

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 19-0003347 CAF**

<b>MAKAYLA KERNS,</b>	§	<b>BEFORE THE OFFICE</b>
<b>Complainant</b>	§	
v.	§	
	§	<b>OF</b>
<b>BMW OF NORTH AMERICA LLC,</b>	§	
<b>Respondent</b>	§	
	§	<b>ADMINISTRATIVE HEARINGS</b>

**DECISION AND ORDER**

Makayla Kerns (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in her 2016 Mini Cooper S. Complainant asserts that the vehicle’s engine will intermittently die after a cold start when she’s backing up in the vehicle and when the vehicle is at a stop and in Green mode. In addition, the vehicle’s dashboard will show a message to shift the vehicle’s transmission to Park and that the engine is off. BMW of North America LLC (Respondent) argued that the vehicle has been repaired, does not have a defect, and that no relief is warranted. The hearings examiner concludes that the vehicle does have an existing warrantable defect and Complainant is eligible for repurchase 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 May 8, 2019, in Carrollton, Texas before Hearings Examiner Edward Sandoval. Complainant, Makayla Kerns, was present and represented herself. Respondent was represented by Julie Schaffrick, After-Sales Manager. Also testifying for Respondent was Victor Cheung, Technical Support Engineer.

**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.<sup>1</sup> Second, the defect or condition in the vehicle creates a serious safety hazard or substantially impairs the use or market value of the vehicle.<sup>2</sup> Third, the owner must have mailed written notice of the alleged defect or

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<sup>1</sup> Tex. Occ. Code § 2301.604(a).

<sup>2</sup> *Id.*

nonconformity to the manufacturer.<sup>3</sup> Lastly, the manufacturer must have been given an opportunity to cure the defect or nonconformity.<sup>4</sup>

In addition to these 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.<sup>5</sup>

However, if a vehicle is found to have a nonconformity that creates a serious safety hazard which continues to exist, the rebuttable presumption that a reasonable number of repair attempts have been performed can be established if the vehicle has been subject to repair two or more times and: (1) at least one repair attempt was made during the 12 months or 12,000 miles, whichever comes first, following the date of original delivery to the owner; and (2) at least one other attempt was made in the 12 months or 12,000 miles, whichever comes first, immediately following the date of the first repair attempt.<sup>6</sup>

“Serious safety hazard” means a life-threatening malfunction or nonconformity that substantially impedes a person’s ability to control or operate a vehicle for ordinary use or intended purposes, or creates a substantial risk of fire or explosion.<sup>7</sup>

## **B. Complainant’s Evidence and Arguments**

Complainant purchased a new 2016 Mini Cooper S from Sewell Mini of Plano (Sewell) located in Plano, Texas on February 21, 2017, with mileage of 97 at the time of delivery.<sup>8</sup> Respondent’s bumper-to-bumper warranty for the vehicle provides coverage for four (4) years or 50,000 miles, whichever comes first. On the date of hearing the vehicle’s mileage was 18,696. At this time, Respondent’s warranty for the vehicle is still in effect.

Complainant testified that approximately two (2) months after purchasing the vehicle, she began to experience a problem with the vehicle’s engine intermittently dying when backing up in the vehicle after a cold start and also when the vehicle is at a stop and in Green mode. In addition,

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<sup>3</sup> Tex. Occ. Code § 2301.606(c)(1).

<sup>4</sup> Tex. Occ. Code § 2301.606(c)(2).

<sup>5</sup> Tex. Occ. Code § 2301.605(a)(1)(A) and (B).

<sup>6</sup> Tex. Occ. Code § 2301.605(a)(2)(A) and (B).

<sup>7</sup> Tex. Occ. Code § 2301.601(4).

<sup>8</sup> Complainant Ex. 1, Retail Purchase Agreement dated February 21, 2017.

the vehicle's dashboard will show a message to shift the vehicle's transmission to Park and that the engine is off. Complainant then has to restart the vehicle. Complainant stated that when the vehicle dies while backing up, she has to restart it several times before it will stay on without dying. Complainant stated that the vehicle dies as soon as she shifts the transmission to reverse and that this tends to occur on a cold start in the morning or after the vehicle has been sitting for several hours. Less often, the vehicle will die when she's driving it and stops for a light or stop sign. On those occasions, the vehicle will die when she attempts to accelerate away from the stop.

