

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 15-0032 CAF**

**ROSA E. SANCHEZ,**  
**Complainant**

v.

**GENERAL MOTORS LLC,**  
**Respondent**

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**BEFORE THE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Rosa E. Sanchez (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in her 2014 Chevrolet Silverado. Complainant asserts the vehicle makes abnormal noises when she's driving it. General Motors LLC (Respondent) argued that there is no defect with the vehicle, that it's operating as designed, and that no relief is warranted. The hearings examiner concludes that the vehicle does not have an existing warrantable defect. Therefore, Complainant is not eligible for relief.

**I. PROCEDURAL HISTORY, NOTICE AND JURISDICTION**

Matters of notice and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law. The hearing in this case convened and the record closed on May 29, 2015, in Fort Worth, Texas before Hearings Examiner Edward Sandoval. Complainant represented herself. Respondent was represented by Kevin Phillips, Business Resource Manager. John Metcalf, District Manager, was present to testify on Respondent's behalf. Also present was Esau Flores, who provided Spanish interpretive services for Complainant.

**II. DISCUSSION**

**A. Applicable Law**

The Lemon Law provides, in part, that a manufacturer of a motor vehicle must repurchase or replace a vehicle complained of with a comparable vehicle if the following conditions are met. First, the manufacturer is not able to conform the vehicle to an applicable express warranty by repairing or correcting a defect after a reasonable number of attempts.<sup>1</sup> Second, the defect or condition in the vehicle creates a serious safety hazard or substantially impairs the use or market value of the vehicle.<sup>2</sup> Third, the owner must have mailed written notice of the alleged defect or nonconformity to the manufacturer.<sup>3</sup> Lastly, the manufacturer must have been given an opportunity to cure the defect or nonconformity.<sup>4</sup>

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

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

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

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

In addition to these conditions, a rebuttable presumption exists that a reasonable number of attempts have been undertaken to conform a motor vehicle to an applicable express warranty if the same nonconformity continues to exist after being subject to repair four or more times and: (1) two of the repair attempts were made in the 12 months or 12,000 miles, whichever comes first, following the date of original delivery to the owner; and (2) the other two repair attempts were made in the 12 months or 12,000 miles, whichever comes first, immediately following the date of the second repair attempt.<sup>5</sup>

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

Complainant purchased a 2014 Chevrolet Silverado, from Lynn Smith Chevrolet (Lynn Smith) in Burleson, Texas on February 25, 2014. The vehicle had mileage of 47 at the time of purchase.<sup>6</sup> At this time, Respondent's basic express warranty for the vehicle is still in effect. Respondent's basic bumper to bumper warranty provides coverage for three (3) years or 36,000 miles, whichever comes first. In addition, Respondent has provided a five (5) year or 100,000 mile powertrain warranty for the vehicle. On the date of hearing the vehicle's mileage was 12,966.

Complainant testified that she began hearing noises when driving the vehicle the second day after purchasing it. She heard what sounded like loose metal under the vehicle when she was driving in reverse. Complainant took the vehicle to the dealer for repair on February 27, 2014. Complainant testified that when she appeared at the dealership, the sales person, Mr. Santos, advised her not to get out of the vehicle. She attempted to explain to Mr. Santos about her concerns, but Mr. Santos said it was too cold to be outside and went back into the dealer's building. Complainant then decided to go home without having the vehicle looked at.

Complainant feels insecure when driving the vehicle. Going up a high hill or high street, the vehicle slows down automatically. She has to accelerate more when driving up such a street.

Complainant feels that the vehicle's gas pedal is loose. She also feels that vehicle's brake line has air in it because of sounds she hears when she steps on the brake. Complainant feels that the brakes are dangerous due to air in the brake line. She feels that there is a need to bleed the brake line. Complainant also stated that she thinks something was moving inside the vehicle's gasoline tank and making a "swooshing" sound. She heard such sounds from the gasoline tank when she first purchased the vehicle, but the sounds no longer occur ever since a repair done on an

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<sup>5</sup> Tex. Occ. Code § 2301.605(a)(1)(A) and (B). Texas Occupations Code § 2301.605(a)(2) and (a)(3) provide alternative methods for a complainant to establish a rebuttable presumption that a reasonable number of attempts have been undertaken to conform a vehicle to an applicable express warranty. However, § 2301.605(a)(2) applies only to a nonconformity that creates a serious safety hazard, and § 2301.605(a)(3) requires that the vehicle be out of service for repair for a total of 30 or more days in the 24 months or 24,000 miles, whichever occurs first, following the date of original delivery to the owner.

