

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 21-0000815 CAF**

**CHRISTINA GUTIERREZ,
Complainant**

v.

**VOLKSWAGEN GROUP OF
AMERICA, INC.,
Respondent**

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**BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Christina Gutierrez (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in her 2020 Volkswagen Passat. Complainant asserts that the vehicle has a defect which causes the oil warning light to illuminate. Volkswagen Group of America, Inc. (Respondent) argued that the vehicle is operating as designed, does not have any defects, and that no relief is warranted. The hearings examiner concludes that the vehicle has an existing warrantable defect and Complainant is eligible for 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 February 9, 2021, before Hearings Examiner Edward Sandoval. Complainant, Christina Gutierrez, represented herself and testified in the hearing. Respondent, Volkswagen Group of America, was represented by Susan Lucas, contract representative. The hearing record closed on February 9, 2021.

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

¹ Tex. Occ. Code § 2301.604(a).

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 these conditions, a rebuttable presumption can be established 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: (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.⁶

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.⁷

“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.⁸

Finally, a rebuttable presumption can be established 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 that substantially impairs the vehicle’s use or market value, the vehicle has been out of service for repair for a cumulative total of 30 or more days, and the repairs 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.⁹

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).

⁷ Tex. Occ. Code § 2301.605(a)(2)(A) and (B).

⁸ Tex. Occ. Code § 2301.601(4).

⁹ Tex. Occ. Code § 2301.605(a)(3)(A) and (B).

The 30 day out of service requirement described in Section 2301.605(a)(3) does not include any period during which the manufacturer or distributor lends the vehicle owner a comparable motor vehicle while the owner's vehicle is being repaired by a franchised dealer.¹⁰

B. Complainant's Evidence and Arguments

Complainant purchased a new 2020 Volkswagen Passat on March 26, 2020, from North Park Volkswagen of Dominion (North Park) in San Antonio, Texas with mileage of 38 at the time of delivery.¹¹ Respondent provided a new vehicle warranty for the vehicle which provides coverage for four (4) years or 50,000 miles, whichever comes first.¹² On the date of hearing the vehicle's mileage was 29,390. At this time, Respondent's warranty is still in effect.

Complainant testified that on April 24, 2020, within a month from the date of purchase, the vehicle's low oil level light illuminated. She pulled the vehicle into a gas station and called her sales person about the issue. The sales person advised Complainant to call Respondent's roadside assistance and have the vehicle towed to the dealer, which she did. North Park's service technician determined that the vehicle's engine was one and a half quarts low on oil and topped off the oil.¹³ The vehicle's mileage at the time of the repair visit was 2,540.¹⁴ The vehicle was in the dealer's possession for an hour and a half. Complainant waited for the vehicle, so she was not provided with a loaner vehicle while her vehicle was being repaired. Complainant stated that when she got the vehicle back, the oil warning light was off.

Complainant testified that she was driving the vehicle on June 22, 2020, when the low oil level warning light illuminated. She took the vehicle to North Park immediately. The technician decided to perform an oil consumption test on the vehicle, since this was the second time that the low oil level warning light illuminated.¹⁵ The vehicle's mileage at the beginning of the test was 8,962.¹⁶ Complainant drove the vehicle 642 miles and returned the vehicle to North Park on June 25, 2020. The vehicle's mileage was 9,604 when she returned the vehicle to the dealer to complete the oil consumption test.¹⁷ The technician determined that the oil loss was acceptable at 0.73 quarts per 1,000 miles.¹⁸ No repair was performed for the issue.

¹⁰ Tex. Occ. Code § 2301.605(c).

¹¹ Complainant Ex. 1, Purchase Agreement dated March 26, 2020.

¹² Respondent Ex. 1, Gutierrez Hearing Summary Packet, p. 1.

¹³ Respondent Ex. 2, Repair Order dated April 24, 2020.

¹⁴ *Id.*

¹⁵ Complainant Ex. 3, Repair order dated June 22, 2020.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

Complainant continued to observe the low oil level warning light illuminate. She took the vehicle to North Park for repair for the issue on July 15, 2020. North Park's service technician added one (1) quart of oil to the engine to address the concern.¹⁹ The vehicle's mileage on this occasion was 11,908.²⁰ The vehicle was in the dealer's possession for one (1) hour. Complainant was not provided with a loaner vehicle while her vehicle was being repaired.

