

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

TUNG NGUYEN and BOYONG PARK,)	
)	No. _____
Plaintiffs,)	
)	CLASS ACTION COMPLAINT
v.)	
)	JURY TRIAL DEMANDED
NISSAN NORTH AMERICA, INC.,)	
)	
Defendant.)	
)	

COMPLAINT

Tung Nguyen and Boyong Park (“Plaintiffs”) on behalf of themselves and the proposed Classes defined herein, allege as follows:

SUMMARY OF THE CASE

1. This is a class action brought by Plaintiffs on behalf of themselves and all persons who purchased or leased a model-year 2013 or later Nissan Pathfinder vehicle equipped with Nissan’s continuously variable automatic transmission (“CVT”) (collectively, the “Vehicles”) marketed, distributed, sold, or warranted by Nissan North America, Inc. (“Nissan” or “Defendant”).

2. All Vehicles at issue in this litigation share a common, uniform defect in the Vehicles’ CVT. The defect is present at the time of sale or lease, and it causes the Vehicles to judder, shudder, shake, and jerk violently when under acceleration. As a result, the Vehicles fail to properly accelerate, including by delaying acceleration and interrupting the forward propulsion of the Vehicles.

3. The CVT defect imposes a safety hazard upon Plaintiffs, the Classes and the public because the Vehicles' malfunctioning transmission prevents drivers from safely accelerating when entering traffic, changing lanes, and making turns, all of which substantially increase the likelihood of collisions involving the Vehicles.

4. Upon information and belief, Nissan has been aware of the CVT defect since prior to the sale or lease of the Vehicles to Plaintiffs and the other members of the Classes through, among other things, its own internal testing and early customer complaints. In addition, to date, the National Highway Traffic Safety Administration ("NHTSA") has received 286 complaints related to the Vehicles' powertrain, many of which describe transmission failures that placed drivers at a high risk of an automobile accident. And, Nissan's dealers, which are responsible for servicing the Vehicles, have received numerous complaints and requests for repairs from the members of the Classes, including from Plaintiffs.

5. Despite this, Nissan has continued selling and leasing the Vehicles, has not corrected the defect, has not disclosed its knowledge of the defect, and has actively concealed that knowledge by issuing service bulletins – that it knows are ineffective – to mollify its customers who have complained about their malfunctioning transmission.

6. When consumers, including Plaintiffs, complain to Nissan dealers about the dangerous condition created by their malfunctioning transmission, rather than repair the defect under warranty, Nissan dealers either inform consumers that their Vehicles are functioning properly, or "as intended," or conduct repairs or software updates that they falsely promise will correct the defect.

PARTIES

7. Plaintiff Tung Nguyen is a citizen of Colorado. On October 2, 2014, he purchased, in Colorado, a new, model-year 2014 Nissan Pathfinder with a five year/60,000 mile drivetrain warranty.

8. Plaintiff Boyong Park is a foreign citizen and a resident of Nevada. On October 10, 2015, he purchased, in Nevada, a used, model-year 2015 Nissan Pathfinder with a five year/60,000 mile drivetrain warranty.

9. Defendant Nissan North America, Inc. is a corporation organized under the laws of the State of California with its corporate headquarters and principal place of business in Franklin, Tennessee. Nissan is the manufacturer, distributor, marketer and warrantor of the Vehicles.

JURISDICTION AND VENUE

10. This Court has jurisdiction over this action under the Class Action Fairness Act, 28 U.S.C. § 1332(d). There are at least 100 members in the proposed class, the aggregated claims of the individual class members exceed the sum or value of \$5,000,000, exclusive of interest and costs, and this is a class action in which Nissan and more than two-thirds of the members of the proposed class are citizens of different states.

11. Venue is proper under 28 U.S.C. § 1391 because Nissan is headquartered in this judicial district and because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this judicial district.

FACTUAL ALLEGATIONS

A. Nissan's representations concerning the performance of the Vehicles

12. Nissan manufactures, distributes, markets and warrants the Pathfinder line of sport utility vehicles. Beginning with the model-year 2013 Pathfinder, Nissan incorporated a continuously variable transmission ("CVT") into the vehicle's drivetrain. The model-year 2013 and later Nissan Pathfinders equipped with a CVT are referred to herein as the "Vehicles." On information and belief, the 2013, 2014, and 2015 model-year Nissan Pathfinders have the same or substantially similar CVT, and the defect is present in all vehicles at the point of sale.

13. A CVT is a form of automatic transmission. However, unlike a traditional automatic transmission that has a set of gears and a fixed number of gear ratios, a CVT does not have fixed gear ratios. Instead, a CVT uses a steel belt/pulley system to change the gear ratio in what is intended to be a continuously smooth motion.

14. In January 2013, Nissan described its CVT as "the next generation in automatic transmission." Nissan promised that owners and lessees of its vehicles would get "seamless shifting, constant power" and could "[s]ay goodbye to gear hunting and shift-shock (that is, loss of power when traditional automatic transmission switches gears," and that its CVT would operate in a "continuously smooth motion." Nissan also represented that its CVT would last longer than a traditional automatic transmission because a CVT has fewer moving parts than a traditional automatic transmission.

