

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 19-0003215 CAF**

**ANGELA CHABOT,
Complainant**

v.

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

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Angela Chabot (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in her 2016 Nissan Rogue. Complainant asserts that the vehicle's hood and headlights vibrate excessively and that the hood and front bumper are out of alignment. Nissan North America, Inc. (Respondent) argued that the vehicle has been repaired and that the vehicle conforms to their warranty. The hearings examiner concludes that the vehicle has been repaired and Complainant is not entitled to repurchase or 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 hearing record closed on May 29, 2019, in Austin, Texas before Hearings Examiner Edward Sandoval. Angela Chabot, Complainant, appeared and represented herself. Respondent was represented by Rafael Maridueno, Dealer Technical Specialist. In addition, Joshua Skobel, Texas Department of Motor Vehicles' intern, was present as an observer.

On July 19, 2019, the hearings examiner issued Order No. 3: Reopening Hearing Record and Ordering Vehicle Inspection in order to allow the Texas Department of Motor Vehicles' (Department) case advisor to inspect the vehicle to determine whether the subject vehicle had been involved in an accident prior to Complainant's purchase. The hearing record was reopened and further testimony was taken from the parties during a continuance held on August 23, 2019. The continuance was conducted by Hearings Examiner Edward Sandoval. Angela Chabot, Complainant, appeared and represented herself. Respondent was represented by Rafael Maridueno, Dealer Technical Specialist. The hearing record was closed on August 23, 2019.

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

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

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).

⁵ Tex. Occ. Code § 2301.605(a)(1)(A) and (B).

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

⁷ Tex. Occ. Code § 2301.601(4).

If a vehicle is found to have a nonconformity that substantially impairs the vehicle's use or market value and 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 (1) out of service for repair for a cumulative 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; and (2) at least two repair attempt were 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.⁸

B. Complainant's Evidence and Arguments

Complainant purchased a new 2016 Nissan Rogue (the vehicle) from Clay Cooley Nissan of Austin (Cooley), in Austin, Texas on February 11, 2017.⁹ The vehicle's mileage was 535 at the time of delivery.¹⁰ The vehicle's mileage on the date of hearing was 25,779.

Complainant testified that soon after purchasing the vehicle she noticed that the hood was out of alignment and that there was a large gap between the hood and one of the vehicle's side panels. Complainant contacted the dealer about the issue and asked if the vehicle had been involved in an accident prior to her purchase of it. The dealer's representative denied that the vehicle had been damaged prior to her purchase of it.

Complainant took the vehicle to Cooley to repair the hood on March 29, 2017. The dealer's service technician inspected the vehicle to determine if the hood alignment was within the manufacturer's specifications.¹¹ Complainant stated that she does not believe that any repair was performed to the vehicle at the time. The vehicle's mileage on this occasion is unknown.¹² The vehicle was in the dealer's possession for approximately a month during this repair visit. Complainant was provided with a loaner vehicle while her vehicle was being repaired.

Complainant drove the vehicle for a period of time after the March 2017 repair visit. She noticed that the vehicle's hood would start "flopping" when she drove the vehicle above 60 mph. In addition, she noticed that the vehicle's headlights seemed to vibrate excessively when she drove the vehicle, particularly the driver's side headlight. Complainant was also concerned because it

⁸ Tex. Occ. Code § 2301.605(a)(2)(A) and (B).

⁹ Complainant Ex. 1, Motor Vehicle Retail Installment Sales Contract dated February 11, 2017.

¹⁰ Complainant Ex. 2, Odometer Disclosure Statement dated February 11, 2017.

¹¹ Complainant Ex. 3, Repair Order dated March 29, 2017.

¹² *Id.* The repair order indicates that the vehicle's mileage was 68. However, this cannot be correct as the vehicle's mileage at the time of purchase on February 11, 2017, was 535.

appeared that the vehicle's front bumper was sticking out about a half inch and was not flush with the panels as it was supposed to be.

Complainant took the vehicle to Round Rock Nissan (Round Rock) located in Round Rock, Texas for repair on September 28, 2017. The dealer's service technician replaced the vehicle's driver's side headlight in order to resolve the headlight vibration issue.¹³ The technician also determined that the hood vibration was normal for the vehicle.¹⁴ Complainant stated that she was told by the technician that no repair was performed to the vehicle during the March 2017 repair visit, as the bolts connecting the hood to the vehicle's frame were still in factory condition. Complainant also stated that she was told by the technician that they could not do anything about the hood because any repair for the hood had to be done by the seller of the vehicle. The vehicle's mileage when it was taken to Round Rock on this occasion was 7,670.¹⁵ The vehicle was in the dealer's possession for one (1) day.¹⁶ Complainant was not provided a loaner vehicle while her vehicle was being repaired.

