

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 20-0014827 CAF**

THELMA and JASMINE ROMO, Complainants	§ § § § § § §	BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
v.		
NISSAN NORTH AMERICA, INC., Respondent		

DECISION AND ORDER

Thelma and Jasmine Romo (Complainants) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in their new 2020 Nissan Sentra SV. Complainants assert that the vehicle has a defect or nonconformity which causes the start button to not always work on the first attempt and another defect that causes a rattling noise from the front of the vehicle. Nissan North America, Inc. (Respondent) argued that the vehicle is operating as designed, does not have a defect, and that no relief is warranted. The hearings examiner concludes that although the vehicle does have a currently existing warrantable defect, Complainant is entitled only to repair relief, as the defect does not substantially impair the use or market value of the vehicle and it does not create a serious safety hazard as defined in the Occupations Code.

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 telephonically on November 10, 2020, before Hearings Examiner Edward Sandoval. Thelma and Jasmine Romo (Complainants) both appeared and testified. They were represented by Jasmine Romo in the hearing. Respondent was represented by Jesse Juan, Arbitration Specialist. The hearing record closed on November 10, 2020.

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

¹ Tex. Occ. Code § 2301.604(a).

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 provided written notice of 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 these 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 by the manufacturer, converter, or distributor, or an authorized agent or franchised dealer of a manufacturer, converter, or distributor 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 occurs first, following the date of original delivery of the motor vehicle to the owner.⁶

If a vehicle is found to have a nonconformity that creates a serious safety hazard which continues to exist, the rebuttable presumption that a reasonable number of repair attempts have been performed can be established if the vehicle has been subject to repair two or more times by the manufacturer, converter, or distributor, or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.⁷

“Serious safety hazard” means a life-threatening malfunction or nonconformity that substantially impedes a person’s ability to control or operate a vehicle for ordinary use or intended purposes, or creates a substantial risk of fire or explosion.⁸

² *Id.*

³ *Id.*

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) (3) provides a third method 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. This section 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 Tex. Occ. Code § 2301.605(a)(2)(A) and (B).

⁸ Tex. Occ. Code § 2301.601(4).

B. Complainant's Evidence and Arguments

Complainants purchased a new 2020 Nissan Sentra SV on July 13, 2020, from Nissan of New Braunfels located in New Braunfels, Texas.⁹ The vehicle's mileage at the time of delivery was 6.¹⁰ Respondent provided a new vehicle limited warranty for the vehicle which provides coverage for three (3) years or 36,000 miles, whichever comes first.¹¹ In addition, Respondent provided a five (5) year or 60,000 mile warranty for the vehicle's powertrain.¹² On the date of hearing the vehicle's mileage was 2,929. At the time of hearing the vehicle's warranties were still in effect.

1. Jasmine Romo's Testimony

Jasmine Romo, co-Complainant, represented Complainants and testified in the hearing. She is the primary driver of the vehicle. She stated that she has two complaints regarding the subject vehicle: the vehicle does not always start on the first start attempt and when driving on rough roads she hears a rattling noise from the front of the vehicle.

Ms. Romo testified that she did not test drive the vehicle prior to purchasing it. The vehicle that she purchased was on the dealer's show room floor and was not available for a test drive. Ms. Romo stated that the dealer's salesperson provided her with a similar vehicle to test drive.

Ms. Romo stated that the vehicle was fine for about the first two (2) weeks of ownership and then one day it failed to start on the first attempt. Ms. Romo testified that the vehicle has a push button start and that she is required to push the start button and step on the vehicle's brake at the same time in order to start the vehicle. In addition, she is not supposed to push the start button for more than three (3) seconds. She stated that, when the problem occurred the vehicle's lights, air conditioner, and radio all turned on, but the engine did not. She then turned the vehicle off and tried restarting it. At that point, the vehicle's engine started and she was able to go on her drive.

Ms. Romo stated that she took the vehicle to Nissan of New Braunfels on July 27, 2020, to address the issue of the vehicle's failure to start on the first attempt. The dealer's service technician inspected the vehicle and found a stored diagnostic trouble code (DTC) on the vehicle's computers.¹³ The DTC indicated that the vehicle's key fobs had not been completely programmed to the vehicle¹⁴ The technician, thereupon, programmed both key fobs to the

⁹ Complainant Ex. 2, Motor Vehicle Retail Installment Sales Contract dated July 13, 2020.

¹⁰ Complainant Ex. 3, Odometer Disclosure Statement dated July 13, 2020.

¹¹ Complainant Ex. 9, Nissan 2020 Warranty Information Booklet, p. 5.

¹² *Id.*

¹³ Complainant Ex. 3-A, Repair Order dated July 27, 2020.