15. With respect to the model-year 2013 Pathfinder, Nissan stated that it was utilizing CVT to "[a]ddress buyers' desire for more efficiency." Nissan promised that the Pathfinder, with the addition of the CVT, would "deliver[] responsive acceleration in a variety of conditions" and "hold[] the engine at the ideal rpm for the conditions at hand, offering responsive power for passing or towing when needed and quiet efficient running at cruising speeds or around town." Similarly

Nissan stated that the 2013 Pathfinder had a “revolutionary CVT transmission for seamless power” that “can hold the engine at the ideal rpm for the job, giving you a wave of power when you need it and running low rpm for quiet, efficient cruising when you don’t.” Nissan repeated these same or similar promises for the model-years 2014 and 2015 Pathfinders.

B. Despite its promises, Nissan knew that the Vehicles were dangerously defective.

16. Far from providing “continuously smooth motion,” “seamless power,” and “responsive power,” the CVT in the Vehicles is dangerously defective because it causes the Vehicles to judder, shudder, shake, and jerk violently when under acceleration. This causes the Vehicles to fail to properly accelerate, including by delaying acceleration and interrupting the forward propulsion of the Vehicles.

17. The CVT’s defect produces an unreasonable safety hazard because it impairs a driver’s ability to control the Vehicle’s speed. For example, drivers are not able to carefully enter traffic, change lanes, or make turns because the Vehicles fail to accelerate in the manner that a driver would reasonably anticipate when depressing the accelerator pedal. This places drivers at an increased risk of crashing their Vehicles or another vehicle crashing into them. In fact, Nissan has acknowledged that when the transmission does not operate properly and “the vehicle stops acceleration, it may increase a risk of crash.”

18. Also, rather than Nissan’s representation that the CVT will prolong the useful life of the Vehicles’ transmission, the CVT decreases the transmission’s useful life, resulting in premature failure and added replacement costs, because the defect causes premature wear to the transmission and related parts.

19. Nissan had exclusive knowledge of the Vehicles CVT defect, and knew or should have known that the defect was not reasonably discoverable by consumers prior to purchasing the Vehicles.

20. Nissan knew or should have known about the defect from its own pre-release internal product testing, early consumer complaints to Nissan's dealers about the defect; warranty claims data related to the defect; consumer complaints to NHTSA and resulting notice from NHTSA; early consumer complaints on websites and internet message boards, and testing conducted in response to owner or lessee complaints.

21. In fact, on January 10, 2013, Nissan sent its dealers Technical Service Bulletin ("TSB") No. NTB13-002, titled "VOLUNTARY SERVICE CAMPAIGN / 2013 PATHFINDER TCM REPROGRAM." That TSB stated that "Nissan is conducting this voluntary service campaign to reprogram the Transmission Control Unit (TCM) on certain specific 2013 Model Year Pathfinder vehicles." The TSB also stated that the reprogramming "will prevent a CVT belt slip condition from occurring and will be performed at no charge for parts or labor."

22. TSB No. NTB13-002 also explained that it did not apply to vehicles where there is "not a match" with the list of applicable TCM Part Numbers, which may occur in circumstances where the reprogramming "has already been done." Through this statement, Nissan acknowledged that it had reprogrammed the TCM on some 2013 Pathfinders prior to issuing the TSB, likely prior to their sale or lease to consumers, which indicates that Nissan was aware of the CVT defect before many of the 2013 Pathfinders entered the market.

23. TSB No. NTB13-002 also included a draft letter to current owners of Nissan Pathfinders informing them that "the Continuously Variable Transmission (CVT) belt may slip in some affected 2013 Nissan Pathfinder Vehicles. An indicator that the CVT belt has slipped is a

shaking or a ‘judder’ from the CVT when coasting.” The draft letter also misinformed consumers that “[t]his is not a safety issue, and the vehicle still meets and/or exceeds all applicable safety standards.”

24. The TCM reprogram prescribed by TSB No. NTB13-002 did not correct the defect in the Vehicles’ CVT. Rather, the Vehicles’ owners and lessees continued to experience the CVT’s shaking and juddering and the dangerous failure of their transmissions to accelerate properly. Nissan, instead of disclosing its knowledge of the Vehicles’ dangerous defect, concealed that knowledge by issuing the ineffective TSB No. NTB13-002 to allay consumers’ concerns.

25. With no cure for the Vehicles’ defect and with mounting complaints from customers, Nissan issued another technical service bulletin on September 10, 2013, TSB No. NTB13-086, titled “2013 - 2014 ALTIMA V6 SEDAN AND PATHFINDER; JUDDER DURING LIGHT ACCELERATION.” This TSB informed dealers “a judder (shudder, single or multiple bumps or vibrations) happens during light acceleration” of the Vehicles. Again this TSB failed to correct the Vehicles’ defect and only operated to hide from consumers the true defect in the Vehicles known to Nissan.

