

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 17-0176644 CAF**

JEREMY CALFY,
Complainant

v.

NISSAN NORTH AMERICA, INC.,
Respondent

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**BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Jeremy Calfy (Complainant) filed a petition seeking relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in his new 2016 Nissan Titan pickup truck. Complainant asserts that the vehicle pulls to the right inordinately. Nissan North America, Inc. (Respondent) argued that Complainant's vehicle has been repaired and, as such, Complainant is not entitled to repurchase or replacement relief. The hearings examiner concludes that the vehicle does have an existing warrantable defect, and Complainant is eligible for replacement 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 November 14, 2017. The hearing was conducted telephonically before Hearings Examiner Edward Sandoval. Complainant, Jeremy Calfy, was represented by J. Keith Mayo, attorney with Mayo, Mendiola, & Vice LLP in the hearing. Complainant was also present to offer testimony. 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 owner must have mailed written notice of the alleged defect or nonconformity to the manufacturer.³ Lastly, the manufacturer must have been given an opportunity to cure the defect or nonconformity.⁴

¹ Tex. Occ. Code § 2301.604(a).

² *Id.*

³ Tex. Occ. Code § 2301.606(c)(1).

⁴ 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.⁵

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 and: (1) at least one repair attempt was made during the 12 months or 12,000 miles, whichever comes first, following the date of original delivery to the owner; and (2) at least one other attempt was made in the 12 months or 12,000 miles, whichever comes first, immediately following the date of the first repair attempt.⁶

“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.⁷

B. Complainant’s Evidence and Arguments

Complainant purchased a new 2016 Nissan Titan pickup truck (the vehicle) from Jimmy Cleveland Nissan (Cleveland) in Wichita Falls, Texas on June 9, 2016.⁸ The vehicle had mileage of 5 at the time of the purchase.⁹ Respondent provided a bumper-to-bumper warranty for the vehicle which provides coverage for three (3) years or 36,000 miles, whichever comes first. At the time of hearing, the vehicle’s mileage was 72,852. Respondent’s warranty for the vehicle had expired prior to the hearing date.

Complainant testified that he did not notice any issue with the vehicle when he first purchased it. However, after driving the vehicle approximately 2,000 miles, he noticed that it would pull or drift to the right when he was driving it. As a result, he took the vehicle to Cleveland for repair for the issue. Complainant lived approximately 45 miles from the dealership, but at the time he was renting a building on Cleveland’s property where he was running an auto body repair business.

⁵ Tex. Occ. Code § 2301.605(a)(1)(A) and (B). Texas Occupations Code § 2301.605(a) (3) provides a third method 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. This section 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.

⁶ Tex. Occ. Code § 2301.605(a)(2)(A) and (B).

⁷ Tex. Occ. Code § 2301.601(4).

⁸ Complainant Ex. 1, Motor Vehicle Retail Sale Installment Contract dated June 9, 2016.

⁹ Complainant Ex. 2, Odometer Disclosure Statement dated June 9, 2016.

Complainant was informed by Cleveland's service technicians that the vehicle's alignment was off. However, they were never able to repair the issue despite repeated attempts and several calls to Respondent's technical line for assistance. Complainant testified that he presented the vehicle to Cleveland for repair on at least ten (10) occasions. He did not always obtain copies of repair invoices for the repair attempts. However, Complainant specified that he did present the vehicle to Cleveland for repair on July 11, 2016, at 4,597 miles; September 8, 2016, at 14,226 miles; September 20, 2016, at 17,596 miles; and October 7, 2016, at 17,597 miles.¹⁰ Complainant testified that he was informed by Cleveland's service manager that the dealer would no longer work on the vehicle because Respondent was refusing to pay for any additional warranty repairs to it.

Complainant's attorney mailed a notice to Respondent on November 1, 2016, that Complainant was dissatisfied with the vehicle.¹¹ Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) with an effective date of May 19, 2017.¹² Complainant stated that he had not been contacted by Respondent for a final repair attempt on the vehicle.

