

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 16-0079 CAF**

**ROBERTO E. MORENO,
Complainant**

v.

**FCA US LLC,
Respondent**

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**BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Roberto E. Moreno (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in his 2014 Dodge Ram 1500. Complainants assert the vehicle's battery gauge intermittently indicates a high charge and the air conditioner and interior lights will not operate. FCA US LLC (Respondent) argued that Complainant's vehicle has been repaired and that Complainant failed to provide Respondent with a reasonable number of repair attempts on the vehicle and, as such, Complainant is not entitled to repurchase or replacement relief. The hearings examiner concludes that Complainant is not eligible for repurchase or replacement relief since he did not meet all of the statutory requirements for such relief under the Lemon Law.

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 14, 2016, in Pharr, Texas before Hearings Examiner Edward Sandoval. Complainant, Roberto E. Moreno, was present and represented himself. Respondent, FCA US LLC, was represented by Jan Kershaw, Early Resolution Case Manager. Also present and testifying for Respondent was Ken Flanagan, Service Manager for Burns Motors, Respondent's authorized dealer.

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

¹ Tex. Occ. Code § 2301.604(a).

² *Id.*

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, 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.⁵

B. Complainant's Evidence and Arguments

Complainant purchased a new 2014 Dodge Ram 1500 from Salsbury's Dodge City in Baton Rouge, Louisiana on August 28, 2014.⁶ The vehicle had mileage of 12 at the time of the purchase.⁷ Respondent provided a bumper-to-bumper warranty for the vehicle which provides coverage for three (3) years or 36,000 miles, whichever comes first. In addition, Respondent has provided a five (5) years or 100,000 miles powertrain warranty for the vehicle. At the time of hearing, the vehicle's mileage was 4,845. Respondent's warranties for the vehicle are still in effect.

Complainant testified that the vehicle is registered in Texas. He also stated that he began having trouble with the vehicle in June of 2015. Complainant observed the vehicle's battery gauge go to "H" and at the same time, the vehicle's air conditioner and interior lights stopped working. The first incident when this occurred lasted about 15 seconds. The second occasion when the problem occurred, the vehicle's air conditioner did not work for the entire time that it took for Complainant to take the vehicle to Respondent's authorized dealer for repair.

Complainant testified that he took the vehicle to Burns Motors (Burns) in McAllen, Texas for repair on September 10, 2015.⁸ Burns' service technician verified the concern and discovered

³ Tex. Occ. Code § 2301.606(c)(1).

⁴ Tex. Occ. Code § 2301.606(c)(2).

⁵ 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.

⁶ Complainant Ex. 1, Motor Vehicle Purchase Agreement dated August 28, 2014.

⁷ *Id.*

⁸ Complainant initially testified that he took the vehicle to Burns on August 20, 2015, but then corrected his testimony after looking at the dates he provided on the Lemon Law complaint to reflect that the first time he took the vehicle for repair was on September 10, 2015.

two diagnostic codes for the vehicle.⁹ The technician replaced the vehicle's alternator in an attempt to resolve the concern.¹⁰ The mileage on the vehicle when Complainant took it to Burns was 3,117.¹¹ The vehicle was in Burns' possession until September 14, 2015. Complainant was not provided with a rental or loaner vehicle at the time.

Complainant stated that he picked up the vehicle from Burns on September 14, 2015. As he was driving away from Burns, Complainant noticed that the battery gauge again went to "H" and the air conditioner stopped working. He immediately returned the vehicle to Burns, where he was told that they would try to repair the vehicle. Burns' technician again verified the concern. He also discovered six (6) diagnostic codes on the vehicle's computer.¹² The technician cleaned all of the ground wires to the vehicle's engine block, the ground wires to the left side frame, the ground wires to the electrical power steering unit and module, and the ground wires to the battery terminals.¹³ In addition, the vehicle's rack and pinion were replaced, since there was an internal failure in the system.¹⁴ The vehicle's mileage on this occasion was 3,127.¹⁵ The vehicle was in Burns' possession for over 30 days. Complainant was provided a rental vehicle for most of the time that the vehicle was being repaired.

Complainant testified that he picked up the vehicle from Burns on October 20, 2015. When he got in the vehicle and was going to drive away from Burns, Complainant noticed that the battery gauge was at "H" again and that the air conditioner was not working. Complainant immediately notified Burns' service advisor of the problem. In addition, Complainant spoke to Ken Flanagan, Burns' service manager, about the problem. Mr. Flanagan informed Complainant that he had checked the vehicle prior to notifying Complainant that it was ready for pick up and that it had been working correctly. Burns' service technician inspected the vehicle and verified the concern.¹⁶ The technician cleaned some ground wires and replaced the vehicle's body control module (BCM), since it was reading the wrong voltage from the vehicle's electronic power steering (EPS) module.¹⁷ The vehicle's mileage on this occasion was 3,152.¹⁸ The vehicle was in Burns' possession for 20 days. Complainant was provided with a rental vehicle for the period of time that the vehicle was in the dealer's possession.

⁹ Complainant Ex. 2, Repair Order dated September 10, 2015.

