

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 17-0113 CAF**

LETICIA COBOS,
Complainant

v.

NISSAN NORTH AMERICA, INC.,
Respondent

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**BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Leticia Cobos (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in her new 2015 Infiniti QX 60. Complainant asserts that water leaks through the vehicle's sunroof seal. Nissan North America, Inc. (Respondent) argued that the vehicle does not have any defects and that no relief is warranted. The hearings examiner concludes that the vehicle does not have an existing warrantable defect and 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 was closed on March 22, 2017, in Pharr, Texas before Hearings Examiner Edward Sandoval. Complainant, Leticia Cobos, represented herself in the hearing. Respondent was represented by Rafael Mariduena, Dealer Technical Specialist.

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 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

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).

In addition to the five 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.⁶

B. Complainant's Evidence and Arguments

Complainant purchased a new 2015 Infiniti QX 60 from Bert Ogden Infiniti (Ogden) in Edinburg, Texas on August 1, 2015, with mileage of 24 at the time of delivery.^{7,8} Respondent provided a bumper-to-bumper warranty for the vehicle good for four (4) years or 60,000 miles, whichever comes first. On the date of hearing the vehicle's mileage was 18,635. At this time, Respondent's warranty is still in effect.

Complainant testified that there is a water leak in the sunroof's back driver side area. The area has weather stripping which acts to create a seal between the sunroof and the rest of the vehicle, but the water leaks through the stripping. Complainant testified that she first noticed the problem in October of 2015, after it had rained. Complainant contacted her salesperson, Vanessa Ochoa, who told her to take the vehicle to Ogden so it could be inspected and repaired.

Complainant made arrangements for a representative from Ogden to pick up the vehicle in order for repairs to be made for the water leak. On October 19, 2015, Ogden's technician inspected the vehicle. The technician adjusted the vehicle's sunroof so that it closed properly in order to address Complainant's concern.⁹ The vehicle's mileage at the time of the repair visit was 4,748.¹⁰ The vehicle was in the dealer's possession for several days. Complainant did not request for and was not provided with a loaner vehicle.

Soon thereafter it rained again and Complainant observed water leaking through the sunroof's weather stripping again. On October 26, 2015, Complainant had the vehicle picked up and taken

⁶ 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.

⁷ Complainant Ex. 1, Motor Vehicle Retail Installment Contract dated August 1, 2015.

⁸ Complainant Ex. 8, Odometer Disclosure Statement dated August 1, 2015.

⁹ Complainant Ex. 2, Repair Order dated October 19, 2015.

¹⁰ *Id.*

to Ogden for repair to the sunroof. Ogden's service technician removed and replaced the vehicle's sunroof weather stripping in an attempt to prevent water from leaking through the stripping.¹¹ The vehicle's mileage on this occasion was 4,818.¹² The vehicle was in the dealer's possession for four (4) days. Complainant did not request for and was not provided with a loaner vehicle.

Complainant indicated that the next time it drizzled, she did not observe a leak in the sunroof's weather stripping. It was not until September of 2016 that Complainant again noticed water dripping from the same area of the vehicle's sunroof. She had the vehicle picked up and taken to Ogden on September 19, 2016, in order to have the issue repaired. Ogden's technician replaced the vehicle's sunroof glass in an attempt to resolve the concern.¹³ The vehicle's mileage on this occasion was 15,100.¹⁴ The vehicle was in Ogden's possession for approximately four (4) days. Complainant did not request for and was not provided with a loaner vehicle.

Complainant drove the vehicle to Houston, Texas in December of 2016. She ran into heavy rain while in Houston. Complainant observed that water was leaking through the sunroof's weather stripping, so she contacted Ms. Ochoa to determine what action she should take. Ms. Ochoa advised Complainant to contact Respondent's customer service department. Complainant contacted the customer service department and complained about the vehicle. She was informed by the customer service representative that Respondent would investigate the matter.

On December 7, 2016, Complainant mailed a letter to Respondent notifying them of her dissatisfaction with the vehicle.¹⁵ Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) on December 11, 2016.¹⁶

Complainant was contacted by Respondent's representative, Luis Rodriguez, in December of 2016, in order to set up an inspection and final repair attempt of the vehicle. The final repair attempt on the vehicle was performed on January 6, 2017, at Ogden by Rafael Mariduena, Dealer Technical Specialist. No repairs were done to the vehicle during the inspection and final repair attempt. Complainant was informed by Ms. Ochoa that nothing was wrong with the vehicle. The vehicle was in Ogden's possession for one (1) day. Complainant was asked by Mr. Rodriguez if she wanted a rental vehicle while her vehicle was being inspected. Complainant did not avail herself of the offer.

¹¹ Complainant Ex. 3, Repair Order dated October 26, 2015.

¹² *Id.*

¹³ Complainant Ex. 4, Repair Order dated September 19, 2016.

¹⁴ *Id.*

¹⁵ Complainant Ex. 5, Letter to Nissan North America, Inc. dated December 7, 2016.

¹⁶ Complainant Ex. 6, Lemon Law Complaint dated December 11, 2016. Complainant signed and dated the complaint on December 7, 2016. However, the complaint was not received by the Texas Department of Motor Vehicles until December 11, 2016, which is the effective date of the complaint.

Complainant testified that the water that leaks through the sunroof's weather stripping is usually just a few drops. Water has never gotten inside the vehicle. Neither the vehicle's seats nor the carpet have ever gotten wet as a result of the water coming through the weather stripping. The water is always between the sunroof and the sunroof shield. Complainant also stated that the week prior to the hearing, she observed water coming through the same area of the sunroof's weather stripping during a heavy rain. In addition, Complainant stated that the water would come through the weather stripping if she took the vehicle through a car wash.