Complainant testified that the vehicle still pulls strongly to the right. He stated that he has had to replace the vehicle's tires at least three (3) times because they've been damaged by the vehicle pulling to the right. The tires become cupped and unsafe for further use. Complainant did reach out to Respondent to see if they would be willing to replace the vehicle and was denied initially. Respondent later made an offer to Complainant to repurchase the vehicle, but Complainant refused the offer because it would cost him \$28,000 for the usage allowance and the amount still owed on his vehicle trade-in.

C. Respondent's Evidence and Arguments

Rafael Mariduena, Dealer Technical Specialist, testified for Respondent. He has worked in the automotive industry for over 25 years. He worked for Nissan dealers as a master technician from 1990 until 2015. In 2015, Mr. Mariduena assumed his current position. He is a Master Certified Automotive Service Excellence (ASE) technician.

Mr. Mariduena testified that he inspected the vehicle on September 15, 2017, and that the vehicle was pulling to the right at the time. He informed Cleveland's service technicians to perform an alignment on the vehicle in order to resolve the issue. However, Mr. Mariduena feels that the technicians performed the alignment in the wrong direction.

¹⁰ Complainant Ex. 3, Lemon Law Complaint dated May 19, 2017.

¹¹ Complainant Ex. 4, Letter to Nissan North America dated November 1, 2016.

¹² Complainant Ex. 3, Lemon Law Complaint dated May 19, 2017. Although Complainant signed the complaint on March 10, 2017, it was not received by the Texas Department of Motor Vehicles until May 19, 2017, which is the effective date of the complaint.

On October 17, 2016, Respondent issued a technical service bulleting (TSB) NTB 16-099 which revised some of the front and rear suspension wheel alignment specifications for 2016 through 2017 Nissan Titans and Titan XD's.¹³ Mr. Mariduena feels that some of the problems experienced by Complainant were due to the wrong alignment specifications being used by Cleveland's service technicians.

Mr. Mariduena does not believe that Respondent ever requested a final repair attempt on the vehicle. He also stated that although the vehicle may pull hard to the right when it's being driven, it is still drivable. Mr. Mariduena also testified that Respondent did offer to repurchase the vehicle from Complainant, but Complainant refused the offer.

Mr. Mariduena testified that Respondent provided a three (3) year or 36,000 mile bumper-to-bumper warranty and a one (1) year or 12,000 mile adjustment warranty for 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 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 address is whether Complainant's vehicle has a defect or condition that substantially impairs its use or market value or which creates a serious safety hazard. The totality of the evidence presented at the hearing reveals that the vehicle pulls to the right inordinately and that the issue has not been repaired. It is apparent from the testimony presented that the vehicle does have a defect or nonconformity which affects its use and market value, as a potential buyer would be more hesitant to purchase a vehicle that pulls strongly to the right when it's being driven. In addition, the issue creates a serious safety hazard as it substantially impedes Complainant's ability to control or operate the vehicle for its ordinary or intended purposes.

Complainant 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. Complainant presented the vehicle for repair to Respondent's authorized representatives on several occasions, including: July 11, 2016; September 8, 2016; September 20, 2016; and October 7, 2016. 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)(2) specifies that a rebuttable presumption that a reasonable

¹³ Respondent Ex. 1, Service Bulletin NTB 16-099 dated October 17, 2016.

number of attempts to repair have been made to repair a serious safety hazard if “at least one attempt to repair the nonconformity was made in the 12 months or 12,000 miles, whichever occurs first, following the date of original delivery to the owner; and at least one other attempt to repair the nonconformity was made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the first repair attempt.” The evidence presented at the hearing establishes that Complainant has met the requirements of this test since he took the vehicle for repair the requisite number of times within the specified time frame. As such, Complainant has established that a reasonable number of attempts to repair the vehicle were made by Respondent.

In addition, the evidence presented at the hearing indicates that Complainant also provided Respondent with written notice of the defect and a final opportunity to cure the defect. Complainant’s attorney informed Respondent via letter dated November 1, 2016, of the issue with the vehicle pulling strongly to the right and providing them with an opportunity to cure of which Respondent did not avail themselves.

Although Respondent has been provided several opportunities 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, Complainant has met his burden of proof to establish that the vehicle has a warrantable and existing defect or condition which creates a serious safety hazard and which substantially impairs the vehicle’s use and market value.

