

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 20-0006422 CAF**

**PEIRAN XU AND BINGBING YANG,
Complainants**

v.

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

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

AMENDED DECISION AND ORDER

Peiran Xu and Bingbing Yang (Complainants) seek relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in their 2020 BMW X3. Complainants assert that the vehicle’s air conditioning system intermittently blows hot air out of the floor vents rather than cool air. BMW of North America, LLC (Respondent) argued that the vehicle is operating as designed, that no defect or nonconformity currently exists in the vehicle, and that no relief is warranted. The hearings examiner concludes that the vehicle does have a currently existing warrantable defect and Complainants are 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 on June 9, 2021, in Austin, Texas before Hearings Examiner Edward Sandoval. Peiran Xu and Bingbing Yang, Complainants, were represented at the hearing by Mr. Xu. Respondent, BMW of North America, LLC, was represented by Misha Paltiyevich, attorney with Clark Hill, PLC. Also appearing for Respondent were Victor Cheung, Technical Support Engineer, and Jordan Reinke, Shop Manager with BMW of Austin. On August 16, 2021, the Decision and Order was issued by the hearings examiner.

On August 16, 2021, Complainants filed a Motion for Rehearing contending that the Decision and Order erroneously concluded that Respondent did not have an opportunity to cure. Respondent did not file a timely response to the Motion. However, on September 10, 2021, Respondent filed a Motion for Rehearing asserting that Complainants did not meet their burden of persuasion to establish the existence of a manufacturing defect in the subject vehicle. On October 25, 2021, Order No. 4: Granting Complainants’ Motion for Rehearing and Denying Respondent’s Motion for Rehearing was issued. No additional testimony was taken on the underlying issues as the assigned hearings examiner decided that the record was sufficiently developed to issue a decision in this matter.

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 repair or correct the defect or condition.³ Fourth, the owner must have provided 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

¹ Tex. Occ. Code § 2301.604(a).

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).

“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

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

An order issued under the Lemon Law may not require a manufacturer, converter, or distributor to make a refund or to replace a motor vehicle unless: (1) the owner, a person on behalf of the owner, or the department has provided written notice of the alleged defect or nonconformity to the manufacturer, converter, or distributor; and (2) the manufacturer, converter, or distributor has been given an opportunity to cure the defect or nonconformity.¹¹

B. Complainant’s Evidence and Arguments

Complainants purchased a new 2020 BMW X3 on December 13, 2019, from BMW of Austin (BMWoA) located in Austin, Texas.¹² The vehicle’s mileage at the time of delivery was 16.¹³ Respondent provided a new vehicle limited warranty for the vehicle which provides coverage for four (4) years or 50,000 miles, whichever comes first. On the date of hearing the vehicle’s mileage was 5,721 miles and the vehicle’s warranty was still in effect.

Peiran Xu, co-Complainant, testified for Complainants. Mr. Xu testified that the vehicle’s air conditioning system worked properly when Complainants initially purchased the vehicle. However, sometime in September of 2020, he noticed that the temperature inside the vehicle was about 73 degrees and he felt hot air being emitted from the air conditioning system’s floor vents.

⁸ Tex. Occ. Code § 2301.601(4).

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

¹⁰ Tex. Occ. Code § 2301.605(c).

¹¹ Tex. Occ. Code § 2301.606(c).

¹² Complainant Ex. 2, Buyer’s Order dated December 13, 2019.

¹³ Complainant Ex. 3, Odometer Disclosure Statement dated December 13, 2019

Mr. Xu stated that the issue occurred intermittently. After the air conditioning issue manifested a couple of times, Mr. Xu took the vehicle to BMWoA for repair on October 2, 2020. BMWoA's service technician inspected the vehicle's computer for fault codes, but found none.¹⁴ The technician checked the temperature of the air being emitted by the air conditioner system and determined that the air from the floor vents was 77 degrees, while the air from the center vent was 50 degrees.¹⁵ The technician compared the vehicle's air conditioner system's operation to that of another similar vehicle and determined that the vehicles had the same temperature deviation "under certain conditions."¹⁶ The technician determined that the issue raised by Complainants was a normal operating characteristic of the vehicle's air conditioning system.¹⁷ Mr. Xu testified that he was not shown the vehicle which was compared to his vehicle. The vehicle's mileage on this occasion was 3,598.¹⁸ The vehicle was in BMWoA's possession for five (5) days. Complainants were provided a loaner vehicle while their vehicle was being repaired.

