

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 18-0181119 CAF**

**MICHAEL MEDINA,
Complainant**

v.

**BMW OF NORTH AMERICA, LLC,
Respondent**

§
§
§
§
§
§
§

BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Michael Medina (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in his 2015 BMW X5 M. Complainant asserts that the vehicle has a defect which causes the vehicle's engine to consume oil excessively. BMW of North America, LLC (Respondent) argues 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 and the record closed on June 7, 2018, in Austin, Texas before Hearings Examiner Edward Sandoval. Complainant, Michael Medina, represented himself and testified in the hearing. Beth White, friend, testified for Complainant. Also, William Grimes, Sales Advisor for Jaguar Land Rover of Austin (Land Rover), testified for Complainant under subpoena. Respondent was represented by Steven Soncini, After-Sales Area Manager. Victor Cheung, Technical Support 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

¹ Tex. Occ. Code § 2301.604(a).

² *Id.*

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

1. Michael Medina's Testimony

Complainant purchased a new 2016 BMW X5 M on November 21, 2015, from BMW of Austin (BMW) in Austin, Texas with mileage of 14 at the time of delivery.^{7,8} Respondent provided a bumper-to-bumper warranty for the vehicle which provided coverage for four (4) years or 50,000 miles, whichever comes first. On the date of hearing the vehicle's mileage was 36,617. At the time of hearing, Respondent's warranty was still in effect.

Complainant noticed soon after purchasing the vehicle that its low oil warning light illuminated indicating that he needed to add oil to the vehicle's engine. He assumed initially that this was due to the need for the engine to "break in." Beginning in March of 2016, however, Complainant began to feel that the vehicle's engine was consuming oil excessively as he was having to add oil to the engine more often than he felt was necessary. Complainant added oil to the engine on December 30, 2015, at 2,770 miles and March 30, 2016, at 4,774 miles.⁹

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, Purchase Order dated November 21, 2015.

⁸ Complainant Ex. 2, Odometer Disclosure Statement Dated November 21, 2015.

⁹ Complainant Ex. 3, 2016 BMW X5M Summary of Oil Usage, undated.

Complainant took the vehicle to BMW to address the oil consumption issue on June 17, 2016, because the low oil warning light had illuminated. BMW's service technician added two liters of oil to the engine.¹⁰ The technician also added a comment on the repair order notifying Complainant that turbo charged engines (such as the engine in Complainant's vehicle) will consume more oil than naturally aspirated engines.¹¹ The vehicle's mileage at the time of the service visit was 7,439.¹² Complainant does not recall how long the vehicle was in BMW's possession on this occasion. He was provided with a loaner vehicle while his vehicle was being attended to.

Complainant testified that he took the vehicle to BMW for an oil change on September 12, 2016. During this repair visit, Complainant informed BMW's representatives that he was concerned with the vehicle's oil consumption and that he thought it was excessive.¹³ BMW's service technician added a comment on the repair order advising Complainant that Respondent's specifications allow their "motorsports" engines to consume up to 2.5 liters of oil every 1,000 miles.¹⁴ The vehicle's mileage on this occasion was 11,057.¹⁵ Complainant was provided a loaner vehicle while his vehicle was in BMW's possession.

Complainant added oil to the vehicle's engine on November 15, 2016, at 13,550 miles (2,493 miles after the oil change); December 16, 2016, at 15,148 miles (1,598 miles after the prior addition of oil); and on March 10, 2017 (3,087 miles after the prior addition of oil).¹⁶

Complainant took the vehicle to BMW for an oil change on March 29, 2017. The vehicle's mileage on this occasion was 19,297.¹⁷ The vehicle was in the dealer's possession for two (2) to three (3) days to address other issues. Complainant was provided with a loaner vehicle while his vehicle was being serviced.