26. Nissan has also been aware of the Vehicles’ CVT defect through 286 complaints related to the Vehicles’ powertrain that have been lodged with NHTSA since 2013. By way of comparison, the Toyota Highlander, Ford Explorer, and Honda Pilot averaged 27 powertrain-related NHTSA complaints during the same time period.

27. In addition, Nissan’s dealers, who are responsible for servicing the Vehicles, have received numerous complaints and requests for repairs from the members of the Classes, including from Plaintiffs. And, internet forums on popular automotive websites, such as Edmunds.com, contain many more complaints concerning the Vehicles’ defective CVT.

C. Plaintiffs' experiences with Nissan's defective Vehicles

28. Passenger safety, vehicle performance, gas mileage, and reliability were all factors in Plaintiffs decisions to purchase their Vehicles. Prior to purchasing their vehicles, Plaintiffs spent considerable time researching the Nissan Pathfinder and comparing it to similar and competing vehicles. In addition, Plaintiffs read various automotive reviews, reviewed information from the Nissanusa.com website, and other consumer websites. Plaintiffs also test drove the Vehicles equipped with the CVT prior to purchase.

29. Reasonable consumers, like Plaintiffs, expect that a vehicle's transmission will perform as expected and will not present a safety hazard. They also expect that automakers, such as Nissan, will not knowingly sell defective vehicles or, thereafter, fail to disclose their knowledge of defects when such defects are learned. Had Nissan disclosed its knowledge of the Vehicles' defect before Plaintiffs purchased their Vehicles, Plaintiffs would have seen such disclosure, and the information disclosed would have been a material factor influencing Plaintiffs decision to purchase the Vehicles.

30. Specifically, had Plaintiffs been aware of the Vehicles' defect, they would have paid substantially less for their vehicles, or they would not have purchased them at all. In addition, all members of the Classes have suffered a diminution in value of their Vehicles as a result of the defect in the Vehicles' CVT.

31. Plaintiff Nguyen first observed the defect in his Vehicle approximately four months after purchasing the vehicle and after having driven it only approximately 4,700 miles. Specifically, Plaintiff Nguyen observed that his Vehicle juddered under acceleration and when going uphill and that the Vehicle hesitated when pulling into highway traffic. Plaintiff Nguyen

reported the transmission failure to his local Nissan dealer in February 2015. The dealer could not replicate the problem and offered no relief.

32. Plaintiff Nguyen continued to experience the failure of his transmission and returned to the dealer in August 2015, after having driven his car approximately 9,800 miles. The dealer diagnosed that Plaintiff Nguyen's Vehicle juddered and reprogrammed the TCM, as prescribed by Nissan's TSBs. This, however, did not repair the defect in Plaintiff Nguyen's Vehicle.

33. Plaintiff Nguyen continued to experience the failure of his transmission and returned to the dealer a third time in December 2015, after having driven his car approximately 14,500 miles. Again the dealer was unable to replicate the problem and failed to correct the Vehicle's defect.

34. Plaintiff Nguyen continues to experience the failure of his transmission and is afraid to drive the Vehicle.

35. Plaintiff Park first observed the defect in his Vehicle during the first month he owned it (after it had been driven approximately 23,300 miles). Specifically, Plaintiff Park observed that his Vehicle juddered under acceleration, shook violently when slowing to a stop, and hesitated when pulling into highway traffic. Plaintiff Park reported the transmission failure to his local Nissan dealer in October 2015. The dealer claimed it could not replicate the problem and offered him no relief.

36. Plaintiff Park continued to experience the failure of his transmission and returned to the dealer on November 20, 2015. Again, the dealer told him that they could not replicate the problem and that the dealer could only take action if the Vehicle recorded the defect in its internal diagnostic system. Again, Plaintiff Park was offered no relief.

37. Plaintiff Park continued to experience the failure of his transmission and returned to the dealer a third time on December 1, 2015. This time, although the dealer did not find the problem defect in the Vehicle's diagnostic system, the dealer joined Plaintiff Park for a test drive and was able to evidence the defect. The dealer sent this evidence to a Nissan engineer. Subsequently, an agent of Nissan consumer affairs contacted Plaintiff Park to inform him that his vehicle was working as intended and that the judder he observed was normal. Thus, Plaintiff Park was offered no relief.

38. Plaintiff Park continues to experience the failure of his transmission and is afraid to drive the Vehicle.

CLASS ACTION ALLEGATIONS

39. This action is brought and can be properly maintained as a nationwide class action pursuant to Fed. R. Civ. P. 23 on behalf of a class defined as follows:

40. All persons who purchased or leased a model-year 2013 or later Nissan Pathfinder vehicle equipped with Nissan's continuously variable automatic transmission ("CVT") (the "Nationwide Class").

41. Alternatively, or in addition to the Nationwide Class claims, Plaintiff Nguyen brings these claims under FED. R. CIV. P. 23 on behalf of himself and all persons who purchased or leased, in Colorado, a model-year 2013 or later Nissan Pathfinder vehicle equipped with Nissan's continuously variable automatic transmission ("CVT") (the "Colorado Subclass").

