, since the dealer's service technician was unable to duplicate the concern.⁸ The vehicle's mileage on this occasion was 5,444.⁹

Complainant testified that she could not recall if she voiced her complaints regarding the vehicle during an oil change performed at Clear Lake Dodge on November 18, 2013. The vehicle's mileage on this occasion was 13,309.¹⁰

Complainant took the vehicle to Clear Lake Dodge on April 7, 2014, because the vehicle had died when her son-in-law was driving it. The vehicle's mileage on this date was 23,097.¹¹

Complainant took the vehicle to Clear Lake Dodge on April 9, 2014, because it had died. The vehicle's mileage was 23,106 on this occasion.¹² No repairs were performed at this time because the service technician could not duplicate the concerns.¹³ Complainant testified that she cannot recall if the vehicle has died while being driven since April of 2014.

Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (TxDMV) regarding the vehicle effective September 30, 2014.¹⁴

⁶ Complainant Ex. 2, Repair Order dated July 19, 2013. Complainant testified that she informed the dealer's service advisor that the vehicle was not driving properly, but the only repairs indicated on the repair order were for an oil change and tire rotation.

⁷ Complainant Ex. 3, Repair Order dated July 29, 2013.

⁸ *Id.*

⁹ *Id.*

¹⁰ Complainant Ex. 4, Repair Order dated November 18, 2013.

¹¹ Complainant Ex. 5, Repair Order dated April 7, 2014.

¹² Complainant Ex. 6, Repair Order dated April 9, 2014.

¹³ *Id.*

¹⁴ Complainant Ex. 8, Lemon Law complaint dated September 30, 2014. Complainant actually signed the form on September 19, 2014. However, it was not received by Texas Department of Motor Vehicles until September 30, 2014, which is the effective date of the complaint.

2. Roman Lopez' Testimony

Roman Lopez, Complainant's son-in-law, testified that he drives the vehicle. On a single day the vehicle died on him three times while he was driving it. This occurred sometime in 2014. However, he could not recall the date.

Mr. Lopez was driving to work, the vehicle died when he put the transmission in reverse. No warning lights came on when the vehicle died. It started again and then died when he was driving on the freeway. Mr. Lopez called his father to pick him up. When his father arrived, Mr. Lopez attempted to start the vehicle and it started. So, Mr. Lopez drove the vehicle to the dealer for repairs with his father following him. While driving the vehicle to the dealer, the vehicle acted as if it was going to turn off again. So, Mr. Lopez put the vehicle in neutral and stepped on the gas. The vehicle continued to drive, but it was going very slow. The dealer had the vehicle in their possession for two or three days. Complainant was not provided with a loaner vehicle while the vehicle was being repaired. Mr. Lopez testified that the vehicle has not died again since April of 2014.

Mr. Lopez testified that approximately five months prior to the hearing date, he took the vehicle to a dealer for repairs after the check engine light illuminated. He testified that no repairs were done at the time. The check engine light was just reset. The check engine light has come on twice, once in 2013 and once in 2014. He was told by the dealer's representative that if the light came on again, to take the vehicle to the dealer for repairs.

Mr. Lopez also testified that when he steps on the gas when driving the vehicle it feels like it's pulling. He informed the dealer's representative of this problem the last time he took the vehicle in to the dealer. Mr. Lopez testified that this was approximately two to three weeks prior to the hearing date. However, he had not mentioned this problem to the dealer before then.

Mr. Lopez testified that they've been having problems with the vehicle ever since they purchased it. He's taken it to the dealer for repairs four or five times. He testified that he was not given repair orders when he took the vehicle in. He was told by the dealer representatives that they would mail the invoices to them. Mr. Lopez testified that he's taken the vehicle to the dealer about five times for repairs. He stated that he did not receive the last repair order from the dealer. There were at least two occasions when he did not receive repair orders from the dealer. However, he cannot recall the dates of those repair visits.

During cross examination, Mr. Lopez testified that he had taken the vehicle to the dealer for repairs twice in 2014. He testified that he had installed after-market speakers in the vehicle. He was advised on the April 7, 2014, repair visit that the stereo had to be disconnected from the vehicle's wire harness in order for repairs to be performed on the vehicle. Mr. Lopez testified that he removed a wire from a fuse. He took the vehicle back to the dealer on April 9, 2014. The vehicle did not die between the two visits.