Mr. Xu testified that the vehicle's air conditioning system worked appropriately for a few days, but the problem with the system's floor vents blowing hot air recurred within about a week after the repair performed by the BMWoA dealership. As a result, on October 15, 2020, Mr. Xu took the vehicle to BMW of South Austin (BMWoSA) located in Austin, Texas for repair for the air conditioning issue. BMWoSA's service technician inspected the vehicle and was unable to find any stored fault codes on the vehicle's computers.¹⁹ The technician also measured the air temperature from all of the air conditioning system's vents and determined that the system was working as designed.²⁰ No repairs were performed at the time. The vehicle's mileage on this occasion was 3,731.²¹ Mr. Xu testified that the vehicle was in the dealer's possession for five (5) to six (6) days. Complainants were provided with a loaner vehicle while their vehicle was being repaired. Mr. Xu felt that the issue could not be recreated by the dealer's technician during this repair visit because the outside air temperature was in the sixties.

Mr. Xu picked up the vehicle from BMWoSA on the afternoon of October 20, 2020. Shortly thereafter, Mr. Xu noticed that the air conditioning system's floor vents were blowing hot air again. He contacted BMWoSA's service department to schedule a repair appointment for the vehicle and was informed that the next available appointment was on October 29, 2020. Mr. Xu scheduled the repair appointment for the date in question. However, he also contacted BMWoA

¹⁴ Complainant Ex. 5, Repair Order dated October 2, 2020.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Complainant Ex. 6, Repair Order dated October 15, 2020.

²⁰ *Id.*

²¹ *Id.*

and found that he could get the vehicle in for repair within a day and took it to them for repair on October 22, 2020. BMWoA's service technician checked the vehicle's air conditioning system and determined that it was working as designed.²² The technician indicated that the functional description of the system indicated that the floor temperature will always be warmer than the center vents when in "heating mode."²³ In addition, the technician compared the vehicle to another vehicle and he determined that the air conditioning systems operated similarly.²⁴ Mr. Xu testified that the vehicle's software was updated and that this was not documented on the repair order. Mr. Xu also stated that the air conditioning system should be in cooling mode and not in heating mode as indicated on the repair order. The vehicle's mileage at the time was 3,809.²⁵ The vehicle was in the dealer's possession for five (5) days during this repair visit. Complainants were provided a loaner vehicle while their vehicle was being repaired.

Mr. Xu took the vehicle to BMWoSA for repair for the air conditioner issue as scheduled on October 29, 2020. The service technician inspected the air conditioning system and compared its operation to that of another similar vehicle.²⁶ The technician verified Complainants' concern.²⁷ However, after further inspection the technician determined that the system was operating within Respondent's specifications.²⁸ In addition, he determined that the system was operating the same as the air conditioning system in the similar vehicle.²⁹ The technician calibrated the air conditioning system's flap motors to ensure that they were operating correctly.³⁰ The vehicle's mileage at the time was 3,856.³¹ Mr. Xu testified that the vehicle was in the dealer's possession for one (1) week on this occasion. Complainants received a loaner vehicle while their vehicle was being repaired.

On October 6, 2020, Complainants sent a letter to Respondent advising them of their dissatisfaction with the vehicle.³² Complainants sent a second letter to Respondent on November 5, 2020, in which they again expressed their unhappiness with the vehicle.³³ Complainants filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) on February 18, 2021.³⁴

²² Complainant Ex. 7, Repair Order dated October 22, 2020.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Complainant Ex. 8, Repair Order dated October 29, 2020.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² Complainant Ex. 9, Letter to BMW of North America, LLC dated October 6, 2020.