42. Alternatively, or in addition to the Nationwide Class claims, Plaintiff Park brings these claims under FED. R. CIV. P. 23 on behalf of himself and all persons who purchased or leased, in Nevada, a model-year 2013 or later Nissan Pathfinder vehicle equipped with Nissan's continuously variable automatic transmission ("CVT") (the "Nevada Subclass").

43. Excluded from the Nationwide Class, the Colorado Subclass and the Nevada Subclass (collectively, the “Classes”) are Nissan’s legal representatives, assigns and successors and persons who have suffered personal injuries as a result of the facts alleged herein.

44. Plaintiffs reserve the right to redefine the Classes.

45. The membership of the Classes is so numerous that individual joinder of all Class members is impracticable. The actual number of Class members is unknown at this time, but numbers in the thousands. The true number of Class members is likely to be known by Nissan and may be ascertained through its records.

46. There are numerous questions of law and fact that are common to Plaintiffs and the Classes and that predominate over any questions that may affect individual Class members, including, without limitation:

- a. Whether the Vehicles’ CVTs are defective;
- b. Whether the defect creates an unreasonable safety risk;
- c. When Nissan became aware of the defect;
- d. Whether Nissan has failed to take proper steps to remedy the defect;
- e. Whether the Vehicles fail to conform to Nissan’s representations and warranties as a result of the defect;
- f. Whether Nissan breached its express warranties to Plaintiffs and the Classes by advertising, marketing and selling the defective Vehicles;
- g. Whether Nissan breached its implied warranties to Plaintiffs and the Classes by advertising, marketing and selling the defective Vehicles that were not of a merchantable quality;

- h. Whether Plaintiffs and the Classes did not receive the benefit of their bargain in purchasing the Vehicles;
- i. Whether Plaintiffs and the Classes are entitled to compensatory damages for the replacement of the Vehicles and/or remediation of the defect;
- j. Whether Nissan's conduct alleged herein constitutes violations of state consumer protection laws;
- k. Whether Nissan has been unjustly enriched by its conduct, as alleged herein; and
- l. Whether Nissan should be required to notify the Classes about their defective Vehicles;

47. Plaintiffs have the same interests in this matter as the Classes' interests, and their claims are typical of the Classes' claims.

48. Plaintiffs will fairly and adequately represent the interests of the Classes and do not have interests adverse to the Classes. Plaintiffs are committed to pursuing this action and have retained competent counsel experienced in the prosecution and successful resolution of consumer class actions. Plaintiffs and their counsel are committed to prosecuting this action vigorously on behalf of the Classes, and have the financial resources to do so.

49. Class certification is appropriate pursuant to Fed. R. Civ. P. 23(b)(2) because Nissan has acted or refused to act on grounds generally applicable to the Classes, making appropriate both declaratory and injunctive relief with respect to the Classes.

50. Class certification is appropriate pursuant to Fed. R. Civ. P. 23(b)(3) because questions of law and fact common to the Classes, including those set forth above, predominate over questions affecting only individual members of the Classes, and because a class action is superior to other available methods for the fair and efficient adjudication of this litigation.

Furthermore, the likelihood that individual members of the Classes will prosecute separate actions is remote given the extensive time and considerable expense necessary to conduct such litigation, especially when compared to the relatively modest amount of damages at issue for each individual Class member. This action will be prosecuted in a manner to ensure the Court's able management of this case as a class action, and Plaintiffs know of no difficulty that would be encountered in the management of this litigation that would preclude its maintenance as a class action.

COUNT I

**Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.* and Fed. R. Civ. P. 57
On behalf of the Nationwide Class, or Alternatively the State Subclasses**

51. Plaintiffs repeat and reallege the allegations of paragraphs 1 to 50 as if fully set forth herein.

52. Declaratory relief is intended to minimize “the danger of avoidable loss and unnecessary accrual of damages.” 10B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2751 (3d ed. 1998).

53. There is an actual controversy between Nissan and Plaintiffs concerning whether the Vehicles' defect creates an unreasonable safety hazard.

54. Pursuant to 28 U.S.C. § 2201, the Court may “declare the rights and legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.”

55. Despite long knowing the nature of the Vehicles' defect and its likelihood of placing Plaintiffs, the Classes and the public at risk of grave injury, Nissan refuses to publicly acknowledge the Vehicles' dangerous defect. Instead, Nissan has unsuccessfully attempted to remediate the defect without advising its consumers and other members of the public of the defect.

56. Accordingly, based on Nissan's failure to act, Plaintiffs seek a declaration that the Vehicles are defective, as alleged herein. The defective nature of the Vehicles is material and

requires disclosure to all persons who own them.

57. The declaratory relief requested herein will generate common answers that will settle the controversy related to the alleged defective nature of the Vehicles and the reasons for their repeated failure. There is an economy to resolving these issues as they have the potential to eliminate the need for continued and repeated litigation.

COUNT II
Breach of Express Warranty
On behalf of the Nationwide Class, or alternatively the State Subclasses

58. Plaintiffs repeat and reallege the allegations of paragraphs 1 to 50 as if fully set forth herein.

59. Nissan is a seller of the Vehicles.

60. The Vehicles are goods.

61. As set forth herein, Nissan had knowledge of the defective nature of the Vehicles and that they posed a serious risk to consumers including Plaintiffs and the Classes.

