

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 16-0294 CAF**

JAMES A. WALLACE,
Complainant

v.

**LEXUS A DIVISION OF TOYOTA
MOTOR SALES, INC.,**
Respondent

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**BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

James A. Wallace (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in his 2014 Lexus ES 350. Complainant asserts that the vehicle has a foul, musty, or moldy smell coming from the vehicle's air conditioning vents. Lexus A Division of Toyota Motor Sales, Inc. (Respondent) argued there is no defect with the vehicle 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 repurchase or replacement 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 October 19, 2016, in Houston, Texas before Hearings Examiner Edward Sandoval. Complainant represented himself. Respondent was represented by Matt Hennessey, Field Technical Specialist.

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 2014 Lexus ES 350 from Westside Lexus (Westside) in Houston, Texas on March 29, 2014, with mileage of 10 at the time of delivery.^{5,6} Respondent's basic warranty for the vehicle provides coverage for four (4) years or 50,000 miles, whichever comes first.⁷ On the date of hearing the vehicle's mileage was 34,266. At this time, Respondent's warranty for the vehicle is still in effect.

Complainant testified that the vehicle's interior has a strong musty or moldy odor. At first, he thought that the odor was an isolated incident, but then noticed that the odor didn't go away. He could smell the odor whenever he started the vehicle. Complainant testified that after he drove the vehicle for a while, the odor would dissipate or he would get used to it.

Complainant took the vehicle to Westside to address the issue and to have routine maintenance performed on the vehicle on August 20, 2014. The service technician informed Complainant that the odor was normal for vehicles in the South. Complainant was informed to switch the vehicle's air conditioner's setting to fresh mode to alleviate the odor. The vehicle's mileage on this occasion was 5,180.⁸

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) provides an alternative method 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.

⁵ Complainant Ex. 1, Motor Vehicle Retail Installment Sales Contract dated March 29, 2014.

⁶ Complainant Ex. 3, Odometer Disclosure Statement dated March 29, 2014.

⁷ Complainant Ex. 16, Lexus 2014 ES 350 Warranty and Services Guide, p. 3.

⁸ Complainant Ex. 4, Repair Order dated August 20, 2014.

Complainant testified that he switched the air conditioner's setting to fresh mode as suggested to him. There was a slight improvement in the odor, but it was still strong. As a result, Complainant took the vehicle back to Westside for repair for the issue on January 9, 2015. Westside's service technician verified the presence of an odor and performed an air conditioning mist service to address the issue.⁹ The vehicle's mileage on this occasion was 10,108.¹⁰

Initially the issue seemed to be addressed, but the odor returned after about 30 days. Complainant noticed that the odor gradually returned. He then took the vehicle to Westside on April 24, 2015, in order to have the concern addressed. Complainant testified that he mentioned the issue to Westside's service advisor. The service technician replaced the vehicle's air conditioner's cabin filter.¹¹ The mileage on this occasion was 15,227.¹²

The odor seemed to dissipate for a while, but returned after a couple of weeks. Complainant took the vehicle to Westside for repair for the odor issue on May 8, 2015. On this occasion, the technician replaced the air conditioner air filter with a charcoal filter.¹³ The vehicle's mileage was 15,803 when Complainant took it to Westside for repair.¹⁴

Complainant testified that the new air filter seemed to address the issue, but the odor returned after a couple of weeks. Complainant took the vehicle to Westside on October 16, 2015, for routine maintenance and to address the odor issue. Westside's technician verified the odor and performed an air conditioning "fresh treatment" to the vehicle.¹⁵ In addition, Complainant was asked to leave the vehicle overnight to see if the issue had been resolved.¹⁶ Complainant was provided with a loaner vehicle while his vehicle was being inspected by the technician. The vehicle's mileage on this occasion was 21,340.¹⁷

Complainant stated that the vehicle smelled better for about two (2) to three (3) weeks, but the odor returned and was as strong as before the treatment. Complainant took the vehicle to Westside on March 25, 2016, for repair. The service technician could not verify the presence of an odor, but applied a fresh air treatment to the vehicle as a precaution.¹⁸ The vehicle's mileage on this occasion was 27,508.¹⁹

⁹ Complainant Ex. 5, Repair Order dated January 9, 2015.

