

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 16-0308 CAF**

LORI ROSOFF,
Complainant

v.

SUBARU OF AMERICA, INC.,
Respondent

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§

BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Lori Rosoff (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in her new 2015 Subaru Forester. Complainant asserts that the vehicle has a defect which causes it to consume oil excessively. Subaru of America, Inc. (Respondent) argued that the vehicle is operating as designed, 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 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 initially on April 5, 2017, in Houston, Texas before Hearings Examiner Edward Sandoval. Complainant, Lori Rosoff, appeared and testified in the hearing. She was represented by her boyfriend, Roger Weissman, who also testified in the hearing. Respondent was represented by Hector Flores, District Parts and Service Manager. Pat Hayes, Field Service Engineer, also testified for Respondent. Observing for Respondent was Jesse Cruz, Field Service Engineer.

A continuance in the hearing was conducted on April 25, 2017, via telephone. Complainant appeared and testified in the continuance. Mr. Weissman represented Complainant and also testified in the continuance. Respondent was represented by Hector Flores, District Parts and Service Manager. Pat Hayes, Field Service Engineer, also testified for Respondent. The hearing record was closed on April 25, 2017.

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 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

Complainant purchased a new 2015 Subaru Forester on May 25, 2015, from Gillman Subaru (Gillman) in Houston, Texas, with mileage of 6 at the time of delivery.⁷ Respondent provided a bumper-to-bumper warranty for the vehicle good for three (3) years or 36,000 miles, whichever comes first. Respondent also provided a powertrain warranty for the vehicle good for five (5) years

¹ Tex. Occ. Code § 2301.604(a).

² *Id.*

³ *Id.*

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. 10, Buyer's Order dated May 25, 2015.

or 60,000 miles. On the date of hearing the vehicle's mileage was 26,906. At this time, Respondent's warranties are still in effect.

1. Lori Rosoff's Testimony

Complainant testified that she feels that the vehicle consumes oil excessively. She stated that she was driving the vehicle on July 15, 2015, when the low oil light illuminated. She took the vehicle to Gillman for service the same day. Gillman's service technician determined that the vehicle was a quart low on oil and topped off the oil.⁸ The vehicle's mileage at the time of the repair visit was 2,757.⁹ The vehicle was in the dealer's possession for one (1) day. Complainant was not provided with a loaner vehicle while her vehicle was in Gillman's possession.

Complainant testified that she took the vehicle for an oil change on September 14, 2015. The oil change on this date was part of the vehicle's regular maintenance schedule. The vehicle's mileage on this occasion was 6,369.¹⁰ The vehicle's low oil light had not illuminated prior to Complainant's visit to the dealer on this date.

On December 23, 2015, the vehicle's low oil light illuminated. Complainant took the vehicle to Gillman the same day for repair. Gillman's service technician determined that the vehicle had consumed about 8.7 ounces of oil per 1,200 miles driven.¹¹ (The vehicle was about a quart low of oil and Complainant had driven the vehicle 4,758 miles since the last oil change.)¹² Gillman's service technician contacted Respondent's field service engineer for help in determining whether the vehicle was consuming oil excessively.¹³ In addition, Complainant requested the technician perform an oil consumption test on the vehicle.¹⁴ The test was commenced on this occasion and Complainant was advised to return the vehicle to Gillman once she had driven it 1,200 miles.¹⁵ The vehicle's mileage on this occasion was 11,128.¹⁶ The vehicle was in the dealer's possession for one (1) day. Complainant was not provided with a loaner vehicle while her vehicle was being repaired.

⁸ Complainant Ex. 1, Repair Order dated July 15, 2015.

⁹ *Id.*

¹⁰ Complainant Ex. 2, Repair Order dated September 14, 2015.

¹¹ Complainant Ex. 3, Repair Order dated December 23, 2015.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

Complainant returned the vehicle to Gillman on January 25, 2016, in order to complete the oil consumption test. Gillman's technician checked the vehicle's oil level and determined that it was still full and no oil needed to be added.¹⁷ The vehicle's mileage on this occasion was 12,456.¹⁸ Complainant stated that the vehicle's low oil light did not illuminate in January of 2016.