62. Nissan expressly warranted in writing that it would repair the Vehicles, at no charge for parts and/or labor, to correct defects in the Vehicles' materials or workmanship.

63. Despite this written warranty, Nissan has failed at its attempts to repair the Vehicles' defects and/or denied that the Vehicles are defective.

64. Nissan's express warranty was part of the basis of the bargain between Nissan and Plaintiffs and the Classes, who relied on the existence of the express warranty when purchasing or leasing their Vehicles.

65. Nissan's warranty to repair the Vehicles fails in its essential purpose because the contractual remedy is insufficient to make Plaintiffs and the Classes whole because Nissan has

refused to provide the promised remedies within a reasonable time and because Nissan is incapable of repairing the defect, despite repeated attempts to do so.

66. Accordingly, Plaintiffs and the Classes are not limited to the limited warranty of “repair” and Plaintiffs and the Classes seek all remedies allowed by law.

67. As detailed above, Plaintiffs notified Nissan of the defects in their Vehicles, but Nissan failed to remedy the defect or provide Plaintiffs with a defect-free Vehicle.

68. Nissan has also been aware of the Vehicles’ defect through consumer warranty claims reporting problems with the Vehicles, customer complaints, and its own internal and external testing, but has failed to repair, replace or retrofit the Vehicles to ensure that they were free of materials defects.

69. As a direct and proximate result of Nissan’s breach of its express warranties, Plaintiffs and the Classes have incurred damages in an amount to be determined at trial.

COUNT III
Breach of Implied Warranty of Merchantability
On behalf of the Nationwide Class, or Alternatively the State Subclasses

70. Plaintiffs repeat and reallege the allegations of paragraphs 1 to 50 as if fully set forth herein.

71. Nissan is a merchant with respect to the Vehicles.

72. The Vehicles are goods.

73. Nissan’s implied warranty of merchantability accompanied the sale of the Vehicles to Plaintiffs and the Classes.

74. Nissan warranted, among other things, that the Vehicles pass without objection in the trade and were fit for ordinary use as safe passenger motor vehicles.

75. The defective nature of the Vehicles makes their use unreasonably dangerous. Thus, the vehicles are not fit for their ordinary use.

76. Nissan had knowledge of the inherent defects in the Vehicles. Any effort by Nissan to limit the implied warranties in a manner that would exclude coverage of the Vehicles is unconscionable, and any such effort to disclaim, or otherwise limit, liability for the Vehicles is null and void.

77. Any limitations Nissan might seek to impose on its warranties are procedurally unconscionable. There was unequal bargaining power between Nissan and Plaintiffs and the Classes, as, at the time of purchase and lease, Plaintiffs and the Classes members had no other options for purchasing warranty coverage other than directly from Nissan.

78. Any limitations Nissan might seek to impose on its warranties are substantively unconscionable. Nissan knew that the Vehicles were defective and would continue to pose safety risks after the warranties purportedly expired. Nissan failed to disclose these defects to Plaintiffs and the Classes members. Thus, Nissan enforcement of the durational limitations on those warranties is harsh and shocks the conscience.

79. Plaintiffs and the Classes have had sufficient direct dealings with either Nissan or its agents (dealerships) to establish privity of contract between Nissan on the one hand, and Plaintiffs and the Classes, on the other hand. Nonetheless, privity is not required here because Plaintiffs and the Classes are intended third-party beneficiaries of contracts between Nissan and its dealers, and specifically, of Nissan's implied warranties. The dealers were not intended to be the ultimate consumers of the Vehicles and have no rights under the warranty agreements provided with the Vehicles; the warranty agreements were designed for and intended to benefit consumers.

Finally, privity is also not required because the Vehicles are dangerous instrumentalities due to the aforementioned defects.

80. Plaintiffs have provided notice to Nissan that their Vehicles are defective, but Nissan has failed to remedy the defect and/or denied the existence of the defect.

81. As a result of Nissan's breach of the implied warranty of merchantability, Plaintiffs and the Classes have incurred damages in an amount to be determined at trial.

COUNT IV
Violation of Magnuson - Moss Warranty Act
On behalf of the Nationwide Class, or Alternatively the State Subclasses

82. Plaintiffs repeat and reallege the allegations of paragraphs 1 to 50 as if fully set forth herein.

83. The Vehicles are a "consumer product," as that term is defined in 15 U.S.C. § 2301(1).

84. Plaintiffs and the Classes are "consumers," as that term is defined in 15 U.S.C. § 2301(3).

85. Nissan is a "supplier" and "warrantor" as those terms are defined in 15 U.S.C. § 2301(4) and (5).

86. 15 U.S.C. § 2310(d)(1) provides a cause of action for any consumer who is damaged by the failure of a warrantor to comply with an implied warranty.