¹⁰ *Id.*

¹¹ Complainant Ex. 6, Repair Order dated April 24, 2015.

¹² *Id.*

¹³ Complainant Ex. 7, Repair Order dated May 8, 2015.

¹⁴ *Id.*

¹⁵ Complainant Ex. 8, Repair Order dated October 16, 2015.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Complainant Ex. 9, Repair Order dated March 25, 2016.

¹⁹ *Id.*

Complainant stated that the vehicle smelled okay for a couple of weeks, but the odor returned again. Complainant felt that the odor was as bad as it had been before the treatment.

On May 9, 2016, Complainant mailed a letter to Respondent advising them of his dissatisfaction with the vehicle.²⁰ In addition, Complainant filed a Lemon Law complainant with the Texas Department of Motor Vehicles (TxDMV) on May 31, 2016.²¹

Complainant testified that Respondent's representative performed an inspection of the vehicle on June 11, 2016. Respondent's field technical specialist requested that Westside's technicians perform an air conditioning mist treatment on the vehicle and replace the vehicle's air conditioner's air filter.²² In addition, Complainant was advised to always use the air conditioner's fresh air mode when driving the vehicle.²³ The mileage on the vehicle on this occasion was 30,382.²⁴ Complainant was required to leave his vehicle at Westside for four (4) days. He was provided with a loaner vehicle while his vehicle was being repaired.

Complainant testified that the odor was slightly better after the inspection. However, the odor soon returned. Complainant testified that he smells the musty, moldy odor every time he starts the vehicle. The longer the vehicle is allowed to sit, the worse the odor gets. Complainant stated that he doesn't eat or drink in the vehicle. He feels that the value of the vehicle is being diminished because of the odor in the vehicle. The vehicle's interior has never been exposed to any water.

Complainant testified that the odor in the vehicle was muted during the test drive taken at the time of hearing because he had driven the vehicle to the hearing location within two (2) hours of the test drive.

C. Respondent's Evidence and Arguments

Matt Hennessey is Respondent's Field Technical Specialist. Mr. Hennessey has been a master certified technician for over 20 years. He is also an Automotive Service Excellence (ASE) Master Technician. He worked for seven (7) to eight (8) years as a service technician for Dodge

²⁰ Complainant Ex. 12, Letter to Lexus dated May 9, 2016.

²¹ Complainant Ex. 11, Lemon Law complaint dated May 31, 2016. Although the complaint was signed on May 24, 2016, the effective date of the complaint is the date that it was received by the Texas Department of Motor Vehicles, which was May 31, 2016.

²² Complainant Ex. 14, Repair Order dated June 11, 2016.

²³ *Id.*

²⁴ *Id.*

and independent dealers. Mr. Hennessey has worked for 19 years as a Field Technical Specialist (FTS). The last 16 years he's worked as an FTS for Lexus.

Mr. Hennessey performed the final repair attempt on Complainant's vehicle. During the final repair attempt, he checked the condition of the vehicle and reviewed the vehicle's repair history. Mr. Hennessey tried to duplicate the problem. When he started the vehicle, he smelled a stale odor. He did not feel that the odor was foul or musty. He thought that it smelled like the vehicle's air filter had worn out.

Mr. Hennessey decided to treat the vehicle's evaporator case with a mist treatment. He indicated that the product is similar to Febreze. It doesn't clean the evaporator case, but is an effort to get the smell out of the vehicle. In addition, he replaced the air conditioner's air filter with a charcoal filter. He also instructed Westside's service advisor to inform Complainant to switch the air conditioner's setting to fresh mode when turning the vehicle on or off in order to help alleviate the issue.

Mr. Hennessey testified that he did not inspect the vehicle's evaporator case. He stated that the case is hot, wet, and dark and that there is a potential for mold to develop in the case. However, odors can also be caused by outside influences. Since Mr. Hennessey did not inspect the evaporator case, he's not sure if there is mold in it.

