

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 15-0308 CAF**

OVIDIU G. CRISTEA,	§	BEFORE THE OFFICE
Complainant	§	
v.	§	
	§	OF
FCA US LLC,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Ovidiu G. Cristea (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in his 2014 Jeep Grand Cherokee. Complainant asserts that the vehicle is defective because, intermittently, smoke comes out of the exhaust pipe. FCA US LLC (Respondent) argues that the vehicle does not have a defect. The hearings examiner concludes that the vehicle does not have a defect or nonconformity. Complainant is thus 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 November 19, 2015, in Houston, Texas, before Hearings Examiner Edward Sandoval. Complainant, Ovidiu G. Cristea, represented himself at the hearing. Timothy B. Palazzolo appeared to offer testimony on behalf of Complainant. Respondent was represented by Jan Kershaw, Early Resolution Case Manager. Stephen M. Heun, Parts and Service Manager, appeared to offer testimony on behalf of Respondent.

II. DISCUSSION

A. Applicable Law

The Lemon Law provides, in part, that a manufacturer of a motor vehicle must repurchase or replace a vehicle complained of with a comparable vehicle if the following conditions are met. First, the manufacturer is not able to conform the vehicle to an applicable express warranty by repairing or correcting a defect after a reasonable number of attempts.¹ Second, the defect or condition in the vehicle creates a serious safety hazard or substantially impairs the use or market value of the vehicle.² Third, the owner must have mailed written notice of the alleged defect or nonconformity to the manufacturer.³ Lastly, the manufacturer must have been given an opportunity to cure the defect or nonconformity.⁴

In addition to these conditions, Section 2301.605 of the Occupation Code specifies that there are three tests which can establish a rebuttable presumption that a reasonable number of attempts have been undertaken by a Respondent to conform a motor vehicle to an applicable express warranty. The first test provides that if the same nonconformity continues to exist after being subject to repair four or more times

¹ Tex. Occ. Code § 2301.604(a).

² *Id.*

³ Tex. Occ. Code § 2301.606(c)(1).

⁴ Tex. Occ. Code § 2301.606(c)(2).

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, then Complainant has established that Respondent has been provided with a reasonable number of attempts to repair the vehicle.⁵ The second test applies to a nonconformity that creates a serious safety hazard as defined in Section 2301.601(4) of the Texas Occupation Code. The third test provides that Complainant can establish a rebuttable presumption that a reasonable number of attempts to conform a motor vehicle to an applicable express warranty if a nonconformity continues to exist which substantially impairs the vehicle's use or market value and (1) the vehicle is out of service for repair for a cumulative total of 30 or more days in the 24 months or 24,000 miles, whichever comes first, following the date of original delivery to the owner and (2) at least two repair attempts were made in the 12 months or 12,000 miles following the date of original delivery to an owner.⁶ However, the Occupations Code also provides that the 30 day period described by this section does not include any period during which the manufacturer or distributor lends the owner a comparable motor vehicle while the owner's vehicle is being repaired by a franchised dealer.⁷

B. Complainant's Evidence and Arguments

1. Ovidiu Cristea's Testimony

On January 22, 2014, Complainant purchased a 2014 Jeep Grand Cherokee from Helfman Dodge-Chrysler-Jeep-Ram (Helfman) of Houston, Texas.⁸ The vehicle's mileage at the time of purchase was 9. The vehicle's New Vehicle Limited Warranty provides bumper-to-bumper coverage for the first three (3) years or 36,000 miles from the date of delivery, whichever comes first.⁹ Respondent's basic warranty for the vehicle is still in effect. On the date of hearing the vehicle's mileage was 12,210.

Complainant testified that soon after purchasing the vehicle, he noticed that smoke would intermittently come out of the exhaust pipe. He took the vehicle to Helfman for repair for this issue sometime in July or August of 2014, but was told that the concern could not be reproduced. Complainant was not provided an invoice or receipt for this repair visit.

