

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 16-0018 CAF**

**AHMED SHAHID,  
Complainant**

v.

**NISSAN NORTH AMERICA, INC.,  
Respondent**

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**BEFORE THE OFFICE  
  
OF  
  
ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Ahmed Shahid (Complainant) filed a complaint with the Texas Department of Motor Vehicles seeking relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged warrantable defects in his/her vehicle manufactured by Nissan North America, Inc. (Respondent). The hearings examiner concludes that the vehicle has a warrantable defect that does not create a serious safety hazard or substantially impair the vehicle's use or market value. Consequently, the Complainant's vehicle does not qualify for repurchase/replacement but qualifies for warranty repair.

**I. Procedural History, Notice and Jurisdiction**

Matters of notice of hearing<sup>1</sup> and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law. The hearing in this case convened January 6, 2016, in Mesquite, Texas, before Hearings Examiner Andrew Kang. The record closed on January 20, 2016, the deadline for filing written submissions. The Complainant, represented himself. The Complainant's wife, Mumiba Hotaki, brother, Mustafa Shahid, and sister, Khadija Shahid, appeared as witnesses for the Complainant. Anthony Panno, Dealer Technical Specialist, represented and testified for the Respondent.

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<sup>1</sup> TEX. GOV'T CODE § 2001.051.

## II. Discussion

### A. Applicable Law

#### 1. Repurchase/Replacement Relief

A vehicle qualifies for repurchase or replacement if the manufacturer cannot “conform a motor vehicle to an applicable express warranty by repairing or correcting a defect or condition that creates a serious safety hazard or substantially impairs the use or market value of the motor vehicle after a reasonable number of attempts.”<sup>2</sup> In other words, (1) the vehicle must have a defect covered by an applicable warranty (warrantable defect); (2) the defect must either (a) create a serious safety hazard or (b) substantially impair the use or market value of the vehicle; and (3) the defect must continue to exist after a “reasonable number of attempts” at repair.<sup>3</sup> In addition, the Lemon Law imposes other requirements for repurchase/replacement relief, including (1) a mailed written notice of the defect to the manufacturer, (2) an opportunity to repair by the manufacturer, and (3) a deadline for filing a Lemon Law complaint.

##### a. Serious Safety Hazard

The Lemon Law defines “serious safety hazard” as a life threatening malfunction or nonconformity that: (1) substantially impedes a person’s ability to control or operate a vehicle for ordinary use or intended purposes, or (2) creates a substantial risk of fire or explosion.<sup>4</sup>

##### b. Substantial Impairment of Value

The Department applies a reasonable purchaser standard for determining whether a defect substantially impairs the value of a vehicle. Under this standard, “factfinders should put themselves in the position of a reasonable prospective purchaser of the subject vehicle and determine (based on the evidence presented) if the current condition of the vehicle would deter them from buying the vehicle or substantially negatively affect how much they would be willing to pay for the vehicle.”<sup>5</sup>

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<sup>2</sup> TEX. OCC. CODE § 2301.604(a).

<sup>3</sup> TEX. OCC. CODE § 2301.604(a).

<sup>4</sup> TEX. OCC. CODE § 2301.601(4).

<sup>5</sup> *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012).

**c. Reasonable Number of Repair Attempts**

The Lemon Law provides three ways to establish a rebuttable presumption that a reasonable number of repair attempts have been undertaken.<sup>6</sup> The first applies generally,<sup>7</sup> the second applies to serious safety hazards,<sup>8</sup> and the third applies to vehicles out of service for repair for at least 30 days.<sup>9</sup> Generally, a rebuttable presumption is established that the vehicle had a reasonable number of repair attempts if:

[T]he 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: (A) two of the repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, following the date of original delivery to the owner; and (B) the other two repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the second repair attempt.<sup>10</sup>

However, the statutory rebuttable presumption does not preclude otherwise finding a reasonable number of attempts to repair the vehicle based on different circumstances and fewer attempts.<sup>11</sup> Furthermore, the Department adopted a decision implying that if the consumer takes the vehicle for a service visit then that visit would constitute a repair attempt unless the consumer was at fault for failure to repair the vehicle.<sup>12</sup>

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<sup>6</sup> TEX. OCC. CODE § 2301.605(a).

<sup>7</sup> TEX. OCC. CODE § 2301.605(a)(1).

<sup>8</sup> TEX. OCC. CODE § 2301.605(a)(2).

<sup>9</sup> TEX. OCC. CODE § 2301.605(a)(3).

