

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 16-0275 CAF**

**MONIKA M. BARNUM,
Complainant**

v.

**GENERAL MOTORS LLC,
Respondent**

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**BEFORE THE OFFICE
OF
ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Monika M. Barnum (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in her 2014 Chevrolet Silverado. Complainant asserts that the vehicle is using oil excessively. General Motors LLC (Respondent) argued that the vehicle does not have any defects and that no relief is warranted. The hearings examiner concludes that the vehicle does not have an 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 was closed on October 12, 2016, in El Paso, Texas, before Hearings Examiner Edward Sandoval. Complainant, Monika M. Barnum, represented herself at the hearing. In addition, her husband, Joseph M. Barnum, testified for Complainant. Respondent was represented by J. T. Barry, District Manager for After-Sales. Michael Pritulsky, Field Service Engineer, testified for 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 manufacturer has been given a reasonable number of attempts to repair or correct the defect or condition.³ Fourth, the owner must have mailed written notice of

¹ Tex. Occ. Code § 2301.604(a).

² *Id.*

³ *Id.*

the alleged defect or nonconformity to the manufacturer.⁴ Lastly, the manufacturer must have been given an opportunity to cure the defect or nonconformity.⁵

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.⁶

B. Complainant's Evidence and Arguments

Monika M. Barnum, Complainant, purchased a new 2014 Chevrolet Silverado from Viva Chevrolet (Viva) in El Paso, Texas on June 19, 2014, with mileage of 30 at the time of delivery.^{7,8} On the date of hearing the vehicle's mileage was 21,384. At this time, Respondent's warranty coverage for the vehicle remains in place, with bumper-to-bumper coverage for three (3) years or 36,000 miles, whichever comes first.⁹ In addition, Respondent's powertrain warranty provides coverage for the vehicle's powertrain for five (5) years or 100,000 miles.¹⁰

1. Monika M. Barnum's Testimony

Complainant testified that she believes that the vehicle is using oil excessively and that the vehicle has a defect that has not been repaired.

Complainant testified that she had the vehicle's oil changed on June 2, 2105, at Viva when the vehicle had been driven 9,928 miles.¹¹ On June 29, 2015, Complainant's husband was driving

⁴ Tex. Occ. Code § 2301.606(c)(1).

⁵ Tex. Occ. Code § 2301.606(c)(2).

⁶ 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.

⁷ Complainant Ex. 1, Motor Vehicle Retail Installment Sales Contract dated June 19, 2014.

⁸ Complainant Ex. 2, Odometer Disclosure Statement dated June 19, 2014.

⁹ Complainant Ex. 11, 2014 Chevrolet Limited Warranty and Owner Assistance Information.

¹⁰ *Id.*

¹¹ Complainant Ex. 3, Repair Order dated June 2, 2015.

the vehicle when the low oil warning light illuminated. As a result, they had the vehicle towed to Viva that same day. Viva's service technician verified that the vehicle had a diagnostic trouble code (DTC) indicating that the oil pressure was low.¹² The technician drained the vehicle's oil and determined that it had 5 ½ quarts of oil, instead of the eight (8) quarts required for the engine.¹³ The technician performed an oil change and marked the vehicle's drain plug, oil filter, oil filter cap, and dipstick to ensure that no one was tampering with the vehicle.¹⁴ The vehicle's mileage on this occasion was 10,606.¹⁵ The vehicle was in Viva's possession for one (1) day during this repair. Complainant was not provided with a loaner vehicle while her vehicle was being repaired.

Complainant returned the vehicle to Viva on August 3, 2015, in order to have the oil consumption issue addressed. Viva's technician removed the vehicle's valve covers in order to inspect the engine for any oil flow restrictions or sludge.¹⁶ The technician found no problems and reinstalled the valve covers and replaced the PCV valve.¹⁷ The vehicle's mileage on this occasion was 11,590.¹⁸ The vehicle was in Viva's possession for three (3) days. Complainant was provided with a loaner vehicle while her vehicle was being repaired. Complainant testified that she was informed verbally by a dealer representative that the vehicle was burning oil excessively.

