

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 20-0007188 CAF**

**HANI TOHME,  
Complainant**

v.

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

and

**BMW FINANCIAL SERVICES NA,  
LLC,  
Intervenor**

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**BEFORE THE OFFICE  
OF  
ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Hani Tohme (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in his 2017 BMW X5. Complainant asserts that the vehicle has defects or nonconformities which have caused the vehicle's power steering to fail, the brakes to lock up, the sunroof not work properly, the XM radio and navigation system to not work, the paint on the front bumper to peel, and the air conditioning system to not work properly. BMW of North America, LLC (Respondent) argued that the vehicle has been repaired, does not have any current defects or nonconformities, and that no relief is warranted. The hearings examiner concludes that the vehicle has been repaired, 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 telephonically on September 22, 2020, before Hearings Examiner Edward Sandoval. Hani Tohme, Complainant, was present and testified. He was represented by his son, John Tohme, in the hearing. Merritt Spencer, attorney with Clark, Hill, Strasburger, appeared and represented Respondent, BMW of North America, LLC. Gino Palacios, paralegal for Respondent, appeared at the hearing. Also appearing for Respondent were James Aguilar, Technical Support Engineer; Richard Haricharan, Area After-Market Manager; and Richard Opaluch, Technical Support Engineer. Subpoenaed witnesses were Ray Bishop, Collision Manager for Sterling McCall Collision Center Clear Lake and

Stephen Prather, General Manager, Advantage BMW Midtown. Mr. Bishop and Mr. Prather were represented by Andrew Sharensen, attorney with Johnson, Deluca, Kurisky, and Gould. Intervenor, BMW Financial Services, NA, LLC, was represented by Sabrina Morrell, paralegal. The hearing was continued to December 11, 2020, in order to provide the hearings examiner an opportunity to inspect and test drive the subject vehicle.

The continuance was conducted by Hearings Examiner Edward Sandoval on December 11, 2020, at the Texas Department of Motor Vehicles' regional office in Houston, Texas. Hani Tohme, Complainant, appeared and represented himself. Respondent was represented by Merritt Spencer, attorney. James Aguilar, Technical Support Engineer, appeared and testified for Respondent. Intervenor did not participate in the continuance. The hearing record was closed on December 11, 2020.

## 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 manufacturer has been given a reasonable number of attempts to repair or correct the defect or condition.<sup>3</sup> Fourth, the owner must have mailed written notice of the alleged defect or nonconformity to the manufacturer.<sup>4</sup> Lastly, the manufacturer must have been given an opportunity to cure the defect or nonconformity.<sup>5</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 by the manufacturer, converter, or distributor, or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and the repair attempts were made before the earlier of:

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

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

<sup>3</sup> *Id.*

<sup>4</sup> Tex. Occ. Code § 2301.606(c)(1).

<sup>5</sup> Tex. Occ. Code § 2301.606(c)(2).

(A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.<sup>6</sup>

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 by the manufacturer, converter, or distributor, or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.<sup>7</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>8</sup>

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

Complainant leased a new 2017 BMW X5 from Advantage BMW Midtown (Midtown) in Houston, Texas on January 31, 2018, with mileage of 490 at the time of delivery.<sup>9</sup> Respondent issued a new vehicle warranty which provides coverage for the vehicle for four (4) years or 50,000 miles from the date of delivery, whichever occurs first.<sup>10</sup> The vehicle’s mileage on the date of hearing was 31,257. At the time of hearing the vehicle’s warranty was still in effect.

John Tohme, Complainant’s son, testified in the hearing. He stated that he was present when Complainant leased the vehicle. Complainant decided to lease the vehicle as a result of an ad that he saw on line which offered an almost \$20,000 discount for the vehicle. Complainant did not test drive the vehicle before leasing. Complainant did not pick up the vehicle at the time that he signed the lease agreement. Mr. Tohme testified that Complainant was told that the vehicle’s bumper had a scratch and that it had to be repaired. He was not given a time frame for the repair. Complainant did not receive the vehicle until 60 days after signing the lease agreement it, as the vehicle required extensive repairs for damage performed prior to the lease. The dealer did not provide Complainant a loaner or rental vehicle while the subject vehicle was being repaired.