Complainant testified that the vehicle's low oil light illuminated on May 16, 2016, even though the vehicle was not due for an oil change. She took the vehicle to Gillman immediately. Gillman's technician determined that the vehicle had consumed approximately 24 ounces of oil since the conclusion of the oil consumption test.¹⁹ The technician calculated that the vehicle had used 6.54 ounces of oil per every 1,200 miles Complainant had driven in the vehicle.²⁰ (The vehicle had been driven 4400 miles and had used 24 ounces of oil.)²¹ Oil was added to the vehicle and Complainant was informed that the vehicle was due for an oil change in 1,600 more miles.²² The vehicle's mileage on this occasion was 16,857.²³ The vehicle was in Gillman's possession for the day. Complainant did not request a loaner vehicle.

Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) on June 13, 2016.²⁴ Complainant testified that she did not send or mail notice to Respondent of her dissatisfaction with the vehicle.

On August 3, 2016, Complainant took the vehicle to Gillman for repair because the low oil light illuminated. The technician determined that the vehicle had used 6.54 ounces per 1,200 miles driven since her last visit to Gillman.²⁵ The decision was made to replace the vehicle's engine for "customer satisfaction."²⁶ The vehicle's mileage on this occasion was 19,201.²⁷ The vehicle was in Gillman's possession for five (5) days. Complainant was not provided a loaner vehicle while her vehicle was being repaired.

¹⁷ Complainant Ex. 4, Repair Order dated January 25, 2016.

¹⁸ *Id.*

¹⁹ Complainant Ex. 5, Repair Order dated May 16, 2016.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ Complainant Ex. 6, Lemon Law Complaint dated June 13, 2016. Complainant signed and dated the complaint on June 8, 2016. However, the complaint was not received by the Texas Department of Motor Vehicles until June 13, 2016, which is the effective date of the complaint.

²⁵ Complainant Ex. 7, Repair Order dated August 1, 2016.

²⁶ *Id.*

²⁷ *Id.*

Complainant took the vehicle to Gillman on September 14, 2016, for an oil change as part of the vehicle's regular scheduled maintenance. The vehicle's mileage on this occasion was 20,368.²⁸ The low oil light had not illuminated prior to Complainant taking the vehicle to Gillman on this occasion.

Complainant testified that on January 6, 2017, the vehicle's low oil light illuminated. She immediately took the vehicle to Gillman for repair. Gillman's service technician performed an oil change on the vehicle to address the issue.²⁹ He also reported the issue to Respondent.³⁰ The vehicle's mileage on this occasion was 23,884.³¹ Complainant was not provided with a loaner vehicle while the oil change was performed.

Complainant testified that as of the date of the hearing on April 5, 2017, the vehicle's low oil light had not illuminated again. However, after the hearing, while Complainant was on her way home, the light illuminated. Complainant took the vehicle to Gillman immediately. Gillman's technician verified that the light was illuminated and topped off the vehicle's oil to resolve the issue.³² The vehicle's mileage on this occasion was 26,934.³³

Complainant stated that she reads the owner's manual as needed. She has not sat down and read the entire manual. She was concerned about this vehicle, because Complainant's prior vehicle was a Subaru Impreza and she had experienced problems with that vehicle consuming oil excessively. Respondent had replaced the engine in the Impreza in an attempt to resolve the oil consumption issue. Complainant also stated that her current vehicle's change engine oil light has never illuminated. She's never driven the vehicle beyond the scheduled maintenance intervals without having the required maintenance performed.

2. Roger Weissman's Testimony

Roger Weissman, Complainant's boyfriend, testified on Complainant's behalf. Mr. Weissman stated that he drives the vehicle at most once per month. Complainant is the primary driver of the vehicle.

²⁸ Complainant Ex. 8, Repair Order dated September 14, 2016.