C. Respondent's Evidence and Arguments

1. Jan Kershaw's Testimony

Jan Kershaw, Early Resolution Case Manager, testified that Respondent provided a basic warranty for the vehicle good for three (3) years or 36,000 miles, whichever comes first. In addition, the vehicle was provided with a powertrain warranty good for five (5) years or 100,000 miles, whichever comes first. Ms. Kershaw also testified that no warranty work has been performed on the vehicle.

2. Stuart Ritchey's Testimony

Stuart Ritchey, Technical Advisor, has worked for Respondent for 29 years. He's worked as a technical advisor since 1994. He's currently certified in eight (8) areas of Automotive Service Excellence (ASE).

Mr. Ritchey performed a final repair attempt on the vehicle on April 7, 2015. He inspected the vehicle at Clear Lake Dodge, Respondent's authorized dealer. Mr. Ritchey was informed that the vehicle would sometimes stall at highway speeds. He performed a visual inspection of the vehicle and observed that the vehicle's tire pressure monitor light was on. No other warning lights were illuminated. After performing a diagnostic scan of the vehicle, Mr. Ritchey found four fault codes. All of the codes had to do with the tire air pressure sensors. No other fault codes were present. Mr. Ritchey then inspected the battery cables, the connectors on the Total Integrated Power Module (TIPM), and the Powertrain Module.

Mr. Ritchey testified that he then took a test drive in the vehicle. He drove it approximately 76 miles. Most of the drive (69 miles) was performed at speeds in excess of 60 mph. The rest of the drive was driven at speeds under 50 mph. He engaged the cruise control to see if anything untoward occurred. In addition, he had a scan tool attached to the vehicle during the test drive. The vehicle did not stall during the test drive.

Mr. Ritchey indicated that Respondent had issued a recall notice for the vehicle's brake booster. This recall repair was performed during the final repair attempt. This was the only active recall for the vehicle at the time.

Mr. Ritchey also indicated that the pulling issue raised by Complainant at the time of hearing probably was due to a warped brake rotor based on Mr. Lopez's description. The rotor needs to be turned or replaced. In addition, brake pads may be needed. However, these items are not covered under warranty, since this would be considered a maintenance issue.

Mr. Ritchey further testified that the tire air pressure sensors should be replaced. This repair is covered by Complainant's after-market extended service contract which has a \$100 deductible. However, Complainant declined the repair at the time that Mr. Ritchey inspected the vehicle.

D. Analysis

Under Texas' Lemon Law, Complainant bears the burden of proof to establish by a preponderance of evidence that a defect or condition creates a serious safety hazard or substantially impairs the use or market value of the vehicle. In addition, Complainant must meet the presumption that a reasonable number of attempts have been undertaken to conform the vehicle to an applicable express warranty. Finally, Complainant is required to serve written notice of the nonconformity on Respondent, who must be allowed an opportunity to cure the defect. If each of these requirements is met and Respondent is still unable to conform the vehicle to an express warranty by repairing the defect, Complainant is entitled to have the vehicle repurchased or replaced.

Complainant purchased the vehicle on May 28 2013, and presented the vehicle to an authorized dealer of Respondent due to her concerns on the following dates: July 19, 2013, July 29, 2013, April 7, 2014 and April 9, 2014. Occupations Code § 2301.604(a) requires a showing that Respondent was unable to conform the vehicle to an applicable express warranty "after a reasonable number of attempts." Section 2301.605(a) goes on to specify that a rebuttable presumption that a reasonable number of attempts to repair have been made if "two or more repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, following the date of original delivery to the owner, and two other repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the second repair attempt." Complainant has not met the requirements of this test.

Complainant presented the vehicle for repairs to an authorized dealer for Respondent on two occasions within the first year or 12,000 miles from purchase. However, these repair visits were not for the same issue. The first repair visit on July 19, 2013, was for an oil change and, according to Complainant's uncontroverted testimony, because the vehicle was rocking. The vehicle's mileage was 4,832. The second repair visit on July 29, 2013, when the vehicle's mileage was 5,444, was made because the vehicle's check engine light had illuminated and the vehicle had died. The next two repair visits that Complainant made were on April 7, 2014 and April 9, 2014, when the vehicle's mileage was 23,097 and 23,106 respectively. However, these two visits were for the same incident, since no repairs were performed on the April 7, 2014, repair visit because Complainant had after-market speakers connected to the vehicle's wiring harness. The dealer refused to perform any work while the speakers were so wired. At this time the vehicle had been driven more than 12,000 miles since the date of the second repair attempt. Complainant has not established that a reasonable number of attempts to repair the vehicle were

conducted by Respondent, since the first two repair visits were for unrelated matters and the third repair was attempted after the vehicle had attained 18,000 additional miles after the second repair attempt.

