

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 22-0009549 CAF**

**KELLY SMITH,
Complainant**

v.

**KIA MOTORS AMERICA, INC.,
Respondent**

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**BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Kelly Smith (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in her new 2021 Kia Soul. Complainant asserts that the vehicle's engine stalls when she's driving and comes to a stop. In addition, the vehicle uses oil excessively, the CEL illuminates, and the vehicle shudders and shakes. The hearings examiner concludes that the vehicle does have an existing warrantable defect and Complainant is eligible for 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 on July 6, 2022, in Austin, Texas before Hearings Examiner Edward Sandoval. Kelly Smith, Complainant, appeared and represented herself in the hearing. Respondent, Kia Motors America, Inc., did not appear at the hearing or offer any evidence. The hearing record closed on July 6, 2022.

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 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

¹ Tex. Occ. Code § 2301.604(a).

² *Id.*

³ *Id.*

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 can be established 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

Finally, a rebuttable presumption can be established 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 that substantially impairs the vehicle’s use or market value, the vehicle has been out of service for repair for a cumulative total of 30 or more days, and the repairs 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.⁹

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).

⁷ Tex. Occ. Code § 2301.605(a)(2)(A) and (B).

⁸ Tex. Occ. Code § 2301.601(4).

⁹ Tex. Occ. Code § 2301.605(a)(3)(A) and (B).

The 30 day out of service requirement described in Section 2301.605(a)(3) does not include any period during which the manufacturer or distributor lends the vehicle owner a comparable motor vehicle while the owner's vehicle is being repaired by a franchised dealer.¹⁰

B. Complainant's Evidence and Arguments

Complainant purchased a new 2021 Kia Soul on January 28, 2021, from Kia of South Austin (KSA) located in Austin, Texas.¹¹ The vehicle's mileage at the time of delivery was 21.¹² Respondent provided a new vehicle limited bumper-to-bumper warranty for the vehicle which provides coverage for five (5) years or 60,000 miles, whichever comes first.¹³ In addition, Respondent provided a powertrain warranty for the vehicle providing coverage for ten (10) years or 100,000 miles for the original owner¹⁴. On the date of hearing the vehicle's mileage was 22,663 and the vehicle's warranties were still in effect.

Complainant testified that she has had issues with the vehicle's engine intermittently stalling when she comes to a stop when driving the vehicle. In addition, she has experienced issues with the vehicle shuddering and shaking, using too much oil, and the check engine light (CEL) illuminating.

Complainant testified that she purchased the vehicle from KSA in January of 2021. She did take a test drive in the vehicle before purchasing it. She did not notice any issues with the vehicle when she test drove it.

Complainant stated that she has experienced the stalling issue with the vehicle since soon after purchasing it. She also noticed after purchasing the vehicle that the vehicle's engine was consuming oil excessively. Complainant took the vehicle to KSA for repair for these issues on May 29, 2021. KSA's service technician noted that Complainant indicated that the vehicle had stalled twice when she was driving it prior to taking the vehicle for repair.¹⁵ The technician began an oil consumption test on the vehicle due to the complaint about the vehicle's excessive oil use.¹⁶ The vehicle's mileage on this occasion was 6,332.¹⁷ Complainant stated that the vehicle was in KSA's possession for one (1) day. She was not provided with a loaner vehicle while her

¹⁰ Tex. Occ. Code § 2301.605(c).

¹¹ Complainant Ex. 2, Buyer's Order dated January 28, 2021.

¹² *Id.*

¹³ Complainant Ex. 9, 2021 Kia Warranty and Consumer Information Manual, undated.

¹⁴ *Id.*

¹⁵ Complainant Ex. 3, Report Order dated May 29, 2021.

¹⁶ *Id.*

¹⁷ *Id.*

vehicle was being repaired. The service technician advised Complainant to return the vehicle to KSA after she had driven 1,000 miles in it in order to complete the oil consumption test.

Complainant returned the vehicle to KSA as requested on June 11, 2021. The vehicle had stalled again during the period of time when she was performing the oil consumption test.¹⁸ KSA's service technician determined that the vehicle was using oil excessively and was instructed to replace the vehicle's engine.¹⁹ The vehicle's mileage on this occasion was 7,336.²⁰ The vehicle was in KSA's possession for over two (2) months. Complainant was provided a loaner vehicle while her vehicle was being repaired.

