

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 20-0008285 CAF**

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

DECISION AND ORDER

Sharon Propes (Complainant) filed a complaint with the Texas Department of Motor Vehicles (Department) seeking relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged warrantable defects in her vehicle distributed by Nissan North America, Inc. (Respondent). A preponderance of the evidence does not show that the subject vehicle qualifies for repurchase/replacement. However, the vehicle qualifies for 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 on May 5, 2020, by telephone, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented himself herself. Jesse Juan, arbitration specialist, represented the Respondent.

II. Discussion

A. Applicable Law

1. Repurchase/Replacement Relief Requirements

A vehicle qualifies for repurchase or replacement if the respondent cannot “conform a motor vehicle to an applicable express warranty by repairing or correcting a defect or condition

¹ TEX. GOV'T CODE § 2001.051.

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 currently 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 written notice of the defect to the respondent, (2) an opportunity to cure by the respondent, and (3) a deadline for filing a Lemon Law complaint.

a. Serious Safety Hazard

The Lemon Law 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

b. Substantial Impairment of Use or Value

i. Impairment of Use

In determining substantial impairment of use, the Department considers “whether a defect or nonconformity hampers the intended normal operation of the vehicle.” For instance, “while a vehicle with a non-functioning air conditioner would be available for use and transporting passengers, its intended normal use would be substantially impaired.”⁵

ii. Impairment of Value

The Department applies a reasonable purchaser standard for determining whether a defect substantially impairs the value of a vehicle. The reasonable purchaser standard “does not require an owner to present an expert witness or any technical or market-based evidence to show decreased value.” Instead, under this standard, “factfinders should put themselves in the position of a reasonable prospective purchaser of the subject vehicle and determine (based on the evidence

² TEX. OCC. CODE § 2301.604(a).

³ TEX. OCC. CODE § 2301.604(a).

⁴ TEX. OCC. CODE § 2301.601(4).

⁵ *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012).

presented) if the current condition of the vehicle would deter them from buying the vehicle or substantially negatively affect how much they would be willing to pay for the vehicle.”⁶

c. Reasonable Number of Repair Attempts

Generally, a rebuttable presumption is established that the vehicle had a reasonable number of repair attempts if:

[T]he 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 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

Alternatively, for serious safety hazards, a rebuttable presumption is established that the vehicle had a reasonable number of repair attempts if:

[T]he same nonconformity creates a serious safety hazard and continues to exist after causing the vehicle to have 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.⁸

Additionally, for vehicles out of service at least 30 days, a rebuttable presumption may be established that the vehicle had a reasonable number of repair attempts if:

[A] nonconformity still exists that substantially impairs the vehicle’s use or market value, the vehicle is out of service for repair for a cumulative total of 30 or more days, 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.⁹

⁶ *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012) (“[T]he Division’s interpretation that expert testimony or technical or market-based evidence is not required to show diminished value or use is consistent with the statute’s goal of mitigating manufacturers’ economic advantages in warranty-related disputes.”).

⁷ TEX. OCC. CODE § 2301.605(a)(1)(A) and (B).

⁸ TEX. OCC. CODE § 2301.605(a)(2).

⁹ TEX. OCC. CODE § 2301.605(a)(3).

The 30 days described above does not include any period when the owner has a comparable loaner vehicle provided while the dealer repairs the subject vehicle.¹⁰

The existence of a statutory rebuttable presumption does not preclude otherwise finding a reasonable number of attempts to repair the vehicle based on different circumstances and fewer attempts.¹¹ Furthermore, the Department adopted a decision indicating that if a consumer presents the vehicle to a dealer for repair and the dealer fails to repair the vehicle, then that visit would constitute a repair attempt unless the consumer was at fault for the failure to repair the vehicle.¹²

d. Other Requirements

Even if a vehicle satisfies the preceding requirements for repurchase/replacement relief, the Lemon Law prohibits repurchase or replacement unless: (1) the owner or someone on behalf of the owner, or the Department has provided written notice of the alleged defect or nonconformity to the respondent;¹³ (2) the respondent was given an opportunity to cure the defect or nonconformity;¹⁴ and (3) the Lemon Law complaint was filed within six months after the earliest of: the warranty's expiration date or the dates on which 24 months or 24,000 miles had passed since the date of original delivery of the motor vehicle to an owner.¹⁵

¹⁰ TEX. OCC. CODE § 2301.605(c).

