

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 16-0031 CAF**

ELIUD ARTEAGA,	§	BEFORE THE OFFICE
Complainant	§	
	§	
v.	§	OF
	§	
NISSAN NORTH AMERICA, INC.,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Eliud Arteaga (Complainant) filed a complaint with the Texas Department of Motor Vehicles seeking relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged warrantable defects in his vehicle manufactured by Nissan North America, Inc. (Respondent). The hearings examiner concludes that the subject vehicle does not have a warrantable defect. Consequently, the Complainant's vehicle does not qualify for repurchase/replacement or warranty repair.

I. Procedural History, Notice and Jurisdiction

Matters of notice of hearing¹ 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 January 27, in Houston, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented and testified for himself. Neal Barnes, Dealer Technical Specialist, represented and testified for the Respondent. Maria del Carmen Flores, Interpreter, translated the proceedings.

¹ TEX. GOV'T CODE § 2001.051.

II. Discussion

A. Applicable Law

1. Repurchase/Replacement Relief

A vehicle qualifies for repurchase or replacement if the manufacturer cannot “conform a motor vehicle to an applicable express warranty by repairing or correcting a defect or condition that creates a serious safety hazard or substantially impairs the use or market value of the motor vehicle after a reasonable number of attempts.”² In other words, (1) the vehicle must have a defect covered by an applicable warranty (warrantable defect); (2) the defect must either (a) create a serious safety hazard or (b) substantially impair the use or market value of the vehicle; and (3) the defect must continue to exist after a “reasonable number of attempts” at repair.³ In addition, the Lemon Law imposes other requirements for repurchase/replacement relief, including (1) a mailed written notice of the defect to the manufacturer, (2) an opportunity to repair by the manufacturer, and (3) a deadline for filing a Lemon Law complaint.

Even if a vehicle satisfies the preceding requirements for repurchase/replacement relief, the Lemon Law prohibits repurchase or replacement unless: (1) the owner mailed written notice of the alleged defect or nonconformity to the manufacturer;⁴ (2) the manufacturer was given an opportunity to cure the defect or nonconformity;⁵ and (3) the owner filed the Lemon Law complaint within six months after the earliest of: the warranty’s expiration date or the dates on which 24 months or 24,000 miles have passed since the date of original delivery of the motor vehicle to an owner.⁶

² TEX. OCC. CODE § 2301.604(a).

³ TEX. OCC. CODE § 2301.604(a).

⁴ TEX. OCC. CODE § 2301.606(c)(1).

⁵ TEX. OCC. CODE § 2301.606(c)(2). Note: a repair visit to a dealer satisfies the “opportunity to cure” requirement if the manufacturer authorized repairs by the dealer after written notice to the manufacturer. *See Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 226 (Tex. App.—Austin 2012).

⁶ TEX. OCC. CODE § 2301.606(d)(2).

2. Warranty Repair Relief

Even if repurchase or replacement relief does not apply, a vehicle may still qualify for warranty repair under Section 2301.204 of the Texas Occupations Code if the vehicle has a “defect . . . that is covered by a manufacturer’s . . . warranty agreement applicable to the vehicle.”⁷

3. Burden of Proof

The law places the burden of proof on the Complainant.⁸ The Complainant must prove each fact required for relief by a preponderance, that is, the Complainant must present evidence showing that all of the required facts are more likely than not true.⁹ For example, the Complainant must show that a warrantable defect more likely than not exists. For any required fact, if the evidence weighs in favor of the Respondent or if the evidence supports the Complainant and the Respondent equally, the Respondent will prevail. The Complainant prevails only if the evidence shows that all of the required facts are more likely than not true.

B. Complainant’s Evidence and Arguments

On November 20, 2013, the Complainant, purchased a new 2013 Nissan Titan from Robbins Nissan, a franchised dealer of the Respondent, Nissan North America, Inc., in Humble, Texas. The vehicle had 34 miles on the odometer at the time of purchase. The vehicle’s basic warranty coverage lasts 36 months or 36,000 miles, whichever occurs first.¹⁰

The Complainant testified that the vehicle information display does not show the correct range for a full tank of gas. He noted that while at the dealer, a vehicle like the subject vehicle displayed a range of 420 miles. He believed the vehicle has a problem because he get 14 miles per gallon (mpg) while other like vehicles get more. He also stated that he believed that the vehicle did not accurately measure the mpg. He then stated that he did not get more than eight or nine mpg. When asked if the amount of gas pumped and mileage on the odometer matched the mpg on the information display, the Complainant answered that the numbers did not match between what he put in and what he read from the display. The Complainant testified that he drove the vehicle

⁷ TEX. OCC. CODE § 2301.204.

