

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 leased a new 2016 Volkswagen Jetta on November 19, 2015, from Rusty Wallis Volkswagen (Wallis) in Garland, Texas through VW Credit Leasing LTD (Intervenor) with mileage of 7 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 or 60,000 miles. On the date of hearing the vehicle's mileage was 33,767. At this time, Respondent's warranties are still in effect.

Complainant testified that within a couple of months of leasing the vehicle, the low oil light illuminated. She took the vehicle to Wallis to address the issue on February 3, 2016. Wallis' 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 3,996.⁹ The vehicle was in the dealer's

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. 1, Motor Vehicle Lease Agreement – Closed End dated November 19, 2015.

⁸ Respondent Ex. 3, Repair Order dated February 3, 2016.

⁹ *Id.*

possession for one (1) day. Complainant was not provided with a loaner vehicle while her vehicle was in Wallis' possession.

Complainant testified that she took the vehicle to Wallis for an oil change on May 27, 2016. The oil change on this date was part of the vehicle's regular maintenance schedule. The vehicle's mileage on this occasion was 10,095.¹⁰ The vehicle's low oil light had not illuminated prior to Complainant's visit to the dealer on this date.

In late September or early October of 2016, the vehicle's low oil and tire pressure lights illuminated. Complainant took the vehicle to Wallis for repair on October 5, 2016. Wallis' service technician topped off the engine oil and put air in the vehicle's tires to address the concerns.¹¹ The vehicle's mileage on this occasion was 16,126.¹² 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.

A couple of months later, on December 13, 2016, Complainant returned the vehicle to Wallis because the low oil light was illuminated. Wallis' service technician checked the vehicle for oil leaks and did not find any.¹³ As a result, the only repair the technician made was to add a quart of oil to the vehicle's engine.¹⁴ The vehicle's mileage on this occasion was 18,353.¹⁵ The vehicle was in Wallis' possession for a few days. Complainant was provided with a loaner vehicle while her vehicle was being repaired.

Complainant testified that she had her cousin change the vehicle's oil in early 2017. On April 24, 2017, Complainant had the vehicle towed to Wallis because the oil light kept illuminating and there did not appear to be any oil on the oil dipstick.¹⁶ Wallis' service technician determined that the vehicle was low on oil and performed an oil change to ensure that the vehicle had sufficient oil in its engine.¹⁷ The vehicle's mileage on this occasion was 24,432.¹⁸ The vehicle was in Wallis' possession for one (1) day. Complainant was provided a loaner vehicle while her vehicle was being repaired.

¹⁰ Respondent Ex. 4, Repair Order dated May 27, 2016.

¹¹ Respondent Ex. 5, Repair Order dated October 5, 2016.

¹² *Id.*

¹³ Respondent Ex. 6, Repair Order dated December 13, 2016.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Respondent Ex. 7, Repair Order dated April 24, 2017.

¹⁷ *Id.*

¹⁸ *Id.*

On June 17, 2017, Complainant had the vehicle repaired by Wallis' service technician because the check engine light (CEL) illuminated. Complainant did not raise the issue of the vehicle's low oil light illuminating at the time.

After getting the vehicle back from Wallis, the low oil light and CEL both illuminated. On June 23, 2017, Complainant decided to take the vehicle to Clay Cooley Volkswagen of Richardson, Texas (Cooley) in order to have the issues addressed. Cooley's service technician topped off the engine's oil and determined that the CEL had illuminated because of a defective radiator grill motor which was replaced.¹⁹ The vehicle's mileage on this occasion was 27,594.²⁰ The vehicle was in Cooley's possession for three (3) days. Complainant was provided a loaner while her vehicle was being repaired.

Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) on June 27, 2017.²¹ Complainant testified that she mailed a notice of her dissatisfaction with the vehicle to Respondent on July 10, 2017.²²

Complainant testified that she was contacted by Respondent's representative after filing the complaint and was asked to allow Respondent to perform an oil consumption test on the vehicle. On August 15, 2017, Complainant took the vehicle to Cooley to have the test performed. The service technician installed the correct amount of oil in the vehicle and informed Complainant to return the vehicle to Cooley after driving about 1,000 miles.²³ The vehicle's mileage on this occasion was 30,294.²⁴

Complainant took the vehicle back to Cooley on September 21, 2017, in order to complete the oil consumption test. The service technician determined that the vehicle had consumed approximately ½ gallon of oil over 1,236 miles.²⁵ The vehicle's mileage on this occasion was 31,530.²⁶

Complainant testified that the vehicle's low oil light illuminated again in late October of 2017. She took the vehicle to Cooley for the issue on November 1, 2017. Cooley's service technician

¹⁹ Respondent Ex. 9, Repair Order dated June 23, 2017.

²⁰ *Id.*

²¹ Complainant Ex. 2, Lemon Law Complaint dated June 27, 2017.

²² Complainant Ex. 3, Letter to Volkswagen of America dated July 10, 2017.

²³ Respondent Ex. 10, Repair Order dated August 15, 2017.

²⁴ *Id.*

²⁵ Respondent Ex. 11, Repair Order dated September 21, 2017.

²⁶ *Id.*

determined that the vehicle was ½ quart low and topped off the oil in order to address the issue.²⁷ The vehicle's mileage on this occasion was 33,293.²⁸

Complainant testified that she was informed by the one of the service technicians who serviced the vehicle that Jetta's use more oil than other vehicles. She never noticed an oil leak from the vehicle. An oil leak was never discovered in the vehicle despite all the repair visits.