¹¹ *Ford Motor Company v. Texas Department of Transportation*, 936 S.W.2d 427, 432 (Tex. App.—Austin 1996, no writ) (“[T]he existence of statutory presumptions does not forbid the agency from finding that different circumstances or fewer attempts meet the requisite ‘reasonable number of attempts.’”).

¹² *DaimlerChrysler Corporation v. Williams*, No. 03-99-00822-CV (Tex. App.—Austin, June 22, 2000, no writ) (not designated for publication) (Repair attempts include “those occasions when the fault for failing to repair the vehicle rests with the dealership.” Conversely, “those occasions when failure to repair the vehicle was the fault of the consumer would not be considered a repair attempt under the statute.”).

¹³ TEX. OCC. CODE § 2301.606(c)(1). 43 TEX. ADMIN. CODE § 215.204 provides that “[u]pon receipt of a complaint for lemon law or warranty performance relief, the department will provide notification of the complaint to the appropriate manufacturer, converter, or distributor.” The Department’s notice of the complaint to the Respondent may satisfy the requirement to provide notice of the defect or nonconformity to the Respondent.

¹⁴ A respondent may delegate its opportunity to cure to a dealer. A repair visit to a dealer satisfies the opportunity to cure requirement when the respondent allows a dealer to attempt repair after written notice to the respondent. *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 221 and 226 (Tex. App.—Austin 2012); Texas Department of Transportation, *Kennemer v. Dutchman Manufacturing, Inc.*, MVD Cause No. 09-0091 CAF (Motor Vehicle Division Sept. 25, 2009) (Final Order Granting Chapter 2301, Subchapter M Relief). An opportunity to cure does not require an actual repair attempt but only a valid opportunity. *Id* at 2.

¹⁵ 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 if the vehicle has a “defect . . . that is covered by a manufacturer’s, converter’s, or distributor’s . . . warranty agreement applicable to the vehicle” and the vehicle owner notified the manufacturer, converter, distributor, or its authorized agent of the defect before the warranty’s expiration.¹⁶ The manufacturer, converter, or distributor has an obligation to “make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty.”¹⁷

3. Burden of Proof

The law places the burden of proof on the Complainant.¹⁸ The Complainant must prove all facts required for relief by a preponderance of the evidence. That is, the Complainant must present sufficient evidence to show that every required fact more likely than not exists.¹⁹ Accordingly, the Complainant cannot prevail where the existence of any required fact appears equally likely or unlikely.

4. The Complaint Identifies the Issues in this Proceeding

The complaint identifies the issues to be addressed in this proceeding.²⁰ The complaint must state “sufficient facts to enable the department and the party complained against to know the nature of the complaint and the specific problems or circumstances forming the basis of the claim for relief under the lemon law.”²¹ However, the parties may expressly or impliedly consent to

¹⁶ TEX. OCC. CODE § 2301.204; 43 TEX. ADMIN. CODE § 215.202(b)(3).

¹⁷ TEX. OCC. CODE § 2301.603(a).

¹⁸ 43 TEX. ADMIN. CODE § 215.66(d).

¹⁹ *E.g.*, *Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

²⁰ “In a contested case, each party is entitled to an opportunity . . . for hearing after reasonable notice of not less than 10 days.” TEX. GOV’T CODE §§ 2001.051; “Notice of a hearing in a contested case must include . . . a short, plain statement of the factual matters asserted.” TEX. GOV’T CODE § 2001.052. *See* TEX. OCC. CODE § 2301.204(b) (“The complaint must be made in writing to the applicable dealer, manufacturer, converter, or distributor and must specify each defect in the vehicle that is covered by the warranty.”); TEX. OCC. CODE § 2301.204(d) (“A hearing may be scheduled on any complaint made under this section that is not privately resolved between the owner and the dealer, manufacturer, converter, or distributor.”).