Complainant testified that she took the vehicle to Sewell for repair for the issue on April 7, 2017. Sewell's service technician verified the issue and also indicated that the vehicle was running rough.<sup>9</sup> The technician programmed the vehicle to the most current software in order to address the issue.<sup>10</sup> The vehicle's mileage at the time was 1,199.<sup>11</sup> The vehicle was in the dealer's possession for one (1) day. The dealer provided Complainant with a loaner vehicle while her vehicle was being repaired.

Complainant stated that she continued to experience the problem with the vehicle dying after the software update. Complainant took the vehicle to Sewell on April 25, 2017, for repair for the issue. Sewell's service technician checked the vehicle and determined that it was operating as designed.<sup>12</sup> He did not perform any repairs on this occasion. The mileage on the vehicle at the time of the repair visit was 1,669.<sup>13</sup> The vehicle was in Sewell's possession for three (3) days. Complainant was provided with a loaner vehicle while her vehicle was being repaired.

Complainant stated that she continued to experience the problem with the vehicle dying almost daily throughout April and into May of 2017. On May 25, 2017, Complainant took the vehicle to Sewell for repair for the issue. Complainant stated that she told Sewell's service advisor that she was continuing to experience the issue of the vehicle dying intermittently. She said that the problem had evolved into the vehicle jerking when she pressed the vehicle's accelerator. The service advisor indicated on the repair order that the "vehicle is jerking when accelerating."<sup>14</sup> Sewell's service technician determined that the vehicle's fuel pressure at idle was lower than a comparable vehicle's and replaced the low pressure fuel pump in order to resolve the issue.<sup>15</sup> The vehicle's mileage at the time was 2,446.<sup>16</sup> The vehicle was in Sewell's possession for six (6) days

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<sup>9</sup> Complainant Ex. 3, Repair Order dated April 7, 2017.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Complainant Ex. 4, Repair Order dated April 25, 2017.

<sup>13</sup> *Id.*

<sup>14</sup> Complainant Ex. 5, Repair Order dated May 25, 2017.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

during this repair visit. Complainant was provided with a loaner vehicle while her vehicle was being repaired.

Complainant testified that the problem continued to occur after the May 25, 2017 repair. However, she did not take the vehicle to the dealer for repair as she hoped that the problem would eventually resolve itself. During the summer of 2018, Complainant decided to take the vehicle to Sewell for repair for the issue again, since it was occurring on an almost daily basis. She took the vehicle to Sewell on August 2, 2018, for several concerns, including maintenance, as well as the issue of the vehicle intermittently dying. Sewell's service advisor indicated on the repair order that the vehicle was dying on cold starts and then ran rough once it did start.<sup>17</sup> Complainant stated that there was no repair performed for the issue.<sup>18</sup> The vehicle's mileage when it was taken to the dealership on this occasion was 9,682.<sup>19</sup> The vehicle was in the dealer's possession overnight. Complainant was provided a loaner vehicle while her vehicle was being repaired.

On November 10, 2018, Complainant wrote a letter to Respondent advising them of her dissatisfaction with the vehicle.<sup>20</sup> On November 17, 2018, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).<sup>21</sup>

Complainant stated that in November of 2018 she received an email from one of Respondent's representatives and was asked to take the vehicle to Sewell for repair. On November 24, 2018, Complainant took the vehicle to Sewell for an inspection and repair for the issue. Sewell's service technician verified the concern, but could not find any "faults in the system."<sup>22</sup> The technician reprogrammed the vehicle's software and replaced the spark plugs in the engine in order to resolve the concern.<sup>23</sup> The vehicle was in Sewell's possession for three (3) weeks on this occasion. Complainant received a loaner vehicle while her vehicle was being repaired.

Complainant testified that the issue was still occurring intermittently. She last experienced the issue with the vehicle dying while backing up two days prior to the hearing when the vehicle died twice while she attempted to back out of the parking space at her apartment complex the first thing in the morning. Prior to that, on the previous Friday, the vehicle died three (3) times while she was trying to back up. Approximately a week and a half before the hearing, the vehicle died while stopped at an intersection waiting for a light to turn green. Complainant stated that when

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<sup>17</sup> Complainant Ex. 6, Repair Order dated August 2, 2018, p. 4.