C. Respondent's Evidence and Arguments

Rafael Maridueno, Dealer Technical Specialist, has worked in the automotive industry for 42 years. He's been an automotive technician since 1990. He is an Automotive Service Excellence (ASE) Certified Master Technician and a Nissan Certified Master Technician. He's been working with Nissan for the past year and a half. Prior to that he worked for an auto dealership in Costa Mesa, California.

Mr. Maridueno testified that he became involved in this complaint when he received a request from Mr. Rodriguez to inspect the vehicle to determine if it needed repair. Mr. Rodriguez informed Mr. Maridueno that Complainant indicated that water was leaking through the vehicle's sunroof's weather stripping.

Mr. Maridueno inspected the vehicle on January 6, 2017, at the Ogden dealership in Edinburg, Texas. He took the vehicle to a car wash area on the dealership lot and hosed it down for about half an hour. He observed that a "slow drip" of water leaked through the sunroof weather stripping right behind the driver's seat. However, the water leaking through was caught by a drip tray under the sunroof weather stripping which is designed to catch the water and funnel it down through channels installed in the vehicle frame and discharges it beneath the vehicle. The water tray is a design of the vehicle, since the weather stripping is not designed to be watertight. Mr. Maridueno determined that the vehicle was operating as designed. Mr. Maridueno testified that the tray will not rust or oxidize. The water is not supposed to pool in the tray, but will eventually drain out or evaporate.

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.

The evidence presented at the hearing established that the vehicle is working as designed and that there is no defect in the vehicle. Although Complainant complained that water leaks through the vehicle's sunroof's weather stripping, this is a normal design characteristic of the vehicle. The weather stripping around the sunroof is not designed to be waterproof, so water may drip or leak through the stripping. The water is then collected in a tray positioned below the weather stripping and then funneled through channels in the body of the vehicle to discharge through the bottom of the vehicle. A design characteristic is not a defect in the vehicle and does not warrant that a vehicle be repurchased or replaced. Given the totality of the evidence, the hearings examiner must hold that Complainant has not established the existence of a defect in the vehicle. As such, Complainant is not entitled to repurchase or replacement relief.

Respondent's bumper-to-bumper warranty applicable to Complainant's vehicle provides coverage for four (4) years or 60,000 miles whichever comes first. On the date of hearing, the vehicle's mileage was 18,635 and it remains under this warranty. As such, the Respondent is still under an obligation to repair the vehicle whenever there is a problem covered by the warranty.

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

III. FINDINGS OF FACT

1. Leticia Cobos (Complainant) purchased a new 2015 Infiniti QX 60 on August 1, 2015, from Bert Ogden Infiniti (Ogden) in Edinburg, Texas, with mileage of 24 at the time of delivery.
2. The manufacturer of the vehicle, Nissan North America, Inc. (Respondent), issued a bumper-to-bumper warranty for four (4) years or 60,000 miles, whichever occurs first.
3. The vehicle's mileage on the date of hearing was 18,635.
4. At the time of hearing the vehicle was still under warranty.

5. Complainant took the vehicle to Respondent's authorized dealer, Ogden, on the following dates in order to address her concerns with water leaking through the sunroof:
 - a. October 19, 2015, at 4,748 miles;
 - b. October 26, 2015, at 4,818 miles; and
 - c. September 19, 2016, at 15,100 miles.
6. On October 19, 2015, Ogden's service technician adjusted the vehicle's sunroof to address Complainant's concern that water was leaking through the sunroof's weather stripping.
7. On October 26, 2015, Ogden's service technician removed and replaced the weather stripping around the vehicle's sunroof in order to address Complainant's concern.
8. On September 19, 2016, Ogden's service technician replaced the vehicle's sunroof glass to address Complainant's concern.
9. On December 11, 2016, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
10. On January 6, 2017, Respondent's dealer technical specialist, Rafael Mariduena, performed a final repair attempt on the vehicle in order to address Complainant's concern regarding water leaking through the vehicle's sunroof's weather stripping.
11. Respondent's dealer technical specialist determined during the final repair attempt that the vehicle was operating as designed, so no repairs were recommended or performed.
12. On January 19, 2017, 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.
13. The hearing in this case convened and the record was closed on March 22, 2017, in Pharr, Texas before Hearings Examiner Edward Sandoval. Complainant, Leticia Cobos, represented herself in the hearing. Respondent was represented by Rafael Mariduena, Dealer Technical Specialist.

IV. CONCLUSIONS OF LAW

1. The Texas Department of Motor Vehicles (Department) has jurisdiction over this matter. Tex. Occ. Code §§ 2301.601-2301.613 (Lemon Law).
2. A hearings examiner of the Department's Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a decision with findings of fact and conclusions of law, and the issuance of a final order. Tex. Occ. Code § 2301.704.
3. Complainant timely filed a complaint with the Department. Tex. Occ. Code § 2301.204; 43 Tex. Admin. Code § 215.202.
4. The parties received proper notice of the hearing. Tex. Gov't Code §§ 2001.051, 2001.052; 43 Tex. Admin. Code § 215.206(2).
5. Complainant bears the burden of proof in this matter.
6. Complainant failed to prove by a preponderance of the evidence that Respondent was unable to conform the vehicle to an express warranty by repairing or correcting a defect or condition that presents a serious safety hazard or substantially impairs the use or market value of the vehicle. Tex. Occ. Code § 2301.604.
7. Respondent remains responsible to address and repair or correct any defects that are covered by Respondent's warranties. Tex. Occ. Code §§ 2301.204, 2301.603.
8. Complainant's vehicle does not qualify for replacement or repurchase. Tex. Occ. Code § 2301.604.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that Complainants' petition for repurchase relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is hereby **DISMISSED**.

SIGNED March 30, 2017



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