²¹ 43 TEX. ADMIN. CODE § 215.202(a)(3).

hearing issues not included in the pleadings.²² Implied consent occurs when a party introduces evidence on an unpleaded issue without objection.²³

5. Incidental Expenses

When repurchase or replacement is ordered, the Lemon Law provides for reimbursing the Complainant for reasonable incidental expenses resulting from the vehicle's loss of use because of the defect.²⁴ Reimbursable expenses include, but are not limited to: (1) alternate transportation; (2) towing; (3) telephone calls or mail charges directly attributable to contacting the manufacturer, distributor, converter, or dealer regarding the vehicle; (4) meals and lodging necessitated by the vehicle's failure during out-of-town trips; (5) loss or damage to personal property; (6) attorney fees, if the complainant retains counsel after notification that the respondent is represented by counsel; and (7) items or accessories added to the vehicle at or after purchase, less a reasonable allowance for use. The expenses must be reasonable and verifiable (for example, through receipts or similar written documents).²⁵ However, the Department's rules expressly exclude compensation for "any interest, finance charge, or insurance premiums."²⁶

B. Summary of Complainant's Evidence and Arguments

On June 19, 2018, the Complainant, purchased a new 2018 Nissan Armada from Baker Nissan North, a franchised dealer of the Respondent, in Houston, Texas. However, the Complainant indicated she took delivery two days later. The vehicle had 23 miles on the odometer at the time of purchase. The vehicle's limited warranty provides basic coverage for 36 months or 36,000 miles, whichever occurs first.

Neither the Complainant nor a person on behalf of the Complainant provided a written notice of defect to the Respondent apart from the complaint. On February 24, 2020, the Complainant filed a complaint with the Department alleging: the wipers will come on after starting; vehicle rattles when closing the driver's door; compressor noise emanates from the rear;

²² 43 TEX. ADMIN. CODE § 215.42; TEX. R. CIV. P. 67.

²³ See *Gadd v. Lynch*, 258 S.W.2d 168, 169 (Tex. Civ. App.—San Antonio 1953, writ ref'd).

²⁴ TEX. OCC. CODE § 2301.604.

²⁵ 43 TEX. ADMIN. CODE § 215.209(a).

²⁶ 43 TEX. ADMIN. CODE § 215.208(b)(1).

driver's seat heater works intermittently; the display does not show the phone's connection status; and two different warnings turn on. In relevant part, the Complainant took the vehicle to a dealer for repair of the alleged issues as follows:

Date	Miles	Issue
June 3, 2019	13,374	Wipers automatically come on; noise from rear driver quarter panel when driver's door closes
October 14, 2019	17,774	Wipers randomly come on; buzzing noise from rear in park related to electronic suspension
November 18, 2019	19,311	Wipers come on with no moisture; noise from rear at idle (air compressor)
March 20, 2020	22,903	Forward collision warning comes on randomly; blind spot warning on while turning left; brakes engage without vehicles/objects around; wiper blades come on and when turning on vehicle; rattle noise from rear when closing door; rear air compressor comes on; seat warmers do not always come on or shut off after a few minutes; calls do not show up on the display.

The Complainant explained that the wipers, with the rain-sensing auto wiper system activated, may turn on anywhere and on sunny days. The wipers will not stop until turning off and restarting the vehicle. Otherwise she would have to manually switch off the wipers. Sometimes the auto wiper system works, sometimes it does not. She first noticed this issue sometime before the September 18, 2018, service visit. She last noticed the issue about a week and a half before the hearing. The wipers appear to turn on randomly, for example, in the garage in the morning or in the afternoon leaving work, and on sunny days. The auto wiper issue would occur about twice a month. The Complainant mostly noticed the rattle when closing door while in the garage because of the quieter conditions. When closing the door, a rear panel makes a vibrating noise. A dealer found a vent in the area that made noise when opening and closing the door. She first noticed the noise sometime before the June 3, 2019, repair visit. She confirmed the noise would occur every time when closing the driver's door after driving. Though, the noise stopped for a while and came back after about six months. She last noticed the noise the day before the hearing. The Complainant described the compressor noise as exactly like a compressor. She can hear the noise when walking back to the vehicle when running. She last noticed the noise at the end of February after a repair. She noticed the compressor noise six to eight times since acquiring the vehicle. Normally, the noise shuts off when getting out of the vehicle. The Complainant stated that she would turn on the seat heater and nothing would happen. Other times the seat may heat normally then stop five