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<sup>6</sup> Tex. Occ. Code § 2301.605(a)(1)(A) and (B). Texas Occupations Code § 2301.605(a) (3) provides a third method for a complainant to establish a rebuttable presumption that a reasonable number of attempts have been undertaken to conform a vehicle to an applicable express warranty. This section 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.

<sup>7</sup> Tex. Occ. Code § 2301.605(a)(2)(A) and (B).

<sup>8</sup> Tex. Occ. Code § 2301.601(4).

<sup>9</sup> Complainant Ex. 2, Motor Vehicle Lease Agreement (Closed End) dated January 31, 2018.

<sup>10</sup> Complainant Ex. 6, BMW New Vehicle Limited Warranty Manual, p. 1.

Mr. Tohme testified that Complainant received the vehicle on April 1, 2018. Mr. Tohme states that Complainant was not provided a reason for the delay in getting the vehicle.

After taking possession of the vehicle, Complainant began to experience problems with the vehicle's XM radio and navigation system not working. In addition, the sunroof stopped working. Complainant took the vehicle to BMW of Beaumont (Beaumont) located in Beaumont, Texas for repair for the issues on June 22, 2018. Beaumont's service technician performed a software update on the vehicle and initialized the vehicle's slide/tilt sunroof and power windows in order to resolve Complainant's concerns with the vehicle.<sup>11</sup> The vehicle's mileage at the time was 4,333.<sup>12</sup> The vehicle was in the dealer's possession until June 26, 2018<sup>13</sup>. Complainant was provided a loaner vehicle while his vehicle was being repaired. The vehicle's sunroof worked properly after the repair was performed. In addition, the radio and navigation system worked immediately after the repair. No other repairs were performed for the sunroof or for the radio and navigation system.

Mr. Tohme testified that soon after getting the vehicle back from the dealer, the theft system activated and the vehicle's navigation system and XM radio would again not work. Complainant took the vehicle back to Beaumont for repair for the issues on June 29, 2018. Beaumont's service technician programmed and encoded vehicle modules, performed a battery power reset, and activated the vehicle's navigation system in order to resolve the issues.<sup>14</sup> The vehicle's mileage on this occasion was 5,698.<sup>15</sup> The vehicle was in Beaumont's possession for 18 days. Mr. Tohme could not recall if Complainant was provided a loaner vehicle on this occasion. Complainant has not had any other repairs performed for the issues addressed during this repair visit.

Mr. Tohme testified that in September of 2018, the vehicle's battery malfunctioned and the air conditioner was not cooling the vehicle. Complainant took the vehicle to Beaumont for repair for the issues on September 25, 2018. Beaumont's service technician replaced the vehicle's battery to address the battery issue.<sup>16</sup> The technician also replaced the vehicle's recirculating air filter.<sup>17</sup> In addition, the service technician determined that the vehicle's air conditioner was working within the manufacturer's specifications.<sup>18</sup> As a result, no repair was performed to the air conditioning system. The vehicle's mileage on this occasion was 11,664.<sup>19</sup> The vehicle was in Beaumont's possession for one (1) day during this repair visit. Mr. Tohme could not recall if Complainant was provided a loaner vehicle at the time. Mr. Tohme testified that the air

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<sup>11</sup> Respondent Ex. 2, Repair Order dated June 22, 2018.

<sup>12</sup> *Id.*

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

<sup>14</sup> Respondent Ex. 3, Repair Order dated June 29, 2018.

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

<sup>16</sup> Respondent Ex. 4, Repair Order dated September 25, 2018.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

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

conditioner worked better after the repair visit. However, he stated that the air conditioner will periodically not blow cold air. Mr. Tohme testified that the last time that the air conditioner did not blow out cold air was approximately one week prior to the hearing date of September 22, 2020. Complainant has not taken the vehicle back to the dealer for repair for the air conditioner issue, however.

Mr. Tohme stated that in April of 2019, Complainant noticed that paint was peeling from the vehicle's front bumper. Complainant took the vehicle to Beaumont for repair for the issue on April 22, 2019. The vehicle's mileage at the time was 20,670.<sup>20</sup> The vehicle was in Beaumont's possession for 22 days while the front bumper was repainted. Complainant was provided a loaner vehicle while his vehicle was being repainted. There have been no other issues with paint peeling from the vehicle.