³³ Complainant Ex. 10, Letter to BMW of North America, LLC dated November 5, 2020.

³⁴ Complainant Ex. 1, Lemon Law Complaint dated February 18, 2021.

Mr. Xu testified that he was contacted by Respondent's representative after the filing of the Lemon Law complaint and was asked to provide Respondent an opportunity to repair the vehicle. Mr. Xu refused to provide them an additional opportunity for repair as he felt that Respondent had sufficient opportunity to repair the vehicle prior to the request. In addition, Mr. Xu indicated that his November 5, 2020 letter to Respondent indicated to Respondent that they had 30 days from the date of the letter to correct any issues with the vehicle.³⁵ This time was in addition to the time provided by the October 6, 2020 letter.³⁶

Mr. Xu testified that there have been no attempts to repair the vehicle's air conditioning system since November of 2020. He stated that the issue with the system is intermittent and that it began to occur again on November 14, 2020. The last time an issue with the system occurred was in approximately early June of 2021. The issue occurs about a third of the time that he drives the vehicle.

C. Respondent's Evidence and Arguments

1. Jordan Reinke's Testimony

Jordan Reinke, BMWoA's shop manager, testified for Respondent. Mr. Reinke has worked in the automotive industry since 1999. He attended school at Universal Technical Institute (UTI). He then worked for two and a half years for a Ford dealership as a service technician. In 2002, Mr. Reinke took a job as a service technician at a BMW dealership where he stayed for thirteen years. Mr. Reinke was hired as a service technician at BMWoA in 2015. In 2019, Mr. Reinke was promoted to BMWoA's lead shop foreman. Mr. Reinke is an Automotive Service Excellence (ASE) Certified Master Technician and a BMW Master Technician.

Mr. Reinke stated that he inspected the vehicle's air conditioning system on October 2, 2020 at BMWoA. He stated that he checked the vehicle's computers for any stored fault codes and found none. He compared the vehicle to another similar vehicle and determined that the vehicles operated similarly. However, the comparison vehicle was not a hybrid vehicle, unlike the subject vehicle. Mr. Reinke stated that he noticed in both vehicles that the air emitted from the air conditioning system's floor vents was warmer than the air being emitted from the dashboard vents. Mr. Reinke recorded a video of part of the inspection. The video in question shows the results of an air temperature check of the air being emitted by the vehicle's air conditioning system. The video indicates a 33 degree difference between the dashboard vents (55 degrees) and the floor vents (88.5 degrees).³⁷ Mr. Reinke felt that the vehicle's air conditioning system was

³⁵ Complainant Ex. 10, Letter to BMW of North America, LLC dated November 5, 2020.

³⁶ Complainant Ex. 9, Letter to BMW of North America, LLC dated October 6, 2020.

³⁷ Respondent Ex. 1, FSE Vehicle Inspection Video dated October 2, 2020.

working correctly and that the vehicle did not have a defect which warranted repurchase or replacement of the vehicle.

2. Victor Cheung's Testimony

Victor Cheung, Technical Support Engineer, testified for Respondent at the hearing. Mr. Cheung has worked in the automotive industry since 1980. He worked for five (5) years as a service technician and a shop foreman for a few years after starting in the industry. In addition, he taught automotive mechanics in a vocational school for one (1) year. Mr. Cheung was hired by Respondent in 1985 and worked as a production supervisor for three (3) years before moving to a position as a regional technical specialist. After three (3) years as a regional technical specialist, Mr. Cheung was moved to his current position of technical support engineer. He is an Automotive Service Excellence (ASE) Master Certified Technician and a BMW Master Certified Technician.