⁸ 43 TEX. ADMIN. CODE § 215.206.66(d).

⁹ *E.g., Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

¹⁰ Respondent’s Ex. 9, Warranty Coverage.

sometimes but that most of the time, his wife drove it. He explained that she did not drive far and drove mostly to the store about 10 to 12 miles from home. The Complainant affirmed that they used the vehicle mostly for local driving. He added that the furthest he has driven is to Brookshire or Cypress where some relatives live. The Complainant testified that the repairs have not permanently resolved his issues with the vehicle. He affirmed that he had a trailer but also stated that he may have only used it once. The Complainant also confirmed that he did not keep anything in the bed of the vehicle. The Complainant said he noticed issues with the vehicle from the beginning and that he knew the vehicle had a problem because he used to drive a similar vehicle. The Complainant provided photos showing: a range of 74 miles with the analog fuel gauge slightly less than half full at 2,010 miles;¹¹ the information display showing an average of 9.2 mpg at 24.8 mph at 3,575 miles;¹² the information display showing an average of 3.4 mpg at 4.2 mph at 15,303 miles;¹³ a range of 386 miles with the with the analog fuel gauge at full at 21, 875 miles;¹⁴ a range of 0 miles with the analog fuel gauge at slightly under a quarter full at 23, 260 miles;¹⁵ a range of 228 miles with the with the analog fuel gauge at full at 24,486 miles.¹⁶

In relevant part, the Complainant took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
April 30, 2015	20,916	Fuel gauge reads low when fuel level is actually at half ¹⁷
May 18, 2015	21,762	Digital gauge for fuel not working properly ¹⁸
August 3, 2015	24,785	Mpg is reading below 9.5 mpg ¹⁹
October 26, 2015	28,190	Distance to empty shows between 220 and 300 on fill up and average mileage shows 8.9 mpg ²⁰

The Respondent's final opportunity to repair the vehicle occurred on October 26, 2015.

¹¹ Complainant's Ex. 8.

¹² Complainant's Ex. 9.

¹³ Complainant's Ex. 10.

¹⁴ Complainant's Ex. 12.

¹⁵ Complainant's Ex. 13.

¹⁶ Complainant's Ex. 11.

¹⁷ Complainant's Ex. 3, Invoice, May 5, 2015.

¹⁸ Complainant's Ex. 4, Invoice, May 22, 2015.

¹⁹ Complainant's Ex. 5, Invoice, August 5, 2015.

²⁰ Complainant's Ex. 6, Invoice I37794, October 27, 2015.

On September 15, 2015, the Complainant mailed a written notice of defect to the Respondent.²¹ On September 24, 2015, the Complainant filed a Lemon Law complaint (Complaint) with the Texas Department of Motor Vehicles (Department) alleging that the vehicle averaged 8.9 miles per gallon with a range of 233 miles on a full tank.

C. Respondent's Evidence and Arguments

When asked if the Complainant knew how to calculate the fuel economy, rather than relying on the information display, he acknowledged that he did not know how. Mr. Barnes testified that in a repair order (RO) opened at Robbins Nissan, the RO stated that the vehicle will show 200 miles to empty but got an average of 4.4 mpg. The dealer reset the mpg (on the information display) and test drove the vehicle and got 17.3 mpg but got 11.7 mpg while driving through the service driveway (consistent with lower fuel economy at low speeds). Mr. Barnes noted that the dealer replaced the combination meter without a diagnostic trouble code (DTC) and without any record of testing to determine the existence of a discrepancy. At the May 22, 2015, service visit, the dealer found the digital fuel gauge (information display) normal and did no work. The dealer did note that when adding fuel with the key on, the numerical display did go up and noted the mpg and found it normal compared to a 2014 Titan. In regard to the fuel level not reading properly, the dealer replaced the sending unit, but provided no information why. Mr. Barnes explained that the estimates on the fuel economy label are averages computed for EPA (Environmental Protection Agency) mileage calculations and that the mileage depends on miles driven, acceleration, whether idling, whether using air conditioning, and many other factors. Mr. Barnes testified that he inspected the vehicle on October 26, 2015. The dealer noted not to fuel the vehicle with the key on. Mr. Barnes explained that for the computer to accurately compute, the vehicle must be cycled off. Otherwise, an inaccuracy may be retained in memory until a hard reset. During a road test at highway speed, the vehicle averaged 18.9 mpg. Actual road tests showed a higher mpg than the vehicle's information display, which prompted Mr. Barnes to check for trouble codes, but found none for the engine management system. Mr. Barnes contacted Nissan engineering who advised Mr. Barnes to check the fuel sending unit on an empty tank. However, because the tank was full, Mr. Barnes performed a hard reset by disconnecting the battery cables

