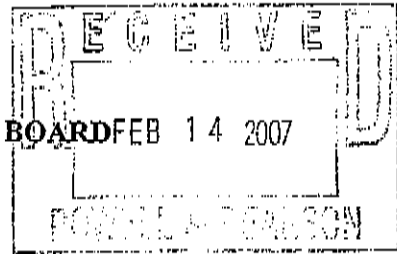


STATE OF FLORIDA
OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD



BRIAN COOK,

Consumer,

vs.

CASE NO.: 2006-0590/FTL

NISSAN MOTOR CORPORATION USA,

Manufacturer.

DECISION OF THE BOARD

THIS CASE came before the Florida New Motor Vehicle Arbitration Board upon approval of the Consumer's request for arbitration. Appearing before the Board were the following:

For the Consumer:

Rebecca J. Covey, Esq.
1318 SE 1 Avenue
Fort Lauderdale, FL 33316

For the Manufacturer:

Fred Mohre, Esq.
399 Carolina Avenue, Suite 200
Winter Park, FL 32789

Upon Notice to the parties, the Board held a hearing in this case on January 10, 2007, in Fort Lauderdale, Florida. Board members present were Chairperson Victor Mantel, Esq., Technical Member Janice K. Olson, and Member Joseph M. Librie. Legal Advisor to the Board was Barbara A. Zappi, Assistant Attorney General, Department of Legal Affairs. Secretary to the Board was Gloria Ramirez, Department of Legal Affairs. Rudy Lobos and Kyle Nyeholt observed the hearing. Court Reporter Terry Tomaselli was present and tape recorded the hearing. The Consumer testified on his own behalf. The Manufacturer presented the testimony of Randy

Drier, District Parts & Service Manager, Nissan Motor Corporation USA, and Eric Vallina, Service Manager, Esserman Nissan. Consumer exhibits C-1 through C-11, and Manufacturer exhibits M-1 through M-6 were received in evidence. The motor vehicle which is the subject of this case was not inspected by the Board.

FINDINGS OF FACT

Based upon the stipulations of the parties, the testimony of the parties and witnesses and the evidence presented, the Board makes the following findings of fact:

1. The parties stipulated that the Consumer leased a new 2004 Nissan Titan pickup truck, Vehicle Identification Number 1N6AA07A14N516759, in Coral Springs, Florida, on October 22, 2004. The lease was for more than one year with the Consumer responsible for having the vehicle repaired. The Consumer was provided with Nissan Motor Corporation USA's written express, limited warranty. Mileage at the time of delivery was 50 miles.
2. The Consumer complains of the following problem that substantially impairs the use, value or safety of the vehicle: an intermittent "knock or tapping noise" that comes from the engine when the vehicle is driven. The Consumer testified the knocking/tapping noise sometimes occurs on cold starts, sometimes after the engine is warm and the truck is being driven down the highway, and sometimes upon acceleration. For the last several months, whenever the knocking/tapping noise happens, it is followed by a little hesitation and then the vehicle surges forward. The Consumer used a higher grade fuel, but the problem remained the same.
3. In addition, the Consumer alleged the vehicle he leased was misrepresented as an

"LE" model when, in fact, it was an "SE" model. The Consumer testified the salesperson told him the vehicle was an LE, and the outside of the truck had the insignia for an LE model; however, all the paperwork indicated it was an SE model.

4. The vehicle was presented to the Manufacturer's authorized service agent for repair of the intermittent knocking/tapping noise on the following occasions: October 30, 2004; November 9, 2004; May 25, 2005; and June 9, 2005 (replaced evaporator cannister purge control valve and bracket).

5. On June 1, 2006, the Consumer sent written notification to the Manufacturer to provide the Manufacturer with a final opportunity to repair the vehicle. The Manufacturer received the notification on June 8, 2006. On June 27, 2006, the vehicle was presented to the Manufacturer's designated repair facility for the final repair attempt. At that time, the condenser fan motor and BCM harness were replaced. The intermittent knocking/tapping noise continued to exist after the final repair attempt.

