

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 17-0174826 CAF**

<b>CEDENO HUNTER,</b>	§	<b>BEFORE THE OFFICE</b>
<b>Complainant</b>	§	
<b>v.</b>	§	
	§	<b>OF</b>
<b>NISSAN NORTH AMERICA, INC.,</b>	§	
<b>Respondent</b>	§	<b>ADMINISTRATIVE HEARINGS</b>

**DECISION AND ORDER**

Cedeno Hunter (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in his new 2016 Nissan Titan XD Platinum. Complainant asserts that the vehicle is defective because it jerks when the transmission shifts between second and third gear and when the transmission downshifts at 45 to 50 miles per hour. 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 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 and the record was closed on September 21, 2017, in Carrollton, Texas before Hearings Examiner Edward Sandoval. Complainant represented himself at the hearing. Respondent was represented by John Howell, Dealer Technical Specialist.

**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.<sup>1</sup> Second, the defect or condition in the vehicle creates a serious safety hazard or substantially impairs the use or market value of the vehicle.<sup>2</sup> Third, the manufacturer has been given a reasonable number of attempts to repair or correct the defect or condition.<sup>3</sup> Fourth, the owner must have mailed written notice of

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<sup>1</sup> Tex. Occ. Code § 2301.604(a).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

the alleged defect or nonconformity to the manufacturer.<sup>4</sup> Lastly, the manufacturer must have been given an opportunity to cure the defect or nonconformity.<sup>5</sup>

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: (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.<sup>6</sup>

## **B. Complainant's Evidence and Arguments**

Complainant purchased a new 2016 Nissan Titan XD Platinum pickup truck on November 19, 2016, from Don Davis Nissan (Davis) in Arlington, Texas.<sup>7</sup> The vehicle's mileage at the time of delivery was 15.<sup>8</sup> Respondent provided a bumper-to-bumper warranty for the vehicle which provides coverage for three (3) years or 36,000 miles, whichever comes first. Respondent has also provided a powertrain warranty for the vehicle which provides coverage for the vehicle's powertrain for five (5) years or 100,000 miles. On the date of hearing the vehicle's mileage was 37,780. The powertrain warranty is still in effect, although the bumper-to-bumper warranty has expired.

Complainant testified that shortly after purchasing the vehicle, the check engine light (CEL) illuminated. He took the vehicle to Davis for repair for the issue. While the vehicle was in Davis' possession, the transmission's software was updated. When Complainant got the vehicle back he noticed that the vehicle seemed to jerk when shifting between second and third gears. He testified that he had not noticed this in the past. As a result, Complainant took the vehicle back to Davis on January 26, 2017, for the transmission shifting issue. Davis' service technician inspected the vehicle and did not find any stored trouble codes.<sup>9</sup> The technician determined that the transmission was shifting normally.<sup>10</sup> The vehicle's mileage when Complainant took it to Davis

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<sup>4</sup> Tex. Occ. Code § 2301.606(c)(1).

<sup>5</sup> Tex. Occ. Code § 2301.606(c)(2).

<sup>6</sup> 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.

<sup>7</sup> Complainant Ex. 1, Motor Vehicle Buyer's Order dated November 19, 2016.

<sup>8</sup> Complainant Ex. 6, Odometer Disclosure Statement dated November 19, 2016.

<sup>9</sup> Complainant Ex. 2, Repair Order dated January 26, 2017.

<sup>10</sup> *Id.*

was 4,702.<sup>11</sup> Complainant was provided with a loaner vehicle while his vehicle was being repaired.

Complainant testified that the vehicle's transmission continued to jerk when shifting gears. He returned the vehicle to Davis on February 17, 2017. On this occasion, Complainant, Davis' shop foreman, and Respondent's dealer technical specialist, John Howell, took a test drive in the vehicle. Mr. Howell and the shop foreman then updated the vehicle's transmission control module (TCM) software with the latest calibrations.<sup>12</sup> No other repairs were performed for the transmission issue at the time. The vehicle was in Davis' possession for three (3) days.<sup>13</sup> Complainant was provided with a loaner vehicle while his vehicle was being repaired. The mileage on the vehicle on this occasion was 4,812.<sup>14</sup>

Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles on April 11, 2017.<sup>15</sup> In addition, Complainant mailed a complaint letter on March 28, 2017, to Respondent outlining his dissatisfaction with the vehicle.<sup>16</sup>

Complainant stated that every time he drives the vehicle, the transmission has a delayed jerk. It's like the shift is lagging behind where it should be. It seems to be more abrupt on the downshift. He's talked to Respondent's representatives about his concerns with the vehicle, but has been told that there is nothing that can be done about it. Complainant stated that he would not have purchased the vehicle if he had felt it shift like this during his test drive at the time of purchase. He stated that he has driven 2017 Titan pickup trucks when provided with a loaner vehicle and they have a smoother shift. Complainant feels that he is not getting the vehicle performance that he expected when purchasing the vehicle.

Complainant states that Respondent's representatives have never requested an opportunity for a final repair attempt on the vehicle.