Complainant testified that she mailed a notice of her dissatisfaction with the vehicle to Respondent on August 3, 2020.²¹ Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) on September 21, 2020.²²

Complainant testified that she continued to experience the low oil level warning light illuminating. She took the vehicle to North Park for routine maintenance on October 5, 2020. She mentioned at the time that she was concerned with the vehicle's oil usage. North Park's service technician decided to perform a second oil consumption test on the vehicle and informed Complainant to return the vehicle to North Park after driving at least 630 miles.²³ The vehicle's mileage on this occasion was 22,168.²⁴

Complainant took the vehicle back to North Park on October 13, 2020, in order to complete the oil consumption test. The service technician checked the vehicle's spark plugs to see if oil had leaked into onto them and did not observe any oil on them.²⁵ The technician also performed a compression test on the vehicle's engine cylinders and determined that they were operating correctly and were at 175 psi.²⁶ In addition, the technician checked the vehicle's fuel for debris and found none.²⁷ He then replaced the vehicle's crankcase breather valve in order to perform a third oil consumption test on the vehicle.²⁸ Complainant was advised to return the vehicle to North Park before driving 1,000 miles in order to complete the test.²⁹ The vehicle's mileage on this occasion was 22,917.³⁰

¹⁹ Respondent Ex. 4, Repair Order dated July 15, 2020.

²⁰ *Id.*

²¹ Complainant Ex. 9, Letter to Volkswagen dated August 3, 2020.

²² Complainant Ex. 10, Lemon Law Complaint dated September 21, 2020.

²³ Respondent Ex. 5, Repair Order dated October 5, 2020.

²⁴ *Id.*

²⁵ Respondent Ex. 6, Repair Order dated October 13, 2020.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

Complainant testified that she returned the vehicle to North Park to complete the oil consumption test on November 13, 2020. North Park's service technician determined that the vehicle's oil loss was within accepted tolerances at 0.33 quarts per 1,000 miles.³¹ No repairs were performed at the time. The vehicle's mileage on this occasion was 24,440.³²

Complainant testified that the low oil level warning light didn't illuminate again through November and most of December. The light illuminated on December 28, 2020. However, this was due to the fact that Complainant had forgotten to replace the oil cap on the vehicle when she had added oil to the vehicle.

Complainant testified that she still has to add oil to the vehicle's engine periodically. On occasion, the vehicle's low oil level warning light will illuminate. The last time this occurred was on February 1, 2021. Complainant stated that she does not feel that it is normal to add oil to a new vehicle so frequently. She stated that she has to add oil to the vehicle's engine every three (3) to four (4) weeks.

C. Respondent's Evidence and Arguments

Susan Lucas, contract representative, appeared and represented Respondent at the hearing. Ms. Lucas presented Respondent's evidence and statement packet for the hearing. Respondent feels that the vehicle is operating normally. In addition, Respondent feels that the "repair history does not show an unreasonable number of repair attempts, or a substantial impairment of use, value or safety of the vehicle."³³

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.

³¹ Complainant Ex. 7, Repair Order dated November 13, 2020.

³² *Id.*

³³ Respondent Ex. 1, Gutierrez Hearing Summary Packet, p. 3.

The first issue to address is whether Complainant's vehicle has a defect or condition that substantially impairs its use or market value or which creates a serious safety hazard. The totality of the evidence presented at the hearing reveals that the vehicle uses oil inordinately and that the issue has not been repaired. It is apparent from the testimony presented that the vehicle does have a defect or nonconformity which affects its use and market value, as a potential buyer would be more hesitant to purchase a vehicle that they are required to put oil in at least once a month. The issue also affects the use of the vehicle as Complainant has to consistently be aware that she may have to add oil to the vehicle. This is highly unusual in that most new vehicles do not require the owner to add or top off the oil at all or only at an oil change. Respondent did not present any evidence to indicate that the oil loss reported by Complainant was normal for the vehicle. Respondent's only comment was that they felt that the vehicle was operating normally and that there was no substantial impairment of use, value, or safety of the vehicle. Respondent did not provide any evidence regarding the parameters of what they consider to be normal oil consumption for the vehicle.

Complainant also presented evidence to indicate that Respondent or its authorized representative was provided with a reasonable number of repair attempts to repair the defect or nonconformity with the vehicle. Complainant presented the vehicle for repair to Respondent's authorized representatives on several occasions, including: April 24, 2020; June 22, 2020; June 25, 2020; July 15, 2020; October 5, 2020; October 13, 2020; and November 13, 2020. 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)(1) specifies that a rebuttable presumption that a reasonable number of attempts to repair have been made if the manufacturer, converter, or distributor, or an authorized agent or franchised dealer of a manufacturer, converter, or distributor has made four or more attempts to repair the vehicle "and the repair 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" The evidence presented at the hearing establishes that Complainant has met the requirements of this test since she took the vehicle for repair the requisite number of times. As such, Complainant has established that a reasonable number of attempts to repair the vehicle were made by Respondent.