Based on the evidence and the arguments presented, the hearings examiner finds that replacement of the vehicle is the appropriate remedy in this case. Complainant’s request for replacement relief is hereby granted.

III. FINDINGS OF FACT

1. Jeremy Calfy (Complainant) purchased a new 2016 Nissan Titan pickup truck on June 9, 2016, from Jimmy Cleveland Nissan (Cleveland) in Wichita Falls, Texas with mileage of 5 at the time of delivery.
2. The manufacturer of the vehicle, Nissan North America, Inc. (Respondent), issued a bumper-to-bumper warranty for the vehicle providing coverage for three (3) years or 36,000 miles, whichever comes first.
3. The vehicle’s mileage on the date of the hearing was 72,852.
4. At the time of hearing the bumper-to-bumper warranty for the vehicle had expired.

5. Complainant first experienced a problem with the vehicle after having driven it about 2,000 miles. He observed that the vehicle pulled strongly to the right whenever he drove it.
6. Complainants' vehicle was serviced by Respondent's authorized dealer, Cleveland, on the following dates because of Complainant's concerns with the vehicle pulling to the right when he was driving it:
 - a. July 11, 2016, at 4,597 miles;
 - b. September 8, 2016, at 14,226 miles;
 - c. September 20, 2016, at 17,596 miles; and
 - d. October 7, 2106, at 17,597 miles.
7. Cleveland's service technicians were not able to resolve the issue of the vehicle pulling strongly to the right.
8. Complainant has had to replace tires on the vehicle on at least three (3) occasions due to the tires cupping.
9. On November 1, 2016, Complainant's attorney provided written notice to Respondent of Complainant's dissatisfaction with the vehicle.
10. On May 19, 2017, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
11. Respondent did not ask Complainant or his representative for an opportunity to perform a final repair or inspection of the vehicle.
12. The vehicle was still pulling strongly to the right at the time of hearing.
13. On September 6, 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 November 14, 2017. The hearing was conducted telephonically before Hearings Examiner Edward Sandoval. Complainant, Jeremy Calfy, was represented by J. Keith Mayo, attorney with Mayo, Mendiola, & Vice LLP in the hearing. Complainant was also present to offer testimony. Respondent was represented by Rafael Mariduena, Dealer Technical Specialist.

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's vehicle has an existing defect or condition that creates a serious safety hazard. Tex. Occ. Code § 2301.604(a).
7. Complainant's vehicle has an existing nonconformity that substantially impairs the use and market value of the vehicle. Tex. Occ. Code § 2301.604(a).
8. After a reasonable number of attempts, Respondent has been unable to repair the nonconformity in Complainant's vehicle so that it conforms to the applicable express warranty. Tex. Occ. Code §§ 2301.604(a) and 2301.605.
9. Based on the above Findings of Fact and Conclusions of Law, Complainant is entitled to relief and replacement of his 2016 Nissan Titan pickup truck under Texas Occupations Code § 2301.604(a).

IT IS THEREFORE ORDERED that:

1. Respondent shall, in accordance with Texas Administrative Code § 215.208(d)(1)(A), promptly authorize the exchange of Complainant's new 2016 Nissan Titan pickup truck (the reacquired vehicle) with Complainant's choice of any comparable motor vehicle.
2. Respondent shall instruct the dealer to contract the sale of the selected comparable vehicle with Complainant under the following terms:

- (a) The sales price of the comparable vehicle shall be the vehicle's Manufacturer's Suggested Retail Price (MSRP);
 - (b) The trade-in value of Complainant's 2016 Nissan Titan pickup truck shall be the MSRP at the time of the original transaction, less a reasonable allowance for Complainant's use of the vehicle;
 - (c) The use allowance for replacement relief shall be calculated in accordance with the formula outlined in Texas Administrative Code § 215.208(b)(2) (the use allowance is \$16,842.14);
 - (d) The use allowance paid by Complainant to Respondent shall be reduced by \$35.00 (the refund for the filing fee) (after deducting the filing fee, the use allowance is reduced to **\$16,807.14**);
3. Respondent's communications with Complainant finalizing replacement of the reacquired vehicle shall be reduced to writing, and a copy thereof shall be provided to the Department within twenty (20) days of completion of the replacement.
4. Respondent shall obtain a Texas title for the reacquired vehicle prior to resale and issue a disclosure statement on a form provided or approved by the Department.¹⁴
5. Respondent shall affix the disclosure label to the reacquired vehicle in a conspicuous location (*e.g.*, hanging from the rear view mirror). Upon Respondent's first retail sale of the reacquired vehicle, the disclosure statement shall be completed and returned to the Department.
6. Within sixty (60) days of transfer of the reacquired vehicle, Respondent shall provide to the Department written notice of the name, address and telephone number of any transferee (wholesaler or equivalent), regardless of residence.
7. Respondent shall repair the defect or condition that was the basis of the 2016 Nissan Titan pickup truck's reacquisition and issue a new 12-month/12,000-mile warranty on the reacquired vehicle.
8. Upon replacement of Complainant's 2016 Nissan Titan pickup truck, Complainant shall be responsible for payment or financing of the usage allowance of the reacquired vehicle, any outstanding liens on the reacquired vehicle, and applicable taxes and fees associated with

¹⁴ Correspondence and telephone inquiries regarding disclosure labels should be addressed to: Texas Department of Motor Vehicles, Enforcement Division-Lemon Law Section, 4000 Jackson Avenue Building 1, Austin, Texas 78731, ph. (512) 465-4076.

the new sale, excluding documentary fees. Further, in accordance with 43 Tex. Administrative Code § 215.208(d)(2):

- (a) If the comparable vehicle has a higher MSRP than the reacquired vehicle, Complainant shall be responsible at the time of sale to pay or finance the difference in the two vehicles' MSRPs to the manufacturer, converter or distributor; and
 - (b) If the comparable vehicle has a lower MSRP than the reacquired vehicle, Complainant will be credited the difference in the MSRP between the two vehicles. The difference credited shall not exceed the amount of the calculated usage allowance for the reacquired vehicle.
9. Complainant shall be responsible for obtaining financing, if necessary, to complete the transaction.
 10. The replacement transaction described in this Order shall be completed within 20 calendar days from the receipt of this Order. If the transaction cannot be accomplished within the ordered time period, Respondent shall repurchase Complainant's 2016 Nissan Titan pickup truck pursuant to the repurchase provisions set forth in 43 Tex. Administrative Code § 215.208(b)(1) and (2). The repurchase price shall be **\$35,390.25**. The refund shall be paid to Complainant and the lien holder, if any, as their interests appear. If clear title is delivered, the full refund shall be paid to Complainant.

Purchase price, including tax, title, license and registration	\$52,197.39
Delivery mileage	5
Mileage at first report of defective condition	4,597
Mileage on hearing date	72,852
Useful life determination	120,000

Purchase price, including tax, title, license and registration					\$52,197.39
Mileage at first report of defective condition				4,597	
Less mileage at delivery				<u>-5</u>	
Unimpaired miles				4,592	
Mileage on hearing date				72,852	
Less mileage at first report of defective condition				<u>-4,597</u>	
Impaired miles				68,255	
Reasonable Allowance for Use Calculations:					
Unimpaired miles					
				<u>4,592</u>	
	120,000	X	\$52,197.39	=	\$1,997.42
Impaired miles					
				<u>68,255</u>	
	120,000	X	\$52,197.39	X .5	= <u>\$14,844.72</u>
Total reasonable allowance for use deduction:					\$16,842.14
Purchase price, including tax, title, license and registration					\$52,197.39
Less reasonable allowance for use deduction					-\$16,842.14
Plus filing fee refund					<u>\$35.00</u>
TOTAL REPURCHASE AMOUNT					\$35,390.25

11. If Complainant's 2016 Nissan Titan pickup truck is substantially damaged or there is an adverse change in its condition, beyond ordinary wear and tear, from the date of the hearing to the date of Respondent's reacquisition of the vehicle, and the parties are unable to agree on an amount allowed for such damage or condition, either party may request reconsideration by the final order authority of the trade-in value of Complainant's vehicle.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that Complainant's petition for replacement relief pursuant to Texas Occupations Code §§ 2301.601-.613 is hereby **GRANTED**. It is further **ORDERED** that Respondent shall repair the warrantable defect in the reacquired vehicle identified in this Decision.

SIGNED November 28, 2017



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