On August 23, 2014, Complainant took the vehicle to Helfman because he was concerned with smoke coming out of the vehicle's exhaust pipe. Complainant had taken a video of the smoke and provided the video to Helfman's service advisor. According to the repair order, Complainant indicated to the service advisor that after driving the vehicle for 5-10 miles and turning it off, when he returned to start the vehicle after about two (2) hours, a cloud of smoke would come out of the tailpipe.¹⁰ The dealer's service technician determined that condensation was the cause of the smoke, since the vehicle's exhaust

⁵ Tex. Occ. Code § 2301.605(a)(1)(A) and (B).

⁶ Tex. Occ. Code § 2301.605(a)(3)(A) and (B).

⁷ Tex. Occ. Code § 2301.605(c).

⁸ Complainant Ex. 1, Vehicle Purchase Order dated January 22, 2014.

⁹ Complainant Ex. 11, Jeep 2014 Warranty Information, p. 2.

¹⁰ Complainant Ex. 2, Repair Order dated August 23, 2014.

did not have a weep hole.¹¹ No repairs were performed for the issue. The vehicle's mileage at the time was 3,182.¹² The vehicle was returned to Complainant on August 25, 2014.¹³ Complainant was not provided with a rental or loaner vehicle while his vehicle was being repaired.

Complainant did not agree with the service technician's assessment. He asked to speak to the service manager about the issue. In addition, Complainant showed the video showing the smoke coming out of the exhaust to the service manager. The service manager indicated that there was a concern and took the vehicle back for further inspection on August 26, 2014. During this repair attempt, Complainant informed Helfman's service advisor that he had changed the oil in the vehicle at 2,500 miles because he wanted to see if the oil was a factor in producing the smoke. The service technician changed the oil again, back to the "break-in" oil.¹⁴ The technician tested the vehicle several times (he would start the vehicle after allowing it to sit for a while) and was not able to duplicate the concern.¹⁵ No other repair was performed during this visit. The vehicle's mileage was 3,198 on this occasion.¹⁶ The vehicle was in Helfman's possession until August 29, 2014.¹⁷ Complainant was not provided with a rental or loaner vehicle while his vehicle was being repaired.

Complainant took the vehicle home and during the next week was able to reproduce the problem at home. Complainant testified that the problem was occurring about three times per week. So, on September 18, 2014, Complainant took the vehicle to Helfman for repair. Complainant informed the dealer's service advisor that after driving the vehicle and parking it for two hours, when he restarted the vehicle, smoke would come out of the tailpipe.¹⁸ Complainant also informed the service advisor that he sometimes smelled a "strange odor."¹⁹ The service technician was able to reproduce the problem, but determined that it was steam coming from the tailpipe.²⁰ The mileage on the vehicle on this repair visit was 3,568.²¹ The vehicle was returned to Complainant on September 19, 2014.²² Complainant did not receive a rental or loaner vehicle while his vehicle was in the dealer's possession.

Complainant disagreed with the Helfman's service technician's assessment of what was causing the smoke to occur. He e-mailed Helfman's service manager and asked that they demonstrate the issue in a similar vehicle. However, the service manager did not respond to the request. Complainant then contacted Respondent's customer support telephone line. He spoke to a representative who asked him to take the vehicle to a different dealership to see if the concern could be addressed. So, Complainant took the vehicle for repair to Allen Samuels Chrysler-Dodge-Jeep-Ram (Samuels) in Katy, Texas on November 8, 2014. Complainant informed the Samuels' service advisor that after the vehicle was driven and then allowed to sit for at least two (2) hours on an incline, when the vehicle was started again, smoke

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Complainant Ex. 3, Repair Order dated August 26, 2014.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Complainant Ex. 4, Repair Order dated September 18, 2014.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

came out of the tailpipe.²³ Samuels's service technician verified the concern and changed the vehicle's oil pan and oil during this visit.²⁴ Some updates to the vehicle's modules were also performed during this visit.²⁵ The vehicle's mileage on this occasion was 4,298.²⁶ The vehicle was in the dealer's possession for about ten (10) days. Complainant was not provided with a rental or loaner vehicle while his vehicle was being repaired.