²¹ Complainant's Ex. 2, Written Notice to the Respondent.

to clear the memory. After the hard reset, the information display showed 452 miles to empty. Mr. Barnes explained that idling and how the vehicle is operated affect the fuel economy. Mr. Barnes stated that leaving the ignition in the "on" position during refueling can lead to inaccuracies (however, the Complainant testified he and his wife do not leave the ignition on when refueling). Mr. Barnes added that city driving would lower the range as compared to highway driving. Consequently, resetting the mileage on the information display and then driving all city miles would lower the mpg as opposed to driving on the highway. Mr. Barnes noted that the vehicle used the total accumulated miles to calculate the range and that the accumulated miles cannot be reset (except with a hard reset by disconnecting the battery cables). Mr. Barnes also pointed out that the fuel warning light comes on based on the fuel level as determined by the fuel level sensor and not on the distance to empty (range) shown on the information display.

D. Inspection and Test Drive

To calculate the fuel economy of the vehicle, the vehicle's gas tank was filled completely at a gas station on the corner of West TC Jester Boulevard and the Interstate 610 service road. The odometer showing 32,158 miles at the initial fueling and the information display showed an average fuel economy of 9.3 mpg at an average speed of 24.7 mph. From the gas station, the vehicle was driven south on I-610 and west on I-10 and back to the same gas station. The test drive consisted almost entirely of highway miles at approximately 60 to 65 mph. At the end of the test drive, the vehicle was refueled at the same gas station. The vehicle took 1.317 gallons of gasoline to completely refill. The vehicle's odometer displayed 32,194 miles at the end of the test drive at the gas station (36 miles driven between the initial fuelling to the refilling). Accordingly, the vehicle traveled 36 miles on 1.317 gallons of gas, which amounts to approximately 27 miles per gallon ($36 \text{ miles} \div 1.317 \text{ gallons} = 27.33 \text{ mpg}$). At the end of the test drive, the information display showed an average fuel economy of 13.5 mpg at an average speed of 52.5 mph. The test drive, mostly on the highway, increased the fuel economy by 4.2 mpg (from 9.3 mpg to 13.5 mpg) and the average speed by 27.8 mph (from 24.7 mph to 52.5 mph).

E. Analysis

The record shows that the variances in the vehicles fuel economy results from driving styles and traffic patterns instead of any warrantable defect; therefore, repurchase/replacement and

warranty repair relief do not apply. The vehicle's fuel economy and environmental label submitted by the Complainant shows a fuel economy of 13 mpg for city driving and 18 mpg for highway driving and 15 mpg for combined city and highway driving. However, the vehicle's label also specifies that "Actual results will vary for many reasons, including driving conditions and how you drive and maintain your vehicle."²² Significantly, the EPA, which regulates the fuel economy estimates on the labels, explained that:

It is important to emphasize that fuel economy varies from driver to driver for a wide variety of reasons, such as different driving styles, climates, traffic patterns, use of accessories, loads, weather, and vehicle maintenance. Even different drivers of the same vehicle will experience different fuel economy as these and other factors vary. Therefore, it is impossible to design a "perfect" fuel economy test that will provide accurate real-world fuel economy estimates for every consumer. With any estimate, there will always be consumers that get better or worse actual fuel economy. The EPA estimates are meant to be a general guideline for consumers, particularly to compare the relative fuel economy of one vehicle to another.²³

