

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 17-0121 CAF**

RATHA TAN,	§	BEFORE THE OFFICE
Complainant	§	
v.	§	
	§	OF
LEXUS A DIVISION OF TOYOTA	§	
MOTOR SALES, INC.,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Ratha Tan (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in his 2016 Lexus RX350. Complainant asserts that the vehicle is defective because the vehicle’s engine creates a noise and vibration when the RPM’s are between 1500 and 1900. Lexus, A Division of Toyota Motor Sales, Inc. (Respondent) argued that the vehicle is operating as designed 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 closed on April 12, 2017, in Fort Worth, Texas before Hearings Examiner Edward Sandoval. Complainant represented himself at the hearing. Respondent was represented by Dustin Joiner, Field 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

¹ Tex. Occ. Code § 2301.604(a).

value of the vehicle.² Third, the manufacturer has been given a reasonable number of attempts to repair or correct the defect or condition.³ Fourth, the owner must have mailed written notice of the alleged defect or nonconformity to the manufacturer.⁴ Lastly, the manufacturer must have been given an opportunity to cure the defect or nonconformity.⁵

In addition to 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 2016 Lexus RX350 from Sewell Lexus (Sewell) in Dallas, Texas on August 24, 2016, with mileage of 8 at the time of delivery.⁷ Respondent provided a four (4) year or 50,000 mile bumper-to-bumper warranty for the vehicle.⁸ In addition, Respondent has provided a powertrain warranty good for six (6) years or 70,000 miles.⁹ On the date of hearing the vehicle's mileage was 8,041. Respondent's warranties for the vehicle were still in effect at the time of hearing.

Complainant testified that soon after purchasing the vehicle he noticed that the vehicle made a noise when the engine's RPM's were between 1500 and 1900 with a vibration occurring concurrently with the noise. He stated that he did not test drive the vehicle before purchasing it, since the vehicle had to be ordered for him. However, Complainant did drive a similar vehicle and did not notice an issue with noise or vibration in that particular vehicle.

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). 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, Retail Purchase Agreement dated August 24, 2016.

⁸ Complainant Ex. 9, Excerpts from Lexus RX350 Warranty Manual, p. 1.

⁹ *Id.*

Sometime in September of 2016, Complainant contacted Sewell's salesperson to complain about the issues with the noise and vibration. The salesperson informed Complainant that they were normal, design issues, and there was nothing to repair.

Complainant continued to hear the noise and feel the vibration when he drove the vehicle. He took the vehicle to Sewell on October 8, 2016. On this occasion, the service technician checked the vehicle, but informed Complainant that there was no solution for the concern.¹⁰ Complainant was provided with a loaner vehicle for the day while his vehicle was being repaired. The mileage on the vehicle on this occasion was 1,280.¹¹

Complainant testified that he took the vehicle back to Sewell on October 12, 2016. Complainant spoke to Craig Parker, Sewell's service advisor, during this visit. Mr. Parker informed Complainant that there was no sense in leaving the vehicle, since there was not a solution for his complaint. Mr. Parker indicated that no service ticket was written for the visit and that the problem complained of was common on the year and model of the vehicle.¹²

Complainant testified that the issue continued to occur. He returned the vehicle to Sewell on November 17, 2016. Complainant informed Mr. Parker that the noise and vibration were getting worse.¹³ Sewell's technician opened a technical assistance (TAS) case for the vehicle, but no repairs were performed at the time.¹⁴ Complainant testified that he was again told that there was no solution for the issue. The vehicle was in the dealer's possession for the day. Complainant was provided with a loaner vehicle while his vehicle was being repaired. The mileage on the vehicle when he delivered it to Sewell on this occasion was 2,748.¹⁵

Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) on November 30, 2016.¹⁶ Complainant testified that he mailed a letter to Respondent on November 17, 2016, outlining the problems he had been experiencing with the vehicle.¹⁷

¹⁰ Complainant Ex. 3, Repair Order dated October 8, 2016.

¹¹ *Id.*

¹² Complainant Ex. 4, Undated Lexus Computer Printout.

¹³ Complainant Ex. 5, Repair Order dated November 17, 2016.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Complainant Ex. 6, Lemon Law Complaint dated November 30, 2016. Complainant signed and dated the complaint on November 17, 2016. However, the complaint was not received by the Texas Department of Motor Vehicles until November 30, 2016, which is the effective date of the complaint.

¹⁷ Complainant Ex. 7, Undated Letter Addressed "To whom may concern [*sic*]."

The parties participated in a prehearing conference on March 13, 2017, prior to this hearing. At the prehearing conference, Respondent's representative requested an opportunity to conduct a final repair attempt on the vehicle. The parties were ordered to schedule a final repair attempt prior to the scheduled hearing date of April 12, 2017.

The final repair attempt was conducted on March 25, 2017, at Sewell. Respondent's technicians classified the noise heard by Complainant as a "drone noise."¹⁸ The technicians confirmed a "slight to moderate engine drone at RPM's of 1500-1700."¹⁹ The technicians installed a new center exhaust pipe to the vehicle which was manufactured in Japan and a mass dampener which was placed in front of the center exhaust muffler.²⁰ The technicians then loosened and re-torqued the vehicle's front exhaust pipes, front exhaust hanger, and the engine mounts.²¹ The vehicle's mileage on this occasion was 7,462.²² The vehicle was in Sewell's possession until March 29, 2017.²³ Complainant was provided with a loaner vehicle while the repairs were being performed.

Complainant testified that he still has a concern with the vehicle's noise and vibration. He stated that the noise is the same as before the repairs. This occurs every time he drives the vehicle.