Mr. Tohme testified that sometime in May of 2019, the vehicle's brakes engaged while Complainant was driving it and a loud screeching noise occurred. No warning lights illuminated. Mr. Tohme stated that when driving the vehicle at the time, it seemed as if the vehicle's parking brake was activated, although it was not. On May 15, 2019, Complainant took the vehicle to Advantage BMW of Clear Lake (Advantage) located in League City, Texas in order to have the issue repaired. Advantage's service technician could not duplicate the issue and performed no repair to the vehicle.<sup>21</sup> Mr. Tohme testified that he told the service advisor that there was an issue with the vehicle's brakes locking up, but that the issue was not included on the repair order. The vehicle's mileage was 20,797 at the time of the repair visit.<sup>22</sup> The vehicle was in the dealer's possession for the repair for one (1) day at the time. No loaner was provided at the time. Complainant refused to pick up the vehicle after the repair was performed. Complainant left the vehicle at Advantage's location for two (2) to four (4) weeks before he decided to pick it up. When Complainant picked up the vehicle, there was no noise from the vehicle's brakes.

Mr. Tohme stated that the brakes have periodically locked up after the incident. However, it seems to only be for a second or so when it occurs. Complainant did not feel that anything could be done regarding the issue or that it could be repaired, so he never took the vehicle for repair for the issue. Mr. Tohme testified that the issue last arose approximately two (2) to three (3) months prior to the hearing date.

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<sup>20</sup> Respondent Ex. 5, Repair Order dated April 22, 2019.

<sup>21</sup> Respondent Ex. 6, Repair Order dated May 15, 2019. Although Mr. Tohme testified that they indicated to the service advisor that the vehicle's brakes were locking, the repair order indicated that the customer was hearing a loud noise while pressing the gas pedal. There was no mention of the brakes locking up on the repair order.

<sup>22</sup> *Id.*

Mr. Tohme testified that the vehicle's power steering failed in October of 2019 and that the vehicle would not turn left or right. In addition, the vehicle would make a loud rubbing noise when Complainant tried to turn the vehicle. Complainant took the vehicle to Advantage for repair for the issue on October 29, 2019. The service advisor indicated on the repair order that the vehicle's transmission shuddered when making slow, sharper turns.<sup>23</sup> Advantage's service technician verified the issue and determined that vehicle's transfer case was not working properly.<sup>24</sup> The technician replaced the transfer case and updated the vehicle programming in order to address the issue.<sup>25</sup> The vehicle's mileage at the time was 22,782.<sup>26</sup> The vehicle was in Advantage's possession for four (4) days during this repair visit. Complainant was provided a loaner vehicle while his vehicle was being repaired. Mr. Tohme stated that the vehicle was operating correctly when it was returned to Complainant. There have not been any other issues with the vehicle's power steering or transmission shudder since the repair.

Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) on January 25, 2020.<sup>27</sup> Complainant mailed written notice to Respondent advising them that he was dissatisfied with the vehicle.<sup>28</sup> However, he could not remember the date that it was mailed.

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

### **1. Stephen Prather's Testimony**

Stephen Prather, Midtown's general manager, testified for Respondent under subpoena. Mr. Prather was called to testify regarding the ownership of the vehicle. Mr. Prather testified that Complainant was the first retail purchaser of the vehicle. There was no record of a sale of the vehicle prior to January 31, 2018. Mr. Prather testified that he does not know how the vehicle was damaged prior to Complainant leasing the vehicle.

### **2. Ray Bishop's Testimony**

Ray Bishop, Collision Manager for Sterling McCall Collision Center Clear Lake, testified under subpoena. Mr. Bishop stated that the vehicle was sent to his facility in early February of 2018, for repair for damage to the vehicle's body. Mr. Bishop stated that there was \$12,720.61 in damage to the vehicle prior to Complainant's possession of it. Mr. Bishop stated that he doesn't

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<sup>23</sup> Respondent Ex. 7, Repair Order dated October 29, 2019. The repair order did not say anything about the vehicle's power steering failing.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Complainant Ex. 1, Lemon Law Complaint dated January 25, 2020.