Complainant testified that the vehicle drove fine for several months after the engine was replaced. In early 2022, Complainant experienced another incident where the vehicle stalled. Complainant stated that in February of 2022, she also experienced an incident where the vehicle's CEL illuminated, and the vehicle shook and shuddered so severely that she had to drive back to her home at 25 mph. Complainant had the vehicle towed to KSA on February 25, 2022, for repair for these issues. KSA's service technician inspected the vehicle and reviewed the vehicle's stored diagnostic trouble codes (DTC's) and found a code indicating that the engine had misfired.²¹ However, the technician was unable to duplicate the misfire or any of the other issues with the vehicle.²² No repairs were performed at the time. The vehicle's mileage on this occasion was 17,284.²³ Complainant testified that the vehicle was in KSA's possession for a month. Complainant was not provided with a loaner vehicle while her vehicle was being repaired. Complainant rented a vehicle for the period from February 25, 2022 through March 25, 2022.²⁴ Complainant's out-of-pocket costs for the vehicle rental totaled \$959.54.²⁵

On February 25, 2022, Complainant wrote a letter to Respondent advising them of her dissatisfaction with the vehicle.²⁶ Complainant was contacted by Respondent's representative indicating that Respondent had received the letter, but Respondent did not request an opportunity to inspect the vehicle or to perform a final repair.

Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) on March 2, 2022.²⁷

¹⁸ Complainant Ex. 4, Repair Order dated June 11, 2021.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Complainant Ex. 5, Repair Order dated February 25, 2022.

²² *Id.*

²³ *Id.*

²⁴ Complainant Ex. 7, Car Rental Invoice dated March 25, 2022.

²⁵ *Id.*

²⁶ Complainant Ex. 6, Letter to Kia dated February 25, 2022.

²⁷ Complainant Ex. 1, Lemon Law Complaint dated March 2, 2022.

Complainant testified that she continued to experience issues with the vehicle stalling when she came to a stop when driving. She took the vehicle to KSA for the issue on April 25, 2022. KSA's service technician test drove the vehicle and was unable to recreate the issue and did not find any stored DTCs on any of the vehicle's computers.²⁸ The vehicle's mileage on this occasion was 18,938.²⁹ The vehicle was in KSA's possession for one (1) day during this repair visit. Complainant was not provided a loaner vehicle on this occasion.

Complainant testified that the vehicle still stalls intermittently. She says it occurs every one (1) to two (2) weeks. When the vehicle stalls, she has to restart it in order to continue on her trip. It has never failed to restart. Complainant stated that the vehicle last stalled during the last week of June of 2022, about a week and a half prior to the hearing date. In addition, the issues with the vehicle's CEL illuminating and the vehicle shuddering and shaking have not recurred.

C. Respondent's Evidence and Arguments

Respondent did not appear at the hearing nor offer any evidence.

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.

1. CEL Illuminating and Shuddering and Shaking Issues

The evidence indicates that in February of 2022, Complainant experienced a situation where the vehicle's CEL illuminated, and the vehicle started to shudder and shake severely. However, this appears to have been a one time incident and, although Respondent's authorized dealer did not perform any repair for the issue, it does not establish grounds to order repurchase or replacement of the vehicle. There was only one repair attempt for the issue and Complainant did not establish

²⁸ Complainant Ex. 8, Repair Order dated April 25, 2022.

²⁹ *Id.*

that Respondent was provided with a reasonable number of repairs for the issues. As such, the hearings examiner will not order repurchase or replacement of the vehicle for these issues.

2. Oil Consumption Issue

The evidence indicates that the vehicle did have an issue with excessive oil consumption. This was verified by KSA's service technician in June of 2021. On June 11, 2021, the vehicle's engine was replaced in order to address the issue. There was no indication after the repair that the vehicle as still using oil excessively. As such, the hearings examiner will not order repurchase or replacement of the vehicle for this issue, as the issue has been repaired.

3. Stalling Issue

The evidence indicates that the vehicle will stall intermittently when it comes to a stop when it's being driven. The issue occurs once about every one (1) to two (2) weeks. Respondent cannot determine what is causing the vehicle to stall. It is apparent from the testimony presented that the vehicle does have a defect or nonconformity which substantially affects the vehicle's use and market value, as a potential buyer would be more hesitant to purchase a vehicle that may stall any time they come to a stop.