87. Nissan provided Plaintiffs and the Classes with an implied warranty of merchantability in connection with the purchase or lease of their Vehicles that is an "implied warranty" within the meaning of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301(7). As a part of the implied warranty of merchantability, Nissan warranted, among other things, that the Vehicles were fit for their ordinary purpose as safe passenger motor vehicles.

88. Nissan breached its implied warranties, as described in more detail above, and is therefore liable to Plaintiffs and the Classes pursuant to 15 U.S.C. § 2310(d)(1). Without limitation, the Vehicles share common defects in that they are equipped with defective CVT that leaves drivers, passengers and other motorists vulnerable to crashes, serious injury, and death.

89. Nissan had knowledge of the inherent defects in the Vehicles. Any effort by Nissan to limit the implied warranties in a manner that would exclude coverage of the Vehicles is unconscionable, and any such effort to disclaim, or otherwise limit, liability for the Vehicles is null and void.

90. Any limitations Nissan might seek to impose on its warranties are procedurally unconscionable. There was unequal bargaining power between Nissan and Plaintiffs and the Classes, as, at the time of purchase and lease, Plaintiffs and the Classes members had no other options for purchasing warranty coverage other than directly from Nissan.

91. Any limitations Nissan might seek to impose on its warranties are substantively unconscionable. Nissan knew that the Vehicles were defective and would continue to pose safety risks after the warranties purportedly expired. Nissan failed to disclose these defects to Plaintiffs and the Classes members. Thus, Nissan enforcement of the durational limitations on those warranties is harsh and shocks the conscience.

92. Plaintiffs and the Classes have had sufficient direct dealings with either Nissan or its agents (dealerships) to establish privity of contract between Nissan on the one hand, and Plaintiffs and the Classes, on the other hand. Nonetheless, privity is not required here because Plaintiffs and the Classes are intended third-party beneficiaries of contracts between Nissan and its dealers, and specifically, of Nissan's implied warranties. The dealers were not intended to be the ultimate consumers of the Vehicles and have no rights under the warranty agreements provided

with the Vehicles; the warranty agreements were designed for and intended to benefit consumers. Finally, privity is also not required because the Vehicles are dangerous instrumentalities due to the aforementioned defects.

93. Pursuant to 15 U.S.C. § 2310(e), Plaintiffs are entitled to bring this class action and are not required to give Nissan notice and an opportunity to cure until such time as the Court determines the representative capacity of Plaintiffs pursuant to Rule 23 of the Federal Rules of Civil Procedure.

94. Plaintiffs and the Classes have not reaccepted their Vehicles by retaining them. They would suffer economic hardship if they returned their Vehicles without Nissan reimbursing them for all payments they made for the Vehicles. Nissan has refused to acknowledge the Vehicles' defects.

95. The amount in controversy of Plaintiffs' individual claims meets or exceeds the sum of \$25. The amount in controversy of this action exceeds the sum of \$50,000, exclusive of interest and costs, computed on the basis of all claims to be determined in this lawsuit. Plaintiffs, individually and on behalf of the other Class members, seek all damages permitted by law, including diminution in value of their vehicles, in an amount to be proven at trial. In addition, pursuant to 15 U.S.C. § 2310(d)(2), Plaintiffs and the other Class members are entitled to recover a sum equal to the aggregate amount of costs and expenses (including attorneys' fees based on actual time expended) determined by the Court to have reasonably been incurred by Plaintiffs and the other Class members in connection with the commencement and prosecution of this action.

COUNT V

Unjust Enrichment

On behalf of the Nationwide Class, or Alternatively the State Subclasses

96. Plaintiffs repeat and reallege the allegations of paragraphs 1 to 50 as if fully set

forth herein and assert this claim in the alternative to any express warranty claims brought on behalf of the Classes.

97. Nissan knew or should have known that Plaintiffs and the Classes paid for the Vehicles with the expectation that they would perform as represented.

98. Plaintiffs and the Classes conferred substantial benefits on Nissan by purchasing the defective Vehicles. Nissan knowingly and willingly accepted and enjoyed those benefits.

99. Nissan's retention of these benefits is inequitable.

100. As a direct and proximate cause of Nissan's unjust enrichment, Plaintiffs and the Classes are entitled to an accounting, restitution, attorneys' fees, costs and interest.

COUNT VI
VIOLATIONS OF THE COLORADO CONSUMER PROTECTION ACT
(COL. REV. STAT. § 6-1-101, *et seq.*)
On behalf of Plaintiff Nguyen and the Colorado Subclass

101. Plaintiff Nguyen repeats and realleges the allegations of paragraphs 1 to 50 as if fully set forth herein.

102. Nissan is a "person" under § 6-1-102(6) of the Colorado Consumer Protection Act ("Colorado CPA"), COL. REV. STAT. § 6-1-101, *et seq.*

103. Plaintiff Nguyen and the Colorado Subclass are "consumers" for purposes of Col. Rev. Stat. § 6-1-113(1)(a) who purchased or leased one or more Vehicles.