Mr. Cheung testified that he has never seen the subject vehicle. However, Mr. Cheung did see the videos submitted by Complainant for this hearing. Mr. Cheung felt that the videos did not record the air temperature of the air blowing out of the vehicle's air conditioning system. Mr. Cheung pointed out that Complainant was recording the air temperature using an infrared gun which doesn't gauge air temperature. The infrared gun actually records the temperature of the object that it is pointed at. Mr. Cheung also stated that the temperatures being recorded using the gun will not be consistent. Mr. Cheung testified that Respondent requested an opportunity to cure after receiving the Lemon Law complaint and that Complainants denied the request.

Mr. Cheung testified that he feels that the mix of hot and cold air being emitted by the vehicle's air conditioning system is a characteristic of the vehicle.

D. Analysis

Under the Lemon Law, Complainants bear 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, Complainants 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, Complainants are 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, Complainants are entitled to have the vehicle repurchased or replaced.

1. Motion for Rehearing

Complainants filed a Motion for Rehearing as indicated in Section I of this order. As was also indicated in Section I, no further testimony was taken from the parties as the hearings examiner determined that the record had been sufficiently developed at the original hearing. Complainants objected to the hearings examiner conclusion that the Respondent was not provided an opportunity to cure as required by Tex. Occ. Code § 2301.606(c).

Complainants, in their Motion for Rehearing, claimed that the Respondent was given several opportunities to cure the defect. Complainants originally sent a letter to the Respondent advising them of their dissatisfaction with the vehicle on October 6, 2020. Complainants then brought the vehicle back to a Respondent authorized dealership 3 times. The Respondent chose not to participate in any of the repair visits.

The Third Court of Appeals considered a situation like the present case in which the Texas Department of Transportation's Motor Vehicle Division (the predecessor to the Texas Department of Motor Vehicles) determined that the manufacturer had an opportunity to cure after the owner provided notice and delivered the vehicle to a dealer for repair.³⁸ In the underlying case, the Division held that when the Complainant provides the Respondent with written notice of the defect and then brings the vehicle in to an authorized dealership for repair, the Respondent is provided with an opportunity to cure.³⁹ If the Complainant files their Lemon Law complaint after the repair visit, the Respondent is not entitled to an additional opportunity to cure.⁴⁰

In the present case, Complainants provided the Respondent with written notice of the defect and then provided 3 opportunities for the Respondent to cure. The Respondent chose not to participate in the repairs and instead allowed the authorized dealerships to attempt to repair the vehicle. Complainants did provide the Respondent with an opportunity to cure and therefore the requirement set out in Tex. Occ. Code § 2301.606(c) has been met.

³⁸ *Dutchmen Manufacturing, v. Texas Department of Transportation*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012, no pet).

³⁹ Texas Department of Transportation, *Kennemer v. Dutchmen Manufacturing, Inc.*, MVD Cause No. 09- 0091, Final Order Granting § 2301 Subchapter M Relief (Motor Vehicle Division Sep. 25, 2009).

⁴⁰ *Id.*

2. Air Conditioning Issue

Complainants' vehicle has a defect or condition that creates a serious safety hazard or substantially impairs the use or market value of the vehicle. Complainants' concern with the vehicle is that the vehicle's air conditioning system intermittently blows hot air out of the floor vents which affects the overall temperature in the vehicle. The evidence presented at the hearing established that there does seem to be an issue with the vehicle's air conditioning system. The video provided by Respondent as evidence in the hearing shows a 33 degree difference between the air temperature being emitted from the dashboard vents and the floor vents. (The dashboard vent's air temperature was 55 degrees and the floor vent's air temperature was 88 degrees.) It is not logical that the vehicle was designed to blow 88 degree air from the vehicle's floor vent when the air conditioning system is being used. This would obviously raise the overall temperature in the vehicle to a temperature less than optimal when the outside temperature may be in the 90's or 100's. As such, the hearings examiner must hold that Complainants have met the burden of persuasion to establish the existence of a defect or nonconformity (the vehicle's air conditioning system intermittently blowing hot air from the floor vents) in the subject vehicle. The defect or nonconformity with the vehicle substantially impairs the use or market value of the vehicle, as Complainants cannot rely on a comfortable drive in Texas heat when using the vehicle. In addition, the vehicle's market value is adversely affected as it would be difficult to sell the vehicle at market price if it has an air conditioning problem.