Complainant stated that the driver's side headlight started to vibrate again within 24 hours of the repair being performed. She also stated that the bumper was not repaired at the time, despite the fact that she mentioned her concern with it to Round Rock's service advisor.

Complainant took the vehicle back to Cooley for repair for the hood alignment and bumper issues on December 28, 2017. The mileage on the vehicle on this occasion was 10,612.¹⁷ The vehicle was in the dealer's possession until January 6, 2018. Complainant was provided with a rental vehicle while her vehicle was being repaired. Complainant stated that she was unhappy with any work that was performed by Cooley's technician. Complainant felt that the gap in the hood was worse than before when she picked up the vehicle and that the front bumper was still sticking out. When Complainant indicated to Cooley's representative that she was unhappy with the work done, she was told that the service manager was not in and that she needed to call him to speak to him.

Complainant contacted Respondent's consumer line to register her complaints regarding the issues with the vehicle. Respondent's representative referred her to Clay Cooley's corporate office in Dallas, Texas, because the Cooley dealership in Austin had been sold and was no longer under Cooley's management. Complainant stated that she was never able to speak to the corporate regional manager regarding her complaints, although she left many messages for him.

¹³ Complainant Ex. 4, Repair Order dated September 28, 2017.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Complainant Ex. 5, Repair Order dated December 28, 2017.

Complainant then contacted Respondent's consumer line again and was informed that there was nothing that they could do to for her, because she had taken the vehicle to Group 1 Collision Center of Round Rock (Group 1) for an estimate for the cost to repair the vehicle.

Complainant took the vehicle to Round Rock for maintenance repairs on May 12, 2018. She informed the service advisor of the issues with the bumper and hood. No work was done for the issues, because it was part of the sale of the vehicle and the selling dealer would have to perform any repairs for the issues.¹⁸ The vehicle's mileage when on this occasion was 14,216.¹⁹ The vehicle was at the dealer's location for the afternoon. Complainant did not receive a rental or loaner vehicle at the time. It was at this time that Complainant was provided the number for Group 1 from which Complainant received a repair estimate. Complainant sent the estimate to Respondent's customer complaint center. Respondent indicated that there was nothing they could do to help Complainant and she would have to have this issue addressed by Clay Cooley's corporate office, since the local dealership had already been sold by this time.

Complainant took the vehicle to Round Rock for repair for her concerns with the hood and bumper on October 16, 2018. Round Rock's service technician verified that the vehicle's hood and front bumper were misaligned.²⁰ The technician attempted to adjust the hood, but was unable to do so.²¹ The technician was unable to duplicate Complainant's concern with the headlight vibration due to the weather conditions.²² The vehicle's mileage on this occasion was 19,912.²³ The vehicle was in Round Rock's possession for one day. Complainant was not provided with a loaner vehicle while her vehicle was being repaired.

On October 18, 2018, Complainants emailed Respondent's consumer affairs department and advised them that she was dissatisfied with the vehicle and would be filing a Lemon Law complaint.²⁴ Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) on November 15, 2018.²⁵

Complainant testified that after she filed the Lemon Law complaint, Respondent contacted her and asked that she allow an inspection of the vehicle by Respondent's representative. The inspection was performed on April 11, 2019, at Round Rock by Mr. Mariduena. Complainant did not receive a loaner vehicle while her vehicle was being inspected. Mr. Mariduena performed an

¹⁸ Complainant Ex. 6, Repair Order dated May 12, 2018.

¹⁹ *Id.*

²⁰ Complainant Ex. 8, Repair Order dated October 16, 2018.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ Complainant Ex. 10, Email to Nissan Consumer Affairs dated October 18, 2018.

²⁵ Complainant Ex. 9, Lemon Law complaint dated November 15, 2018.

inspection of the vehicle and then took it to Group 1 for an estimate for the cost of repair. The vehicle was not repaired at the time.