<sup>6</sup> Complainant Ex. 1, Buyer's Order dated February 25, 2014.

unknown date by a Lynn Smith service technician. She also stated that she hears a “clunking” noise when she shifts the vehicle into reverse.

Complainant testified that she did not always get copies of repair orders from the dealer when she took the vehicle for repair. She said that she was told by the service technicians that nothing was wrong with the vehicle when they returned it to her after a repair attempt.

Complainant was provided loaner vehicles from the dealership whenever she took her vehicle in for repairs. On some of those occasions she was provided with a vehicle similar to her vehicle. She testified that the loaner vehicles would make similar noises and drive similar to her vehicle.

Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (TxDMV) regarding the vehicle with an effective date of October 1, 2014.<sup>7</sup> Complainant testified that she mailed two complaint letters about the vehicle in early April of 2014, approximately six months prior to the filing of the Lemon Law complaint. The letters were not addressed to any particular entity or individual.<sup>8</sup> Complainant could not recall if she mailed the letters to the manufacturer or to the dealer.

Complainant also testified that she took the vehicle to the dealer on more than four occasions between the date of purchase (February 25, 2014) and the date she filed the Lemon Law complaint (October 1, 2014). However, she could not recall any specific dates of repairs performed on the vehicle beyond those evidenced by the repair orders submitted by Respondent.

During cross examination Complainant testified that she is the primary driver of the vehicle and that there are no other individuals who drive the vehicle. Complainant was involved in an automobile accident in the vehicle on April 11, 2015. She was making a stop and her vehicle was rear ended. Complainant’s vehicle, in turn, hit the vehicle in front of her. The vehicle sustained approximately \$5000 in body damage which repairs were paid by an insurance company.

The vehicle has not been involved in any floods. Nor has there been any damage to the windshield, bumpers, or side doors. The vehicle has the original tires and the original spare. The tires have been rotated. The vehicle has not sustained any interior damage or undercarriage damage. Complainant has not installed any after-market items on the vehicle. She has never used the vehicle’s attached tow hitch.

The vehicle’s check engine light has never illuminated. The vehicle has never stalled while she was driving and has never left her stranded. She’s never had the vehicle towed. However,

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<sup>7</sup> Complainant Ex. 2, Lemon Law complaint signed September 28, 2014. Although the complaint was signed by Complainant on September 28, 2014, it was not received by Texas Department of Motor Vehicles until October 1, 2014, which is the effective date of the complaint.

<sup>8</sup> Complainant Ex. 3, Letter dated April 1, 2014 and Letter dated April 5, 2013. The second date is obviously a misprint since the date on the letter would have been prior to the purchase of the vehicle.

Complainant indicated that she has lost control of the vehicle. She testified that this occurs because the vehicle jumps forward when she shifts into drive. However, Complainant has never struck another vehicle.

Complainant stated that she took the vehicle to the dealer for repair two days after purchasing it. However, the dealer did not keep the truck or look at it. The vehicle has not been in the dealer's possession for more than thirty days. Complainant testified that she has never mailed any documents to Respondent. In addition, she testified that she did not always receive a loaner vehicle when she took her vehicle in for repairs.

Complainant testified that she did inform the dealer that the vehicle was leaking water. She stated it still leaks and doesn't feel that the water leakage is due to the air conditioner being on.

Complainant has been able to stop at stop lights in the vehicles. However, she stated that she tries to keep a distance between herself and other vehicles.

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

John Metcalf, District Manager, testified that he has worked for Respondent for 24 years. He's worked as a district manager of after sales and as a field service engineer. Mr. Metcalf has General Motors training certifications. His current duties involve anything relating to parts and after sales activities.