minutes later. The seat would work sometimes. She last noticed the heater malfunction about a week before the hearing. She noted that the seat heater on her husband's Nissan functioned. She elaborated that the seat heater problem would occur about 80% of the time. The Complainant testified the touch screen display not displaying phone information started with issues with the radio. When getting in the vehicle, the radio would be blaring, so she had the radio repaired. However, when calling from the vehicle, the phone information will not show on the display. Unless she disconnected from a call first, she could not hang up the phone without using the button on the phone, though the display worked before the radio repair. The radio was first repaired on September 18, 2018, and software "replaced" on October 18, 2019. The display issue occurred every time placing a call and last occurred the Saturday before the hearing. She noted that a technician paired a phone to the vehicle and the same malfunction occurred. However, the problem did not occur previously. The Complainant described the two warnings would turn on: (1) a single beep with an indicator showing "systems on"—sometimes the vehicle will beep but not display the indicator, and (2) the vehicle will beep to warn of something too close (Blind Spot Warning [BSW]), even though nothing is beside the vehicle. Both warnings started about the same time in February 2020. A warning would turn on about once a week. She last noticed such warning the Saturday before the hearing. She elaborated that the BSW indicates a vehicle's presence when turning on the turn signal. She noted that the BSW would turn on when she drove by a curve with numerous signs but did not happen every time going around a curve. Sometimes the BSW would go off with nothing beside her. She last noticed the BSW issue on April 10, 2020. The Complainant testified that the forward collision avoidance issue happened three times. She described that, after stopping at a red light, she turned left when the light turned green and the vehicle beeped and the forward collision warning acted like the vehicle would hit something. Nothing was around in all three instances. The issue occurred on March 13, 14, and April 17 of 2020. She brought the vehicle to the dealer on March 20, 2020, but the dealer found nothing wrong. The Complainant stated that the vehicle currently had 24,495 miles on the odometer.

On rebuttal, the Complainant stated that she felt leaving the wipers in the off position made the auto wiper function worthless. She noted that the reason the dealer worked on the trim was because the dealer damaged it. Regarding the compressor, she had not heard such noise in her prior Nissan truck or in her husband's Nissan Armada. Additionally, the dealer poked a hole in the seat and the seat's heat does not work properly. She also noted that the steering mounted controls would

not work when the screen did not display the call. Finally, she stated that the frontal collision function would activate with nothing around her.

C. Summary of Respondent's Evidence and Arguments

Mr. Juan testified that the subject vehicle has had four repair visits for the wiper issue but no repairs. He pointed out that the owner's manual specifies that: "The rain-sensing auto wipers are intended for use during rain. If the switch is left in the AUTO position, the wipers may operate unexpectedly when dirt, fingerprints, oil film or insects are stuck on or around the sensor. The wipers may also operate when exhaust gas or moisture affect the rain sensor." He concluded that the auto wipers were operating as designed. Mr. Juan stated that the noise when closing the door only had two repair visits. Moreover, the noise does not substantially impair the vehicle. The compressor noise led to the replacement of the compressor and it is operating as intended. The vehicle has an auto-leveling suspension that uses an air compressor to adjust for uneven loads. The Complainant noted that she noticed the compressor noise with the vehicle parked on a slope. The heated seat concern had one repair attempt and could not be duplicated at the most recent visit. Further, the heated seat issue did not substantially impair the vehicle. Regarding the concern that the phone information did not show on the display, Mr. Juan explained that the hands-free phone system switch mounted on the steering wheel may be used to disconnect calls even if the touch screen display does not work. Mr. Juan pointed out certain conditions listed in the owner's manual when Lane Departure Warning (LDW) and Intelligent Lane Intervention (I-LI) will normally not be available as signified by a beep (for example, when: Vehicle Dynamic Control (VDC) or Antilock Braking System (ABS) is operating, the four-wheel drive switch is set to 4H or 4L, the vehicle is parked in direct sunlight under high temperatures). Similarly, the owner's manual lists limitations with the Blind Spot Warning (BSW). The manual specifies that the BSW may normally pick up "objects such as guardrails, walls, foliage and parked vehicles." Further, the BSW issue appears to have had only one repair attempt. Lastly, the manual also addresses Automatic Emergency Braking (AEB). The manual expressly contemplates that: "In some road or traffic conditions, the AEB system may unexpectedly push the accelerator pedal up or apply partial braking." And as Mr. Juan noted, simply depressing the accelerator pedal will override the AEB braking.