During cross-examination, Complainant testified that when he drove the loaners provided to him during his vehicle repairs, that the loaners had a similar noise that was lighter than his own vehicle. In addition, he testified that the vibration he was feeling had diminished some after the final repair attempt.

C. Respondent's Evidence and Arguments

Dustin Joiner, Field Technical Specialist, testified for Respondent. He's worked in the automotive industry for 14 years. He has been in his current position for two (2) years. Prior to that, he worked for Toyota as a Master Diagnostic Specialist for 11 years. Mr. Joiner is an Automotive Service Excellence (ASE) certified technician. He is also a Master Certified Technician for Toyota and Lexus vehicles.

Mr. Joiner testified that the noise and vibration complained of by Complainant are design issues with the vehicle. The noise comes from the vehicle's exhaust. Complainant's vehicle was

¹⁸ Complainant Ex. 8, Repair Order dated March 25, 2107.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

compared by Sewell's technicians to similar vehicles and the noise is the same. No repair is required. The only thing that can be done is to document the concern.

Mr. Joiner testified that the final repair attempt on Complainant's vehicle was performed by Ken Pelletier, Field Technical Specialist, and John Selby, Diagnostic Specialist. Mr. Joiner stated that the mass dampener installed on Complainant's vehicle is a metal weight encased in rubber. The dampener is designed to absorb some of the vehicle's vibration so that it's not transmitted into the vehicle. Mr. Joiner also stated that the repairs performed on Complainant's vehicle at the final repair attempt were for "goodwill" purposes as the technicians did not feel that there was a defect with the vehicle.

Mr. Joiner stated that Respondent has received some complaints about excessive noise in the vehicle which is caused by exhaust flowing through the vehicle's exhaust pipe. It's a harmonic noise that doesn't affect the safety or use of the vehicle. It's not a defect and it's not evidence of anything being broken on the vehicle.

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 first issue to be addressed is whether Complainant's vehicle has a defect or condition that creates a serious safety hazard or substantially impairs the use or market value of the vehicle. Complainant indicated that he was concerned with a droning noise that occurs when the vehicle's engine's RPM's are between 1500 and 1900. In addition, he stated that he felt a vibration whenever the noise occurred. It is understandable that the noise and vibration can be annoying and Complainant testified as much. However, they do not create a serious safety hazard as defined in Section 2301.601(4) of the Texas Occupations Code. They are not life-threatening malfunctions or nonconformities that substantially impede Complainant's ability to control or operate the vehicle and do not create substantial risk of fire or explosion.

In addition, the noise and vibration do not *substantially* impair the use or market value of the vehicle. If Complainant were to trade in the vehicle or attempt to sell it to another party, it's doubtful that the noise and vibration would affect the purchase price, since most people would not even notice them.

The hearings examiner must hold that there is no evidence of a defect with the vehicle and, as such, repurchase or replacement relief for Complainant is not warranted.

On the date of hearing, the vehicle's mileage was 8,041 and it remains under warranty. As such, Respondent is still under an obligation to perform repairs for any other issues that arise that are covered by the vehicle's warranty.

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

III. FINDINGS OF FACT

1. Ratha Tan (Complainant) purchased a new 2016 Lexus RX350 on August 24, 2016, from Sewell Lexus (Sewell) in Dallas, Texas, with mileage of 8 at the time of delivery.
2. The manufacturer of the vehicle, Lexus, A Division of Toyota Motor Sales, Inc. (Respondent), issued a bumper-to-bumper warranty for the vehicle good for four (4) years or 50,000 miles. In addition, Respondent provided a powertrain warranty good for six (6) years or 70,000 miles.
3. The vehicle's mileage on the date of hearing was 8,041.
4. At the time of hearing the warranties for the vehicle were still in effect.
5. Soon after purchasing the vehicle, Complainant noticed a droning noise and vibration whenever the vehicle's engine's RPM's were in the 1500 to 1900 range.
6. Complainant took the vehicle to Respondent's authorized dealer, Sewell, in order to address his concerns regarding the noise and vibration on the following dates:
 - a. October 8, 2016, at 1,280 miles;
 - b. October 12, 2016, at unknown miles; and
 - c. November 17, 2016, at 2,748 miles.
7. On October 8, 2016, Sewell's service technician did not perform any repair to the vehicle.

- Complainant was informed that the noise and vibration were normal and that no solution to the issues existed.
8. On October 12, 2016, Craig Parker, Sewell's service advisor, informed Complainant that the issues complained of were common for the 2016 RX. No repairs were performed at the time.
 9. On November 17, 2016, Sewell's service technician created a technical assistance case for Complainant's concern. No repairs were performed to the vehicle at the time.
 10. On November 30, 2016, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
 11. On March 25, 2017, Respondent's technicians performed a final repair attempt on the vehicle.
 12. During the final repair attempt, the technicians replaced the vehicle's center exhaust pipe and installed a mass dampener in front of the center exhaust muffler. In addition, the technicians loosened and re-torqued the vehicle's front exhaust pipes, front exhaust hanger, and engine mounts.
 13. On February 13, 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.
 14. The hearing in this case convened and the record closed on April 12, 2017, in Fort Worth, Texas before Hearings Examiner Edward Sandoval. Complainant represented himself at the hearing. Respondent was represented by Dustin Joiner, Field 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 that the vehicle has an existing warrantable defect. Tex. Occ. Code § 2301.604(a).
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 Complainant's petition for replacement or repurchase relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is hereby **DISMISSED**.

SIGNED April 17, 2017



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