6. On July 6, 2006, the Consumer filed a claim with BBB/AUTOLINE, the state-certified informal dispute settlement program sponsored by Nissan Corporation. The program declined to consider the Consumer's complaint on the grounds that it was without jurisdiction to do so. Subsequently, on August 10, 2006, the Consumer requested arbitration by this Board seeking a refund.

7. The Manufacturer contends that the engine does not exhibit a "knocking or tapping" noise. Randy Drier, District Parts & Service Manager for Nissan Motor Corporation, USA, testified he conducted the final repair attempt, and he drove the vehicle for approximately five

miles and did not hear any such noise at any time. However, because some Titan models exhibit a "tapping" noise at idle, he replaced the condenser fan with an updated part "just in case" the condenser fan mount was causing a tapping noise.

8. In order to lease the vehicle, the Consumer contributed a down payment of \$530.00, which included the initial monthly lease payment, and a trade-in vehicle, a 2000 Jeep Wrangler, which was encumbered by a lien of \$9,900.57, for which he received a net trade-in allowance of zero, as reflected in the lease agreement. The Consumer was not satisfied with the net trade-in allowance reflected in the lease agreement. The Consumer produced the NADA Official Used Car Guide (Southeastern Edition) in effect at the time of the trade-in, because, contrary to the requirements of Section 681.102(19), Florida Statutes (2006), the Manufacturer did not produce same. The NADA Guide reflected a retail price for the trade-in of \$15,625.00 (\$14,200.00 plus \$175.00 for alloy wheels, plus \$75.00 for a CD player, plus \$500.00 for a hard top, plus \$675.00 for low mileage) which, when reduced by the lien of \$9,900.57, resulted in a net trade-in allowance of \$5,724.43. The vehicle was leased from the lessor, Huntington LT. The Consumer is required to pay the Lessor the sum of \$497.87 per month, and as of the date of this hearing, 24 lease payments have been made in addition to the first month's payment for a total of \$11,948.88.

9. The purchase price of the vehicle, for the purpose of calculating the statutory reasonable offset for use was \$32,291.22 (\$34,291.22 reduced by a Manufacturer rebate of \$2,000.00). Mileage attributable to the Consumer as of the day of the hearing was 11,291 miles (11,432 miles minus 50 miles at delivery, 5 test-drive miles, 76 round-trip miles driven to the

Manufacturer's service agent for repair of the nonconformity and 10 miles driven to the hearing).

Application of the statutory formula results in a reasonable offset for use of \$3,038.33.

10. The Consumer incurred the following incidental charges as a result of the nonconformity: \$4.64 for postage and \$20.00 for parking at this hearing.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Board makes the following conclusions:

1. Pursuant to Chapter 681, Florida Statutes (2006), and the evidence presented, the Florida New Motor Vehicle Arbitration Board has jurisdiction of the parties to and the subject matter of this case.
2. Section 681.108(1), Florida Statutes (2006), requires the Consumer to first resort to a manufacturer-sponsored informal dispute settlement program if the program was certified by the State of Florida on or before the date of acquisition of the motor vehicle and the Consumer was informed, in writing, how and where to file a claim with the program. If the Consumer submits to such a program and the program declines to accept jurisdiction, or fails to render a decision within 40 days of the date the claim is filed, or if the Consumer is dissatisfied with the decision rendered, the Consumer may request arbitration of the dispute by this Board. §681.109, Fla. Stat. (2006). The Consumer met the prior resort requirement and is properly before this Board.
3. Section 681.104(2)(a), Florida Statutes (2006), requires that "if the manufacturer or its authorized service agent, cannot conform the motor vehicle to the warranty by repairing or correcting any nonconformity after a reasonable number of attempts," the manufacturer must repurchase the defective vehicle and either replace it with a replacement motor vehicle that is

acceptable to the consumer, or pay a refund to the consumer as set forth in paragraph (2)(b). The refund or replacement must include all reasonably incurred "collateral " and "incidental " charges, as those terms are defined in the statute. The manufacturer receives a "reasonable offset" for the consumer's use of the defective vehicle, pursuant to a formula set forth in the statute. The Board shall grant this relief "if a reasonable number of attempts have been undertaken to correct a nonconformity or nonconformities." §681.1095(8), Fla. Stat. (2006).