<sup>28</sup> Complainant Ex. 5, Letter to BMW USA, undated.

feel that the vehicle had major damage. He stated that parts for this model vehicle are expensive. Mr. Bishop stated that he does not think that any of the vehicle's electronics were affected by the repairs. In addition, no components for the braking system were replaced during the repair.

### **3. Richard Opaluch's Testimony**

Richard Opaluch, Technical Support Engineer, testified for Respondent. He has worked for Respondent for the last three (3) years in his current position. Mr. Opaluch stated that he has worked for 24 years with BMW in various dealerships. He is a Certified BMW Master Technician. He is also an Automotive Service Excellence (ASE) Certified Master Technician.

Mr. Opaluch stated that he examined the vehicle's repair history and that there has been no issue raised by Complainant that was presented more than twice for repair.

Mr. Opaluch testified that on June 22, 2018, Complainant presented the vehicle to Beaumont for repair because the XM radio and navigation system were not working. The vehicle went into theft prevention mode and the systems were locked which means that the radio won't play and the navigation system won't work. The vehicle is not unsafe to operate in this condition. The technician generated an unlocking code and programmed the vehicle's computers to the latest software level and imported an unlocking code to the vehicle. In addition, the vehicle's sunroof and power windows were initialized to get the sunroof to work properly.

On June 29, 2018, the XM radio and navigation system again were not working because the vehicle went into theft prevention mode. The unlocking code was put back into the vehicle again. A loaner was provided for Complainant while his vehicle was being repaired.

Mr. Opaluch stated that on September 25, 2018, the vehicle's battery was replaced which was recommended by Respondent's maintenance interval and was part of the vehicle's normal maintenance. The technician inspected the vehicle's air conditioning unit and determined that the air conditioner was working within factory specifications. There was no repair performed for the air conditioning issue. However, when the battery was replaced, the entire electrical system was reset. The reset was not done to repair the vehicle's air conditioner.

On April 22, 2019, Mr. Opaluch happened to be at Beaumont and inspected the vehicle when requested by Beaumont's technicians. He observed that the vehicle's clear coat was peeling from the vehicle's front bumper. Mr. Opaluch reported the issue to the area's after sales manager who decided to cover the cost of repainting the bumper under goodwill, since it was apparent that the paint issue was not due to Complainant's actions. Complainant was provided with a loaner vehicle while the vehicle was being repaired. Mr. Opaluch stated that there was no record of a paint issue recurring with the vehicle.

Mr. Opaluch stated that on May 15, 2019, Complainant presented the vehicle to Advantage for repair. However, there was nothing on the repair invoice to indicate that there was an issue with the vehicle's brakes locking. The technician found no faults with the vehicle. Mr. Opaluch stated that the vehicle's brakes were not locking at this time. He stated that the vehicle will come to a stop if the brakes locked. In this type of situation, it is not possible to continue to drive the vehicle. Mr. Opaluch stated that something could have gotten stuck between the brake rotor and brake pad to create the noise heard by Complainant and make it seem as if the brakes were locking. No repair was done for the issue at the time of the repair visit. The vehicle was ready for pick up on May 16, 2019, but Complainant did not pick it up until June 4, 2019.

Mr. Opaluch stated that the October 29, 2019 repair invoice indicated that the vehicle's transmission was shuddering on slow sharp turn or acceleration. There was nothing on the invoice about the vehicle's power steering not working. Mr. Opaluch stated that due to mechanical failure the technician replaced the vehicle's transfer box which supplies power to the vehicle's front wheels. This was not an electronic issue. There were no other repairs to the vehicle for similar issues.

Mr. Opaluch stated that the XM radio and navigation system issues were the only issues on the vehicle that required more than one (1) repair attempt. He stated that the theft prevention system is designed to prevent the vehicle's radio from being stolen. The system is all one piece, that's why both the radio and the navigation system were affected at the same time.

## **E. 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.

### **1. Sunroof Issue**

The first issue raised by Complainant was that the vehicle's sunroof stopped working soon after leasing the vehicle and taking possession of it. Complainant took the vehicle to Beaumont for repair for the issue on June 22, 2018. Beaumont's service technician repaired the issue at the



time. After the repair, Complainant did not have any other issues with the sunroof. The Lemon Law requires that in order for a vehicle to be determined to be a “lemon” the “nonconformity continues to exist” after the manufacturer has made repeated repair attempts.<sup>29</sup> As such, the hearings examiner must hold that the issues with the vehicle’s sunroof has been repaired and does not provide grounds to order repurchase or replacement of the vehicle.