Complainant added oil to the vehicle's engine on May 8, 2017, at 20,885 miles (1,586 miles after the previous oil change); on July 10, 2017, at 23,254 miles (2,369 miles after the prior addition of oil); and on August 11, 2017, at 24,539 miles (1,285 miles after the prior addition of oil).¹⁸ Complainant indicated that he always added at least one (1) liter of oil (sometimes more) to the vehicle's engine on these occasions.

¹⁰ Respondent Ex. 4, Repair Order dated June 17, 2016.

¹¹ *Id.*

¹² *Id.*

¹³ Respondent Ex. 5, Repair Order dated September 12, 2016.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Respondent Ex. 3, 2016 BMW X5M Summary of Oil Usage, undated.

¹⁷ Respondent Ex. 6, Repair Order dated March 29, 2017.

¹⁸ Respondent Ex. 3, 2016 BMW X5M Summary of Oil Usage, undated.

On September 6, 2017, Complainant took the vehicle to BMW for an oil change. The vehicle's mileage on this occasion was 27,062.¹⁹ The vehicle was in BMW's possession for one (1) day. Complainant could not recall if he was provided with a loaner vehicle while his vehicle was being serviced.

Complainant mailed a letter giving notice of his dissatisfaction with the vehicle to Respondent on October 16, 2017.²⁰ Complainant decided to write to Respondent because he had stopped at a Land Rover dealership and inquired as to the possibility of trading his vehicle in for a different manufacturer's vehicle. Complainant testified that he was given a low trade-in quote for the vehicle by the dealer's representative and was told that it was a result of the vehicle's oil consumption issues.

On October 31, 2017, Complainant took the vehicle to BMW for repair for the oil consumption issue. BMW's service technician determined that the vehicle's valve stem seals were leaking oil into engine cylinders 5 and 6.²¹ The technician then began an oil consumption test on the vehicle. Complainant was instructed to drive the vehicle 1,000 miles and then return the vehicle to BMW to complete the test.²² The vehicle's mileage on this occasion was 29,654.²³ The vehicle was in BMW's possession for a few days. Complainant was provided a loaner vehicle while his vehicle was being serviced.

Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) on November 13, 2017.²⁴

On November 29, 2017, Complainant took the vehicle to BMW to complete the oil consumption test. BMW's service technician measured the oil in the vehicle's crankcase after the vehicle was returned to BMW.²⁵ The technician determined that the vehicle had used 1.8 quarts of oil after being driven 1,092 miles.²⁶ The technician indicated on the repair order that engine specifications for this type of engine allowed for a loss of 2.5 liters of oil per 1,000 miles.²⁷ The technician then replaced the engine's valve stem seals for "customer satisfaction."²⁸ The vehicle's mileage at the

¹⁹ Respondent Ex. 8, Repair Order dated September 6, 2017.

²⁰ Complainant Ex. 13, Letter to BMW of North America, LLC dated October 16, 2017.

²¹ Respondent Ex. 9, Repair Order dated October 31, 2017.

²² *Id.*

²³ *Id.*

²⁴ Complainant Ex. 14, Lemon Law Complaint dated November 13, 2017. Although the complaint was signed by Complainant on October 17, 2017, it was not received by the Texas Department of Motor Vehicles until November 13, 2017, which is the effective date of the complaint.

²⁵ Complainant Ex. 10, Repair Order dated November 29, 2017.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

time the vehicle was delivered to BMW was 30,751.²⁹ The vehicle was in BMW's possession for one (1) week. Complainant was provided with a loaner vehicle while his vehicle was being repaired.

Complainant testified that he has added oil to the vehicle's engine on February 15, 2018, at 33,514 miles (2,793 miles after the completion of the oil consumption test); March 22, 2018 at 34,604 miles (1,060 miles after the prior addition of oil); and May 2, 2018, at 35,860 miles (1,256 miles after the prior addition of oil).³⁰

During cross-examination, Complainant stated that the vehicle does have a turbo charged engine and was considered to be a high performance engine. He was not informed by the dealer's salesperson that the vehicle's engine would have different care issues.