4. The Consumer's allegation that there was a misrepresentation regarding whether the vehicle was an "LE" or "SE" model is not an issue that falls within the above-quoted scope of the Board's authority; therefore, it will not be addressed in this Decision.

5. A nonconformity is defined as a "defect or condition that substantially impairs the use, value or safety of a motor vehicle, but does not include a defect or condition that results from an accident, abuse, neglect, modification or alteration of the motor vehicle by persons other than the manufacturer or its authorized service agent." §681.102(16), Fla. Stat. (2006).

6. Upon consideration of the evidence presented by the parties, it is concluded that the intermittent knocking or tapping noise in the engine area is a defect or condition that substantially impairs the use and value of the vehicle, and as such, it constitutes a nonconformity within the meaning of the statute. The Manufacturer's assertions to the contrary are rejected.

7. Section 681.104(3), Florida Statutes (2006), provides in pertinent part:

(3) It is presumed that a reasonable number of attempts have been undertaken to conform a motor vehicle to the warranty if, during the Lemon Law rights period...

(a) The same nonconformity has been subject to repair at least three times by the manufacturer or its authorized service agent, plus a final attempt by

the manufacturer to repair the motor vehicle if undertaken as provided for in paragraph (1)(a), and such nonconformity continues to exist.

Paragraph (1)(a) of Section 681.104, Florida Statutes (2006), requires that, after three attempts have been made to repair the same nonconformity, the consumer must give written notice to the Manufacturer of the need for repair to allow the Manufacturer a final opportunity to cure the nonconformity.

8. The Consumer took the vehicle to the Manufacturer's authorized service agent for repair of the same nonconformity on at least three occasions prior to sending the written notice; thereafter, a final repair was attempted. The nonconformity continued to exist after the final repair attempt. Accordingly, it is presumed that a reasonable number of attempts have been undertaken to conform the vehicle to the warranty. The Manufacturer having failed to conform the vehicle to the warranty within a reasonable number of attempts, the Consumer is entitled to the requested relief under the Lemon Law.

9. It is concluded that the Consumer's 2004 Nissan Titan pickup truck, Vehicle Identification Number 1N6AA07A14N516759, is a "Lemon" within the meaning of Chapter 681, Florida Statutes (2006). Accordingly, the Consumer is entitled to a refund of \$5,724.43 for the net trade-in allowance, \$530.00 for the down payment, and \$11,948.88 for the monthly lease payments made as of the date of the hearing, plus any subsequent monthly lease payments the Consumer is required to make prior to the date of repurchase. Incidental charges in the amount of \$4.64 for postage and \$20.00 for parking at this hearing are added to the amount of the refund. §681.102(8), Fla. Stat. (2006). The Manufacturer is entitled to a reasonable offset for the Consumer's use of the vehicle, calculated according to the formula set forth in Section

681.102(20), Florida Statutes (2006), in the amount of \$3,038.33. The lessor, Huntington LT, is entitled to a refund of the lease price less the aggregate deposit and lease payments previously paid to the lessor for the leased vehicle. "Lease price" is defined in Section 681.102(9), Florida Statutes (2006), as:

[t]he aggregate of the capitalized cost, as defined in s.521.003(2), and each of the following items to the extent not included in the capitalized cost:

- (a) Lessor's earned rent charges through the date of repurchase.
- (b) Collateral charges, if applicable.
- (c) Any fee paid to another to obtain the lease.
- (d) Any insurance or other costs expended by the lessor for the benefit of the lessee.
- (e) Any amount equal to state and local sales taxes, not otherwise included as collateral charges, paid by the lessor when the vehicle was initially purchased.