D. Analysis

To qualify for Lemon Law relief, the vehicle must have a defect covered by warranty (warrantable defect).²⁷ Lemon Law relief does not apply to all issues that may occur with a vehicle but only to defects covered by warranty (warrantable defects) that continues to exist after repairs.²⁸ The Lemon Law does not require that a manufacturer provide any particular warranty coverage nor does the Lemon Law impose any specific standards for vehicle characteristics. The Lemon Law only requires the manufacturer to conform its vehicles to whatever coverage the warranty provides. In part, the warranty generally states that:

This warranty covers any repairs needed to correct defects in materials or workmanship of all parts and components of each new Nissan vehicle supplied by Nissan subject to the exclusions listed under the heading “WHAT IS NOT COVERED” or, if the part is covered by one of the separate coverages described in the following sections of this warranty, that specific coverage applies instead of the basic coverage.

According to these terms, the warranty only applies to defects in materials or workmanship (manufacturing defects).²⁹ A manufacturing defect is generally an isolated aberration occurring only in those vehicles not produced according to the manufacturer’s specifications. A defectively manufactured vehicle has a flaw because of some error in making it, such as incorrect assembly or the use of a broken part. Manufacturing defects exist when the vehicle leaves the manufacturing plant. Unlike manufacturing defects, issues that do not arise from manufacturing, such as the vehicle’s design characteristics (which exist before manufacturing) or improper dealer repairs (which occur after manufacturing), are not warrantable defects. Design characteristics result from

²⁷ TEX. OCC. CODE §§ 2301.603(a), 2301.604(a); TEX. OCC. CODE § 2301.204.

²⁸ TEX. OCC. CODE §§ 2301.603(a), 2301.604(a); TEX. OCC. CODE § 2301.204.

²⁹ Courts have affirmed that warranty language covering “defects in material or workmanship” do not cover design issues. *E.g.*, *Whitt v. Mazda Motor of America*, 5th Dist. Stark No. 2010CA00343, 211-Ohio-3097, ¶¶ 18-21 (“The manufacturer’s express warranty in the case sub judice provides: ‘Mazda warrants that your new Mazda Vehicle is free from defects in material or workmanship’ The trial court found the warranty did not cover claims of design defects. . . . The problems about which Appellants complained did not fall within the applicable expressed warranty.”); *see GT & MC, Inc. v. Texas City Refining, Inc.*, 822 S.W.2d 252, 257 (Tex. App.—Houston [1st Dist.] 1991, writ denied) (“the language in the contract of May 12, 1980, expressly limited TCR’s recovery only for defects in materials or workmanship to damages for repair or replacement value. No mention was made in the guarantee of remedies for design defects.”).

the vehicle's specified design and not from any error during manufacturing.³⁰ In sum, the warranty only covers manufacturing defects and the Lemon Law does not apply to design characteristics or design defects.

1. Auto Wipers

This issue is not a warrantable defect that can qualify for any relief. Instead, the auto wipers activating without rain is a normal characteristic of the vehicle's design. The owner's manual expressly states that the wipers may normally activate without rain.

2. Rattle When Closing the Driver's Door

The evidence shows that the rattle continued after the final repair visit on March 20, 2020. However, the Department's precedents hold that a noise by itself cannot support repurchase or replacement.³¹ Furthermore, this issue did not have sufficient repair attempts to qualify for repurchase or replacement. Accordingly, the rattle qualifies for warranty repair only.

3. Compressor Noise

A preponderance of the evidence does not show that the compressor noise is a warrantable defect that qualifies for relief. The subject vehicle's design incorporates an auto-leveling suspension at the rear that uses an air compressor to adjust for uneven loads. The situations the Complainant noticed the compressor noise include conditions when the auto-leveling system's air compressor would be active.