## **2. XM Radio and Navigation System Issues**

Complainant also indicated that the vehicle’s XM radio and navigation system did not work properly. The vehicle went into theft prevention mode twice soon after Complainant began leasing the vehicle. The vehicle was repaired for these issues on June 22, 2018 and June 29, 2018. The issues were repaired during the second repair attempt and did not recur after that date. As such, the hearings examiner must hold since they are repaired, they do not provide grounds to order repurchase or replacement of the vehicle.

## **3. Air Conditioner Issue**

Another issue raised by Complainant was that the vehicle’s air conditioner did not seem to work correctly. He felt that it took too long to cool off. The evidence provided at hearing indicates that the vehicle’s air conditioner was working within the manufacturer’s specifications. In addition, Complainant never raised the issue for further repair after September 25, 2018. As such, the hearings examiner must hold that there is no defect with the vehicle’s air conditioner since it’s operating within the manufacturer’s specifications. Therefore, the issue does not provide grounds to order repurchase or replacement of the vehicle.

## **4. Paint Peeling Issue**

Complainant raised the issue of the vehicle’s clear coat peeling off the vehicle’s front bumper. Complainant presented the issue to Respondent’s authorized dealer for repair on April 22, 2018, and the issue was addressed at the time. There was no evidence presented at the hearing indicating that the issue had recurred. As such, the hearings examiner must hold that the paint peeling issue has been repaired and that it does not provide grounds to order repurchase or replacement of the vehicle.

## **5. Brakes Locking Up/Noise From Front Brakes Issue**

Complainant indicated that he had a concern that the vehicle’s brakes were locking up and that it was an ongoing concern. The testimony provided by Complainant’s witness was that this occurs periodically for about a second or so when Complainant is driving the vehicle. The controverting

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<sup>29</sup> Tex. Occ. Code § 2301.605.

testimony was that if the vehicle's brakes locked up, Complainant would not be able to continue driving the vehicle. During the test drive and inspection of the vehicle, the hearings examiner did not notice any issues with the way the vehicle performed. Since it seems unlikely that the vehicle's brakes are actually locking up while Complainant is driving, the hearings examiner must hold that Complainant has failed to meet his burden of proof to establish that there is a brake defect in the vehicle.

In addition, Complainant complained in May of 2019 about a loud noise from the vehicle's brakes when the vehicle's accelerator was depressed. The issue could not be duplicated during the May 15, 2019, repair attempt. In addition, Complainant did not indicate that the issue recurred after the repair visit. As such, the hearings examiner must hold that the brakes locking up and loud noise from the vehicle's brakes do not constitute grounds to order repurchase or replacement of the vehicle.

#### **6. Power Steering/Transmission Shudder Issues**

Complainant's testimony was that there was an issue with the vehicle's power steering and that he presented the vehicle to Respondent's authorized dealer for repair for the issue on October 29, 2019. However, Respondent's testimony was that the issue was never raised by Complainant and that the repair performed on October 29, 2019 was for a transmission shudder when the driver turned the vehicle. The issue was repaired during the above cited repair visit. The issue never recurred and Complainant has not had any issues with the vehicle's power steering. Regardless of what the actual issue was during the repair described above, the hearings examiner must hold that the issue was repaired and that it does not provide grounds for the hearings examiner to order repurchase or replacement of the vehicle.

Respondent's new vehicle 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 31,257 and the vehicle 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 warranties.

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

### **III. FINDINGS OF FACT**

1. Hanı Tohme (Complainant) leased a new 2017 BMW X5 on January 31, 2018, from Advantage BMW Midtown (Midtown) in Houston, Texas, with mileage of 490 at the time of delivery.