Mr. Metcalf first became involved in the present case when he was notified of the filing of the Lemon Law complaint in January of 2015. He contacted Complainant and arranged an appointment for a final repair attempt on January 28, 2015. The final repair attempt took place at Bruce Lowrie Chevrolet, one of Respondent's authorized dealers, in Fort Worth, Texas.

Mr. Metcalf met Complainant as scheduled on January 28, 2015. He accompanied Complainant while she drove the vehicle and heard her concerns. Mr. Metcalf performed a visual inspection of the vehicle prior to the drive. Complainant informed Mr. Metcalf that she was concerned with the vehicle making a "clunking" noise whenever she shifted out of reverse gear. In addition, Complainant indicated that she could hear an air noise when she stepped on the brake pedal. Finally, she indicated that the vehicle was dripping water from the exhaust system.

Mr. Metcalf was able to duplicate Complainant's concern regarding the clunking noise occurring when shifting the vehicle in and out of gear. Respondent was aware of the noise and determined that it was normal for the vehicle. Mr. Metcalf testified that Respondent released a Technical Service Bulletin (TSB) to its authorized dealers regarding this issue on November 18, 2014. A TSB is an informational document issued by Respondent advising dealers of a particular condition of certain vehicles and what may be causing the condition. The TSB indicates that the

sound heard by Complainant is normal and is a characteristic for the model vehicle in question. The noise occurs as the result of freeplay (lash) between the components in the vehicle's driveline.<sup>9</sup> Freeplay is the clearance between gears which allow the gears to operate properly and which can translate into a clunk noise whenever the gear is loaded and unloaded quickly.<sup>10</sup> Mr. Metcalf testified that an individual usually has to be listening for the sound in order to hear it. However, the sound can be heard on like vehicles as that owned by Complainant. Complainant informed Mr. Metcalf that she had driven vehicles similar to hers when she was provided with a loaner and that they all acted and sounded the same as her vehicle.

Mr. Metcalf testified that it was not unusual for water to leak from the muffler area of the vehicle, since there was a designed "weep" hole in the muffler which allows condensation from the vehicle to be released. This concern did not occur during Mr. Metcalf's inspection of the vehicle. However, Complainant showed Mr. Metcalf pictures showing water under the vehicle.

Finally, Mr. Metcalf did hear noise from the vehicle's brake pedal. He feels that the noise is a characteristic of the brake system and has to do with the brake booster. Complainant informed Mr. Metcalf that all of her concerns with the vehicle had all arisen with the similar loaner vehicles she had been provided by the dealer while her vehicle was being repaired.

Complainant was also notified by Mr. Metcalf during the final repair attempt that Respondent had an open "campaign" in order to correct an issue with the vehicle's air bag connectors. Complainant did not want to have the repair performed at the time. However, she took the vehicle the following day to Lynn Smith to have the repair performed.

Mr. Metcalf testified that Respondent had issued another TSB for the vehicle which addressed a "bump feel or clunk noise" after a stop. The noise is related to the fuel tank and could create a sloshing noise in the fuel tank. There was no repair for this issue. The TSB indicates that this is also a normal operating characteristic for the vehicle.<sup>11</sup>

Complainant took the vehicle to Lynn Smith for repair on March 10, 2014. The vehicle was returned to Complainant on March 25, 2014.<sup>12</sup> The mileage on the vehicle was 277.<sup>13</sup> Complainant indicated to the dealer's service advisor that the vehicle's gas pedal was loose and had play, that the vehicle's rear end felt like it was grabbing and after shifting loosening up and making noise, that the gas tank was making a swooshing sound, and that the right front felt like it was bouncing and it was making a noise.<sup>14</sup> The dealer's service technicians could not verify

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<sup>9</sup> Respondent Ex- 1, Global Warranty, Mileage Chart, Repair Orders, Technical Service Bulletins, New Vehicle Limited Warranty, and E-mail between John Metcalf and John Garza, p. 9.

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

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

<sup>12</sup> *Id.*, p. 4.