<sup>10</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 establishing a rebuttable presumption that a reasonable number of attempts have been undertaken to conform a vehicle to an applicable express warranty. Section 2301.605(a)(2) only applies 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>11</sup> “[T]he existence of statutory presumptions does not forbid the agency from finding that different circumstances or fewer attempts meet the requisite ‘reasonable number of attempts.’” *Ford Motor Company v. Texas Department of Transportation*, 936 S.W.2d 427, 432 (Tex. App.—Austin 1996, no writ).

<sup>12</sup> “[O]nly those occasions when failure to repair the vehicle was the fault of the consumer would not be considered a repair attempt under the statute.” *DaimlerChrysler Corporation v. Williams*, No. 03-99-00822-CV (Tex. App.—Austin, June 22, 2000, no writ) (not designated for publication).

**d. Other Requirements**

Even if a vehicle satisfies the preceding requirements for repurchase/replacement relief, the Lemon Law prohibits repurchase or replacement unless: (1) the owner mailed written notice of the alleged defect or nonconformity to the manufacturer;<sup>13</sup> (2) the manufacturer was given an opportunity to cure the defect or nonconformity;<sup>14</sup> and (3) the owner filed the Lemon Law complaint within six months after the earliest of: the warranty's expiration date or the dates on which 24 months or 24,000 miles have passed since the date of original delivery of the motor vehicle to an owner.<sup>15</sup>

**2. Warranty Repair Relief**

Even if repurchase or replacement relief does not apply, a vehicle may still qualify for warranty repair under Section 2301.204 of the Texas Occupations Code if the vehicle has a "defect . . . that is covered by a manufacturer's . . . warranty agreement applicable to the vehicle."<sup>16</sup>

**3. Burden of Proof**

The law places the burden of proof on the Complainant.<sup>17</sup> The Complainant must prove each fact required for relief by a preponderance, that is, the Complainant must present enough evidence to show that all of the required facts are more likely than not true.<sup>18</sup> For example, the Complainant must show that a warrantable defect more likely than not exists. For any required fact, if the evidence weighs in favor of the Respondent or if the evidence supports the Complainant and the Respondent equally, the Respondent will prevail. The Complainant prevails only if the evidence shows that all of the required facts are more likely than not true.

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<sup>13</sup> TEX. OCC. CODE § 2301.606(c)(1).

<sup>14</sup> TEX. OCC. CODE § 2301.606(c)(2). Note: a repair visit to a dealer satisfies the "opportunity to cure" requirement if the manufacturer authorized repairs by the dealer after written notice to the manufacturer. *See Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 226 (Tex. App.—Austin 2012).

<sup>15</sup> TEX. OCC. CODE § 2301.606(d)(2).

<sup>16</sup> TEX. OCC. CODE § 2301.204.

<sup>17</sup> 43 TEX. ADMIN. CODE § 215.206.66(d).

<sup>18</sup> *E.g., Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

### A. Complainant's Evidence and Arguments

On January 1, 2015, the Complainant, purchased a new 2015 Nissan Armada from Crest Nissan, a franchised/authorized dealer of the Respondent, Nissan North America, Inc., in Frisco, Texas. The vehicle had six miles on the odometer at the time of purchase.<sup>19</sup> The vehicle's limited warranty provides basic coverage for 36 months or 36,000 miles, whichever occurs first.<sup>20</sup>

The Complainant testified that he had Nissans before. However, the subject vehicle would make a rattling noise from the driver's side front wheel. He explained that the vehicle operated normally on smooth roads but made a rattling noise when hitting a bump or driving on rough roads. The dealer's technicians test drove the vehicle and verified the issue. After lubrication, the noise went away but then came back. Likewise, after repairs, the noise went away but then came back. The Complainant stated that he had been to the dealer at least six times. The dealer confirmed the issue but did not know how to fix it. Mrs. Hotaki was initially the primary driver. However Mrs. Hotaki explained that she hardly drove the vehicle because she did not feel comfortable taking chances driving the vehicle. Mrs. Hotaki testified that if driving the vehicle daily, the noise can be heard when driving over smooth roads. The Complainant confirmed to the hearings examiner that the noise could be heard on smooth roads after driving. The Complainant added that a friend with a similar vehicle did not exhibit such noise driving over the same roads as the Complainant. The Complainant noted that the vehicle did not make the noise until over 2,000 miles.