104. The Colorado CPA prohibits deceptive trade practices in the course of a person's business. Nissan engaged in deceptive trade practices prohibited by the Colorado CPA, including: (1) knowingly making a false representation as to the characteristics, uses, and benefits of the Vehicles that had the capacity or tendency to deceive the Colorado Subclass members; (2) representing that the Vehicles are of a particular standard, quality, and grade even though Nissan knew or should have known they are not; (3) advertising the Vehicles and/or the defective CVT

installed in them with the intent not to sell or lease them as advertised; and (4) failing to disclose material information concerning the Vehicles that was known to Nissan at the time of advertisement, sale or lease with the intent to induce the Colorado Subclass members to purchase, lease or retain the Vehicles.

105. In the course of its business, Nissan failed to disclose and actively concealed the dangers and risks posed by the Vehicles as described herein and otherwise engaged in activities with a tendency or capacity to deceive. Nissan also engaged in unlawful trade practices by employing deception, deceptive acts or practices, fraud, misrepresentations, or concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or lease of the Vehicles.

106. Nissan's actions as set forth above occurred in the conduct of trade or commerce.

107. Nissan's unfair or deceptive acts or practices, including these concealments, omissions, and suppressions of material facts, had a tendency or capacity to mislead, tended to create a false impression in consumers, were likely to and did in fact deceive reasonable consumers, including Plaintiff Nguyen and the Colorado Subclass, about the true safety and reliability of the Vehicles, the quality of Nissan's brands, and the true value of the Vehicles.

108. Nissan intentionally and knowingly misrepresented material facts regarding the Vehicles with intent to mislead Plaintiff Nguyen and the Colorado Subclass.

109. Nissan knew or should have known that its conduct violated the Colorado CPA.

110. Nissan owed Plaintiffs a duty to disclose the true safety and reliability of the Vehicles because Nissan:

- a. Possessed exclusive knowledge of the dangers and risks posed by the foregoing;

- b. Intentionally concealed the foregoing from Plaintiff Nguyen and the Colorado Subclass; and/or
- c. Made incomplete representations about the safety and reliability of the foregoing generally, while purposefully withholding material facts from Plaintiff and the Colorado Subclass that contradicted these representations.

111. In light of the Vehicles' defect, and the stigma attached to Vehicles due to the defect and Nissan's failure to disclose the same, the Vehicles are now worth significantly less than they would be otherwise. A vehicle made by a reputable manufacturer of safe vehicles is worth more than an otherwise comparable vehicle made by a manufacturer that consumers learn makes unsafe vehicles and conceals defects rather than promptly remedying them.

112. Plaintiff Nguyen and the Colorado Subclass suffered ascertainable loss caused by Nissan's misrepresentations and its failure to disclose material information. Had they been aware of the Vehicles' defect, Plaintiff Nguyen and the Colorado Subclass would have paid less for their vehicles or would not have purchased or leased them at all. Plaintiff Nguyen and the Colorado Subclass did not receive the benefit of their bargain as a result of Nissan's misconduct.

113. Plaintiff Nguyen and the Colorado Subclass risk irreparable injury as a result of Nissan's acts and omissions in violation of the Colorado CPA, and these violations present a continuing risk to Plaintiff Nguyen, the Colorado Subclass, and the general public. Nissan's unlawful acts and practices complained of herein affect the public interest.

114. As a direct and proximate result of Nissan's violations of the Colorado CPA, Plaintiff Nguyen and the Colorado Subclass have suffered injury-in-fact and/or actual damage.

115. Pursuant to Colo. Rev. Stat. § 6-1-113, Plaintiff Nguyen individually and on behalf of the Colorado Subclass, seeks monetary relief against Nissan Defendants measured as the greater

of (a) actual damages in an amount to be determined at trial and discretionary trebling of such damages, or (b) statutory damages in the amount of \$500 for each Plaintiff Nguyen and each member of the Colorado Subclass.

116. Plaintiff Nguyen also seeks an order enjoining Nissan's unfair, unlawful, and/or deceptive practices, declaratory relief, attorneys' fees, and any other just and proper relief available under the Colorado CPA.

COUNT VII
VIOLATIONS OF THE NEVADA DECEPTIVE TRADE PRACTICES ACT
(Nev. Rev. Stat. §§ 598.0903, et seq.)
On behalf of Plaintiff Park and the Nevada Subclass

117. Plaintiff Park repeats and realleges the allegations of paragraphs 1 to 50 as if fully set forth herein.

118. The Nevada Deceptive Trade Practices Act ("Nevada DTPA"), Nev. Rev. Stat. §598.0903, et seq. prohibits deceptive trade practices. Nev. Rev. Stat. § 598.0915 provides that a person engages in a "deceptive trade practice" if, in the course of business or occupation, the person: "5. Knowingly makes a false representation as to the characteristics, ingredients, uses, benefits, alterations or quantities of goods or services for sale or lease or a false representation as to the sponsorship, approval, status, affiliation or connection of a person therewith"; "7. Represents that goods or services for sale or lease are of a particular standard, quality or grade, or that such goods are of a particular style or model, if he or she knows or should know that they are of another standard, quality, grade, style or model"; "9. Advertises goods or services with intent not to sell or lease them as advertised"; or "15. Knowingly makes any other false representation in a transaction."