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

<sup>14</sup> *Id.*

Complainant's concerns and no repairs were performed. Complainant was provided with a loaner vehicle during this repair visit.<sup>15</sup>

Complainant took the vehicle to Lynn Smith for repair on April 7, 2014. The vehicle was returned to Complainant on April 9, 2014.<sup>16</sup> The vehicle's mileage on this occasion was 908.<sup>17</sup> Complainant indicated to the dealer's service technician that the engine seemed to be trying to accelerate by itself and that there was a noise in the vehicle's brake pedal when she stepped on it.<sup>18</sup> The dealer's service technicians updated the software for the vehicle's powertrain control module.<sup>19</sup> The service technician could not find a problem regarding the noise in the brake pedal.<sup>20</sup> Complainant was provided with a loaner vehicle on this occasion.<sup>21</sup>

Complainant took the vehicle to Lynn Smith for repair on July 14, 2014. The vehicle was returned to Complainant on July 23, 2014.<sup>22</sup> The vehicle's mileage on this occasion was 3,973.<sup>23</sup> Complainant indicated to the dealer's service advisor that she was hearing a "clunk" in the rear end of the vehicle which the service technician was unable to duplicate.<sup>24</sup> In addition, the dealer's service technician performed two recalls to the vehicle.<sup>25</sup> Complainant was provided with a loaner vehicle on this occasion.<sup>26</sup>

Complainant took the vehicle to Lynn Smith on September 22, 2014, in order to have the vehicle's oil changed.<sup>27</sup> She did not raise any other issues with the vehicle during this visit.

Mr. Metcalf testified that all of the recalls for the vehicle have been completed. He also stated that Complainant has never suffered from loss of use of the vehicle. Mr. Metcalf stated that all vehicles make some noise. In his opinion, the noises complained of by Complainant are normal operating characteristics of the vehicle. He does not feel that there are any defects or non-conformities in the vehicle. Mr. Metcalf stated that the vehicle's warranty does not cover slight noise, vibrations, or other normal characteristics of a vehicle.<sup>28</sup>

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

<sup>16</sup> *Id.*, p. 5.

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

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

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

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*, p. 6.

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

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

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

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

<sup>27</sup> *Id.*, p. 7.

<sup>28</sup> *Id.*, p. 12.

#### D. Analysis

Under the Lemon Law, Complainant bears the burden of proof to establish by a preponderance of evidence that a defect or condition creates a serious safety hazard or substantially impairs the use or market value of the vehicle. In addition, Complainant must meet the presumption that a reasonable number of attempts have been undertaken to conform the vehicle to an applicable express warranty. Finally, Complainant is required to serve written notice of the nonconformity on Respondent, who must be allowed an opportunity to cure the defect. If each of these requirements is met and Respondent is still unable to conform the vehicle to an express warranty by repairing the defect, Complainant is entitled to have the vehicle repurchased or replaced.

The first issue to be addressed is whether the vehicle in question has a defect or condition which creates a serious safety hazard or substantially impairs the use or market value of the vehicle. In the present case, the evidence indicates that the vehicle does not have such a defect or non-conformity. Complainant complained about a clunking noise when she shifts the vehicle into gear and an "air" noise when she steps on the brake pedal. In addition, Complainant indicated on her original Lemon Law complaint that the vehicle's gas pedal was loose.<sup>29</sup> Respondent testified that both noises heard by Complainant were normal operating characteristics of the vehicle. In fact, Respondent has issued a TSB to its authorized dealers advising them that certain model vehicles will sometimes make a clunking sound when being shifted into gear. This is reinforced by Complainant's own testimony specifying that she drove rental vehicles which were similar to her own vehicle and that she heard the same sounds from those vehicles. Since the sounds (the clunking noise and the brake noise) are normal operating characteristics of the vehicle, the hearings examiner must hold that the noises do not indicate that there is a defect with the vehicle. In regards to the loose gas pedal, Complainant raised that issue for repair on only one occasion, March 10, 2014, and no repairs were performed as the service technician determined that the pedal was fine. Complainant never raised that issue for repair afterwards, but did include the issue on the Lemon Law complaint. In addition, Complainant did not raise the loose gas pedal issue to Respondent's representative when the final repair attempt was performed on January 28, 2015. As such, it must be determined by the hearings examiner that the issue was either repaired or is also a normal operating characteristic of the vehicle. The hearings examiner must therefore conclude that Complainant has not met her burden to establish that the vehicle has a defect or non-conformity that creates a serious safety hazard or substantially impairs the use or market value of the vehicle. Therefore, the hearings examiner finds that repurchase or replacement relief for Complainant is not warranted.