Group 1 performed repairs to the vehicle's hood, headlights, and bumper issues sometime afterward after April 11, 2019. The repairs took between one and a half to two weeks to complete. Complainant did not receive a loaner vehicle while the repairs were being performed. Complainant stated that the vehicle's front bumper and front driver's side headlight were replaced during the repair. The hood was repainted.

Complainant stated that after the repair the hood and bumper were still vibrating excessively, so she took the vehicle back to Group 1. The technician glued the bumper to the vehicle so that it wouldn't move. He also indicated that there was a "breakdown" in the hood of the vehicle which would require that the hood be replaced. Respondent gave the Group 1 technician permission to replace the hood during this latter repair.

Complainant stated that since receiving the vehicle back from Group 1, the hood seemed stable and was not vibrating or "flopping." She feels that the bumper and driver's side headlight are still vibrating and the right side of the bumper sticks out about ½ inch. She feels that the front end vibration is causing damage to the driver's side headlight. Complainant stated that she doesn't feel that she can trust the vehicle any longer.

C. Respondent's Evidence and Arguments

Rafael Mariduena, Dealer Technical Specialist, represented Respondent in the hearing. He has worked in the automotive industry for 30 years. Prior to 2015, Mr. Mariduena worked for several automobile dealers in various capacities in the technical field. He was hired by Respondent for his current position in 2015. Mr. Mariduena is an Automotive Service Excellence (ASE) Certified Master Technician. He is also a Nissan Certified Master Technician.

Mr. Mariduena testified that he first saw the vehicle on April 11, 2019. Mr. Mariduena stated that he was asked by a representative of Respondent's Consumer Affairs Department to inspect the vehicle to investigate Complainant's concerns. Mr. Mariduena stated that he is not qualified to perform repairs to a vehicle's body, so he took the vehicle to Group 1 to obtain an estimate as to the cost to repair the vehicle's hood and bumper. Mr. Mariduena stated that after obtaining the estimate, any further repairs would have to be approved by Respondent. Those repairs were approved and Group 1's technicians replaced the vehicle's hood, front bumper, and left front (driver's side) headlight. Mr. Mariduena testified that he did not inspect the vehicle's frame at the time of his inspection of the vehicle on April 11, 2019. Mr. Mariduena indicated that there is no record that Complainant's vehicle was ever involved in an accident prior to her purchase of it.

Mr. Maridueno stated that the driver's side headlight vibrates because the entire vehicle vibrates at idle. Mr. Maridueno also stated that the headlight assembly was replaced in the past because the brackets were broken, but they should have been repaired.

D. Department's Inspection of the Vehicle

John Dufour, Department's case advisor, inspected the vehicle on August 2, 2019, pursuant to Order No. 3: Reopening Hearing Record and Ordering Vehicle Inspection issued on July 19, 2019. The inspection took place at Round Rock Nissan and Complainant was present at the time.²⁶ Respondent did not have a representative present for the inspection.²⁷

Mr. Dufour prepared a written report of his inspection. He stated in his report:

The hood, fenders, front bumper cover, headlights, and all supporting structures were securely attached and body panels were properly aligned. A negligible gap was noted at the right front fender to bumper cover union. With the headlights on and idling in gear with the brake on a slight vibration could be observed of the left headlight beam.²⁸

Mr. Dufour's technical analysis was:

There was no obvious evidence of collision damage. The body panels appear to be attached and aligned properly. Possible engine vibration being transmitted to the left headlight could be causing the slight headlight beam vibration.²⁹

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.

²⁶ Department Ex. 1, Texas Department of Motor Vehicles Enforcement Division – Vehicle Inspection Report dated August 6, 2019.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

Occupations Code § 2301.603 provides that “a manufacturer, converter, or distributor shall make repairs necessary to conform a new motor vehicle to an applicable manufacturer’s, converter’s, or distributor’s express warranty.” Relief under the Lemon Law can only be granted if the manufacturer of a vehicle has been unable to conform a vehicle to the manufacturer’s warranty. If a vehicle has been repaired then no relief can be possible. A loss of confidence in the vehicle when a defect has been cured does not warrant relief under the Lemon Law. The Lemon Law requires that in order for a vehicle to be determined to be a “lemon” the “nonconformity continues to exist” after the manufacturer has made repeated repair attempts.³⁰ In the present case, the evidence reveals that the vehicle has been fully repaired and that it currently conforms to the manufacturer’s warranty. There may be a slight vibration in the vehicle, but this seems to be normal engine vibration and not grounds to order repurchase or replacement of the vehicle. Therefore, the hearings examiner finds that there is no defect with the vehicle that has not been repaired and, as such, repurchase or replacement relief for Complainant is not warranted.