In addition, the evidence presented at the hearing indicates that Complainant also provided Respondent with written notice of the defect and a final opportunity to cure the defect. Complainant informed Respondent via letter dated August 3, 2020, of the issue with the vehicle's low oil level warning light illuminating and providing them with an opportunity to cure of which Respondent did not avail themselves.

Although Respondent has been provided several opportunities to repair the vehicle and to ensure that it operates properly, they have not been able to repair the vehicle so that it conforms to their written warranty. As such, Complainant has met her burden of proof to establish that the vehicle has a warrantable and existing defect or condition which substantially impairs the vehicle's use and market value.

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

III. FINDINGS OF FACT

1. Christina Gutierrez (Complainant) purchased a new 2020 Volkswagen Passat on March 26, 2020, from North Park Volkswagen of Dominion (North Park) in San Antonio, Texas with mileage of 38 at the time of delivery.
2. The manufacturer of the vehicle, Volkswagen Group of America, Inc. (Respondent), issued a new vehicle limited 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 29,390.
4. At the time of hearing the vehicle's warranty was still in effect.
5. Soon after purchasing the vehicle, the vehicle's low oil level warning light illuminated prior to the vehicle having been driven 3,000 miles.
6. Prior to filing the Lemon Law complaint, 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 level warning light illuminating:
 - a. April 24, 2020, at 2,540 miles;
 - b. June 22, 2020, at 8,962 miles;
 - c. June 25, 2020, at 9,604 miles; and
 - d. July 15, 2020, at 11,908 miles.
7. On April 24, 2020, North Park's service technician found the vehicle to be one and a half quarts low on oil and topped it off.

8. On June 22, 2020, North Park's service technician began an oil consumption test on the vehicle.
9. On June 25, 2020, the oil consumption test described in Findings of Fact #8 was completed. North Park's technician determined that the results showed an acceptable loss of oil, approximately 0.73 quarts per 1,000 miles.
10. On July 15, 2020, North Park's service technician added a quart of oil to the vehicle's engine as it was low on oil and the low oil level warning light had illuminated.
11. On August 3, 2020, Complainant provided written notice to Respondent of her dissatisfaction with the vehicle.
12. On September 21, 2020, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
13. After filing the Lemon Law complaint, on October 5, 2020, Complainant took the vehicle to North Park for routine maintenance and mentioned her concern that the vehicle seemed to use an inordinate amount of oil. The vehicle's mileage at the time was 22,168.
14. During the service visit described in Findings of Fact #13, North Park's service technician started an oil consumption test on the vehicle. Complainant was advised to return the vehicle to North Park after driving at least 630 miles to complete the test.
15. On October 13, 2020, Complainant took the vehicle to North Park to complete the oil consumption test.
16. During the repair visit described in Findings of Fact #15, North Park's technician inspected the vehicle's spark plugs to see if there was an oil leak, there was no oil on the spark plugs.
17. The technician also performed a compression test on the vehicle's engine cylinders and determined that they met Respondent's specifications at 175 psi. He also checked to see if there was debris in the vehicle's fuel and found none.
18. During the service visit described in Findings of Fact # 15, North Park's technician replaced the vehicle's crankcase breather valve and performed another oil consumption test on the vehicle. The vehicle's mileage was 22,917 at the time.

19. On November 13, 2020, Complainant took the vehicle back to North Park to complete the third oil consumption test on the vehicle.
20. On November 13, 2020, North Park's service technician determined that the vehicle's oil consumption was within Respondent's specified tolerances. No repair was performed at the time.
21. Complainant still has to put oil in the vehicle's engine every three (3) to four (4) weeks.
22. The low oil level warning light still illuminates intermittently.
23. On December 7, 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.
24. The hearing in this case convened telephonically on February 9, 2021, before Hearings Examiner Edward Sandoval. Complainant, Christina Gutierrez, represented herself and testified in the hearing. Respondent, Volkswagen Group of America, was represented by Susan Lucas, contract representative. The hearing record closed on February 9, 2021.

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's vehicle has an existing nonconformity that substantially impairs the use and market value of the vehicle. 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 and replacement of her 2020 Volkswagen Passat under Texas Occupations Code § 2301.604(a).