C. Respondent's Evidence and Arguments

Joe Matussak, Fixed Operations Manager, testified for Respondent. He has worked in the automotive industry for approximately 32 years. He's worked for Respondent in his current position for the past 16 years. Mr. Matussak had been a VW Master Technician in the past prior to being hired by Respondent.

Mr. Matussak testified that the vehicle has a turbo-charged engine and that it does consume a certain amount of oil while being driven. Synthetic oil is used to lubricate the vehicle's engine and this allows a longer period of time between oil changes on average about 10,000 miles. Respondent has installed a low oil level light in the vehicle to keep drivers apprised of the fact that they may need to top off the engine oil. Mr. Matussak stated that this does not mean that there is any danger to the engine unless the oil **pressure** light illuminates. Mr. Matussak stated that there was no evidence that the vehicle had an oil leak and there was no smoke coming from the engine to indicate that the engine was burning oil.

Mr. Matussak described how the oil consumption test was performed by Cooley's technician in September of 2017. He stated that the technician weighs the oil prior to putting it in the crankcase. Then when the vehicle is returned the oil is drained and weighed again. The difference indicates how much oil was used per the mileage driven. Mr. Matussak indicated that the test performed on Complainant's vehicle indicated that ½ quart was consumed during the approximately 1,200 miles driven by Complainant. Mr. Matussak 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. The manual indicates that it is considered normal if the vehicle consumes one (1) quart of oil per 1,200 miles.²⁹ Mr. Matussak indicated that the oil consumption test performed on Complainant's vehicle showed that it was using less oil than is considered normal.

²⁷ Complainant Ex. 4, Repair Order dated November 1, 2017.

²⁸ *Id.*

²⁹ Respondent Ex. 13, Page from the Volkswagen Jetta Owner's Manual.

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's low oil light illuminates too often, the evidence presented at the hearing indicates that the vehicle's oil usage falls within the manufacturer's specifications and is normal and that the oil light is designed to illuminate once the engine has consumed a certain amount of oil. 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 also provided for the vehicle by Respondent is good for five (5) years or 60,000 miles. On the date of hearing, the vehicle's mileage was 33,767 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. Cynthia Vitela (Complainant) leased a new 2016 Volkswagen Jetta on November 19, 2015, from Rusty Wallis Volkswagen (Wallis) in Garland, Texas through VW Credit Leasing LTD (Intervenor) with mileage of 7 at the time of delivery.

2. The manufacturer of the vehicle, Volkswagen Group 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 33,767.
4. At the time of hearing the vehicle's warranties were still in effect.
5. In February of 2016, the vehicle's low oil light illuminated prior to the vehicle having been driven 5,000 miles.
6. Complainant took the vehicle to Respondent's authorized dealers on the following dates in order to address her concerns with the vehicle's low oil warning light illuminating:
 - a. February 3, 2016, at 3,996 miles;
 - b. October 5, 2016, at 16,126 miles;
 - c. December 13, 2106, at 18,353 miles;
 - d. April 24, 2017, at 24,432 miles; and
 - e. June 23, 2017, at 27,594 miles.
7. On February 3, 2016, Wallis' service technician found the vehicle to be a quart low on oil and topped off the oil.
8. On October 5, 2016, Wallis' service technician topped off the vehicle's engine oil because it was low.
9. On December 13, 2016, Wallis' service technician added a quart of oil to the vehicle's engine as it was low on oil. He also inspected the vehicle for an oil leak and did not find one.
10. On April 24, 2017, Wallis' service technician determined that the vehicle was very low on oil after Complainant had allowed her cousin to perform an oil change on the vehicle. The technician performed an oil change on the vehicle to address the issue of the vehicle's low oil level.
11. On June 23, 2017, Complainant took the vehicle to Clay Cooley Volkswagen (Cooley) of Richardson, Texas because the low oil level light illuminated. Cooley's service technician determined that the engine's oil level was low and topped off the oil.

12. On June 27, 2017, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
13. After filing the Lemon Law complaint, Complainant was requested by Respondent's representative that she allow them to perform an oil consumption test on the vehicle to determine if the vehicle was using an inordinate amount of oil.
14. On August 15, 2017, Cooley's service technician performed the first step of the oil consumption test with the vehicle's mileage at 30,294.
15. On September 21, 2017, Complainant took the vehicle to Cooley to complete the oil consumption test.
16. Cooley's technician determined that the vehicle had used approximately ½ quart of oil after being driven 1,236 miles during the oil consumption test and that this was within the manufacturer's specifications for oil usage for the engine in Complainant's vehicle.
17. On November 1, 2017, Complainant took the vehicle to Cooley because the low oil light had illuminated. Cooley's service technician determined that the engine was ½ quart low and added oil to the vehicle to address the issue.
18. Respondent's engine specifications provide that the normal oil consumption for this type of vehicle would be one (1) quart for every 1,200 miles driven.
19. On September 11, 2017, 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.
20. The hearing in this case convened and the record closed on November 15, 2017, in Carrollton, Texas before Hearings Examiner Edward Sandoval. Complainant, Cynthia Vitela, represented herself and testified in the hearing. Respondent and Intervenor were represented by Joe Matussak, Fixed Operations Manager.

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 November 21, 2017



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