

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 15-0048 CAF**

**ANDRIS BAEZ-JIMENEZ,
Complainant**

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BEFORE THE OFFICE

v.

OF

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

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Andris Baez-Jimenez (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in her 2013 Nissan Pathfinder. Complainant alleged that: the vehicle's passenger air bag light turned on even when an adult sat in the front passenger seat; the vehicle vibrated during acceleration and braking; and the seatbelt light turned on even with the seatbelt buckled. The seat belt issue has since been resolved, leaving only the air bag light and vibration issues for resolution. Nissan North America, Inc. (Respondent) claimed that the vehicle did not have any defects and that no relief was warranted. The hearings examiner concludes that the air bag light issue is not an existing warrantable defect and that the vibration does not create a safety hazard or substantially impair the use or market value of the vehicle. Further, the evidence does not show a reasonable number of repair attempts for the vibration issue. Therefore, the Complainant is not eligible for replacement or repurchase 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 May 12, 2015, in San Antonio, Texas, before Hearings Examiner, Andrew Kang. Complainant, Andris Baez-Jimenez, represented herself at the hearing. Respondent was represented by Adam Sackner, Dealer Technical Specialist.

II. Discussion

A. Applicable Law

The Lemon Law, in part, requires a manufacturer of a motor vehicle to repurchase or replace a vehicle when the manufacturer is “unable to conform a motor vehicle to an applicable express warranty.”¹ Additionally, warranty repair under section 2301.204 of the Texas Occupations Code requires a “defect in a motor vehicle that is covered by a manufacturer’s . . . warranty agreement applicable to the vehicle.”² Accordingly, there must be a defect under an applicable warranty to be eligible for relief, whether replacement or repurchase or warranty repair.

Further, for the vehicle to be subject to replacement or repurchase, a warrantable defect or condition must either (1) create a serious safety hazard or (2) substantially impair the use or market value of the motor vehicle despite a reasonable number of attempts at repair.³ The Occupations Code defines “serious safety hazard” as a life threatening malfunction or nonconformity that: (1) substantially impedes a person’s ability to control or operate a vehicle for ordinary use or intended purposes, or (2) creates a substantial risk of fire or explosion.⁴ 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

¹ TEX. OCC. CODE § 2301.604(a).

² TEX. OCC. CODE § 2301.204.

³ TEX. OCC. CODE § 2301.604(a).

⁴ TEX. OCC. CODE § 2301.601(4).

⁵ TEX. OCC. CODE § 2301.605(a)(1)(A) and (B). Texas Occupations Code § 2301.605(a)(2) and (a)(3) provide alternative methods for establishing a rebuttable presumption that a reasonable number of attempts have been undertaken to conform a vehicle to an applicable express warranty. Section 2301.605(a)(2) only applies 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.

B. Complainant's Evidence and Arguments

The Complainant purchased a new 2013 Nissan Pathfinder from Gunn Nissan, Ltd., the Respondent's authorized franchised dealer, (Dealer) in San Antonio, Texas, on March 5, 2013.⁶ The vehicle's mileage at time of purchase was 25 miles.⁷ The Respondent's warranty provides 36 months or 36,000 miles basic coverage and 60 months or 60,000 mile powertrain coverage.⁸ The Complainant is the primary driver of the vehicle. She drives the vehicle often when at home, but travels out of town without the vehicle on a regular basis. The Complainant identified three issues: (1) the air bag light turning on with an adult passenger, (2) intermittent vibration during acceleration and braking, and (3) the seat belt light turning on with the seat belt buckled. The Complainant testified that the seat belt light issue appears to have been successfully repaired, leaving only the air bag light and vibration issues to be addressed.

1. Air Bag Light

In May 2013, Complainant first noticed that the front passenger air bag status light (air bag light) turned on despite having an adult sitting in the front passenger seat. This warning light appeared on the center console (not on the dashboard).

On May 13, 2013, Complainant brought the vehicle to the Dealer to address concerns with the Occupant Classification System (OCS) sensors. The OCS sensors determine the activation of the passenger air bag. The Dealer informed the Complainant of a recall concerning the OCS sensors in Nissan Pathfinders, but that her OCS sensors were not within range to be replaced.⁹

On November 9, 2013, the vehicle was brought back to the Dealer because the the air bag light continued to stay on with an adult sitting in the passenger seat. The technician did not find the OCS sensors within range for replacement. However, the technician performed a zero point reset.¹⁰

⁶ Complainant's Ex. 3, Buyer's Order.

⁷ Complainant's Ex. 4, Odometer Disclosure Statement.

⁸ Complainant's Ex. 1, Nissan 2013 Warranty Information Booklet.

⁹ Complainant's Ex. 13, Repair Order 806024104/1.

¹⁰ Complainant's Ex. 14, Repair Order 806044777/1.