<sup>18</sup> *Id.* The repair order does not indicate that any action was taken regarding Complainant's concern about the vehicle dying at the time.

<sup>19</sup> *Id.*

<sup>20</sup> Complainant Ex. 8, Letter to BMW Manufacturing dated November 10, 2018.

<sup>21</sup> Complainant Ex. 7, Lemon Law Complaint dated November 17, 2018.

<sup>22</sup> Complainant Ex. 9, Repair Order dated November 24, 2018.

<sup>23</sup> *Id.*

the light turned green, she attempted to accelerate in the vehicle and it died. She felt that the vehicle could have been rear ended if there had been another vehicle behind hers. Complainant stated that she does not feel safe in the vehicle. She does not feel comfortable driving her younger siblings in the vehicle with her, as she's afraid that the vehicle may die while she's driving and it could be rear ended.

### **C. Respondent's Evidence and Arguments**

Victor Cheung, Technical Support Engineer, testified for Respondent. Mr. Cheung has worked for over 30 years in the automotive industry. He's worked for Respondent for 33 years. He's been in his current position for the past 25 years. Mr. Cheung is an Automotive Service Excellence (ASE) Certified Master Technician. In addition, he is a BMW Level 1 Master Technician.

Mr. Cheung inspected Complainant's vehicle on March 25, 2019, at Sewell's location. This was Respondent's final inspection and repair attempt on the vehicle. Mr. Cheung stated that he checked all of the vehicle's status values and tried to duplicate the concern. However, he could not recreate the issue of the vehicle dying when backing up after a cold start or dying at a stop when in Green mode. Mr. Cheung did state that the vehicle felt a little "rough" on start up. He determined that the vehicle's computers' programming was out of date, so he updated the computers in an attempt to resolve Complainant's concerns. Mr. Cheung also changed the vehicle battery during the repair visit. No other repair was performed at the time. The vehicle's mileage at the time of the inspection was 16,653.<sup>24</sup> Complainant was provided a loaner vehicle while the inspection took place.

Mr. Cheung stated that Green mode in the vehicle is a system which allows the vehicle's driver to be more eco-friendly and to drive more economically. Green mode is designed to turn the engine off when the vehicle is being driven and is at a stop and certain parameters are met. However, the engine is supposed to restart when the driver takes their foot off the brake. It's not necessary to physically restart the vehicle using the start/stop button when the engine turns off in Green mode.

### **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 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

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<sup>24</sup> Respondent Ex. 1, Repair Order dated March 25, 2019.

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.

The evidence establishes the existence of a defect or nonconformity in Complainant's vehicle that creates a serious safety hazard. A vehicle that intermittently dies at stop signs and stop lights creates a serious safety hazard as it substantially impedes Complainant's ability to operate the vehicle for ordinary use or intended purpose. There is a danger that when the vehicle dies it could be struck from behind by impatient or inattentive drivers while Complainant is trying to restart it. The intermittent nature of the condition also increases the safety risk. Complainant has met her burden of proof to establish the existence of a warrantable defect or condition in the vehicle that creates a serious safety hazard.

Complainant purchased the vehicle on February 21, 2017, and presented the vehicle to Respondent's authorized dealer (Sewell) for repair due to her concerns with the vehicle's engine intermittently dying when backing up and when the vehicle is at a stop when in Green mode on the following dates: April 7, 2017; April 25, 2017; May 25, 2017; August 2, 2018; and November 24, 2018. Occupations Code § 2301.604(a) requires a showing that Respondent was unable to conform the vehicle to an applicable express warranty "after a reasonable number of attempts." Section 2301.605(a)(2) specifies that a rebuttable presumption that a reasonable number of attempts to repair a vehicle that has a defect or nonconformity that creates a serious safety hazard have been made if "at least one repair attempt to repair the nonconformity was made in the 12 months or 12,000 miles, whichever occurs first, following the date of original delivery to the owner, and at least one other repair attempt was made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the first repair attempt." The evidence presented at the hearing establishes that Complainant has met the requirements of this test as she took the vehicle for repair for the issue three (3) times within a two (2) month period. As such, Complainant has established that Respondent was provided a reasonable number of attempts to repair the vehicle.