Mr. Hennessey does not feel that there is a defect with the vehicle. He did not smell an odor during the test drive taken by the parties at the time of hearing.

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 has not met the burden of proof to establish that his vehicle has a defect which creates a serious safety hazard or which substantially impairs its use or market value. Complainant testified that there is an odor which he smells when he starts the vehicle. The odor

was not detected during the test drive taken at the time of hearing. However, the fact that there is an odor that occurs during start-up of the vehicle does not indicate the presence of a defect in the vehicle. The odor does not create a serious safety hazard nor does it substantially impair the use or market value of the vehicle. As such, the hearings examiner must hold that Complainant is not entitled to the requested relief.

Respondent's basic warranty applicable to Complainant's vehicle provides coverage for four (4) years or 50,000 miles whichever comes first. On the date of hearing, the vehicle's mileage was 34,266 and the basic warranty coverage is still in effect. Respondent is still under an obligation to repair any issues with the vehicle that are covered under the warranty, including any odor issues.

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

III. FINDINGS OF FACT

1. James A. Wallace (Complainant) purchased a new 2014 Lexus ES 350 on March 29, 2014, from Westside Lexus, in Houston, Texas, with mileage of 10 at the time of delivery.
2. The manufacturer of the vehicle, Lexus A Division of Toyota Motor Sales, Inc. (Respondent), issued a basic warranty for the vehicle good for four (4) years or 50,000 miles, whichever occurs first.
3. The vehicle's mileage on the date of hearing was 34,266.
4. At the time of hearing the vehicle's basic warranty was still in effect.
5. Complainant feels that the vehicle's interior has a musty, moldy smell whenever he starts the vehicle.
6. Complainant took the vehicle to Respondent's authorized dealer in order to address his concerns with the vehicle, on the following dates:
 - a. August 20, 2014, at 5,180 miles;
 - b. January 9, 2015, at 10,108 miles;
 - c. April 24, 2015, at 15, 217 miles;
 - d. May 8, 2015, at 15, 803 miles;
 - e. October 16, 2015, at 21,340 miles; and
 - f. March 25, 2016, at 27,508 miles.

7. On August 20, 2014, no repair was performed on the vehicle. Complainant was instructed to use the fresh air mode on the vehicle's air conditioner to address the issue.
8. On January 9, 2015, Westside's service technician performed an air conditioner mist service on the vehicle.
9. On April 24, 2015, the technician replaced the vehicle's air conditioner cabin filter.
10. On May 8, 2015, the technician replaced the vehicle's air conditioner air filter with a charcoal filter.
11. On October 16, 2015, the technician performed an air conditioner fresh air treatment to the vehicle.
12. On March 25, 2016, the technician applied an air conditioner fresh air treatment to the vehicle.
13. On May 31, 2016, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
14. On June 11, 2016, Respondent's field engineer performed a final repair attempt on the vehicle and replaced the vehicle's air conditioner's air filter and performed an air conditioning mist treatment on the vehicle.
15. 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.
16. The hearing in this case convened and the record closed on October 19, 2016, in Houston, Texas before Hearings Examiner Edward Sandoval. Complainant represented himself. Respondent was represented by Matt Hennessey, Field Technical Specialist.

IV. CONCLUSIONS OF LAW

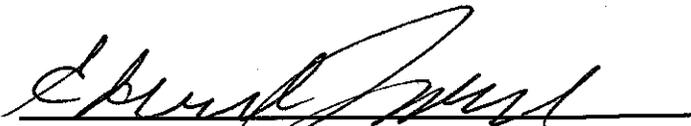
1. The Texas Department of Motor Vehicles (Department) has jurisdiction over this matter. Tex. Occ. Code §§ 2301.601-.613 (Lemon Law).

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 failed to 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. Respondent remains responsible to address and repair or correct any defects that are covered by Respondent's warranties. Tex. Occ. Code § 2301.204.
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 Complainants' petition for repurchase relief pursuant to Texas Occupations Code §§ 2301.601-.613 is hereby **DISMISSED**.

SIGNED November 23, 2016


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