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

III. FINDINGS OF FACT

1. Angela Chabot (Complainant) purchased a new 2016 Nissan Rogue on February 11, 2017, from Clay Cooley Nissan of Austin (Cooley) located in Austin, Texas, with mileage of 535 at the time of delivery.
2. Nissan North America, Inc. (Respondent) is the manufacturer or distributor of the vehicle.
3. The vehicle’s mileage on the date of the original hearing was 25,779.
4. Soon after purchasing the vehicle, Complainant noticed that the vehicle’s hood was misaligned and that there was a gap between the side of the hood and the passenger side front panel.
5. Complainant also noticed when driving the vehicle that the hood and driver’s side headlight vibrated excessively.

³⁰ Tex. Occ. Code § 2301.605.

6. Complainant took the vehicle to Respondent's authorized dealers (Clay Cooley Nissan of Austin and Round Rock Nissan) in order to address her concerns with the hood misalignment and the hood and headlight vibrating on the following dates:
 - a. March 29, 2017, at unknown miles;
 - b. September 29, 2017, at 7,670 miles;
 - c. December 28, 2017, at 10,612 miles;
 - d. May 12, 2018, at 14,216 miles; and
 - e. October 16, 2018, at 19,912 miles.
7. On March 29, 2017, the Cooley's service technician checked the hood and determined that the alignment of the hood was within the required specifications.
8. On September 29, 2017, Round Rock's service technician addressed the issue of the vehicle vibration and determined that the hood vibration was normal. The technician replaced the driver's side headlight assembly to address the issue of the headlight vibration.
9. On December 28, 2017, Cooley's service technician performed repairs to the vehicle to address Complainant's concerns regarding the misalignment of the hood and to address an issue of the left side of the front bumper popping out.
10. On May 12, 2018, Complainant took the vehicle to Round Rock for repair because she felt that the hood was still misaligned and the bumper was still sticking out too far. Round Rock's technician did not perform any repairs for Complainant's concerns at the time.
11. On October 16, 2018, Round Rock's technician was unable to recreate the issues of the hood and headlight vibrating severely when driving the vehicle. No repairs were performed for the issues.
12. On October 18, 2018, Complainant sent an email to Respondent regarding her dissatisfaction with the vehicle and informing them that she was filing a Lemon Law complaint, since she felt that the vehicle had not been repaired to her satisfaction.
13. On November 15, 2018, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
14. On February 12, 2019, 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.

15. On April 11, 2019, Rafael Mariduena, Respondent's Dealer Technical Specialist, inspected the vehicle and took the vehicle to Group 1 Collision Center of Round Rock (Group 1) to obtain an estimate for the cost of repair to the vehicle's hood and bumper.
16. In May of 2019, Group 1's technicians realigned and repainted the vehicle's hood, replaced the front bumper and the driver's side headlight assembly in order to resolve Complainant's concerns.
17. On August 2, 2019, John Dufour, Department Case Advisor inspected the vehicle and determined that the vehicle's body panels were attached and aligned properly, and that possible engine vibration could be causing a slight head light beam vibration.
18. The hearing in this case convened and the hearing record closed on May 29, 2019, in Austin, Texas before Hearings Examiner Edward Sandoval. Angela Chabot, Complainant, appeared and represented herself. Respondent was represented by Rafael Mariduena, Dealer Technical Specialist. In addition, Joshua Skobel, Texas Department of Motor Vehicles' intern, was present as an observer.
19. On July 19, 2019, the hearings examiner issued Order No. 3: Reopening Hearing Record and Ordering Vehicle Inspection in order to allow the Texas Department of Motor Vehicles' (Department) case advisor to inspect the vehicle to determine whether the subject vehicle had been involved in an accident prior to Complainant's purchase. The hearing record was reopened and further testimony was taken from the parties during a continuance held on August 23, 2019. The continuance was conducted by Hearings Examiner Edward Sandoval. Angela Chabot, Complainant, appeared and represented herself. Respondent was represented by Rafael Mariduena, Dealer Technical Specialist. The hearing record was closed on August 23, 2019.

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 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.
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-.613 is hereby **DISMISSED**.

SIGNED September 4, 2019



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