Complainants 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. Complainants presented the vehicle for repair to Respondent's authorized dealers on four (4) separate occasions for repair for the complained of issue prior to the filing of the Lemon Law complaint: October 2, 2020; October 15, 2020; October 22, 2020; and October 29, 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) provides 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. In the present case, despite the repair attempts, the problem continues to exist. As such, Complainants have established that a reasonable number of attempts to repair the vehicle were made by Respondent and the vehicle has not been repaired.

In addition, the evidence presented at the hearing indicates that Complainants provided Respondent with written notice of the defect and an opportunity to cure the defect. Complainants informed Respondent via letters dated October 6, 2020 and November 5, 2020, of their concerns with the vehicle's air conditioning system. On October 15, 2020; October 22, 2020; and October 29, 2020, Complainants brought the vehicle to an authorized dealer for repairs providing the Respondent with an opportunity to cure.

Although Respondent has been provided adequate opportunity 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, Complainants have met their burden of persuasion to establish that the vehicle has a warrantable and existing defect or condition which substantially impairs the use or market value of the vehicle. Therefore, the hearings examiner will order Respondent to repurchase the vehicle as requested by Complainants.

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

III. FINDINGS OF FACT

1. Peiran Xu and Bingbing Yang (Complainants) purchased a new 2020 BMW X3 on December 13, 2019, from BMW of Austin (BMWoA) located in Austin, Texas with mileage of 16 at the time of delivery.
2. The manufacturer or distributor of the vehicle, BMW of North America, LLC (Respondent), issued a new vehicle limited warranty for the vehicle which provides coverage for the first four (4) years or 50,000 miles after delivery, whichever comes first.
3. The vehicle's mileage on the date of hearing was 5,721.
4. At the time of hearing the vehicle's warranty was still in effect.
5. Complainants have experienced several situations where the vehicle's air conditioning system intermittently blows hot air out of the floor vents rather than cool air.
6. Complainants took the vehicle for repair to Respondent's authorized dealers, BMWoA and BMW of South Austin (BMWoSA) located in Austin, Texas, in order to address their concerns with the vehicle's air conditioning system on the following dates:

- a. October 2, 2020, at 3,598 miles;
 - b. October 15, 2020, at 3,731 miles;
 - c. October 22, 2020, at 3,809 miles; and
 - d. October 29, 2020, at 3,856 miles.
7. On October 2, 2020, BMWoA's service technician inspected the vehicle's air conditioning system and determined that it was working as designed, after comparing the vehicle's air conditioning system's operation to that of a similar vehicle's. No repairs were performed at the time.
 8. On October 6, 2020, Complainants mailed a letter to Respondent advising them of their dissatisfaction with the vehicle.
 9. On October 15, 2020, BMWoSA's service technician inspected the vehicle's air conditioning system and determined that it was working as designed. No repairs were performed at the time.
 10. On October 22, 2020, BMWoA's service technician inspected the vehicle's air conditioning system and compared its operation to a similar vehicle's air conditioning system and determined that it was operating normally. No repairs were performed at the time.
 11. On October 29, 2020, BMWoSA's service technician inspected the vehicle and verified the air conditioning concern. However, he determined, after comparing the vehicle's air conditioning system's operation to another similar vehicle's, that the system was operating normally.
 12. On November 5, 2020, Complainants mailed a second letter to Respondent advising them that they were dissatisfied with the vehicle.
 13. On February 18, 2021, Complainants filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
 14. The issue with the vehicle's air conditioning system blowing hot air out of the floor vents continues to occur intermittently.