Complainant also presented evidence to indicate that Respondent or its authorized representative was provided with a reasonable number of repair attempts to repair the defect or nonconformity with the vehicle. Complainant presented the vehicle for repair to Respondent's authorized dealer on four (4) separate occasions for the stalling issue: May 29, 2021; June 11, 2021; February 25, 2022; and April 25, 2022. Occupations Code § 2301.604(a) requires a showing that Respondent was unable to conform the vehicle to an applicable express warranty "after a reasonable number of attempts." Section 2301.605(a)(1) provides that a rebuttable presumption 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. In the present case, Complainant has met this test, and, despite the repair attempts, the problem continues to exist. As such, Complainant has established that a reasonable number of attempts to repair the vehicle were made by Respondent or its representative and the vehicle has not been repaired.

In addition, the evidence presented at the hearing indicates that Complainant provided Respondent with written notice of the defect and a final opportunity to cure the defect. Complainant informed Respondent via letter dated February 25, 2022, of her concerns with the vehicle and providing Respondent with an opportunity to cure. Respondent did not ask for an opportunity to inspect the vehicle or to perform a final repair on the vehicle.

Although Respondent has been provided adequate opportunity to repair the vehicle and to ensure that it operates properly, they have not been able to repair the vehicle so that it conforms to their written warranty. As such, Complainant has met her burden of persuasion to establish that the vehicle has a warrantable and existing defect or condition which creates a serious safety hazard, and which substantially impairs the use or market value of the vehicle. Therefore, the hearings examiner will order Respondent to repurchase the vehicle as requested by Complainant.

Based on the evidence and the arguments presented, the hearings examiner finds that repurchase of the vehicle is the appropriate remedy in this case. Complainant's request for repurchase relief is hereby granted.

III. FINDINGS OF FACT

1. Kelly Smith (Complainant) purchased a new 2021 Kia Soul on January 28, 2021, from Kia of South Austin (KSA) located in Austin, Texas with mileage of 21 at the time of delivery.
2. The manufacturer or distributor of the vehicle, Kia Motors America, Inc. (Respondent), issued a new vehicle limited warranty for the vehicle which provides bumper-to-bumper coverage for the first five (5) years or 60,000 miles after delivery, whichever comes first. In addition, Respondent provided a powertrain warranty providing coverage for the vehicle's powertrain for ten (10) years or 100,000 miles for the original owner.
3. The vehicle's mileage on the date of hearing was 22,663.
4. At the time of hearing the vehicle's warranties were still in effect.
5. Complainant has experienced issues with the vehicle's engine intermittently stalling when she comes to a stop when driving the vehicle. In addition, she has experienced issues with the vehicle shuddering and shaking, using too much oil, and the check engine light (CEL) illuminating.

6. Complainant took the vehicle for repair to Respondent's authorized dealer, KSA, in order to address her concerns with the vehicle stalling, shuddering or shaking, CEL illuminating, and excessive oil consumption on the following dates:
 - a. May 29, 2021, at 6,332 miles;
 - b. June 11, 2021, at 7336 miles;
 - c. February 25, 2022, at 17,284 miles and
 - d. April 25, 2022, at 18,938 miles.
7. On May 29, 2021, KSA's service technician commenced an oil consumption test on the vehicle in order to address the oil consumption and stalling issues.
8. On June 11, 2021, KSA's service technician determined that the vehicle was using oil excessively and replaced the vehicle's engine to address the oil consumption and stalling issues.
9. On February 25, 2022, KSA's service technician found a stored diagnostic trouble code (DTC) on the vehicle's computers indicating that the engine had misfired causing the CEL to illuminate and the vehicle to shudder and shake.
10. No repair was performed on the vehicle during the repair visit described in Findings of Fact #9 as the technician was unable to duplicate the issue.
11. On February 25, 2022, Complainant mailed a letter to Respondent advising them that she was dissatisfied with the vehicle.
12. On March 2, 2022, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
13. On April 25, 2022, KSA's service technician was unable to duplicate the issue of the vehicle's engine stalling when the vehicle was at a stop. No repair was performed at the time.
14. Complainant incurred incidental expenses of \$959.54 when she had to rent a vehicle on February 25, 2022, because KSA did not have a loaner vehicle available for her.
15. The vehicle still stalls intermittently when coming to a stop.