As such, Complainant was unable to establish that a reasonable number of attempts to repair the vehicle were made by Respondent. Complainant has not established that Respondent has not conformed the vehicle to its express warranty. There is no defect with the vehicle that creates a serious safety hazard or substantially impairs the use or market value of the vehicle. Therefore, the hearings examiner finds that repurchase or replacement relief for Complainant is not warranted.

Respondent's express warranty applicable to Complainant's vehicle provides "bumper to bumper" coverage for 3 years or 36,000 miles whichever comes first. In addition, the powertrain warranty provides coverage for 5 years or 100,000 miles. On the date of hearing, the vehicle's mileage was 51,829. The vehicle's basic express warranty has expired. However, the powertrain warranty is still in effect. Respondent is still under an obligation to repair the vehicle whenever there is a problem covered by the powertrain warranty.

Complainant's request for repurchase or replacement relief is denied.

III. FINDINGS OF FACT

1. Angelina Calderon (Complainant), purchased a new 2013 Dodge Durango on May 28, 2013, with mileage of 1,342 from Clear Lake Chrysler--Jeep--Dodge (Clear Lake Dodge) in Webster, Texas.
2. The vehicle's mileage on the date of hearing was 51,829.
3. The manufacturer of the vehicle, FCA US LLC (Respondent), issued an express warranty for the vehicle for three (3) years or 36,000 miles.
4. At the time of hearing the vehicle's basic express warranty had expired.
5. Soon after purchasing the vehicle, Complainant noticed that the vehicle would shake abnormally.
6. Complainant's vehicle was serviced by Respondent's authorized dealer, Clear Lake Dodge, on the following dates:
 - a. July 19, 2013, at 4,832 miles;
 - b. July 29, 2013, at 5,444 miles;

- c. November 18, 2013, at 13,309 miles;
 - d. April 7, 2014, at 23,097 miles; and
 - e. April 9, 2014, at 23,106 miles.
7. On July 19, 2013, regular maintenance was performed on the vehicle by the dealer's service technician. Complainant's concerns with the way the vehicle was driving were not addressed by the dealer.
 8. On July 29, 2013, the dealer's service technician performed no repairs because Complainant's concerns regarding the vehicle dying and the check engine light illuminating could not be repeated.
 9. On November 18, 2013, regular maintenance, an oil change and tire rotation, were performed by the dealer's service technician. Complainant did not raise any other issues with the vehicle during this repair visit.
 10. On April 7, 2014, the vehicle died three times while Roman Lopez, Complainant's son-in-law, was driving it to work.
 11. On April 7, 2014, the dealer advised Mr. Lopez that no repairs could be performed to the vehicle because after-market speakers were attached to the vehicle's wiring harness.
 12. On April 9, 2014, Complainant took the vehicle back to the dealer after disconnecting the speakers from the wiring harness. However, the dealer's service technician could not duplicate Complainant's concerns, so no repairs were performed.
 13. On September 30, 2014, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
 14. On January 20, 2015, the Department's Office of Administrative Hearings issued a notice of hearing directed to Complainant and Respondent, giving all parties 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 matters asserted.
 15. The hearing in this case convened and the record closed on April 22, 2015, in Houston, Texas before Hearings Examiner Edward Sandoval. Complainant represented herself at the hearing. Also present as a witness for Complainant was Roman Lopez, her son-in-law. Respondent was represented by Jan Kershaw, Early Resolution Case Manager. Present as a witness for Respondent was Stuart Ritchey, Technical Advisor. Gerardo Barchielli, interpreter, was present to provide Spanish interpretive services for Complainant.


IV. CONCLUSIONS OF LAW

1. The Texas Department of Motor Vehicles (Department) has jurisdiction over this matter. Tex. Occ. Code §§ 2301.601-2301.613 (Lemon Law).
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. Complainant timely filed a complaint with the Department. Tex. Occ. Code § 2301.204; 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. Complainant bears the burden of proof in this matter.
6. Complainant has not established by a preponderance of the evidence that the vehicle currently has a verifiable defect or condition that presents a serious safety hazard or substantially impairs the use or market value of the vehicle. Tex. Occ. Code § 2301.604.
7. Complainant's vehicle does not qualify for replacement or repurchase. Tex. Occ. Code § 2301.604.

ORDER

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

SIGNED May 8, 2015



EDWARD SANDOVAL
CHIEF HEARINGS EXAMINER
OFFICE OF ADMINISTRATIVE HEARINGS
TEXAS DEPARTMENT OF MOTOR VEHICLES