In addition, the evidence presented at the hearing indicates that Complainant also provided Respondent with a final opportunity to cure the defect. Complainant informed Respondent via letter dated November 10, 2018, of the issues with the vehicle and providing them with an opportunity to cure of which Respondent availed themselves. The vehicle was inspected and a final repair attempt was performed on March 25, 2019, by Respondent's representative who had the vehicle's computers reprogrammed and charged the battery. However, the problem with the vehicle intermittently dying when backing up and when driving in Green mode continues to occur.

Although Respondent has been provided several opportunities to repair the vehicle and to ensure that it operates properly, they have not been able to do so. As such, Complainant has met her burden of proof to establish that the vehicle has a warrantable and existing defect or condition that creates a serious safety hazard.

Based on the evidence and the arguments presented, the hearings examiner finds that repurchase of the vehicle is the appropriate remedy in this case. Complainant's request for repurchase relief is hereby granted.

### III. FINDINGS OF FACT

1. Makayla Kerns (Complainant) purchased a new 2016 Mini Cooper S on February 21, 2017, from Sewell Mini of Plano (Sewell) in Plano, Texas with mileage of 97 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 which provides coverage for four (4) years or 50,000 miles, whichever occurs first.
3. The vehicle's mileage on the date of hearing was 18,696.
4. At the time of hearing the vehicle's bumper-to-bumper warranty was still in effect.
5. Complainant is concerned because the vehicle's engine will intermittently die after a cold start when she's backing up in the vehicle and when at a stop when being driven in Green mode. In addition, the vehicle's dashboard will show a message to shift the vehicle's transmission to Park and that the engine is off.
6. Complainant took the vehicle to Respondent's authorized dealer in order to address her concerns with the vehicle dying and the warning message displaying on the following dates:
  - a. April 7, 2017, at 1,199 miles;
  - b. April 25, 2017, at 1,669 miles;
  - c. May 25, 2017, at 2,446 miles; and
  - d. August 2, 2018, at 9,682 miles.
7. On April 7, 2017, Sewell's service technician verified the concern and reprogrammed the vehicle's computers to add the most current software in order to resolve the issue.

8. On April 25, 2017, Sewell's service technician determined that the vehicle was operating as designed, as he could not recreate the concern.
9. On May 25, 2017, Sewell's service technician replaced the vehicle's low pressure fuel pump in order to resolve an issue of the vehicle jerking during acceleration.
10. On May 25, 2017, Complainant had informed Sewell's service advisor that the vehicle was dying and that the vehicle's dashboard was showing a message to shift the vehicle's transmission to Park.
11. On August 2, 2018, Sewell's service technician inspected the vehicle for the complained of issue (as well as other issues). There is no record as to what repair, if any, was performed at the time.
12. Complainant provided written notice of the defect to Respondent on November 10, 2018.
13. On November 17, 2018, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
14. On November 24, 2018, Sewell's service technician inspected the vehicle and verified Complainant's concern. The technician changed the vehicle's spark plugs in order to resolve the concern.
15. Respondent performed a final repair on the vehicle on March 25, 2019, at Sewell. The vehicle was reprogrammed and the battery was charged in an attempt to resolve the issue.
16. Complainant is still experiencing the issue with the vehicle intermittently dying when backing up after a cold start and also intermittently dying when at a stop while in Green mode.
17. On February 12, 2019, 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 and the record closed on May 8, 2019, in Carrollton, Texas before Hearings Examiner Edward Sandoval. Complainant, Makayla Kerns, was

present and represented herself. Respondent was represented by Julie Schaffrick, After-Sales Manager. Also testifying for Respondent was Victor Cheung, Technical Support Engineer.

#### 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's vehicle has an existing nonconformity that creates a serious safety hazard. Tex. Occ. Code § 2301.604(a).
7. After a reasonable number of attempts, Respondent has been unable to repair the nonconformity in Complainant's vehicle so that it conforms to the applicable express warranty. Tex. Occ. Code §§ 2301.604(a) and 2301.605.
8. Based on the above Findings of Fact and Conclusions of Law, Complainant is entitled to relief under Texas Occupations Code § 2301.604(a).
9. Based on the above Findings of Fact and Conclusions of Law, Respondent is required to repurchase Complainant's 2016 Mini Cooper S. Tex. Occ. Code § 2301.604(a)(1).