In relevant part, the Complainant took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
June 1, 2015	3,123	Noise from driver front side like a rattle especially going over bumps <sup>21</sup>
June 16, 2015	3,401	Noise coming from driver front when going over bumps <sup>22</sup>
July 7, 2015	3,866	Repair to driver front noise in wheel area <sup>23</sup>
August 17, 2015	5,802	Noise coming from driver front wheel area <sup>24</sup>
August 31, 2015	6,617	Noise still in car after previous repair <sup>25</sup>

<sup>19</sup> Complainant's Ex. 1, Purchase Order.

<sup>20</sup> Complainant's Ex. 10, 2015 Warranty Information Booklet.

<sup>21</sup> Complainant's Ex. 2, Invoices; Complainant's Ex. 3, Repair Order Detail.

<sup>22</sup> Complainant's Ex. 2, Invoices; Complainant's Ex. 3, Repair Order Detail

<sup>23</sup> Complainant's Ex. 2, Invoices; Complainant's Ex. 3, Repair Order Detail

<sup>24</sup> Complainant's Ex. 2, Invoices; Complainant's Ex. 3, Repair Order Detail

<sup>25</sup> Complainant's Ex. 2, Invoices; Complainant's Ex. 3, Repair Order Detail

The repairs did not permanently resolve the rattling noise.

On September 28, 2015, the Complainant mailed a written notice of defect to the Respondent. On September 14, 2015, the Complainant filed a Lemon Law complaint (Complaint) with the Texas Department of Motor Vehicles (Department) alleging that the vehicle made a rattling, metal clapping noise from the driver side wheel.

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

Mr. Panno testified that he and dealership technicians heard the complained of sound. He further testified that he could reproduce the sound in a like vehicle. Mr. Panno explained that the noise would not occur with the brakes pressed, which narrowed the source of the noise to the brakes. Mr. Panno explained that he authorized the dealer to replace the left side caliper assembly in an attempt to address the noise. However, he did not find a deformation, as documented by the dealer on the repair order. Mr. Panno testified that while at another dealership, he drove a used 2014 Armada with 32,000 miles, and that vehicle would reproduce the same noise, but only when driving over bumps (specifically, the white lane markers). Mr. Panno provided diagrams to show how the brake calipers "float" on pins to allow the calipers to slide back and forth to center themselves. Mr. Panno explained that the movement of the pins cause the rattling noise. Mr. Panno explained that they replaced every part that they could to address the noise. Mr. Panno brought a new, same-model vehicle for comparison at the hearing. During the test drive, the comparison vehicle exhibited the same noise as the subject vehicle.

### **C. Test Drive**

During the test drive at the hearing, the subject vehicle exhibited a slight rattling noise when driving over bumps. The Respondent provided a new, same-model vehicle for comparison. During the test drive of the comparison vehicle, on the same route as the test drive of the subject vehicle, the comparison vehicle exhibited the same rattling noise over bumps.

### **D. Analysis**

In this case, the vehicle appears to have a warrantable defect, but one that does not cause a serious safety hazard or a substantial impairment of use or market value. Accordingly, the vehicle

does not qualify for repurchase/replacement but does qualify for warranty repair. Rattling from the brake calipers by itself does not necessarily appear to be a warrantable defect. However, the extent and frequency of the rattling described by Mrs. Hotaki appears to exceed the rattling that may normally occur with a Nissan Armada. The Respondent's evidence showed that a Nissan Armada may normally exhibit some rattling noise from the brake calipers, as confirmed by the test drive of a new Nissan Armada at the hearing and Mr. Panno's testimony regarding the test drive of a used Nissan Armada. However, the Respondent's evidence did not show that such rattling may occur to the same extent as on the subject vehicle. Mr. Panno noted that he could only reproduce the noise in the 2014 Pathfinder when driving over road marker bumps. In this case, the testimony showed that brake calipers on the Complainant's vehicle, after sufficient driving, would eventually rattle from just driving, without hitting any bumps. Nevertheless, the record indicates that such rattling did not affect the performance of the vehicle, certainly not to the degree of a serious safety hazard (i.e., a life-threatening nonconformity that substantially impedes the vehicle's control or operation or creates a substantial risk of fire or explosion). Moreover, the rattling was relatively quiet and not such that it would deter a reasonable prospective purchaser or substantially negatively affect the purchase price for the vehicle. Consequently, only warranty repair relief applies.