²⁹ Complainant Ex. 9, Repair Order dated January 6, 2017.

³⁰ *Id.*

³¹ *Id.*

³² Complainant Ex. 11, Repair Order dated April 5, 2017.

³³ *Id.*

Mr. Weissman testified that he has never seen the vehicle's low oil light illuminate. He also stated that he has worked in the automotive industry since 1985. He's currently employed as an assistant service manager for an automobile dealer. Mr. Weissman stated that he's familiar with automotive repair protocols and procedures and he feels that it's unusual for a new vehicle's low oil light to illuminate to the point that Complainant's vehicle is doing. He has looked for an oil leak in the vehicle, but has not seen a sign of one. Mr. Weissman feels that Complainant doesn't drive the vehicle in harsh conditions which could potentially affect the vehicle's oil consumption.

C. Respondent's Evidence and Arguments

1. Pat Hayes' Testimony

Pat Hayes, Field Service Engineer (FSE), testified for Respondent. He has worked for Respondent for 25 years. Mr. Hayes has been an FSE for Respondent since 2010. He is an Automotive Service Excellence (ASE) master technician.

Mr. Hayes testified that he has never seen or inspected the vehicle. He was contacted by Gillman's technician via telephone regarding the vehicle's oil consumption on December 23, 2015. The technician informed Mr. Hayes that the vehicle had consumed 8.7 ounces of oil over 1,200 miles. Mr. Hayes did not feel that the oil consumption by the vehicle was unusual. He stated that the upper limits of normal fuel consumption for this type of vehicle would be 10.6 ounces over 1,200 miles.

Mr. Hayes pointed out that the vehicle's owner's manual informs customers that the vehicle will consume engine oil and may increase consumption under certain circumstances. Among the circumstances listed in the manual is if the "vehicle is operated in stop and go and/or heavy traffic situations."³⁴

Mr. Hayes stated that Complainant's vehicle has the most up-to-date short block engine available to Respondent. It's expected that the engine will consume oil at a higher than normal rate over the vehicle's first 6,000 miles.

Mr. Hayes also testified that Mr. Flores approved the replacement of the vehicle's short block engine in August of 2016. Mr. Hayes now feels that replacing the vehicle's engine was a mistake and should not have been done.

³⁴ Respondent Ex. 2, Information packet 2, containing excerpts from the owner's manual and Service Bulletin 02-157-14R, p. 4.

Mr. Hayes agreed that Respondent's previous vehicle had an issue with excessive oil consumption. However, Complainant's present vehicle was not within the range of vehicles that had been found to have had this problem. The excessive oil consumption for those vehicles was due to Respondent's use of low tension piston rings in the engines which were at the lower end of tolerance. Respondent redesigned the engine piston rings in order to resolve the issue. Complainant's current vehicle has the redesigned engine.

Mr. Hayes testified that Complainant never sent Respondent written notice of her dissatisfaction with the vehicle. Respondent did not ask for a final repair attempt on the vehicle, since the feeling was that the vehicle was operating as designed.

2. Hector Flores' Testimony

Hector Flores, District Parts and Service Manager, also testified for Respondent. He has worked for Respondent for 33 years. He has been in his present position since 2010. Mr. Flores does not have any technical automotive experience.

Mr. Flores testified that he has never seen the vehicle. However, he did approve the replacement of the vehicle's engine that occurred on August 3, 2016. Mr. Flores testified that he approved the replacement for customer satisfaction.

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.

The evidence presented at the hearing established that the vehicle is working as designed and that there is no defect in the vehicle. Although Complainant complained that the vehicle consumes oil excessively, the evidence presented at the hearing indicates that the vehicle's oil usage falls within the manufacturer's specifications and is normal. A design characteristic is not a defect in the vehicle and does not warrant that a vehicle be repurchased or replaced. Given the totality of the

evidence, the hearings examiner must hold that Complainant has not established the existence of a defect in the vehicle. As such, Complainant is not entitled to repurchase or replacement relief.