Complainant stated that she took the vehicle to Viva for scheduled maintenance on January 4, 2016. Viva's service technician determined that the vehicle was a quart low on oil.¹⁹ The technician contacted Respondent's technical assistance center and was informed that the oil consumption was within manufacturer's specifications since the vehicle had been driven approximately 4,000 miles since the last oil change.²⁰ Complainant stated that she was given two technical service bulletins (TSB's) that potentially applied to her vehicle. The first TSB referred to engine oil consumption. The second TSB contained information about black smoke being emitted from a vehicle on a cold start. Complainant testified that she had informed Viva's service advisor that the vehicle was emitting blue smoke on startup which was the reason that she was provided the second TSB. The vehicle's mileage on this occasion was 15,560.²¹

¹² Complainant Ex. 4, Repair Order dated June 29, 2015.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Complainant Ex. 5, Repair Order dated August 3, 2015.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Complainant Ex. 5-A, Repair Order dated January 4, 2016.

²⁰ *Id.*

²¹ *Id.*

On January 21, 2016, Complainant wrote a letter to Respondent advising them of her dissatisfaction with the vehicle.²² Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) on May 16, 2016.²³

Complainant testified that she received a call from a Viva representative asking her to take the vehicle to the dealer for an inspection by Respondent's representative. Complainant requested that an oil change be performed for the vehicle at the same time. Complainant stated that she was never provided any information about the results of the inspection of the vehicle. When Complainant asked a Viva representative about the inspection, she was told that she would have to get the information from Respondent.

2. Joseph M. Barnum's Testimony

Joseph M. Barnum is Complainant's husband. He testified that he is the primary driver of the vehicle. He drives the vehicle almost every day and averages between 40 to 50 miles per day in the vehicle.

While driving the vehicle, Mr. Barnum has seen the warning oil light illuminate only one time. This occurred in June of 2015. He stated though that every time that he starts the vehicle, he sees blue smoke come out of the exhaust. The smoke usually lasts for about 20 seconds. He has also seen black smoke come out of the vehicle's exhaust. Mr. Barnum stated that he has been a certified automotive technician in the past and that blue smoke coming out of a vehicle's exhaust indicates that the vehicle is burning oil. Complainant's vehicle has 5.3 liter V-8 engine. Mr. Barnum stated that he has never worked on this type of vehicle before.

C. Respondent's Evidence and Arguments

1. J. T. Barry's Testimony

J. T. Barry, District Manager for After-Sales, testified for Respondent. He stated that the issue with the vehicle's oil consumption is not a defect. The oil use is within manufacturer's specifications. He feels that the technician who performed the oil change on June 2, 2016, did not put enough oil in the vehicle and that's why the vehicle's low oil warning light illuminated within a few weeks. The vehicle requires eight (8) quarts of oil in order to fill it. Mr. Barry also stated that newer vehicles will use more oil than normal until the vehicle's engine gets broken in.

²² Complainant Ex. 7, Letter to Chevrolet Customer Assistance dated January 21, 2016.

²³ Complainant Ex. 8, Lemon Law Complaint dated May 16, 2016. Complainant signed and dated the complaint on May 3, 2016. However, the complaint was not received by the Texas Department of Motor Vehicles until May 16, 2016, which is the effective date of the complaint.

Mr. Barry stated that the vehicle is still under warranty and that Respondent will make any necessary repairs to ensure that the vehicle is operating correctly.

During cross-examination, Mr. Barry stated that if there is any damage done to the vehicle's engine because of a low oil issue, it would be covered under Respondent's warranty, since the issue was raised by Complainant and the low oil situation may have been caused by the dealer's technician. Mr. Barry also testified that no repairs were performed on the vehicle during the final repair attempt performed on June 8, 2016.

2. Michael Pritulsky's Testimony

Michael Pritulsky, Field Service Engineer (FSE), has worked in the automotive industry for 32 years. He has worked for Respondent or its dealers for 24 years. Mr. Pritulsky has been an FSE for the past year and a half. Before becoming an FSE, Mr. Pritulsky worked for three and a half years for Respondent's technical assistance center. Mr. Pritulsky is an Automotive Service Excellence (ASE) certified master technician.

Mr. Pritulsky testified that he was dispatched on June 1, 2016, to perform a final repair attempt on Complainant's vehicle. He inspected the vehicle on June 8, 2016, at Viva. The vehicle was allowed to sit overnight at Viva and Mr. Pritulsky started it the following day. Mr. Pritulsky testified that when he started the vehicle, he observed a puff of smoke coming from the exhaust. However, he could not tell if the smoke was blue or black. Mr. Pritulsky allowed the vehicle to reach operating temperature and then turned it off in order to check the vehicle's oil level. He observed that the engine was a quarter to half a quart low. Mr. Pritulsky felt that this was within manufacturer's specifications, since the vehicle had been driven 2,900 miles since its last oil change.