15. The appropriate calculations for repurchase are:

Purchase price, including tax, title, license and registration	\$44,346.58
Delivery mileage	16
Mileage at first report of defective condition	3,598
Mileage on hearing date	5,721
Useful life determination	120,000

Purchase price, including tax, title, license and registration					\$44,346.58
Mileage at first report of defective condition					3,598
Less mileage at delivery					<u>-16</u>
Unimpaired miles					3,582
Mileage on hearing date					5,721
Less mileage at first report of defective condition					<u>-3,598</u>
Impaired miles					2,123
Reasonable Allowance for Use Calculations:					
Unimpaired miles					
					<u>3,582</u>
	120,000	X	\$44,346.58	=	\$1,323.75
Impaired miles					
					<u>2,123</u>
	120,000	X	\$44,346.58	X .5	= <u>\$392.28</u>
Total reasonable allowance for use deduction:					\$1,716.03
Purchase price, including tax, title, license and registration					\$44,346.58
Less reasonable allowance for use deduction					-\$1,716.03
Plus filing fee refund					<u>\$35.00</u>
TOTAL REPURCHASE AMOUNT					\$42,665.55

16. On April 1, 2021, the Department's Office of Administrative Hearings issued a notice of hearing directed to Complainants 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.

17. The hearing in this case convened on June 9, 2021, in Austin, Texas before Hearings Examiner Edward Sandoval. Peiran Xu and Bingbing Yang, Complainants, were represented at the hearing by Mr. Xu. Respondent, BMW of North America, LLC, was represented by Misha Paltiyevich, attorney with Clark Hill, PLC. Also appearing for Respondent were Victor Cheung, Technical Support Engineer, and Jordan Reinke, Shop Manager with BMW of Austin. The hearing record closed on June 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. Complainants 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. Complainants bear the burden of proof in this matter.
6. Complainants' vehicle has an existing defect or condition (the air conditioning system intermittently blows hot air out of the system's floor vents) that substantially impairs Complainants' use or 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 Complainants' vehicle so that it conforms to the applicable express warranty. Tex. Occ. Code §§ 2301.604(a) and 2301.605.
8. Complainants did provide Respondent with an opportunity to cure. Tex. Occ. Code § 2301.606(c).
9. Complainants' vehicle does qualify for replacement or repurchase. Tex. Occ. Code § 2301.604.

10. Based on the above Findings of Fact and Conclusions of Law, Complainants are entitled to relief and repurchase of the 2020 BMW X3 under Texas Occupations Code § 2301.604(a).

IT IS THEREFORE ORDERED that:

1. Respondent shall accept the return of the vehicle from Complainants. Respondent shall have the right to have its representatives inspect the vehicle upon the return by Complainants. 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 the final order;
2. Respondent shall repurchase the subject vehicle in the amount of **\$42,665.55**. (This total includes the \$35.00 Lemon Law filing fee.) The total refund shall be paid to Complainants and the vehicle lien holder as their interests require. If clear title to the vehicle is delivered to Respondent, then the full refund shall be paid to Complainants. At the time of the 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, Complainants are responsible for providing Respondent with clear title to the vehicle;
3. Within 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 31st 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 vehicle prior to resale and issue a disclosure statement provided by or approved by the Department's Enforcement Division – Lemon Law Section;
5. Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall affix the disclosure label to the reacquired vehicle in a conspicuous place, and upon the first retail

sale of the vehicle, the disclosure statement shall be completed and returned to the Department's Enforcement Division – Lemon Law Section; and

6. Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall provide the Department's Enforcement Division – Lemon Law Section, in writing, the name, address and telephone number of the transferee (wholesale purchaser or equivalent) of the vehicle within 60 calendar days of the transfer.

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-.613 is hereby **GRANTED**. It is further **ORDERED** that Respondent, BMW of North America, LLC, shall repair the warrantable defect (the air conditioning system intermittently blows hot air out of the system's floor vents) in the reacquired vehicle identified in this Decision.

SIGNED December 7, 2021.



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