IT IS THEREFORE ORDERED that:

1. Respondent shall, in accordance with Texas Administrative Code § 215.208(d)(1)(A), promptly authorize the exchange of Complainant's new 2020 Volkswagen Passat (the reacquired vehicle) with Complainant's choice of any comparable motor vehicle.
2. Respondent shall instruct the dealer to contract the sale of the selected comparable vehicle with Complainant under the following terms:
 - (a) The sales price of the comparable vehicle shall be the vehicle's Manufacturer's Suggested Retail Price (MSRP);
 - (b) The trade-in value of Complainant's 2020 Volkswagen Passat shall be the MSRP at the time of the original transaction, less a reasonable allowance for Complainant's use of the vehicle;
 - (c) The use allowance for replacement relief shall be calculated in accordance with the formula outlined in Texas Administrative Code § 215.208(b)(2) (the use allowance is \$2,945.07);
 - (d) The use allowance paid by Complainant to Respondent shall be reduced by \$35.00 (the refund for the filing fee) (after deducting the filing fee, the use allowance is reduced to **\$2,910.07**);

3. Respondent's communications with Complainant finalizing replacement of the reacquired vehicle shall be reduced to writing, and a copy thereof shall be provided to the Department within twenty (20) days of completion of the replacement.
4. Respondent 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.³⁴
5. Respondent shall affix the disclosure label to the reacquired vehicle in a conspicuous location (*e.g.*, hanging from the rear view mirror). 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 shall provide to the Department written notice of the name, address and telephone number of any transferee (wholesaler or equivalent), regardless of residence.
7. Respondent shall repair the defect or condition that was the basis of the 2020 Volkswagen Passat's reacquisition and issue a new 12-month/12,000-mile warranty on the reacquired vehicle.
8. Upon replacement of Complainant's 2020 Volkswagen Passat, Complainant shall be responsible for payment or financing of the usage allowance of the reacquired vehicle, any outstanding liens on the reacquired vehicle, and applicable taxes and fees associated with the new sale, excluding documentary fees. Further, in accordance with 43 Tex. Administrative Code § 215.208(d)(2):
 - (a) If the comparable vehicle has a higher MSRP than the reacquired vehicle, Complainant shall be responsible at the time of sale to pay or finance the difference in the two vehicles' MSRPs to the manufacturer, converter or distributor; and
 - (b) If the comparable vehicle has a lower MSRP than the reacquired vehicle, Complainant will be credited the difference in the MSRP between the two vehicles. The difference credited shall not exceed the amount of the calculated usage allowance for the reacquired vehicle.

³⁴ 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.

9. Complainant shall be responsible for obtaining financing, if necessary, to complete the transaction.
9. The replacement transaction described in this Order shall be completed within 20 calendar days from the receipt of this Order. If the transaction cannot be accomplished within the ordered time period, Respondent shall repurchase Complainant's 2020 Volkswagen Passat pursuant to the repurchase provisions set forth in 43 Tex. Administrative Code § 215.208(b)(1) and (2). The repurchase price shall be **\$19,282.49**. The refund shall be paid to Complainant and the lien holder, if any, as their interests appear. If clear title is delivered, the full refund shall be paid to Complainant.

Purchase price, including tax, title, license and registration	\$22,193.06
Delivery mileage	38
Mileage at first report of defective condition	2,540
Mileage on hearing date	29,390
Useful life determination	120,000


Purchase price, including tax, title, license and registration									
									\$22,193.06
Mileage at first report of defective condition									2,540
Less mileage at delivery									<u>-38</u>
Unimpaired miles									2,502
Mileage on hearing date									29,390
Less mileage at first report of defective condition									<u>-2,540</u>
Impaired miles									26,850
Reasonable Allowance for Use Calculations:									
Unimpaired miles									
									<u>2,502</u>
	120,000	X							\$22,193.06 = \$462.73
Impaired miles									
									<u>26,850</u>
	120,000	X							\$22,193.06 X .5 = <u>\$2,482.85</u>
Total reasonable allowance for use deduction:									\$2,945.57
Purchase price, including tax, title, license and registration									\$22,193.06
Less reasonable allowance for use deduction									-\$2,945.57
Plus filing fee refund									<u>\$35.00</u>
TOTAL REPURCHASE AMOUNT									\$19,282.49

11. If Complainant's 2020 Volkswagen Passat is substantially damaged or there is an adverse change in its condition, beyond ordinary wear and tear, from the date of the hearing to the date of Respondent's reacquisition of the vehicle, and the parties are unable to agree on an amount allowed for such damage or condition, either party may request reconsideration by the final order authority of the trade-in value of Complainant's vehicle.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that Complainant's petition for replacement 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 April 6, 2021



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