On May 15, 2014, the Dealer inspected the OCS sensors again at the Complainant's request. On this visit, the technician reprogrammed the OCS sensors.¹¹ Complainant returned to the dealer on September 11, 2014. During this visit, Complainant stated that the passenger air bag light continued to come on intermittently with an adult sitting in the passenger seat. The Dealer performed a zero point reset.¹²

On September 23, 2014, Complainant notified Respondent of the air bag issue.¹³ On October 9, 2014, Respondent responded with an apology, but declined to repurchase the vehicle.¹⁴

On October 28, 2014, a Nissan Dealer Technical Specialist (DTS) test drove the vehicle with Complainant in an attempt to duplicate the passenger air bag light problem. The concern could not be duplicated. The technician still re-torqued the OCS sensors and seat frame to specifications.¹⁵

On November 19, 2014, Complainant provided written notice of the alleged defect to the Respondent with a copy of her Lemon Law complaint dated October 20, 2014.¹⁶ The complaint listed the air bag light issue as a problem that continued to exist. The Complainant testified that the problem was never corrected and that on April 5, 2015, the air bag light came on despite her son sitting in the passenger seat. Complainant further testified that she felt that her family and friends in her vehicle were in danger.

2. Vehicle Vibration

The Complainant testified that the vehicle vibrated intermittently approximately four to five times per year with the vibration lasting about a minute. The Complainant could not determine whether the vibration occurred when accelerating or decelerating but noted that the vibration appeared random and that it occurred in all types of weather and temperatures. The Complainant could not discern if the vibration affected the performance of the vehicle. The Complainant explained that she would feel the vibration in her foot through the pedals. However, the

¹¹ Complainant's Ex. 15, Repair Order 806064557/1.

¹² Complainant's Ex. 17, Repair Order 806078952/1.

¹³ Complainant's Ex. 7, Letter from Complainant to Respondent.

¹⁴ Complainant's Ex. 5, Letter from Respondent to Complainant.

¹⁵ Complainant's Ex. 19, Repair Order 806083396/1.

¹⁶ Complainant's Ex. 7, Letter from Complainant to Respondent dated November 19, 2014.

Complainant described one instance of vibration as feeling like someone moving inside the vehicle. With regard to the vibration issue, the Complainant took her vehicle to the Dealer for service on October 15, 2014, during which the transmission control module was updated; however, the vibration could not be duplicated.¹⁷

C. Respondent's Evidence and Arguments

Adam Sackner is a National Institute for Automotive Service Excellence (ASE) certified Master Technician employed by the Respondent. He worked as mechanic for ten years before getting the ASE certification. Mr. Sackner testified that the issues were never duplicated at the dealer and the Respondent had inspected and serviced the vehicle pursuant to its service campaigns. Mr. Sackner testified that he visited with the Complainant on October 28, 2014, to address the issues with her vehicle, but could not duplicate either the vibration or the air bag light issue.

Mr. Sackner testified that motion by the passenger could keep the air bag's OCS from calibrating and therefore could cause the yellow air bag light to stay on. The OCS takes approximately fifteen seconds to calibrate, so if the passenger shifts position soon after sitting down, the sensors may not read properly. Also, for example, the sensors may not read properly if the vehicle is moving, the passenger is leaning forward or reclined, if something is hanging on the seat's back or pressing on the seat's back. However, the OCS can recalibrate while driving if the road is sufficiently smooth (assuming no other conditions that may prevent recalibration). The OCS is designed to turn off the passenger air bag if the OCS cannot make a satisfactory reading. The air bag deactivation is a safety feature that prevents injury to small children from the deployment of the passenger air bag. During the test drive on October 28, 2014, Mr. Sackner could not duplicate the issues identified by the Complainant. Also, no error codes indicated any malfunction of the air bag system.¹⁸ The Respondent concluded that the vehicle was working as designed.

¹⁷ Complainant's Ex. 18, Repair Order 806083396/1; Complainant's Ex. 19, Repair Order dated October 15, 2014 (Complainant's Ex. 19 appears to be a partially handwritten version of Complainant's Ex. 18).

¹⁸ Complainant's Ex. 19, Repair Order 806083396/1.

D. Analysis

To qualify for replacement or repurchase, the Lemon Law requires that a warrantable defect create a serious safety hazard, or substantially impair the use or market value of the vehicle.¹⁹ Under 43 TEX. ADMIN. CODE § 215.206.66(d), the Complainant bears the burden of proving by a preponderance of evidence that a warrantable defect creates a serious safety hazard or substantially impairs the use or market value of vehicle after a reasonable number of repair attempts. In the case of the air bag light, the evidence shows that the deactivation of the airbag is not a warrantable defect at all, but is a consequence of the air bag system's intended design. In the case of the vehicle vibration, the condition does not appear to create a safety hazard or substantially impair the use or market value of the vehicle after a reasonable number of repair attempts. Accordingly, replacement/repurchase relief does not apply in this case.