2. Beth White's Testimony

Beth White, Complainant's friend, testified for Complainant. She testified that she was present at Land Rover with Complainant when he was informed of the trade-in value of the vehicle. She also felt that Land Rover's quote as to the value of the vehicle was low. Ms. White testified that the oil consumption of the vehicle was given as the reason for the low quote.

3. William Grimes' Testimony

William Grimes, Sales Advisor for Land Rover of Austin, testified under subpoena for Complainant. He's worked in the automotive industry for two and a half (2 ½) years. He's worked for Land Rover for a little over one (1) year. Mr. Grimes does not have a technical background and has not worked as an automotive technician in the past.

Mr. Grimes stated that he was the sales person who spoke to Complainant at Land Rover when Complainant asked about trading in his vehicle. Mr. Grimes was not responsible for determining the trade-in value of the vehicle. He turned the vehicle over to Land Rover's pre-owned vehicle manager, Brad Roosma, who made the determination of the vehicle's trade-in value. Mr. Grimes indicated that Complainant was not pleased with the trade-in quote from Mr. Roosma. Mr. Grimes stated that he informed Complainant that one of the factors in the quote was the repair history of the vehicle.

During cross-examination, Mr. Grimes testified that he has never worked for Respondent or any of its dealers. He has no experience with Respondent's products. In addition, Mr. Grimes stated

²⁹ *Id.*

³⁰ Respondent Ex. 3, 2016 BMW X5M Summary of Oil Usage, undated.

that he has no automotive technical experience. Mr. Grimes also stated that he did not observe any evidence of an oil leak from the vehicle.

C. Respondent's Evidence and Arguments

Victor Cheung, Technical Support Engineer, testified for Respondent. He has worked in the automotive industry for 35 years. He's worked for Respondent for 32 years with the last 30 years in his present position. Mr. Cheung is an Automotive Service Excellence (ASE) Certified Master Technician and a BMW Master Certified Technician. Mr. Cheung has worked solely on the technical side of the automotive industry. His job duties include helping Respondent's authorized dealerships in dealing with technical related issues with Respondent's vehicles.

Mr. Cheung testified that he has personally inspected the vehicle on two (2) separate occasions. He was assigned to perform a final repair attempt on the vehicle on November 3, 2017, at BMW. (This was documented on the repair order dated October 31, 2017 – Complainant's Exhibit 9.) On this occasion Mr. Cheung began the oil consumption test on the vehicle. He testified that he did not see any external oil leaks from the vehicle's engine. However, he did find that two (2) of the vehicle's spark plugs were wet with oil.³¹ Mr. Cheung determined that the valve stem seals were leaking in cylinders 5 and 6.³² Mr. Cheung stated that he drained the vehicle's engine of oil and refilled the engine with 9.5 liters of oil in order to begin the oil consumption test. Complainant was instructed to drive the vehicle for 1,000 miles and then return the vehicle to BMW to complete the test.

Mr. Cheung stated that when the vehicle was returned to BMW on November 29, 2017, the oil was drained from the engine and weighed again. The difference indicated how much oil was used per the mileage driven. Mr. Cheung indicated that the test performed on Complainant's vehicle indicated that 1.9 quarts (roughly 1.7 liters) was consumed during the approximately 1,029 miles driven by Complainant.³³ Mr. Cheung pointed out that the oil consumption was within Respondent's specifications for this type of engine (Motorsport, turbo charged engines). Respondent's Service Bulletin SI B11 03 13 provides that the specifications for BMW Motorsport engines allow consumption of 2.5 liters of oil per 1,000 miles.³⁴ Mr. Cheung indicated that the oil consumption test performed on Complainant's vehicle's engine showed that the oil consumption was within Respondent's designed parameters.

Mr. Cheung went on to state that the engine's valve stem seals were replaced in an attempt to provide customer satisfaction. The seals were not required to be replaced at the time.

³¹ Complainant Ex. 9, Repair Order dated October 31, 2017.