Respondent's express warranty applicable to Complainant's vehicle provides "bumper to bumper" coverage for 3 years or 36,000 miles whichever comes first. In addition, the powertrain

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<sup>29</sup> Complainant also complained about a "swooshing" sound inside the gasoline tank that she heard while driving. However, she believes this was repaired and is no longer an issue, since she has not heard it in quite a while. As a result, this issue is not being addressed in this decision.

warranty provides coverage for 5 years or 100,000 miles. On the date of hearing, the vehicle's mileage was 12,966. Respondent is still under an obligation to repair the vehicle whenever there is a problem covered by these warranties.

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

### III. FINDINGS OF FACT

1. Rosa E. Sanchez (Complainant) purchased a 2014 Chevrolet Silverado on February 25, 2014, from Lynn Smith Chevrolet in Burleson, Texas with mileage of 47 at the time of purchase.
2. The vehicle's mileage on the date of hearing was 12,966.
3. The manufacturer of the vehicle, General Motors LLC (Respondent), issued an express warranty for the vehicle for three (3) years or 36,000 miles and a powertrain warranty for five (5) years or 100,000 miles.
4. At the time of hearing both warranties for the vehicle were still in effect.
5. Complainant first heard noises in the vehicle within two days of purchase.
6. On February 27, 2014, Complainant took the vehicle to Lynn Smith Chevrolet (Lynn Smith), Respondent's authorized dealer, to complain about the noises she was hearing when driving the vehicle. However, no repairs were done at the time.
7. Complainant's vehicle was serviced by Lynn Smith, on the following dates because of Complainant's concerns with the vehicle:
  - a. March 10, 2014, at 277 miles;
  - b. April 7, 2014, at 908 miles; and
  - c. July 14, 2014, at 3,973 miles.
8. On March 10, 2014, Complainant took the vehicle for repair because the gas pedal was loose, the vehicle's rear end felt like it was grabbing and was making noise, the gas tank was making a "swooshing" sound, and the right front was making a noise and felt like it was bouncing. However, no repairs were performed on the vehicle, since the problems could not be duplicated.
9. On April 7, 2014, Complainant took the vehicle for repair because the vehicle seemed to be trying to accelerate on its own and the brake pedal was making a noise. The dealer's service technicians updated the vehicle's software in the powertrain control module to

address the acceleration issue. They were not able to find a problem with the brake.

10. On July 14, 2014, Complainant took the vehicle for repair because she heard a “clunk” in the rear end of the vehicle. No repairs were performed because the dealer’s service technician was unable to duplicate the noise.
11. On October 1, 2014, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
12. Respondent performed a final repair attempt on the vehicle on January 28, 2015. No repairs were performed because Respondent’s representatives determined that the vehicle was operating as designed.
13. On February 17, 2015, 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.
14. The hearing in this case convened and the record closed on May 29, 2015, in Fort Worth, Texas before Hearings Examiner Edward Sandoval. Complainant represented herself. Respondent was represented by Kevin Phillips, Business Resource Manager. John Metcalf, District Manager, was present to testify on Respondent’s behalf. Also present was Esau Flores, who provided Spanish interpretive services for Complainant.

#### IV. CONCLUSIONS OF LAW

1. The Texas Department of Motor Vehicles (Department) has jurisdiction over this matter. Tex. Occ. Code §§ 2301.601-.613 (Lemon Law).
2. A hearings examiner of the Department’s Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a decision with findings of fact and conclusions of law, and the issuance of a final order. Tex. Occ. Code § 2301.704.
3. Complainant timely filed a complaint with the Department. Tex. Occ. Code § 2301.204; 43 Tex. Admin. Code § 215.202.
4. The parties received proper notice of the hearing. Tex. Gov’t Code §§ 2001.051, 2001.052; 43 Tex. Admin. Code § 215.206(2).

5. Complainant bears the burden of proof in this matter.
6. Complainant did not prove by a preponderance of the evidence that the vehicle has a verifiable 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.
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 June 15, 2015**



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