Respondent's bumper-to-bumper warranty applicable to Complainant's vehicle provides coverage for three (3) years or 36,000 miles whichever comes first. In addition, the powertrain warranty is good for five (5) years or 60,000 miles. On the date of hearing, the vehicle's mileage was 26,906 and it remains under these warranties. As such, 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. Lori Rosoff (Complainant) purchased a new 2015 Subaru Forester on May 25, 2015, from Gillman Subaru in Houston, Texas, with mileage of 6 at the time of delivery.
2. The manufacturer of the vehicle, Subaru of America, Inc. (Respondent), issued a bumper-to-bumper warranty for the vehicle good for three (3) years or 36,000 miles, whichever occurs first. Respondent has also provided a powertrain warranty for the vehicle good for five (5) years or 60,000 miles.
3. The vehicle's mileage on the date of hearing was 26,906.
4. At the time of hearing the vehicle's warranties were still in effect.
5. In July of 2015, the vehicle's low oil light illuminated.
6. Complainant took the vehicle to Respondent's authorized dealer, Gillman, on the following dates in order to address her concerns with the vehicle's oil consumption and the low oil warning light illuminating:
 - a. July 15, 2015, at 2,756 miles;
 - b. December 23, 2015, at 11,128 miles;
 - c. January 25, 2016, at 12,456 miles; and
 - d. May 16, 2016, at 16,857 miles.

7. On July 15, 2015, Gillman's service technician found the vehicle to be a quart low on oil, topped off the oil level, and advised Complainant to continue with the engine break-in period of 6,000 miles.
8. On December 23, 2015, Gillman's service technician determined that Complainant's vehicle had consumed 8.7 ounces of oil per 1,200 miles since the vehicle's last oil change and that the vehicle was one quart of oil low. The technician performed an oil change on the vehicle and commenced an oil consumption test for the vehicle.
9. On January 25, 2016, Gillman's service technician completed the oil consumption test and determined that the vehicle had not consumed any oil over the 1,327 miles driven by Complainant since the commencement of the oil consumption test.
10. On May 16, 2016, Gillman's service technician determined that the vehicle's low oil light was working correctly, that the vehicle had consumed 6.54 ounces of oil per 1,200 miles driven, and added oil to the vehicle.
11. On June 13, 2016, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
12. On August 3, 2016, Complainant took the vehicle to Gillman because it was consuming oil.
13. On the August 3, 2016, repair visit, Gillman's technician determined that the vehicle had used 6.54 ounces of oil per 1,200 miles since her last visit to the dealer. However, for customer satisfaction the vehicle's engine was replaced.
14. On January 7, 2017, Complainant took the vehicle to Gillman because the low oil light had illuminated again. Gillman's technician performed an oil change for the vehicle.
15. On April 5, 2017, Complainant took the vehicle to Gillman because the low oil light had illuminated. Gillman's technician added oil to the vehicle to address the issue.
16. Respondent's engine specifications provide that the upper limits of normal fuel consumption for this type of vehicle would be 10.6 ounces over 1,200 miles.

17. 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.
18. The hearing in this case convened initially on April 5, 2017, in Houston, Texas before Hearings Examiner Edward Sandoval. Complainant, Lori Rosoff, appeared and testified in the hearing. She was represented by her boyfriend, Roger Weissman, who also testified in the hearing. Respondent was represented by Hector Flores, District Parts and Service Manager. Pat Hayes, Field Service Engineer, also testified for Respondent. Observing for Respondent was Jesse Cruz, Field Service Engineer. A continuance in the hearing was conducted on April 25, 2017, via telephone. Complainant appeared and testified in the continuance. Mr. Weissman represented Complainant and also testified in the continuance. Respondent was represented by Hector Flores, District Parts and Service Manager. Pat Hayes, Field Service Engineer, also testified for Respondent. The hearing record was closed on April 25, 2017.

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 Complainants' petition for repurchase relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is hereby **DISMISSED**.

SIGNED June 5, 2017



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