³² *Id.*

³³ Complainant Ex. 10, Repair Order dated November 29, 2017.

³⁴ Respondent Ex. 1, Technical Service Bulletin SI B11 03 13 dated August 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 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 engine 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 four (4) years or 50,000 miles whichever comes first. On the date of hearing, the vehicle's mileage was 36,617 and it remains covered under the warranty. 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. Michael Medina (Complainant) purchased a new 2016 BMW X5 M on November 21, 2015, from BMW of Austin (BMW) in Austin, Texas with mileage of 14 at the time of delivery.
2. The manufacturer of the vehicle, BMW of North America, LLC (Respondent), issued a bumper-to-bumper 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 36,617.
4. At the time of hearing the vehicle's warranty was still in effect.
5. Complainant believes that the vehicle's engine consumes oil excessively.
6. Complainant took the vehicle to Respondent's authorized dealer on the following dates in order to add oil to the engine due to the low oil warning light illuminating:
 - a. December 30, 2015, at 2,770 miles;
 - b. March 30, 2016, at 4,774 miles;
 - c. June 17, 2106, at 7,439 miles;
 - d. November 15, 2016, at 13,550 miles;
 - e. December 16, 2016, at 15,148 miles;
 - f. March 10, 2017, at 18,235 miles;
 - g. May 8, 2017, at 20,885 miles;
 - h. July 10, 2017, at 23,254 miles; and
 - i. August 11, 2017, at 24,539 miles.
7. On each of the oil top offs listed in Findings of Fact 6 at least one (1) liter of oil was added to the vehicle's engine.
8. Complainant took the vehicle to Respondent's authorized dealer on the following dates for an oil change for the vehicle's engine:
 - a. September 12, 2016, at 11,057 miles;
 - b. March 29, 2017, at 19,297 miles; and
 - c. September 6, 2017, at 27,062 miles.
9. On October 16, 2017, Complainant mailed a letter to Respondent advising them of his dissatisfaction with the vehicle and his belief that it was consuming oil excessively.
10. On November 3, 2017, Victor Cheung, Respondent's Technical Support Engineer, inspected the vehicle and began an oil consumption test on the vehicle's engine.
11. On November 13, 2017, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
12. On November 29, 2017, Complainant took the vehicle to BMW to complete the oil consumption test.

13. Mr. Cheung determined that the vehicle's engine had used approximately 1.7 liters of oil after being driven 1,092 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 for this particular engine.
14. Respondent's engine specifications for Motorsport engines (turbo charged) provide that the acceptable oil consumption would be 2.5 liters of oil for every 1,000 miles driven in the vehicle.
15. On February 6, 2018, 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 June 7, 2018, in Austin, Texas before Hearings Examiner Edward Sandoval. Complainant, Michael Medina, represented himself and testified in the hearing. Beth White, friend, testified for Complainant. Also, William Grimes, Sales Advisor for Jaguar Land Rover of Austin, testified for Complainant under subpoena. Respondent was represented by Steven Soncini, After-Sales Area Manager. Victor Cheung, Technical Support Engineer, testified for Respondent.

IV. CONCLUSIONS OF LAW

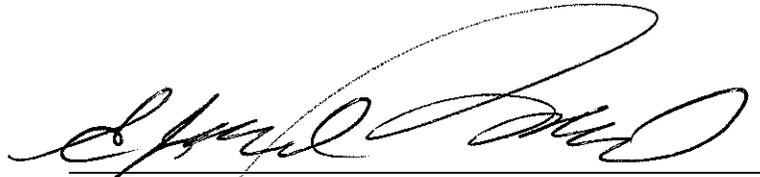
1. The Texas Department of Motor Vehicles (Department) has jurisdiction over this matter. Tex. Occ. Code §§ 2301.601-2301.613 (Lemon Law).
2. A hearings examiner of the Department's Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, 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 Complainants' petition for repurchase relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is hereby **DISMISSED**.

SIGNED June 15, 2018



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