Mr. Pritulsky then drove the vehicle for about 17 miles. He did not observe any smoke coming out of the vehicle's exhaust during the test drive. He stated that the vehicle appeared to be in good condition. Mr. Pritulsky did not observe any sign of abuse to the vehicle.

Mr. Pritulsky also stated that the vehicle's engine was one quart low for the period from August 3, 2016 through January 4, 2016. He felt that this was not an excessive consumption of oil for the vehicle as this was within the manufacturer's specifications.

Mr. Pritulsky also testified that blue smoke from a vehicle's exhaust indicates that the vehicle's oil is getting in the engine cylinders and the oil is being burned off. Black smoke indicates that the vehicle is burning excess gas and is more common in colder temperatures.

Mr. Pritulsky feels that the vehicle's oil consumption is within manufacturer's specifications and that the vehicle does not have a defect.

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.

Complainant purchased the vehicle on June 19, 2014, and presented the vehicle to Respondent's authorized dealer for repair due to her concerns with the engine's oil consumption on the following dates: June 29, 2015; August 3, 2015; and January 4, 2016. Except for the repair visit on June 29, 2015, the dealer's service technicians did not feel that the vehicle was consuming oil excessively. On the contrary, they felt that the oil usage was within manufacturer's specifications. Complainant has the burden of proof to establish that a vehicle has a defect that has not been repaired by Respondent. In the present case, Complainant has not been able to prove the existence of a defect in the vehicle. Therefore, repurchase or replacement relief for Complainant is not warranted.

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. In addition, the powertrain warranty provides coverage for five (5) years or 100,000 miles. On the date of hearing, the vehicle's mileage was 21,384 and it remains under the warranties. As such, Respondent is still under an obligation to repair the vehicle whenever there is a problem covered by the warranties.

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

III. FINDINGS OF FACT

1. Monika M. Barnum (Complainant) purchased a new 2014 Chevrolet Silverado on June 19, 2014, from Viva Chevrolet (Viva) in El Paso, Texas, with mileage of 30 at the time of delivery.

2. The manufacturer of the vehicle, General Motors LLC (Respondent), issued a bumper-to-bumper warranty for three (3) years or 36,000 miles, whichever occurs first and a separate powertrain warranty for five (5) years or 100,000 miles.
3. The vehicle's mileage on the date of hearing was 21,384.
4. At the time of hearing the vehicle was still under warranty.
5. Complainant feels that the vehicle uses oil excessively.
6. Complainant took the vehicle for repair to Respondent's authorized dealer, Viva Chevrolet, on the following dates:
 - a. June 29, 2015, at 10,606 miles;
 - b. August 3, 2015, 11,590 miles; and
 - c. January 4, 2016, at 15,560 miles.
7. On June 29, 2015, Viva's service technician determined that the vehicle's engine oil level was low and, as a result, the low oil level light had illuminated. The technician performed an oil change and marked the vehicle's drain plug, oil filter, oil filter cap, and dipstick to ensure that no one was tampering with the vehicle.
8. On August 3, 2015, Viva's technician removed the engine's valve covers in order to inspect the engine. He did not find any problems and reinstalled the valve covers and replaced the vehicle's PCV valve. He could not find any issues with excessive oil consumption by the vehicle.
9. On January 4, 2016, Viva's service technician found that the engine was a quart low after the vehicle had been driven 4,000 miles. The oil consumption was found to be within manufacturer's specifications and no repairs were performed.
10. On May 16, 2016, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
11. On June 8, 2016, Respondent's field service engineer performed a final repair attempt on the vehicle. No repairs were performed because the engineer felt that the vehicle was operating as designed.

12. On August 16, 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 was closed on October 12, 2016, in El Paso, Texas, before Hearings Examiner Edward Sandoval. Complainant, Monika M. Barnum, represented herself at the hearing. In addition, her husband, Joseph M. Barnum, testified for Complainant. Respondent was represented by J. T. Barry, District Manager for After-Sales. Michael Pritulsky, Field Service Engineer, testified for 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 by a preponderance of the evidence that Respondent was unable to conform the vehicle to an express warranty by repairing or correcting a 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. 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 November 2, 2016



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