4. Seat Heater

The evidence shows that the seat heater malfunctions continued after the final repair visit on March 20, 2020. However, the record includes no evidence that the heater impairs the use of the vehicle. Moreover, the heater malfunction does not substantially impair the value of the vehicle under the reasonable prospective purchaser standard. Also, this issue did not have sufficient repair

³⁰ In contrast to manufacturing defects, "[a] design defect exists where the product conforms to the specification but there is a flaw in the specifications themselves." *Torres v. Caterpillar, Inc.*, 928 S.W.2d 233, 239 (Tex. App.—San Antonio 1996), *writ denied*, (Feb. 13, 1997).

³¹ *E.g.*, Texas Department of Transportation, *Alvarez v Ford Motor Company*, MVD Cause No. 08-0440, (Motor Vehicle Division Dec. 11, 2008) (final order denying § 2301.604 relief); State Office of Administrative Hearings *Alvarez v Ford Motor Company*, Docket No. 601-08-4215.CAF, (Oct. 9, 2008) (proposal for decision).

attempts to qualify for repurchase or replacement. Accordingly, the seat heater qualifies for warranty repair only.

5. Phone Information Not Displayed

A preponderance of the evidence does not show that the phone display issue is a warrantable defect. Significantly, the Complainant traced the origin of the malfunction to a repair on the radio, after which the touch screen would no longer display the phone information. That is, the record indicates that the dealer's repair caused the malfunction. However, as explained in above, the warranty does not cover improper dealer repairs, so that no relief applies.

6. Warning Indicators

a. "System On" and Beeps

This issue is not a warrantable defect that can qualify for any relief. The evidence shows that the "system on" message and associated beeps are normal indicators of the function of various systems, such as Lane Departure Warning (LDW), Intelligent Lane Intervention (I-LI), and Intelligent Back-up Intervention (I-BI). The owner's manual specifies that the "system on" indicator occurs when various systems turn on. For example, the owner's manual shows that the "system on" indicator shown in Complainant's Exhibit 6 relates to the Intelligent Back-up Intervention (I-BI) system. The manual states that: "When the shift lever is placed in the R (Reverse) position, the indicator on the IBI system key [] illuminates on the center display and I-BI ON indicator appears on the vehicle information display." Complainant's Exhibit 6 shows the shift lever indicator in reverse, consistent with the owner's manual. Conversely, a beep indicates when a system becomes unavailable. The owner's manual specifically lists instances when such systems may normally be unavailable. In sum, the beeps and "system on" message are normal indicators notifying the driver when various systems are available and are not defects.

b. Blind Spot Warning (BSW)

This issue is not a warrantable defect that can qualify for any relief. The owner's manual specifies that the BSW indicator may come on even without vehicles in the vicinity. However, this is a normal limitation in the design of the vehicle and not a defect.

7. Forward Collision - Automatic Electronic Braking (AEB)

This issue is not a warrantable defect that can qualify for any relief. The owner's manual specifies that AEB may normally cause the vehicle to brake without vehicles in the vicinity. However, this is a normal limitation in the design of the vehicle and not a defect. Accordingly, this issue cannot support any relief.

III. Findings of Fact

1. On June 19, 2018, the Complainant, purchased a new 2018 Nissan Armada from Baker Nissan North, a franchised dealer of the Respondent, in Houston, Texas. However, the Complainant indicated she took delivery two days later. The vehicle had 23 miles on the odometer at the time of purchase.
2. The vehicle's limited warranty provides basic coverage for 36 months or 36,000 miles, whichever occurs first.
3. The Complainant took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
June 3, 2019	13,374	Wipers automatically come on; noise from rear driver quarter panel when driver's door closes
October 14, 2019	17,774	Wipers randomly come on; buzzing noise from rear in park related to electronic suspension
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March 20, 2020	22,903	Forward collision warning comes on randomly; blind spot warning on while turning left; brakes engage without vehicles/objects around; wiper blades come on and when turning on vehicle; rattle noise from rear when closing door; rear air compressor comes on; seat warmers do not always come on or shut off after a few minutes; calls do not show up on the display.

4. Neither the Complainant nor a person on behalf of the Complainant provided a written notice of defect to the Respondent apart from the complaint.
5. On February 24, 2020, the Complainant filed a complaint with the Department alleging: the wipers will turn on after starting; vehicle rattles when closing the driver's door; compressor noise emanates from the rear; driver's seat heating works intermittently; the display does not show the phone's connection status; and two different warnings turn on.

