

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 19-0009152 CAF**

**JANET S. JOHNSON,
Complainant**

v.

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

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Janet S. Johnson (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in her 2017 Nissan Rogue. Complainant asserts that the vehicle is defective because there is a “rattling” noise that intermittently occurs from the vehicle’s windshield area. 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 or nonconformity 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 on September 12, 2019, in Carrollton, Texas, before Hearings Examiner Edward Sandoval. Janet S. Johnson, Complainant, represented herself at the hearing. Nissan North America, Inc., Respondent, was represented by John Howell, Dealer Technical Specialist. The hearing record closed on September 12, 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 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

¹ Tex. Occ. Code § 2301.604(a).

² *Id.*

³ *Id.*

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 the repair attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever comes first, following the date of original delivery to the owner.⁶

B. Complainant's Evidence and Arguments

Complainant purchased a new 2017 Nissan Rogue from Clay Cooley Nissan (Cooley) in Farmers Branch, Texas on December 17, 2017, with mileage of 16 at the time of delivery.^{7,8} Respondent provided a bumper-to-bumper warranty for the vehicle which provides coverage for three (3) years or 36,000 miles. On the date of hearing the vehicle's mileage was 16,475. At the time of hearing Respondent's warranty was still in effect.

Complainant testified that a week after purchasing the vehicle she began to hear a "rattling" noise from the vehicle's windshield area during a trip to Houston. When she returned home, Complainant took the vehicle to Cooley to repair the issue. When she arrived at Cooley on December 27, 2018, Complainant ran into the salesperson (Stan) she had been dealing with during her purchase of the vehicle. Stan indicated to Complainant that he would take the vehicle to the dealer's service area for repair to the vehicle. When the vehicle was returned to Complainant, she was informed that the technician had taken off the vehicle's front license plate holder in order to address the rattling noise issue. Complainant was not provided with a repair invoice during this visit to Cooley. She was not provided with a loaner vehicle, as Complainant was at the dealership for a short period of time. Since no invoice was prepared for the repair visit, Complainant did not know the vehicle's mileage at the time of the repair.

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. 3, Motor Vehicle Retail Installment Sales Contract dated December 11, 2017.

⁸ Complainant Ex. 2, Odometer Disclosure Statement dated December 11, 2017.

Complainant continued to hear the rattling noise from the vehicle's windshield area. In an attempt to resolve the issue, Complainant took the vehicle to Cooley for repair on January 3, 2018. Cooley's service technician heard a rattle noise from the vehicle's dashboard and insulated the dashboard in order to repair the concern.⁹ The vehicle's mileage when Complainant turned it over to the dealer on this occasion was 1,301.¹⁰ The vehicle was in the dealer's possession for a few hours that day. Complainant was not provided with a loaner vehicle while her vehicle was being repaired.

Complainant continued to hear the rattle noise from the front of the vehicle. She returned the vehicle to Cooley for repair for the issue on January 8, 2018. Complainant testified that she doesn't know what repair, if any, was performed at the time. The mileage on the vehicle at the time was 1,496.¹¹ Cooley had the vehicle in their possession for three (3) days during this repair visit. Complainant was provided with a loaner vehicle while her vehicle was being repaired.¹²

Complainant testified that she continued to hear the rattle after the January 8, 2018 repair. However, the rattle was slightly better. Complainant stated that she would hear the rattle noise whenever she drove over a bump in the vehicle. She contacted Respondent's consumer relations division in order to voice her complaints about the vehicle. Complainant indicated to Respondent's representatives that she wanted them to repurchase the vehicle from her due to the rattling noise issue. Complainant's request for repurchase was denied by Respondent.¹³ However, Complainant was informed that Respondent was going to have a dealer technical specialist inspect the vehicle in order to ensure that it was operating correctly.

Complainant took the vehicle back to Cooley for repair on February 2, 2018. On this occasion, Complainant test drove the vehicle along with Respondent's dealer technical specialist, Tony Panno.¹⁴ Mr. Panno had the vehicle's map lamp assembly insulated in order to resolve the rattle issue.¹⁵ The vehicle was in Cooley's possession for one (1) day on this occasion. Complainant was provided with a loaner vehicle during this repair visit. The mileage on the vehicle at the time Complainant turned it over to Cooley was 2,858.¹⁶

⁹ Complainant Ex. 4, Repair Order dated January 3, 2018.