Complainant took the vehicle home after retrieving it from Samuels on November 9, 2014. That same day, the issue occurred again. Complainant contacted Respondent's complaint line again and was told by the representative that the dealers had done enough to fix the vehicle. He was then referred to Respondent's arbitration process if he wanted the vehicle to be repurchased by Respondent. Instead, in February of 2015, Complainant contacted an attorney to represent him. The attorney wrote a demand letter to Respondent outlining Complainant's issues with the vehicle. However, Respondent did not make a settlement offer. Complainant did not pursue any further options with the attorney at that time.

Complainant testified that he then looked into Texas' Lemon Law. He saw that one of the requirements of the Lemon Law was to write a notice letter to the manufacturer. On May 5, 2015, Complainant mailed a letter to Respondent notifying them of his dissatisfaction with the vehicle.²⁷

Complainant was contacted by Respondent's representative after Respondent received the notice letter. The representative made arrangements to repair Complainant's vehicle. The repair was performed on June 10, 2015, at Helfman. Stephen Heun, Parts and Service Area Manager for Respondent, conducted the repair. The issue addressed during the repair concerned the smoke coming out of the vehicle's tailpipe when the vehicle was started after sitting for a couple of hours. Mr. Heun inspected the engine oil and the vehicle's oil pan.²⁸ In addition, he verified that the powertrain control module (PCM) was up to date.²⁹ No repairs were performed at the time. Complainant did speak to Mr. Heun and showed him videos of his concern with the vehicle. However, Mr. Heun indicated that the correct parts were on the vehicle and no repairs were performed. The vehicle's mileage on this occasion was 9,002.³⁰ Complainant was not provided with a rental or loaner vehicle during this repair visit.

Complainant then decided to file the Lemon Law complaint. It was received by the Texas Department of Motor Vehicles (TxDMV) on July 1, 2015.³¹

Complainant testified that after the repair on November 8, 2014, the incidents of smoke coming out of the tailpipe occurred less frequently. It seemed to occur about two (2) to three (3) times per month. It last occurred within the month prior to the hearing of November 19, 2015. Complainant also testified that

²³ Complainant Ex. 5, Repair Order dated November 8, 2014.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ Complainant Ex. 7, Letter to Manufacturer dated May 5, 2015.

²⁸ Complainant Ex. 8, Repair Order dated June 10, 2015.

²⁹ *Id.*

³⁰ *Id.*

³¹ Complainant Ex. 9, Lemon Law Complaint Form dated July 1, 2015.

there have been no other major problems with the vehicle. He likes the vehicle and hopes to have it repaired.

During cross examination, Complainant testified that he performed the first oil change on the vehicle himself prior to presenting it to Helfman for repair in August of 2013. Complainant's wife no longer drives the vehicle, since she is on maternity leave. His concern is that the smoke indicates there is a problem with the vehicle's engine and that when the vehicle's warranty expires he will have to perform a major repair for the vehicle. Complainant testified that the smoke that has been emitted from the tailpipe has always been white.

Complainant also testified that the vehicle's check engine light (CEL) has never illuminated. The vehicle has never been low on oil. He has personally changed the oil in the vehicle on two (2) occasions. He's never noticed any oil leaks on his driveway from the vehicle. He's never noticed an oil residue on the vehicle's rear bumper. Complainant testified that he does wash the vehicle regularly and may not have noticed any residue. He's never had to put coolant in the vehicle.

2. Timothy Palazzolo's testimony

Timothy Palazzolo, owner of GAP Racing, testified for Complainant. He has been in the auto repair industry for 18 years. His shop performs complete auto repair. Mr. Palazzolo has owned GAP Racing since 2007. Complainant is one of his customers.

Mr. Palazzolo testified that he has never seen the issue of the smoke coming from the tailpipe in person. He's only seen videos and discussed the issue with Complainant. Mr. Palazzolo stated that from the videos it's hard to tell if the smoke is blue or white. However, he thinks that it is oil, from the information provided from Complainant that there was a smell associated with the smoke. He doesn't think that the smoke is normal for the vehicle. Mr. Palazzolo also stated that he feels that it's more of a nuisance, but he is concerned that it may cause a need for future repairs to the vehicle.