DECISION

Based upon the foregoing findings of fact and conclusions, it is

ORDERED that the Manufacturer shall pay to the Consumer a refund in the amount of \$18,203.31, which represents the lessee costs and all collateral charges, less the sum of \$3,038.33 as the statutory offset for use, plus incidental charges in the amount of \$24.64, for a total refund of \$15,189.62. The amount of the refund shall be increased by the amount of any additional lease payments the Consumer may make prior to the date of repurchase of the vehicle. The Manufacturer shall refund to the Lessor, Huntington LT, the sum which represents the lease price, as defined by Section 681.102(9), Florida Statutes (2006), less the aggregate deposit and rental payments previously paid to the Lessor for the leased vehicle. The Lessor shall not assess a penalty for early lease termination against the Consumer/Lessee. It is further

ORDERED that the Manufacturer shall comply with this Decision within 40 days of the

Repurchase
3-26
POSTED
3-14
Appenf

date the Manufacturer receives this Decision. Upon compliance with this Decision by the Manufacturer, the Consumer shall deliver possession of the subject motor vehicle to the Manufacturer and the titleholder shall deliver clear title to the vehicle to the Manufacturer. In the event the Manufacturer fails to comply within the time specified, and fails to file an appeal as set forth below, the Consumer is directed to notify the Department of Legal Affairs, Lemon Law Arbitration Program, Enforcement Unit, The Capitol, Tallahassee, Florida 32399-1050, of such noncompliance. It is further

ORDERED that the Board retains jurisdiction of this case for the purpose of correcting any technical errors or mistakes in this Decision arising from inadvertence, oversight or omission.

RIGHTS OF APPEAL

This Decision shall become final and binding upon the parties unless within 30 days of receipt of this Decision, either party files an appeal by petition to the Circuit court, pursuant to Section 681.1095(10), Florida Statutes (2006), which states, "The petition shall be filed in the county where the consumer resides, or where the motor vehicle was acquired, or where the arbitration hearing was conducted." Within seven (7) days after the petition has been filed, the appealing party must send a copy of the petition to the Department of Legal Affairs, Lemon Law Arbitration Program, The Capitol, Tallahassee, Florida 32399-1050.

Pursuant to Section 681.1095(12), Florida Statutes (2006):

An appeal of a decision by the board to the circuit court by a consumer or a manufacturer shall be by trial de novo. In a written petition to appeal a decision by the board, the appealing party must state the action requested

and the grounds relied upon for appeal.

Within 30 days of final disposition of the appeal, the appealing party shall furnish the Department of Legal Affairs with a copy of the order or judgment of the court.

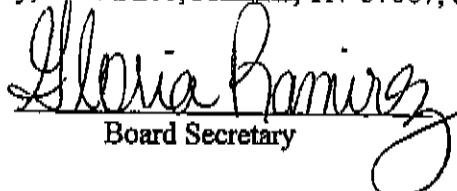
DONE and ORDERED this 5th day of February, 2007.

FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

Victor Mantel, Esq., Chairperson
Janice K. Olson, Member
Joseph M. Librie, Member

CERTIFICATE OF MAILING

I HEREBY CERTIFY that copies of the foregoing Decision were furnished by U.S. Certified Mail to: Brian Cook, 1612 NE 48 Court, Pompano Beach, FL 33064; and to Trisha Quezada, Arbitration Specialist, 9009 Carothers Parkway, Suite B200, Franklin, TN 37067, on this 12th day of February, 2007.


Board Secretary

Additional copies by regular mail to:

Huntington LT
2361 Morse Road NC1N12
Columbus, OH 43229

Rebecca J. Covey, Esq.
1318 SE 1 Avenue
Fort Lauderdale, FL 33316

Fred Mohre, Esq.
399 Carolina Avenue, Suite 200
Winter Park, FL 32789

Victor Mantel, Esq.
Janice K. Olson
Joseph M. Librie

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