¹⁰ *Id.*

¹¹ Complainant Ex. 5, Repair Order dated January 8, 2018.

¹² *Id.*

¹³ Complainant Ex. 8, Letter from Respondent to Complainant dated January 23, 2018.

¹⁴ Complainant Ex. 6, Repair Order dated February 2, 2018.

¹⁵ *Id.*

¹⁶ *Id.*

Complainant testified that she did not take the vehicle back to the dealer for further repair for the noise issue because she had been told that there was no repair for it. Sometime in early 2019, Complainant was informed by a friend of the option of filing a Lemon Law complaint.

Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles on May 2, 2019.¹⁷ Also on May 2, 2019, Complainant mailed a letter to Respondent informing them of her dissatisfaction with the vehicle.¹⁸

Respondent contacted Complainant to make an appointment to have the vehicle inspected and test driven by their representative. The vehicle was inspected on May 23, 2019, at Cooley. Complainant stated that she was informed by Respondent's representative that nothing could be done about the noise and that it couldn't be fixed. Complainant also indicated that the noise did not occur during the test drive.

Complainant feels that the rattling noise issue is a serious safety problem. She doesn't know where the noise is coming from. She doesn't know if the noise will get worse or if the windshield will move or shift. Complainant stated that she doesn't know what to do if the noise gets worse. She also stated that she feels that it's unfair that Respondent will not replace or accept return of the vehicle as she feels that it's defective.

During cross-examination Complainant stated that she hears the rattling noise at different speeds. She hears it more often on side streets rather than on the highway. Complainant stated that the noise is intermittent.

Complainant also stated that the vehicle has never left her stranded. The noise has not affected her use of the vehicle. Complainant also stated that she heard the rattling noise from the vehicle's windshield on the days immediately preceding the hearing and during the test drive taken at the time of hearing.

C. Respondent's Evidence and Arguments

John Howell, Dealer Technical Specialist, has worked in the automotive industry for 32 years. For the first 29 years of his career, Mr. Howell worked as technician for various Nissan and Infiniti dealers. Mr. Howell has worked for Respondent for the past three (3) years as a dealer technical specialist. Mr. Howell is an Automotive Service Excellence (ASE) Certified Master Technician. He also is a Nissan Certified Master Technician.

¹⁷ Complainant Ex. 9, Lemon Law Complaint. Complainant dated May 2, 2019.

¹⁸ Complainant Ex. 10, Letter to Nissan North America, Inc. dated May 2, 2019.

Mr. Howell had not seen the vehicle prior to the hearing date. Mr. Howell testified that Mr. Panno had inspected and test driven Complainant's vehicle on two (2) occasions: February 2, 2018 and May 23, 2019. On February 2, 2018, Mr. Panno had Cooley's technician insulate the vehicle's map lamp assembly in order to repair the rattling noise issue. On May 23, 2019, Mr. Panno did not order any repair as the issue could not be duplicated. Mr. Howell indicated that the May 23, 2019, inspection was cut short because Complainant had a work issue that she had to address.

Mr. Howell testified that various repairs have been performed to the vehicle to address Complainant's concern regarding the rattling noise from the vehicle's windshield area. Mr. Howell was not aware of the repair visit that occurred on December 27, 2017. Mr. Howell stated that on January 3, 2018, Cooley's technicians insulated the vehicle's dashboard and made sure that it was secure. On January 8, 2018, Cooley's technicians secured and insulated the vehicle's harness at the vehicle's A pillar.¹⁹ On February 2, 2018, Mr. Panno had Cooley's technicians insulate the vehicle's map lamp assembly in order to address the issue.

Mr. Howell also testified that Complainant had taken the vehicle to Cooley four (4) times since February of 2018 for maintenance and other minor issues and that she had not raised the issue of the rattling noise from the vehicle's windshield.

During the test drive of the vehicle taken at the time of hearing, Mr. Howell indicated that he heard a slight rattle from the windshield area once during the drive.

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.

Complainant's concern involved a "rattling" noise that she hears intermittently from the vehicle's windshield when the vehicle is being driven. Complainant's testimony was that this noise was

¹⁹ Respondent Ex. 1, National Service History, undated, p. 2.

still occurring at the time of hearing. Respondent's representative also indicated that he heard a slight noise from the vehicle's windshield area during the test drive taken at hearing. However, the hearings examiner did not hear the noise. Regardless of whether the hearings examiner heard the noise, the testimony was that the party representatives heard the noise and the hearings examiner will rely on their testimony regarding the existence of a rattling noise.