¹⁴ *Id.*

vehicle's computers in order to address the issue of the vehicle not starting on the first attempt.¹⁵ The vehicle's mileage on this occasion was 339.¹⁶ The vehicle was in the dealer's possession until July 29, 2020, during this repair visit. Ms. Romo stated that she received a loaner vehicle while Complainants' vehicle was in the dealer's possession.

Ms. Romo stated that after receiving the vehicle back from the dealer, she experienced another incident where the vehicle failed to start on the first start attempt. This occurred in early August of 2020. In addition, Ms. Romo started to hear a rattling noise from the front passenger's side of the vehicle. On August 5, 2020, Ms. Romo took the vehicle to Nissan of New Braunfels for repair for the starting issue and the rattling noise issue. The dealer's service technician inspected the vehicle and was unable to duplicate the issue of the vehicle not starting on the first attempt; therefore, no repair was performed for the issue.¹⁷ The technician test drove the vehicle with Ms. Romo and verified hearing a rattling noise from the front passenger side of the vehicle when driving on a bumpy road.¹⁸ The technician adjusted the vehicle's air bag curtain brace in an attempt to address the noise issue.¹⁹ The vehicle's mileage at the time was 557.²⁰ Ms. Romo stated that she had been advised to pick up the vehicle on August 12, 2020, but when she attempted to start the vehicle on that date she had an issue starting it on the first attempt and left the vehicle at the dealer's location for further repair. She did not actually pick up the vehicle until August 19, 2020. Complainants received a loaner vehicle while their vehicle was being repaired.

Complainants filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) on August 10, 2020, in which they complained about the vehicle failing to start on the first start attempt and the rattling noise from the front of the vehicle.²¹ In addition, Complainants mailed a letter to Respondent on August 10, 2020, in which they indicated their dissatisfaction with the vehicle.²²

Ms. Romo testified that in August of 2020, she received a call from a representative in Nissan's customer support office. The representative informed Ms. Romo that Respondent would not repurchase the vehicle because it was brand new and there had only been two (2) repairs to the vehicle. At no time did Respondent's representative ask for an opportunity to inspect or repair the vehicle.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Complainant Ex. 4, Repair Order dated August 5, 2020.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ Complainant Ex. 1, Lemon Law Complaint dated August 10, 2020.

²² Complainant Ex. 5, Letter to Nissan North America dated August 10, 2020.

Ms. Romo testified that on August 20, 2020, the day after she picked the vehicle up from the dealer, she heard a rattling noise from the front of the vehicle. As a result, she scheduled an appointment for repair for the issue for September 14, 2020. When she took the vehicle to Nissan of New Braunfels for repair, she was informed that they would not attempt to repair the start issue, as they could not duplicate the issue and it was up to Nissan to resolve the issue. As a result, the service technician only addressed the issue of the rattling noise that Ms. Romo continued to hear. The technician test drove the vehicle, but could only verify a noise from the driver's side sun visor, although Ms. Romo indicated that she heard a noise from the front passenger's side door.²³ The technician re-secured the sun visor and did not hear the noise when he test drove the vehicle again.²⁴ The vehicle's mileage on this occasion was 1,563.²⁵ The vehicle was in the dealer's possession until September 18, 2020. Complainants were provided with a loaner vehicle while the subject vehicle was being repaired.

Ms. Romo stated that when she drove the vehicle on September 19, 2020, the day after picking up the vehicle from the dealer, she heard the rattling noise again. Ms. Romo took the vehicle back to Nissan of New Braunfels on September 21, 2020, so that the dealer's service technician could address the noise issue. The service advisor test drove the vehicle with Ms. Romo and initially could not duplicate the concern.²⁶ However, on an "extremely rough construction road" the technician heard a noise on the vehicle's right A pillar.²⁷ The technician insulated the passenger's side A pillar in order to resolve the issue.²⁸ The vehicle's mileage on this occasion was 1,648.²⁹ The vehicle was returned to Complainants on September 24, 2020.³⁰ Complainants were provided a loaner vehicle while their vehicle was being repaired.

Ms. Romo stated that when she drove the vehicle on September 25, 2020, the day after picking up the vehicle from the dealer, she heard the rattling noise again. She continued to hear the rattling noise over the next few days. As a result, Ms. Romo took the vehicle to Nissan of New Braunfels for repair for the noise issue on September 29, 2020. The dealer's service technician tightened all the bolts in the driver's front door panel, adjusted the left side upper curtain shield, and replaced both sun visors in order to address the noise issue.³¹ The vehicle's mileage on this

²³ Complainant Ex. 6, Repair Order dated September 14, 2020.

²⁴ *Id.*

²⁵ *Id.*

²⁶ Complainant Ex. 7, Repair Order dated September 21, 2020.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* Ms. Romo testified that there was an error on the repair order regarding the vehicle's mileage on this occasion. She took a picture of the mileage at the time she left the vehicle with the dealer and, at the time, the mileage for the vehicle was 1,648. Ms. Romo stated that she hand wrote the mileage correction on the repair order in question.