1. Air Bag Light

The deactivation of the passenger air bag due to the calibration/recalibration of the OCS is inherent to the design of the air bag system and is not a manufacturing defect. The passenger air bag off light is designed to inform the passenger that the "passenger frontal air bag has been automatically turned off."²⁰ This deactivation of the air bag occurs to prevent small-stature passengers from suffering injuries due to deployment of the air bag. The National Highway Traffic Safety Administration explained that OCS can misclassify occupants due to "a number of situations."²¹ For example, if the passenger shifts their position during calibration, occupant misclassification may occur.

The deactivation of the passenger air bag is a safety feature. The OCS sensors that detect the presence of small passengers requires passengers to remain still for at least fifteen seconds to work properly. Consequently, shifting body weight and vehicle motion may prevent calibration. During the inspection and test drive at the hearing, Mr. Sackner deliberately created the passenger air bag off condition by pressing on the seat. With the hearings examiner sitting in the front passenger seat, the Complainant began driving the vehicle less than 15 seconds from the time the air bag off light came on. The Complainant drove the vehicle on roads not sufficiently smooth

¹⁹ TEX. OCC. CODE § 2301.604(a).

²⁰ Respondent's Ex. 1, NHTSA Air Bag Report.

²¹ Respondent's Ex. 1, NHTSA Air Bag Report.

enough for the OCS to recalibrate. During the test drive, because the OCS could not determine the occupant size, the OCS responded exactly as designed by leaving the air bag system off as a precaution to avoid injury to any small occupants. However, when given stable conditions for a sufficient time, the OCS recalibrated and the air bag off light turned off. Accordingly, the vehicle actually operated according to its intended design and the deactivation of the air bag is not a defect. Because the complained of condition is not a defect, the Complainant is not eligible for repurchase or replacement relief.

2. Vehicle Vibration

The evidence does not show that the vibration creates a safety hazard or substantially impair the use or market value of the vehicle, given the vibration's infrequency and absence of any apparent effect on the vehicle. The Complainant testified that the vibration may occur four or five times over a year and that she could not discern any effect on the performance of the vehicle. Further, the repair orders in evidence only includes one instance of service addressing the vibration issue, which does not meet the requirement to undertake a reasonable number of attempts to repair the vehicle.²²

III. Findings of Fact

1. Andris Baez-Jimenez (Complainant) purchased a new 2013 Nissan Pathfinder on March 5, 2013, from Gunn Nissan (Dealer), the Respondent's authorized dealer, in San Antonio, Texas, with 25 miles on the odometer at the time of delivery.
2. The vehicle's manufacturer, Nissan North America, Inc. (Respondent) issued a warranty with basic coverage for 36 months or 36,000 miles, whichever occurs first, and with powertrain coverage for 60 months or 60,000 miles, whichever occurs first. Coverage begins on the date of the vehicle's delivery or first use, whichever is earlier.
3. Complainant took the vehicle to the Dealer on the following dates and mileage to address the issue of the passenger air bag deactivation with an adult sitting in the passenger seat:
 - a. May 13, 2013, at 3,740 miles;
 - b. November 9, 2013, at 10,701 miles;
 - c. May 15, 2014, at 16,273 miles;

²² TEX. OCC. CODE § 2301.605(a).

- d. September 11, 2014, at 20,884 miles;
 - e. October 17, 2014, at 22,104 miles;
 - f. May 7, 2015, at 26,536 miles;
4. Complainant took the vehicle to the Dealer, on October 17, 2014, at 22,104 miles to address the vibration issue.
 5. A Nissan Dealer Technical Specialist performed a final inspection on October 28, 2014. Complainant's concerns with the passenger air bag could not be duplicated and no errors codes were recovered.
 6. An occupant classification system (OCS) can misclassify occupants for various reasons, such as the shifting of an occupant's body and the motion of the vehicle during calibration. Calibration requires the occupant to remain still for at least fifteen seconds.
 7. If the OCS cannot properly classify the occupant, as a safety feature, the vehicle will deactivate the passenger air bag to avoid injury to a small occupant.
 8. At the inspection and test drive performed at the hearing, Mr. Sackner deliberately created the air bag off condition and the OCS responded as designed by leaving the air bag deactivated with an adult in the passenger seat when the conditions did not allow the OCS to properly classify the occupant.
 9. The complained of vibration did not have any discernable effect on the vehicle's performance.
 10. On October 20, 2014, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
 11. On November 24, 2015, 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.
 12. The hearing in this case convened and the record was closed on May 12, 2015, in San Antonio, Texas, before Hearings Examiner Andrew Kang. Complainant, Andris Baez-

Jimenez, represented herself at the hearing. Adam Sackner, Dealer Technical Specialist represented the Respondent.

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. 43 TEX. ADMIN. CODE § 215.206.66(d).
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 after a reasonable number of attempts. 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.

V. 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 Sections 2301.601-2301.613 is hereby **DISMISSED**.

SIGNED June 26, 2015



**ANDREW KANG
HEARINGS EXAMINER
OFFICE OF ADMINISTRATIVE HEARINGS
TEXAS DEPARTMENT OF MOTOR VEHICLES**