There is no doubt that Complainant does hear a rattling noise intermittently when driving the vehicle. However, the presence of a noise is insufficient to prove the existence of a warrantable defect in a vehicle. There has to be a relationship between the complained of noise and a warrantable defect or nonconformity in the vehicle, or alternatively, that a warrantable defect or nonconformity is the source of the complained of noise. It is understandable that the noise can be annoying and Complainant testified as much. However, the rattling noise does not create a serious safety hazard as defined in Section 2301.601(4) of the Texas Occupations Code. It's not a life-threatening malfunction or nonconformity that substantially impedes Complainant's ability to control or operate the vehicle and it does not create substantial risk of fire or explosion.

In addition, the rattling noise does 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 rattling noise would affect the purchase price, since most people would not even notice it.

Therefore, the hearings examiner finds that there is no 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 31,251 and it remains under warranty. As such, the Respondent is still under an obligation to repair the vehicle whenever there is a problem covered by the vehicle's warranty.

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

III. FINDINGS OF FACT

1. Janet S. Johnson (Complainant) purchased a new 2017 Nissan Rogue on December 17, 2017, from Clay Cooley Nissan (Cooley) in Farmers Branch, Texas, with mileage of 16 at the time of delivery.
2. The manufacturer or distributor of the vehicle, Nissan North America, Inc. (Respondent), issued a bumper-to-bumper warranty for the vehicle which provides coverage for three (3) years or 36,000 miles, whichever occurs first.

3. The vehicle's mileage on the date of hearing was 31,251.
4. Respondent's warranty was still in effect at the time of hearing.
5. Complainant intermittently hears a rattling noise from the subject vehicle's windshield.
6. Complainant took the vehicle to Respondent's authorized dealer, Cooley, on the following dates in order to address her concerns regarding the rattling noise coming from the windshield:
 - a. December 27, 2017, at unknown miles;
 - b. January 3, 2018, at 1,301 miles;
 - c. January 8, 2018, at 1,496 miles; and
 - d. February 2, 2018, at 2,858 miles.
7. On December 27, 2017, Cooley's service technician removed the vehicle's front license plate holder in order to address Complainant's concern regarding the rattling noise.
8. On January 3, 2018, Cooley's service technician insulated the vehicle's dashboard in order to resolve the rattling noise concern.
9. On January 8, 2018, Cooley's service technician secured and insulated the vehicle's wiring harness at the A pillar in order to resolve the rattling noise issue.
10. On February 2, 2018, Cooley's service technician insulated the vehicle's map lamp assembly in order to resolve the noise issue pursuant to instructions provided by Respondent's dealer technical specialist, Tony Panno, who inspected the vehicle.
11. On May 2, 2019, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
12. A final inspection and repair attempt on the vehicle was scheduled for May 23, 2019, at Cooley. The inspection was to be performed by Mr. Panno.
13. During the final inspection described in Findings of Fact #12, Mr. Panno was only able to test drive Complainant's vehicle for a short period of time because Complainant had a work issue that prevented her from leaving the vehicle for a thorough inspection.
14. Also during the test drive described in Findings of Fact #12, Mr. Panno was unable to duplicate the noise issue.

15. Complainant still intermittently hears a rattling noise from the vehicle's windshield.
16. On July 15, 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.
17. The hearing in this case convened on September 12, 2019, in Carrollton, Texas, before Hearings Examiner Edward Sandoval. Janet S. Johnson, Complainant, represented herself at the hearing. Nissan North America, Inc., Respondent, was represented by John Howell, Dealer Technical Specialist. The hearing record closed on September 12, 2019.

IV. CONCLUSIONS OF LAW

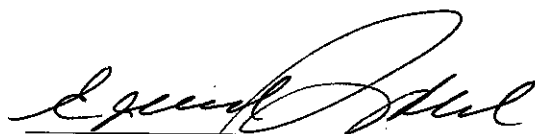
1. The Texas Department of Motor Vehicles (Department) has jurisdiction over this matter. Tex. Occ. Code §§ 2301.601-2301.613 (Lemon Law).
2. A hearings examiner of the Department's Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, 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 Complainant's petition for replacement or repurchase relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is hereby **DISMISSED**.

SIGNED September 20, 2019.



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