2. The vehicle lease was administered through BMW Financial Services, NA, LLC.
3. The manufacturer or distributor of the vehicle, BMW of North America, LLC (Respondent), issued a new vehicle warranty for the vehicle providing coverage for four (4) years or 50,000 miles, whichever comes first, from the date of delivery.
4. The vehicle's mileage on the date of hearing was 31,257.
5. At the time of hearing the vehicle's warranty was still in effect.
6. Complainant raised several issues with the vehicle, these were: the vehicle's power steering failed, the brakes locked up, the sunroof didn't work properly, the XM radio and navigation system did not work, the paint on the front bumper peeled, and the air conditioning system did not work properly.
7. Complainant took the vehicle to Respondent's authorized dealers, BMW of Beaumont (Beaumont) located in Beaumont, Texas and Advantage BMW of Clear Lake (Advantage) located in League City, Texas, for repair for the issues described in Findings of Fact #6 on the following dates:
  - a. June 22, 2018, at 4,333 miles;
  - b. June 29, 2018, at 5,698 miles;
  - c. September 25, 2018, at 11,664 miles;
  - d. April 22, 2019, at 20,670 miles;
  - e. May 15, 2019, at 20,797 miles; and
  - f. October 29, 2019, at 22,782 miles.
8. On June 22, 2018, Beaumont's service technician performed a software update and initialized the vehicle's sunroof and power windows because the sunroof had stopped worked.
9. Also on June 22, 2018, Beaumont's service technician generated an unlocking code and updated the vehicle's software to address the issue of the vehicle's XM radio and navigation system not working because the vehicle had gone into theft prevention mode.
10. On June 29, 2018, Beaumont's service technician programmed and encoded vehicle modules, performed a battery power reset, and activated the vehicle's navigation system in order to resolve the issues to resolve complainant's concerns regarding the vehicle's theft system activating, and the navigation system and XM radio not working.

11. On September 25, 2018, Complainant informed Beaumont's service advisor that he was having issues with the vehicle's battery and the air conditioner wasn't working.
12. During the repair visit described in Findings of Fact #11, Beaumont's service technician replaced the vehicle's battery and the recirculating air filter. In addition, the technician determined that the vehicle's air conditioner was operating within the manufacturer's specifications.
13. On April 22, 2019, Beaumont's service department had the vehicle's front bumper repainted because the clear coat was peeling.
14. On May 15, 2020, Advantage's service technician was unable to recreate Complainant's concern about a loud noise coming from the vehicle when stepping on the vehicle's accelerator. No repair was performed for the issue.
15. On October 29, 2020, Advantage's service technician replaced the vehicle's transfer case and updated the vehicle's programming to address the issue of the transmission shuddering when making a turn in the vehicle.
16. On January 25, 2020, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
17. On an unknown date, Complainant mailed a letter to Respondent advising them that he was dissatisfied with the vehicle.
18. On April 24, 2020, 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.
19. The hearing in this case convened telephonically on September 22, 2020, before Hearings Examiner Edward Sandoval. Hani Tohme, Complainant, was present and testified. He was represented by his son, John Tohme, in the hearing. Merritt Spencer, attorney with Clark, Hill, Strasburger, appeared and represented Respondent, BMW of North America, LLC. Gino Palacios, paralegal for Respondent, appeared at the hearing. Also present and testifying for Respondent were James Aguilar, Technical Support Engineer; Richard Haricharan, Area After Market Manager; and Richard Opaluch, Technical Support Engineer. Subpoenaed witnesses were Ray Bishop, Collision Manager for Sterling

McCall Collision Center Clear Lake, and Stephen Prather, General Manager, Advantage BMW Midtown. Mr. Bishop and Mr. Prather were represented by Andrew Sharensen, attorney with Johnson, Deluca, Kurisky, and Gould. Intervenor, BMW Financial Services, NA, LLC, was represented by Sabrina Morrell, paralegal. The hearing was continued to December 11, 2020, in order to provide the hearings examiner an opportunity to inspect and test drive the subject vehicle.

20. The continuance was conducted by Hearings Examiner Edward Sandoval on December 11, 2020, at the Texas Department of Motor Vehicles' regional office in Houston, Texas. Hani Tohme, Complainant, appeared and represented himself. Respondent was represented by Merritt Spencer, attorney. James Aguilar, Technical Support Engineer, appeared and testified for Respondent. Intervenor did not participate in the continuance. The hearing record was closed on December 11, 2020.

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

**SIGNED** January 25, 2021



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