¹⁰ *Id.*

¹¹ *Id.*

¹² Complainant Ex. 3, Repair Order dated September 16, 2015.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Complainant Ex. 4, Repair Order dated October 20, 2015.

¹⁷ *Id.*

¹⁸ *Id.*

As a result of the problems with the vehicle, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (TxDMV) with an effective date of October 26, 2015.¹⁹ Complainant did not mail a notice to Respondent informing them of the concerns with the vehicle.

On February 18, 2016, Complainant experienced the same problem in the vehicle where the battery gauge went to "H" and the air conditioner stopped working. He took the vehicle to Burns for repair on that date. On this occasion, Burns' service technician could not duplicate the concern and there were no diagnostic codes on the vehicle's computer.²⁰ The technician did not perform any repairs, since the problem was not duplicated. The vehicle's mileage on this occasion was 4,218.²¹ The vehicle was in the dealer's possession for over a month. Respondent considered this repair as a final repair attempt on the vehicle. Complainant testified that the problem with the vehicle has not recurred since the final repair attempt.

During cross-examination, Complainant testified that he was wrong about the date that he first took the vehicle for repair. The vehicle was over a year old at the time of the first repair. Complainant stated that he doesn't drive the vehicle often. He averages driving about 20 to 30 miles per week in the vehicle. Complainant also stated that the battery discharging may have been an issue with the vehicle.

C. Respondent's Evidence and Arguments

Ken Flanagan, Burns' Motors Service Manager, testified for Respondent. He has been working in the automotive industry since 1973. He's worked with Burns for 27 years. He was a technician for 12 years. He then worked for Burns as a service advisor for 10 years, before becoming the service manager. He was an Automotive Service Excellence (ASE) Master Technician for over 20 years. However, all of his ASE certifications have expired.

Mr. Flanagan testified that he first became aware of Complainant's difficulties with the vehicle in September of 2015, after it had been in Burns' repair shop for about a week. Mr. Flanagan stated that the diagnostic codes which appeared indicated that the vehicle's battery was overcharging. The target voltage for the battery is 14.5 volts. The battery was charging up to 18 volts. If the battery is low, then it can overcharge which could affect the vehicle's air conditioning system and may cause the blower motor to turn off.

¹⁹ Complainant Ex. 6, Lemon Law complaint dated October 26, 2015. Although the complaint was signed by Complainant on October 21, 2015, it was not received by Texas Department of Motor Vehicles until October 26, 2015, which is the effective date of the complaint.

²⁰ Complainant Ex. 5, Repair Order dated February 18, 2016.

²¹ *Id.*

Mr. Flanagan stated that on September 10, 2015, Burns' technician determined that the vehicle's alternator was failing and so they replaced it. The technician then took a short test drive in the vehicle and determined that it was working correctly. On September 16, 2015, the vehicle was repaired again and the technician determined that one of the diagnostic codes concerned the vehicle's power steering module which can affect the vehicle's main computer. So, the technician replaced the vehicle's rack and pinion. In addition, the technician checked and cleaned all of the vehicle's ground wires pursuant to instructions from Respondent's STAR tech support team. At this time, Complainant was provided with a rental vehicle for the time that his vehicle was being repaired. After the repairs were completed, the technician drove the vehicle and determined that it was repaired. However, Complainant immediately began experiencing the same problem with the vehicle and he left it with Burns for further repairs. So, another repair was attempted on October 20, 2015. Respondent sent a technical representative, Stuart Ritchey, to help with the repairs on the vehicle. Again, the ground circuits were checked and cleaned. Also, the vehicle's BCM was replaced. After he completed the repairs, the technician drove the vehicle for several miles to ensure that it was working properly. The vehicle was then returned to Complainant.

Mr. Flanagan testified that Complainant returned the vehicle to Burns on February 18, 2016, because he was experiencing the same problem with the vehicle, i.e., the battery gauge went to "H" and the air conditioner stopped working. However, Burns' technician couldn't duplicate the concern. They kept the vehicle for several days (over a month according to the repair order²²) and started and test drove the vehicle frequently, but could not duplicate the problem. Complainant was not provided with a rental vehicle while his vehicle was in Burns' possession. During this repair visit, Burns' technician attached a data recorder to the vehicle to determine if any diagnostic codes were being set by the vehicle's computer. No codes appeared. The technician drove the vehicle approximately 100 miles in an attempt to recreate the concern, but was unable to recreate the problem. Mr. Flanagan testified that in his opinion, the vehicle is repaired.

Jan Kershaw, Respondent's Early Resolution Case Manager, testified that Respondent has provided a three (3) years or 36,000 miles bumper-to-bumper warranty and a five (5) years or 100,000 miles powertrain warranty for the vehicle. Complainant did not provide written notice to Respondent regarding his dissatisfaction with the vehicle. In addition, Ms. Kershaw stated that Respondent considered the repair performed on February 18, 2016, to be the final repair attempt for the vehicle.

²² Complainant Ex. 5, Repair Order dated February 18, 2016.