6. On April 16, 2020, the Department's Office of Administrative Hearings issued a notice of hearing directed to all parties, giving them 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 factual matters asserted.
7. The hearing in this case convened on May 5, 2020, by telephone, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented himself herself. Jesse Juan, arbitration specialist, represented the Respondent.
8. The vehicle's odometer displayed 24,495 miles at the time of the hearing.
9. The vehicle's warranty was in effect at the time of the hearing.
10. The owner's manual expressly states that the wipers may normally activate without rain.
11. The rattle from closing the driver's door continued after the final repair visit.
12. The subject vehicle's design incorporates an auto-leveling suspension at the rear that uses an air compressor to adjust for uneven loads. The situations the Complainant noticed the compressor noise include conditions when the auto-leveling system's air compressor would be active.
13. The seat heater malfunctions continued after the final repair visit.
14. The failure of the touch screen to display the phone's information originated from a dealer's repair on the radio.
15. The "system on" message and associated beeps are normal indicators of the function of various vehicle systems.
16. The owner's manual specifies that the blind spot warning indicator may normally come on even without vehicles in the vicinity.
17. The owner's manual specifies that automatic electronic braking may normally cause the vehicle to brake without vehicles in the vicinity.

IV. Conclusions of Law

1. The Texas Department of Motor Vehicles has jurisdiction over this matter. TEX. OCC. CODE §§ 2301.601-2301.613 and 2301.204.
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 filed a sufficient complaint with the Department. 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 issues concerning the wipers, compressor noise, the screen not displaying the phone's information, the two different warning indicators, and the automatic electronic braking do not support replacement or repurchase. The Complainant did not prove that these issues were covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.603 and 2301.604(a).
7. The issues concerning the rattles when closing the driver's door, and driver's seat heater do not support replacement or repurchase. The Complainant did not prove that these issues create a serious safety hazard or substantially impair the use or market value of the vehicle. TEX. OCC. CODE § 2301.604(a). Further, the Complainant did not meet the requirement for a reasonable number of repair attempts for these issues. TEX. OCC. CODE §§ 2301.604(a) and 2301.605(a).
8. The Complainant does not qualify for reimbursement of incidental expenses because the vehicle does not qualify for replacement or repurchase. TEX. OCC. CODE §§ 2301.603, 2301.604(a); 43 TEX. ADMIN. CODE § 215.209.

9. If the Complainant's vehicle does not qualify for replacement or repurchase, this Order may require repair to obtain compliance with the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603; 43 TEX. ADMIN. CODE § 215.208(e).
10. The Complainant's vehicle qualifies for warranty repair. The Complainant proved that the rattles when closing the driver's door, and the driver's seat heater malfunction are defects covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603. The Complainant or an agent of the Complainant notified the Respondent or Respondent's agent of the alleged defect(s). TEX. OCC. CODE §§ 2301.204 and 43 TEX. ADMIN. CODE § 215.202(b)(3).
11. The Respondent remains responsible to address and repair or correct any defects that are covered by the Respondent's warranty. TEX. OCC. CODE § 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**. It is **FURTHER ORDERED** that the Respondent shall make any repairs needed to conform the subject vehicle to the applicable warranty; specifically, the Respondent shall resolve the following issues: the rattle when closing the driver's door and seat heater malfunction (failure to turn on or turning off prematurely). Upon this Order becoming final under Texas Government Code § 2001.144:³² (1) the Complainant shall deliver the vehicle to the Respondent within 20 days; and (2) the Respondent shall complete the repair of the vehicle within **20 days** after receiving it. However, if the Department determines the Complainant's refusal or inability to deliver the vehicle caused the failure to complete the required repair as prescribed, the Department may consider the 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).

³² This Order does not become final on the date this Order is signed, instead: (1) this Order becomes final if a party does not file a motion for rehearing within 25 days after the date this Order is signed, or (2) if a party files a motion for rehearing within 25 days after the date this Order is signed, this Order becomes final when: (A) an order overruling the motion for rehearing is signed, or (B) the Department has not acted on the motion within 55 days after the date this Order is signed. Accordingly, this Order cannot become final (1) while a motion for rehearing remains pending; or (2) after the grant of a motion for rehearing.

SIGNED July 7, 2020

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

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