During cross-examination, Complainant testified that the vehicle has never failed to perform. He's never been left stranded and the transmission has always shifted into gear.

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<sup>11</sup> *Id.*

<sup>12</sup> Complainant Ex. 3, Repair Order dated February 17, 2017.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Complainant Ex. 5, Lemon Law Complaint. Complainant signed and dated the complaint on March 28, 2017. However, the complaint was not received by the Texas Department of Motor Vehicles until April 11, 2017, which is the effective date of the complaint.

<sup>16</sup> Complainant Ex. 4, Letter to Nissan dated March 28, 2017.

### **C. Respondent's Evidence and Arguments**

John Howell, Dealer Technical Specialist, testified for Respondent. Mr. Howell has been in the automotive industry for over 30 years. He worked as a service technician for Nissan dealerships for 29 years before obtaining his current position. Mr. Howell is an Automotive Service Excellence (ASE) Certified Master Technician and a Nissan Master Certified Technician. Mr. Howell's current job duties require that he help resolve customer concerns regarding Respondent's manufactured vehicles.

Mr. Howell testified that he inspected Complainant's vehicle on February 17, 2017. He understood Complainant's concern involved the vehicle's transmission's shift quality. Mr. Howell met with Complainant on that occasion and discussed the concern with him. Mr. Howell, Davis' shop foreman, and Complainant then test drove the vehicle. Mr. Howell testified that he did not feel that the transmission had an abnormal shift quality. After the test drive, Mr. Howell checked the vehicle's TCM software and installed updated calibrations to it. Mr. Howell also stated that the vehicle's computers did not have any diagnostic trouble codes (DTC) at the time.

Mr. Howell also stated that after the filing of the Lemon Law complaint, Complainant was contacted by Respondent's representative who offered to send Mr. Howell to inspect the vehicle again, but Complainant refused the offer.

Mr. Howell testified that the vehicle's transmission has been designed to learn the vehicle's driver's driving patterns in order to anticipate the driver's habits and adjust for them. This is called "adaptive learning." This sometimes causes the transmission to shift a bit differently from other vehicles that customers may have driven in the past. In the present case, Complainant's vehicle is an extra heavy duty pickup truck. Respondent's engineers have manufactured into the transmission a firm shift because they don't want the transmission to slip when the vehicle is towing something heavy. If the transmission starts spinning in those circumstances, the transmission can be destroyed.

Mr. Howell stated that the vehicle's transmission is performing as designed. In addition, the vehicle has never failed to perform for Complainant.

### **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.

The first issue to be addressed is whether Complainant's vehicle has a defect or condition that creates a serious safety hazard or substantially impairs the use or market value of the vehicle. Complainant's complaint with the vehicle has to do with the transmission shift which he explained as a jerk. The evidence presented at the hearing established that the transmission is shifting as designed, since the subject vehicle is an extra heavy duty pickup truck which requires such a shifting style. However, the transmission's shifting style 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 transmission's shifting style 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 issue would affect the purchase price, since most people would not think it unusual.

As such, the hearings examiner finds that there is no defect with the vehicle. Therefore, repurchase or replacement relief for Complainant is not warranted.

On the date of hearing, the vehicle's mileage was 37,780 and it remains covered under Respondent's warranties. As such, Respondent is still under an obligation to repair the vehicle whenever there is a problem covered by the vehicle's warranties.

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

### III. FINDINGS OF FACT

1. Cedeno Hunter (Complainant) purchased a new 2016 Nissan Titan XD Platinum on November 19, 2016, from Don Davis Nissan (Davis) in Arlington, Texas with mileage of 15 at the time of delivery.
2. The manufacturer 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, and a powertrain warranty which provides coverage for five (5) years or 100,000 miles.

3. The vehicle's mileage on the date of hearing was 37,780.
4. At the time of hearing the vehicle's bumper-to-bumper warranty had expired. The powertrain warranty was still in effect, however.
5. Complainant feels that the vehicle's transmission jerks when shifting between second and third gear and when downshifting at 45 to 50 miles per hour.
6. Complainant took the vehicle for repair to Respondent's authorized dealer, Davis, in order to address his concerns regarding the vehicle's transmission on the following dates:
  - a. January 26, 2017, at 4,702 miles; and
  - b. February 17, 2017, at 4,812 miles.
7. On January 26, 2017, Davis' service technician determined that the vehicle's transmission was shifting properly and that no repairs were needed.
8. On February 17, 2017, Davis' service technician updated the vehicle's transmission control module (TCM) with Respondent's newest calibration and test drove the vehicle. He determined that the vehicle was operating as designed.
9. On April 11, 2017, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
10. On June 20, 2017, 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.
11. The hearing in this case convened and the record was closed on September 21, 2017, in Carrollton, Texas before Hearings Examiner Edward Sandoval. Complainant, Cedeno Hunter, represented himself at the hearing. Respondent was represented by John Howell, Dealer Technical Specialist.

#### **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 28, 2017**



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