C. Respondent's Evidence and Arguments

Stephen Heun, Parts and Service Area Manager, testified on behalf of Respondent. Mr. Heun has worked for 29 years with Respondent. He is a former Automotive Service Excellence (ASE) certified master technician, but his certification has expired. Mr. Heun's responsibilities include dealing with customers, determining warranty costs, training and consulting with dealer technicians and service advisors.

Mr. Heun testified that he performed a final repair attempt on Complainant's vehicle on June 10, 2015, at Helfman. Complainant took the vehicle to the dealer on June 9, 2015, and left it overnight. Mr. Heun could start the vehicle the next day. He did not see any smoke, vapor, or steam emit from the vehicle's tailpipe. He did see the videos of prior incidents taken by Complainant, but could not duplicate the problem. Mr. Heun removed the vehicle's oil pan and verified the part number on the pan. In addition, he checked the vehicle's coolant level and determined that it was fine. After the final repair attempt, the vehicle was returned to Complainant.

Mr. Heun also testified that when smoke is emitted from a vehicle's tailpipe, it can be different colors. If blue smoke is emitted, then that would indicate that the vehicle is burning oil. If black smoke is emitted, then that would indicate that the fuel mixture is too rich in fuel. If white smoke is emitted, then that would indicate water or coolant, as this would be water based vapor. Since Complainant did not indicate any problems with the vehicle's cooling system and there have been no reports regarding coolant loss or the addition of coolant in the vehicle, then the smoke would be water vapor. Mr. Heun stated that if the vehicle's exhaust gets warm and then the vehicle is stopped and allowed to cool off, condensation can form in the exhaust pipe. Some manufacturers will design the exhaust with a weep hole. However, Respondent does not do so. As a result, when the vehicle is restarted steam can form and come out of a vehicle's exhaust or tailpipe.

Mr. Heun testified that if the smoke was being caused by the vehicle burning oil, then there would be an oily residue on the vehicle's back bumper. The residue would need to be cleaned periodically.

In addition, Mr. Heun testified that the smell experienced by Complainant may be normal. He also stated that all of Complainant's concerns have been about white smoke coming from the exhaust. He also stated that complainant raised a concern about Technical Service Bulletin (TSB) 09-002-13.³² This TSB describes a condition similar to Complainant's except the color of the smoke (blue instead of white). If blue smoke were coming out of the vehicle's tailpipe, then the vehicle would have driveability concerns. The vehicle's check engine light (CEL) would illuminate and the vehicle would have performance issues.

During cross examination, Mr. Heun testified that he did not think that the smoke color is difficult to differentiate, but some people may not be able to tell the color. If the smoke were blue, then the vehicle's oil consumption could increase.

Regarding the TSB, Mr. Heun testified that one of the service advisors apparently felt that it could apply to Complainant's vehicle and that's why the oil pan was replaced on November 18, 2014.

D. Analysis

Under the 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 the manufacturer was given a reasonable number of attempts to repair or correct the defect or condition to conform the vehicle to an applicable express warranty. Finally, Complainant is required to serve written notice of the defect or 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 or condition, Complainant is entitled to have the vehicle repurchased or replaced.

In order to be eligible for repurchase or replacement relief, a complainant must prove that the manufacturer is unable to conform the vehicle to an applicable express warranty by repairing or correcting a defect after a reasonable number of attempts.³³ Complainant in the present case has failed to

³² Complainant Ex. 6, Technical Service Bulletin 09-002-13 dated October 9, 2013.

³³ Tex. Occ. Code § 2301.604(a).

show that the vehicle has a defect or nonconformity. Testimony from the parties established that the vehicle emits white smoke from its tailpipe intermittently and only under certain circumstances. Complainant did not dispute that the smoke that he has seen has always been white. Respondent's witness testified that white smoke would be evidence of water vapor or condensation being burned off since the exhaust pipe does not have a weep hole allowing condensation to drip out of the pipe. From the evidence presented at the hearing, the hearings examiner must hold the vehicle is operating as designed and that Complainant has not met the burden of proof to establish the vehicle has a defect or nonconformity.