³⁰ *Id.*

³¹ Complainant Ex. 8, Repair Order dated September 29, 2020.

occasion was 1,910.³² The vehicle was in the dealer's possession until October 15, 2020. Complainants received a loaner vehicle while their vehicle was being repaired.

Ms. Romo testified that she continues to have an issue with the vehicle not starting on the first start attempt. On every occasion that the vehicle has failed to start on the first attempt, the vehicle's radio, air conditioner, and lights all turn on. She says that the issue occurs intermittently. Once it occurs on a particular day, it will happen every time she attempts to start the vehicle throughout the rest of the day. The last time the issue occurred was on October 23, 2020. Ms. Romo stated that the vehicle has not failed to start nor has it left her stranded.

Ms. Romo also testified that she continues to hear a rattling noise from the front of the vehicle whenever she drives it. She hears the noise on a daily basis. In addition, she has begun to hear a noise from the vehicle's sunroof when she drives the vehicle in reverse gear.

2. Thelma Romo's Testimony

Thelma Romo, co-Complainant, testified in the hearing. Thelma Romo testified that she never drives the vehicle as it was purchased for her daughter, Jasmine Romo. However, Thelma Romo has heard a rattling noise from the front of the vehicle on several occasions when she's ridden in it. In addition, she stated she has observed Jasmine Romo have to attempt to start the vehicle twice, before the vehicle has started.

Thelma Romo stated that the current rattling noise seems to be coming from the vehicle's sun roof on the passenger side.

C. Respondent's Evidence and Arguments

Jesse Juan, Arbitration Specialist, appeared for Respondent and testified at the hearing. Mr. Juan testified that he has never seen the vehicle. In addition, he stated that Respondent did not request that they be allowed a final inspection or a final opportunity to cure.

Mr. Juan did state that it seems to be unusual to have to push a vehicle's start button twice in order to have to start a vehicle. However, the vehicle has never failed to start. In addition, he stated that a rattle in the vehicle when driving on rough roads does not classify as a substantial impairment of the use or market value of the vehicle.

³² *Id.*

D. Analysis

Under the Lemon Law, Complainants bear 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, Complainants 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, Complainants are 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, Complainants are entitled to have the vehicle repurchased or replaced.

1. Start Button Issue

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.

The evidence taken at hearing indicates that the vehicle does not always start on the first attempt and that when the vehicle fails to start, the vehicle's radio, air conditioner, and lights all turn on, the engine is the only item that does not start. Even though the issue is frustrating, it does not substantially impair the use or market value of the vehicle nor does it create a serious safety hazard as defined in the Occupations Code. As such, the hearings examiner must hold that this issue does not provide sufficient grounds to order repurchase or replacement of the vehicle; however, the hearings examiner will order Respondent to investigate and attempt to repair the concern with the vehicle not starting on the first attempt.

2. Rattling Noise Issue

Complainants' second concern involved a "rattling" noise that comes from the front of the vehicle when driving on rough or bumpy roads. Complainants indicated that the noise does not occur often on smooth roads or on the highway. This noise was still occurring at the time of hearing and it was described as coming from the vehicle's sunroof area. It is understandable that the noise can be annoying. 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 Complainants' ability to control or operate the vehicle nor does it create a 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, as some noises in a vehicle are not uncommon.

On the date of hearing, the vehicle's mileage was 2,929 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 warranties.

Complainants' request for repurchase or replacement relief is denied.

III. FINDINGS OF FACT

1. Thelma and Jasmine Romo (Complainants) purchased a new 2020 Nissan Sentra SV on July 13, 2020, from Nissan of New Braunfels in New Braunfels, Texas with mileage of 6 at the time of delivery.
2. The manufacturer or distributor of the vehicle, Nissan North America, Inc. (Respondent), issued a new vehicle limited warranty for the vehicle which provides warranty coverage for the vehicle for three (3) years or 36,000 miles, whichever occurs first. In addition, Respondent provided a powertrain warranty which provides coverage for the vehicle's powertrain for five (5) years or 60,000 miles.
3. The vehicle's mileage on the date of hearing was 2,929.
4. At the time of hearing the vehicle's warranties were still in effect.
5. Complainants have experienced occasions where the driver has had to push the vehicle's start button twice before the vehicle will start. Although the vehicle does not start upon the first attempt, the vehicle's radio, air conditioner, and lights all turn on.
6. Complainants have also heard a rattling noise from the front of the vehicle when driving on rough roads.
7. Complainants took the vehicle for repair to Respondent's authorized dealer, Nissan of New Braunfels, in order to address their concerns with the start issue and/or the rattling noise on the following dates:

- a. July 27, 2020, at 339 miles;
 - b. August 5, 2020, at 557 miles;
 - c. September 14, 2020, at 1,563 miles;
 - d. September 21, 2020, at 1,648 miles; and
 - e. September 29, 2020, at 1,910 miles.
8. On July 27, 2020, the dealer's service technician discovered a diagnostic trouble code (DTC) stored on the vehicle's computers indicating that the programming of the vehicle's key fobs was incomplete. As a result, the technician programmed both key fobs to the vehicle in an attempt to resolve the issue of the vehicle not starting on the first start attempt.
 9. On August 5, 2020, the dealer's service technician was unable to duplicate a problem with the vehicle failing to start on the first start attempt. No repair was performed for this issue at the time.
 10. Also during the repair visit described in Findings of Fact #9, the technician verified hearing a noise from the vehicle's front passenger side and adjusted the vehicle's air bag curtain brace in order to resolve the issue.
 11. On August 10, 2020, Complainants filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
 12. On August 10, 2020, Complainants mailed a letter to Respondent advising them of their dissatisfaction with the vehicle.
 13. On September 14, 2020, Nissan of New Braunfel's service technician was unable to duplicate a problem with the vehicle failing to start on the first start attempt and was unable to find any stored diagnostic codes for the issue on the vehicle's computers. No repair was performed for this issue at the time.
 14. During the repair visit described in Findings of Fact #13, the technician inspected the vehicle for a rattling noise from the front passenger side door. The technician verified a noise from the driver's side visor and re-secured the visor clip in an attempt to address the noise issue.
 15. On September 21, 2020, Nissan of New Braunfel's service technician initially was unable to verify the issue regarding the rattling noise when on a test drive with Ms. Romo. While driving on an extremely rough road, the technician heard a vibration type noise from the right A pillar and insulated the pillar in order to address the issue. Complainants did not

- raise the issue of the vehicle failing to start on the first attempt to the service advisor at the time.
16. On September 29, 2020, Nissan of New Braunfels's service technician tightened all bolts on the vehicle's front door panel, adjusted the left side upper curtain shield, and replaced both sun visors in an attempt to resolve the issue of Complainants hearing a rattling noise while driving the vehicle. Complainants did not raise the issue of the vehicle failing to start on the first attempt to the service advisor at the time.
 17. Complainants last experienced an issue where the vehicle failed to start on the first try on October 23, 2020.
 18. Complainants hear a rattling noise in the vehicle when driving on rough roads on a daily basis.
 19. Respondent did not request that they be allowed a final opportunity to inspect or repair the vehicle.
 20. On September 1, 2020, 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.
 21. The hearing in this case convened telephonically on November 10, 2020, before Hearings Examiner Edward Sandoval. Thelma and Jasmine Romo (Complainants) both appeared and testified. They were represented by Jasmine Romo in the hearing. Respondent was represented by Jesse Juan, Arbitration Specialist. The hearing record closed on November 10, 2020.

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. Complainants 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. Complainants bear the burden of proof in this matter.
6. Complainants proved by a preponderance of the evidence that the vehicle has a verifiable defect or nonconformity, *i.e.*, the vehicle intermittently fails to start on the first start attempt. However, that defect does not present a serious safety hazard nor substantially impair the use or market value of the vehicle. Tex. Occ. Code § 2301.604.
7. Respondent had a final opportunity to cure the defect. Tex. Occ. Code § 2301.606(c)(2).
8. 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.
9. Complainants' vehicle does not qualify for replacement or repurchase. Tex. Occ. Code § 2301.604.
10. Complainants are entitled to repair relief under the terms of Respondent's warranty. Tex. Occ. Code § 2301.204.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that Complainants' petition for replacement or repurchase relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is hereby **DISMISSED**. It is **FURTHER ORDERED** that Respondent shall make any repairs needed to conform the vehicle's start button (the vehicle's engine failing to start on the first attempt) to the applicable warranty. Complainant shall deliver the subject vehicle to Respondent within 20 days after the date this Order becomes final under Texas Government Code § 2001.144.³³ Within 40 days after receiving the vehicle from Complainant, Respondent shall complete repair of the subject vehicle. However, if the Department determines Complainant's refusal or inability to deliver the vehicle caused the failure to complete the required repair as

³³ (1) This Order becomes final if a party does not file a motion for rehearing within 20 days after receiving a copy of this Order, or (2) if a party files a motion for rehearing within 20 days after receiving a copy of this Order, this Order becomes final when: (A) the Department renders an order overruling the motion for rehearing, or (B) the Department has not acted on the motion within 45 days after the party receives a copy of this Order.

prescribed, the Department may consider Complainant to have rejected the granted relief and deem this proceeding concluded and the complaint file closed under 43 Texas Administrative Code § 215.210(2).

SIGNED November 17, 2020.

A handwritten signature in black ink, appearing to read "Edward Sandoval", written over a horizontal line.

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