119. Nissan engaged in deceptive trade practices that violated the Nevada DTPA, including: knowingly representing that Vehicles have uses and benefits which they do not have;

representing that they are of a particular standard, quality, and grade when they are not; advertising them with the intent not to sell or lease them as advertised; representing that the subject of a transaction involving them has been supplied in accordance with a previous representation when it has not; and knowingly making other false representations in a transaction.

120. In the course of its business, Nissan failed to disclose and actively concealed the dangers and risks posed by the Vehicles as described herein and otherwise engaged in activities with a tendency or capacity to deceive. Nissan also engaged in unlawful trade practices by employing deception, deceptive acts or practices, fraud, misrepresentations, or concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or lease of the Vehicles.

121. Nissan's actions as set forth above occurred in the conduct of trade or commerce.

122. Nissan's unfair or deceptive acts or practices, including these concealments, omissions, and suppressions of material facts, had a tendency or capacity to mislead, tended to create a false impression in consumers, were likely to and did in fact deceive reasonable consumers, including Plaintiff Park and the Nevada Subclass, about the true safety and reliability of the Vehicles, the quality of Nissan's brands, and the true value of the Vehicles.

123. Nissan intentionally and knowingly misrepresented material facts regarding the Vehicles with intent to mislead Plaintiff Park and the Nevada Subclass.

124. Nissan knew or should have known that its conduct violated the Nevada DTPA.

125. Nissan owed Plaintiffs a duty to disclose the true safety and reliability of the Vehicles because Nissan:

- a. Possessed exclusive knowledge of the dangers and risks posed by the foregoing;

- b. Intentionally concealed the foregoing from Plaintiff Nguyen and the Colorado Subclass; and/or
- c. Made incomplete representations about the safety and reliability of the foregoing generally, while purposefully withholding material facts from Plaintiff Park and the Nevada Subclass that contradicted these representations.

126. In light of the Vehicles' defect, and the stigma attached to Vehicles due to the defect and Nissan's failure to disclose the same, the Vehicles are now worth significantly less than they otherwise would be. A vehicle made by a reputable manufacturer of safe vehicles is worth more than an otherwise comparable vehicle made by a manufacturer that consumers learn makes unsafe vehicles that conceals defects rather than promptly remedying them.

127. Plaintiff Park and the Nevada Subclass suffered ascertainable loss caused by Nissan's misrepresentations and its failure to disclose material information. Had they been aware of the Vehicles' defect, Plaintiff Park and the Nevada Subclass would have paid less for their vehicles or would not have purchased or leased them at all. Plaintiff Park and the Nevada Subclass did not receive the benefit of their bargain as a result of Nissan's misconduct.

128. Plaintiff Park and the Nevada Subclass risk irreparable injury as a result of Nissan's acts and omissions in violation of the Nevada DTPA, and these violations present a continuing risk to Plaintiff Park, the Nevada Subclass, and the general public. Nissan's unlawful acts and practices complained of herein affect the public interest.

129. As a direct and proximate result of Nissan's violations of the Nevada DTPA, Plaintiff Park and the Nevada Subclass have suffered injury-in-fact and/or actual damage.

130. Accordingly, Plaintiff Park and the Nevada Subclass seek their actual damages, punitive damages, an order enjoining Nissan's deceptive acts or practices, costs of Court,

attorney's fees, and all other appropriate and available remedies under the Nevada Deceptive Trade Practices Act. Nev. Rev. Stat. § 41.600.

PRAYER FOR RELIEF

Plaintiffs, on behalf of themselves and all others similarly situated, request the Court to enter judgment against Nissan, as follows:

- A. Certification of the proposed Classes, including appointment of Plaintiffs' undersigned counsel as Class Counsel;
- B. An order temporarily and permanently enjoining Nissan from continuing the unlawful, deceptive, fraudulent and unfair business practices alleged in this Complaint;
- C. Injunctive relief in the form of a recall or free replacement program;
- D. Costs, restitution, damages, including treble and punitive damages, and disgorgement in an amount to be determined at trial;
- E. An order requiring Nissan to pay both pre- and post-judgment interest on any amounts awarded;
- F. An award of costs and attorneys' fees; and
- G. Such other or further relief as may be appropriate.

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a jury trial for all claims and issues so triable.

Dated: March 18, 2016

Respectfully submitted:

s/ Gregory F. Coleman

Gregory F. Coleman

Lisa A. White

Greg Coleman Law PC

First Tennessee Plaza
800 S. Gay Street, Suite 1100
Knoxville, Tennessee 37929
Tel: 865-247-0080
Fax: 865-522-0049
Email: greg@gregcolemanlaw.com
lisa@gregcolemanlaw.com

Lawrence Deutsch*
Eugene Tompkins*
Jeffrey Osterwise*
Berger & Montague, P.C.
1622 Locust Street
Philadelphia, PA 19103
Tel. (215) 875-3062
Fax: (215) 875-4604
Email: ldeutsch@bm.net
gtompkins@bm.net
josterwise@bm.net

Attorneys for Plaintiffs

**motion for pro hac vice admission forthcoming*