#### **IT IS THEREFORE ORDERED** that:

1. Respondent shall accept the return of the vehicle from Complainant. Respondent shall have the right to have its representatives inspect the vehicle upon the return by Complainant. If from the date of the hearing to the date of repurchase the vehicle is

substantially damaged or there is an adverse change in its condition beyond ordinary wear and tear, and the parties are unable to agree on an amount of an allowance for such damage or condition, either party may request reconsideration by the Office of Administrative Hearings of the repurchase price contained in this final order;

2. Respondent shall repurchase the subject vehicle in the amount of **\$25,941.58** which shall be paid to Complainant and the vehicle lien holder as their interests require. (The total repurchase price includes reimbursement of the \$35 Lemon Law filing fee.) If clear title to the vehicle is delivered to Respondent, then the full refund shall be paid to Complainant. At the time of return, Respondent or its agent is entitled to receive clear title to the vehicle. If the above noted repurchase amount does not pay all liens in full, Complainant is responsible for providing Respondent with clear title to the vehicle;

Purchase price, including tax, title, license and registration	\$28,223.37
Delivery mileage	97
Mileage at first report of defective condition	1,199
Mileage on hearing date	18,696
Useful life determination	120,000

Purchase price, including tax, title, license and registration		\$28,223.37			
Mileage at first report of defective condition		1,199			
Less mileage at delivery		<u>-97</u>			
Unimpaired miles		1,102			
Mileage on hearing date		18,696			
Less mileage at first report of defective condition		<u>-1,199</u>			
Impaired miles		17,497			
Reasonable Allowance for Use Calculations:					
Unimpaired miles		<u>1,102</u>			
	120,000		X	\$28,223.37	= \$259.18
Impaired miles		<u>17,497</u>			
	120,000		X	\$28,223.37	X .5 = <u>\$2,057.60</u>
Total reasonable allowance for use deduction:					<u>\$2,316.79</u>
Purchase price, including tax, title, license and registration		\$28,223.37			
Less reasonable allowance for use deduction		<u>-\$2,316.79</u>			
Plus filing fee refund		<u>\$35.00</u>			
<b>TOTAL REPURCHASE AMOUNT</b>		<b>\$25,941.58</b>			

11. Within twenty (20) calendar days from the receipt of this order, the parties shall complete the return and repurchase of the subject vehicle. If the repurchase of the subject vehicle is not accomplished as stated above, barring a delay based on a party's exercise of rights in accordance with Texas Government Code § 2001.144, starting on the 31<sup>st</sup> calendar day from receipt of this order, Respondent is subject to a contempt charge and the assessment of civil penalties. However, if the Office of Administrative Hearings determines the failure to complete the repurchase as prescribed is due to Complainants' refusal or inability to deliver the vehicle with clear title, the Office of Administrative Hearings may deem the granted relief rejected by Complainants and the complaint closed pursuant to 43 Texas Administrative Code § 215.210(2).

4. Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall obtain a Texas title for the reacquired vehicle prior to resale and issue a disclosure statement on a form provided or approved by the Department;<sup>25</sup>
5. Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall affix the disclosure label to the reacquired vehicle in a conspicuous. Upon Respondent's first retail sale of the reacquired vehicle, the disclosure statement shall be completed and returned to the Department.
6. Within sixty (60) days of transfer of the reacquired vehicle, Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall provide to the Department written notice of the name, address and telephone number of any transferee (wholesaler or equivalent), regardless of residence.

### 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-.613 is hereby **GRANTED**. It is further **ORDERED** that Respondent shall repair the warrantable defect in the reacquired vehicle identified in this Decision.

**SIGNED May 23, 2019.**



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

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<sup>25</sup> Correspondence and telephone inquiries regarding disclosure labels should be addressed to: Texas Department of Motor Vehicles, Enforcement Division-Lemon Law Section, 4000 Jackson Avenue Building 1, Austin, Texas 78731, ph. (512) 465-4076.