16. The vehicle last stalled during the last week of June of 2022, approximately a week and a half prior to the hearing.
17. Complainant has not experienced any issues with the vehicle's oil consumption, the vehicle shuddering or shaking, or the CEL illuminating since February of 2022.
18. The appropriate calculations for repurchase are:

Purchase price, including tax, title, license and registration	\$21,150.00
Delivery mileage	21
Mileage at first report of defective condition	6,332
Mileage on hearing date	22,663
Useful life determination	120,000

Purchase price, including tax, title, license and registration	\$21,150.00				
Mileage at first report of defective condition	6,332				
Less mileage at delivery	<u>-21</u>				
Unimpaired miles	6,311				
Mileage on hearing date	22,663				
Less mileage at first report of defective condition	<u>-6,332</u>				
Impaired miles	16,331				
Reasonable Allowance for Use Calculations:					
Unimpaired miles					
	<u>6,311</u>				
	120,000	X	\$21,150.00	=	\$1,112.31
Impaired miles					
	<u>16,331</u>				
	120,000	X	\$21,150.00	X .5	= <u>\$1,439.17</u>
Total reasonable allowance for use deduction:	\$2,551.48				
Purchase price, including tax, title, license and registration	\$21,150.00				
Less reasonable allowance for use deduction	-\$2,551.48				
Plus filing fee refund	<u>\$35.00</u>				
TOTAL REPURCHASE AMOUNT	\$18,633.52				

19. On May 3, 2022, 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.

20. The hearing in this case convened on July 6, 2022, in Austin, Texas before Hearings Examiner Edward Sandoval. Kelly Smith, Complainant, appeared and represented herself in the hearing. Respondent, Kia Motors America, Inc., did not appear at the hearing or offer any evidence. The hearing record closed on July 6, 2022.

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's vehicle has an existing defect or condition (the vehicle stalling when coming to a stop) that substantially impairs Complainant's use or market value of the vehicle. Tex. Occ. Code § 2301.604(a).
7. After a reasonable number of attempts, Respondent has been unable to repair the nonconformity in Complainant's vehicle so that it conforms to the applicable express warranty. Tex. Occ. Code §§ 2301.604(a) and 2301.605.
8. Based on the above Findings of Fact and Conclusions of Law, Complainant is entitled to relief and repurchase of the 2021 Kia Soul under Texas Occupations Code § 2301.604(a).

IT IS THEREFORE ORDERED that:

1. Respondent shall accept the return of the vehicle from Complainant. Respondent shall have the right to have its representatives inspect the vehicle upon the return by Complainant. If from the date of the hearing to the date of repurchase the vehicle is substantially damaged or there is an adverse change in its condition beyond ordinary wear and tear, and the parties are unable to agree on an amount of an allowance for such damage or condition, either party may request reconsideration by the Office of Administrative Hearings of the repurchase price contained in the final order;
2. Respondent shall repurchase the subject vehicle in the amount of **\$19,593.06**. (This total includes the \$35.00 Lemon Law filing fee and the incidental expense of \$959.54 for a rental vehicle in February of 2022, when the servicing dealer did not have a loaner vehicle available.) The total refund shall be paid to Complainant and the vehicle lien holder as their interests require. If clear title to the vehicle is delivered to Respondent, then the full refund shall be paid to Complainant. At the time of the return, Respondent or its agent is entitled to receive clear title to the vehicle. If the above noted repurchase amount does not pay all liens in full, Complainant is responsible for providing Respondent with clear title to the vehicle;
3. Within 20 calendar days from the receipt of this order, the parties shall complete the return and repurchase of the subject vehicle. If the repurchase of the subject vehicle is not accomplished as stated above, barring a delay based on a party's exercise of rights in accordance with Texas Government Code § 2001.144, starting on the 31st calendar day from receipt of this order, Respondent is subject to a contempt charge and the assessment of civil penalties. However, if the Office of Administrative Hearings determines the failure to complete the repurchase as prescribed is due to Complainant's refusal or inability to deliver the vehicle with clear title, the Office of Administrative Hearings may deem the granted relief rejected by Complainant and the complaint closed pursuant to 43 Texas Administrative Code § 215.210(2);
4. Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall obtain a Texas title for the vehicle prior to resale and issue a disclosure statement provided by or approved by the Department's Enforcement Division – Lemon Law Section;
5. Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall affix the disclosure label to the reacquired vehicle in a conspicuous place, and upon the first retail

sale of the vehicle, the disclosure statement shall be completed and returned to the Department's Enforcement Division – Lemon Law Section; and

6. Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall provide the Department's Enforcement Division – Lemon Law Section, in writing, the name, address and telephone number of the transferee (wholesale purchaser or equivalent) of the vehicle within 60 calendar days of the transfer.

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 §§ 2301.601-.613 is hereby **GRANTED**. It is further **ORDERED** that Respondent, Kia Motors America, Inc., shall repair the warrantable defects (the vehicle stalling when coming to a stop) in the reacquired vehicle identified in this Decision.

SIGNED July 29, 2022.



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