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 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 August 28, 2014, and presented the vehicle to Respondent's authorized dealer due to his concerns with the vehicle's battery gauge indicating a high charge and the air conditioning system and interior lights not working, on the following dates: September 10, 2015; September 16, 2015; and October 20, 2015. 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)(1) specifies 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." The evidence presented at the hearing establishes that Complainant has not met the requirements of this test since Complainant has presented the vehicle for repair only three times since the date of purchase and before the filing of the Lemon Law complaint. In addition, the first repair attempt for the issues raised by Complainant occurred over 12 months from the date of original delivery to Complainant. (The first repair attempt for Complainant's concern was performed on September 10, 2015.) As such, Complainant has not met the presumption that Respondent has been provided with a reasonable number of attempts to repair the vehicle.

In addition, the evidence presented at the hearing indicates that Complainant did not provide written notice to Respondent that he was dissatisfied with the vehicle. Occupations Code § 2301.606(c) provides that "an order issued under this subchapter [Subchapter M, Lemon Law] may not require a manufacturer, converter, or distributor to make a refund or to replace a motor vehicle unless: (1) the owner or a person on behalf of the owner has mailed written notice of the alleged defect or nonconformity to the manufacturer, converter, or distributor; and (2) the manufacturer, converter, or distributor has been given an opportunity to cure the alleged defect or nonconformity." Complainant never mailed written notice of his dissatisfaction with the vehicle to Respondent.

From the evidence presented, it is apparent that Complainant has not met the requirements for replacement or repurchase relief under the Occupations Code, since only three repair attempts were made on the vehicle prior to filing the complaint, the first attempt being over 12 months after the delivery of the vehicle to Complainant, and because he did not give written notice of the defect to Respondent.

Respondent's express warranty applicable to Complainant's vehicle provides bumper-to-bumper coverage for three (3) years or 36,000 miles whichever comes first. On the date of hearing, the vehicle's warranty was still in effect. As such, Respondent is under an obligation to repair the vehicle under the terms of the express warranty whenever there is an issue with the vehicle.

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

III. FINDINGS OF FACT

1. Roberto E. Moreno (Complainant) purchased a 2014 Dodge Ram 1500 on August 28, 2014, from Salsbury's Dodge City in Baton Rouge, Louisiana with mileage of 12 at the time of delivery.
2. The manufacturer of the vehicle, FCA US LLC (Respondent), issued a bumper-to-bumper warranty for the vehicle for three (3) years or 36,000 miles.
3. The vehicle's mileage on the date of hearing was 4,845.
4. At the time of hearing the warranty for the vehicle was still in effect.
5. Complainant first experienced a problem with the vehicle in September of 2015, when the vehicle's battery gauge went to "H" and the air conditioner stopped working.
6. Complainants' vehicle was serviced by Respondent's authorized dealer, Burns Motors (Burns) in McAllen, Texas on the following dates because of Complainant's concerns with the vehicle:
 - a. September 10, 2015, at 3,117 miles;
 - b. September 16, 2015, at 3,127 miles; and
 - c. October 20, 2015, at 3,152 miles.
7. On September 10, 2015, Burns' service technician determined that the vehicle's alternator had an internal problem and so he replaced it.
8. On September 16, 2015, Burns' service technician found that the rack and pinion had an

internal failure and he replaced it. In addition, the technician cleaned all of the ground wires to the vehicle's engine block, the ground wires to the left side frame, the ground wires to the electrical power steering unit and module, and the ground wires to the battery terminals.

9. On October 20, 2015, Burns' service technician cleaned some ground wires and replaced the vehicle's body control module (BCM), since it was reading the wrong voltage from the vehicle's electronic power steering (EPS) module.
10. On October 26, 2015, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
11. On February 18, 2016, Complainant took the vehicle to Burns because the battery gauge went to "H" and the air conditioner turned off. Burns' Service technician could not duplicate the problem and no repair was performed.
12. On February 18, 2016, 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.
13. The hearing in this case convened and the record closed on April 14, 2016, in Pharr, Texas before Hearings Examiner Edward Sandoval. Complainant, Roberto E. Moreno, was present and represented himself. Respondent, FCA US LLC, was represented by Jan Kershaw, Early Resolution Case Manager. Also present and testifying for Respondent was Ken Flanagan, Service Manager for Burns Motors, Respondent's authorized dealer.

IV. CONCLUSIONS OF LAW

1. The Texas Department of Motor Vehicles (Department) has jurisdiction over this matter. Tex. Occ. Code §§ 2301.601-.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 did not prove by a preponderance of the evidence that the vehicle 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 did not meet the presumption that a reasonable number of repair attempts were undertaken by Respondent prior to the filing of the Lemon Law complaint. Tex. Occ. Code § 2301.605(a).
8. Complainant did not mail written notice of the defect to Respondent. Tex. Occ. Code § 2301.606(c)(1).
9. Respondent remains responsible to address and repair or correct any defects that are covered by Respondent's warranties. Tex. Occ. Code § 2301.204.
10. 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-.613 is hereby **DISMISSED**.

SIGNED April 25, 2016



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