Although the Complainant's actual fuel economy differs from the EPA estimates, the EPA specifically contemplates that a driver's actual fuel economy may vary for numerous reasons, including driving styles and traffic patterns. Before the start of the test drive, the vehicle's information display showed the vehicle had averaged 9.3 mpg at an average speed of 24.7 mph, which comports with the Complainant's testimony that he and his spouse drove predominately local miles. In the present case, the Complainant's actual mileage appears to differ from EPA estimates as a result of driving styles and traffic patterns, just as the EPA contemplated. On the other end of the spectrum, the vehicle exceeded the 18 mpg EPA highway estimate on the test drive at the hearing. During the test drive, the vehicle produced a fuel economy of 27 mpg driving almost exclusively highway miles. But again, the difference from EPA estimates appears to result from driving style and traffic patterns, except that the consistent cruising at highway speeds produced greater fuel economy. In this case, driving styles and traffic patterns, and not any manufacturing defect, appear to have caused the variance from the EPA's fuel economy estimates. The record shows that driving at slower speeds on local roads reduced fuel economy while

²² Complainant's Ex. 7, window sticker.

²³ Fuel Economy Labeling of Motor Vehicles: Revisions To Improve Calculation of Fuel Economy Estimates 71 Fed. Reg. 77,872, 77,874 (2006) (to be codified at 40 C.F.R. Parts 86 and 600).

consistent cruising at highway speeds increased fuel economy. The vehicle's lower fuel economy simply reflects the predominate use of the vehicle for local driving at lower speeds rather than any manufacturing defect. Accordingly, the vehicle does not qualify for repurchase/replacement for warranty repair.

III. Findings of Fact

1. On November 20, 2013, the Complainant, purchased a new 2013 Nissan Titan from Robbins Nissan, a franchised dealer of the Respondent, Nissan North America, Inc., in Humble, Texas. The vehicle had 34 miles on the odometer at the time of purchase.
2. The vehicle's basic warranty coverage lasts 36 months or 36,000 miles, whichever occurs first.
3. The vehicle's warranty was in effect at the time of the hearing.
4. The Complainant took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
April 30, 2015	20,916	Fuel gauge reads low when fuel level is actually at half
May 18, 2015	21,762	Digital gauge for fuel not working properly
August 3, 2015	24,785	Mpg is reading below 9.5 mpg
October 26, 2015	28,190	Distance to empty shows between 220 and 300 on fill up and average mileage shows 8.9 mpg

The Respondent's final opportunity to repair the vehicle occurred on October 26, 2015.

5. On September 15, 2015, the Complainant mailed a written notice of defect to the Respondent.
6. On September 24, 2015, the Complainant filed a Lemon Law complaint (Complaint) with the Texas Department of Motor Vehicles (Department) alleging that the vehicle averaged 8.9 miles per gallon with a range of 233 miles on a full tank.
7. On November 16, 2015, the Department's Office of Administrative Hearings issued a notice of hearing directed to the Complainant and the Respondent, Nissan North America, Inc., 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.

8. Matters of notice of hearing 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 January 27, in Houston, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented and testified for himself. Neal Barnes, Dealer Technical Specialist, represented and testified for the Respondent. Maria del Carmen Flores, Interpreter, translated the proceedings.
9. The vehicle's odometer displayed 32,158 miles at the time of the hearing.
10. Actual fuel economy may vary from the Environmental Protection Agency's fuel economy estimates due to a variety of reasons, such as different driving styles, climates, traffic patterns, use of accessories, loads, weather, and vehicle maintenance.
11. The Complainant and his spouse predominantly drove the vehicle locally.
12. The vehicle's information display showed that prior to the inspection and test drive, the vehicle averaged 9.3 mpg at an average speed of 24.7 mph.
13. The vehicle operated normally during the test drive at the hearing and achieved a fuel economy of 27 mpg driving predominantly highway miles.
14. The test drive, consisting mostly of highway miles, increased the fuel economy by 4.2 mpg (from 9.3 mpg to 13.5 mpg) and the average speed by 27.8 mph (from 24.7 mph to 52.5 mph).

IV. Conclusions of Law

1. The Texas Department of Motor Vehicles 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. The Complainant timely filed a sufficient complaint with the Department. TEX. OCC. CODE §§ 2301.204, 2301.606(d); 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. The Complainant bears the burden of proof in this matter. 43 TEX. ADMIN. CODE § 206.66(d).
6. The Complainant did not prove that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE § 2301.604(a).
7. The Complainant's vehicle does not qualify for replacement or repurchase. TEX. OCC. CODE § 2301.604.
8. The Respondent remains responsible to address and repair or correct any defects that are covered by the Respondent's warranties. TEX. OCC. CODE §§ 2301.204, 2301.603.

V. Order

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that the Complainant's petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is **DISMISSED**.

SIGNED March 2, 2016



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