### **III. Findings of Fact**

1. On January 1, 2015, the Complainant, purchased a new 2015 Nissan Armada from Crest Nissan, a franchised/authorized dealer of the Respondent, Nissan North America, Inc., in Frisco, Texas. The vehicle had six miles on the odometer at the time of purchase.
2. The vehicle's limited warranty provides basic coverage for 36 months or 36,000 miles, whichever occurs first.
3. The vehicle's warranty was in effect at the time of the hearing.
4. The Complainant took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
June 1, 2015	3,123	Noise from driver front side like a rattle especially going over bumps <sup>26</sup>
June 16, 2015	3,401	Noise coming from driver front when going over bumps <sup>27</sup>
July 7, 2015	3,866	Repair to driver front noise in wheel area <sup>28</sup>
August 17, 2015	5,802	Noise coming from driver front wheel area <sup>29</sup>
August 31, 2015	6,617	Noise still in car after previous repair <sup>30</sup>

5. On September 28, 2015, the Complainant mailed a written notice of defect to the Respondent.
6. On September 14, 2015, the Complainant filed a Lemon Law complaint (Complaint) with the Texas Department of Motor Vehicles (Department) alleging that the vehicle made a rattling, metal clapping noise from the driver side wheel.
7. On October 19, 2015, the Department's Office of Administrative Hearings issued a notice of hearing directed to the Complainant and the Respondent, Nissan North America, Inc., 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.
8. The hearing in this case convened January 6, 2016, in Mesquite, Texas, before Hearings Examiner Andrew Kang. The record closed on January 20, 2016, the deadline for filing written submissions. The Complainant, represented himself. The Complainant's wife, Mumiba Hotaki, brother, Mustafa Shahid, and sister, Khadija Shahid, appeared as witnesses for the Complainant. Anthony Panno, Dealer Technical Specialist, represented and testified for the Respondent.
9. The vehicle's odometer displayed 11,188 miles at the time of the hearing.

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<sup>26</sup> Complainant's Ex. 2, Invoices; Complainant's Ex. 3, Repair Order Detail.

<sup>27</sup> Complainant's Ex. 2, Invoices; Complainant's Ex. 3, Repair Order Detail

<sup>28</sup> Complainant's Ex. 2, Invoices; Complainant's Ex. 3, Repair Order Detail

<sup>29</sup> Complainant's Ex. 2, Invoices; Complainant's Ex. 3, Repair Order Detail

<sup>30</sup> Complainant's Ex. 2, Invoices; Complainant's Ex. 3, Repair Order Detail

10. The vehicle exhibited some rattling noise going over bumps during the test drive at the hearing.
11. A same-model comparison vehicle also rattled going over bumps during the test drive at the hearing.
12. The Respondent showed that both a new and used vehicles of the same model as the subject vehicle may normally exhibit a rattling noise from the brake calipers.

#### 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. The Complainant timely filed a sufficient complaint with the Department. TEX. OCC. CODE §§ 2301.204, 2301.606(d); 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. The Complainant bears the burden of proof in this matter. 43 TEX. ADMIN. CODE § 206.66(d).
6. The Complainant's vehicle does not qualify for replacement or repurchase. The Complainant did not show that the subject vehicle has a warrantable defect that creates a serious safety hazard or substantially impairs the use or market value of the vehicle. TEX. OCC. CODE § 2301.604.
7. The Respondent has a continuing obligation to address and repair or correct any warrantable nonconformities reported to the Respondent or Respondent's franchised dealer before the warranty expired. TEX. OCC. CODE §§ 2301.204, 2301.603.

**V. Order**

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that the Complainant's petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is **DISMISSED**. It is **FURTHER ORDERED** that the Respondent shall repair the vehicle's brake caliper rattling. The Complainant shall deliver the subject vehicle to the Respondent within 15 days after the date this Decision and Order becomes final under Texas Government Code § 2001.144.<sup>31</sup> Within 15 days after receiving the vehicle from the Complainant, the Respondent shall complete repair of the subject vehicle. However, if the Department determines the Complainant's refusal or inability to deliver the vehicle caused the failure to complete the required repair, the Department may consider the Complainant to have rejected the granted relief and deem this proceeding concluded and the complaint file closed under 43 Texas Administrative Code § 215.210(2).

**SIGNED February 23, 2016**

  
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**ANDREW KANG**  
**HEARINGS EXAMINER**  
**OFFICE OF ADMINISTRATIVE HEARINGS**  
**TEXAS DEPARTMENT OF MOTOR VEHICLES**

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<sup>31</sup> (1) If a party does not timely file a motion for rehearing, this Order becomes final when the period for filing a motion for rehearing expires, or (2) if a party timely files a motion for rehearing, this Order becomes final when: (A) the Department renders an order overruling the motion for rehearing, or (B) the Department has not acted on the motion within 45 days after the party receives a copy of this Decision and Order.