Given the evidence provided in the hearing, the hearings examiner must hold that repurchase or replacement relief for Complainant is not warranted.

Respondent's express warranty applicable to Complainant's vehicle provides coverage for three (3) years or 36,000 miles whichever comes first. On the date of the hearing, the vehicle's mileage was 12,210. The vehicle's basic express warranty is still in effect. Respondent is still under an obligation to repair the vehicle whenever there is a problem covered by the warranty.

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

III. FINDINGS OF FACT

1. On January 22, 2014, Ovidiu G. Cristea (Complainant) purchased a 2014 Jeep Grand Cherokee from Helfman Dodge-Chrysler-Jeep-Ram (Helfman) of Houston, Texas. The vehicle's mileage at the time of purchase was 9.
2. The manufacturer of the vehicle, FCA US LLC (Respondent), issued an express warranty for the vehicle for three (3) years or 36,000 miles.
3. The vehicle's mileage on the date of hearing was 12,210.
4. At the time of hearing the warranty for the vehicle was still in effect.
5. Soon after purchasing the vehicle, Complainant noticed smoke coming from the vehicle's tailpipe after the vehicle had been driven, allowed to sit on an incline for two (2) to three (3) hours, and then restarted.
6. Complainant took the vehicle to Respondent's authorized dealers on the following dates in order to address his concern with the smoke emitting from the vehicle's tailpipe:
 - a. August 23, 2014, at 3,182 miles;
 - b. August 26, 2014, at 3,198 miles;
 - c. September 19, 2014, at 3,568 miles; and
 - d. November 8, 2014, at 4,298 miles.

7. On August 23, 2014, Helfman's service technician determined that the smoke was caused by normal condensation and did not perform any repair to the vehicle.
8. On August 26, 2014, Helfman's service technician could not duplicate Complainant's concern. However, the oil was changed to a "break-in" oil, since the vehicle's mileage was at 3,198.
9. On September 19, 2014, Helfman's service technician duplicated the concern, but determined that the smoke emitting from the tailpipe was normal steam.
10. On November 8, 2014, Allen Samuels' service technician duplicated the concern and replaced the vehicle's oil pan and added new oil to the vehicle. In addition, updates to several vehicle modules were performed at this time.
11. On May 5, 2015, Complainant mailed written notice of his dissatisfaction to Respondent.
12. Respondent performed a final repair attempt on the vehicle on June 10, 2015. No repairs were performed because Respondent's representative determined that the vehicle was operating as designed.
13. On July 1, 2015, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
14. On August 10, 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 November 19, 2015, in Houston, Texas, before Hearings Examiner Edward Sandoval. Complainant, Ovidiu G. Cristea, represented himself at the hearing. Timothy B. Palazzolo appeared to offer testimony on behalf of Complainant. Respondent was represented by Jan Kershaw, Early Resolution Case Manager. Stephen M. Heun, Parts and Service Manager, appeared to offer testimony on behalf of Respondent.

IV. CONCLUSIONS OF LAW

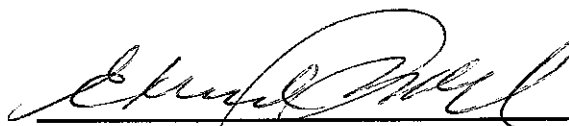
1. The Texas Department of Motor Vehicles (Department) has jurisdiction over this matter. Tex. Occ. Code §§ 2301.601-2301.613 (Lemon Law).
2. A hearings examiner of the Department's Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, 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 failed to prove that the vehicle has an existing warrantable defect. Tex. Occ. Code § 2301.604(a).
7. Respondent remains responsible to address and repair or correct any defects that are covered by Respondent's warranties. Tex. Occ. Code §§ 2301.204, 2301.603.
8. 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 December 8, 2015



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