

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 15-0140 CAF**

**MICHELLE ESPINDOLA,  
Complainant**

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**BEFORE THE OFFICE**

v.

**OF**

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

**ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Michelle Espindola (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for an alleged defect in her 2014 Kia Optima Hybrid. Complainant asserts that the vehicle intermittently produces a noise when braking. Kia Motors America, Inc. (Respondent) contends that the vehicle has been repaired. The hearings examiner concludes that the vehicle does not have an existing warrantable defect that creates a serious safety hazard or substantially impairs the use or market value of the vehicle. Accordingly, Complainant is not eligible for replacement or repurchase relief.

**I. Procedural History, Notice and Jurisdiction**

Matters of notice and jurisdiction were not contested and are addressed only in the Findings of Fact and Conclusions of Law. The hearing in this case convened on February 9, 2015, in Pharr, Texas, before Hearings Examiner Andrew Kang. Complainant represented herself. Additionally, Irma Rosas, the Complainant's mother, testified for the Complainant. Michael Mulligan, District Parts and Service Manager, represented Respondent. Additionally, Richard Peralta, Field Technical Representative, and Michael Rotta, Service Manager for Bert Ogden-Harlingen-Kia, testified for the Respondent. The hearing record was closed on April 29, 2015, at the conclusion of the hearing on the merits.

## II. Discussion

### A. Applicable Law

For the vehicle to be subject to replacement or repurchase, a warrantable defect or condition must fall in one of two categories:

A manufacturer, converter, or distributor that is unable to conform a motor vehicle to an applicable express warranty by repairing or correcting a defect or condition that creates a serious safety hazard or substantially impairs the use or market value of the motor vehicle after a reasonable number of attempts shall reimburse the owner for reasonable incidental costs resulting from loss of use of the motor vehicle because of the nonconformity or defect and: (1) replace the motor vehicle with a comparable motor vehicle; or (2) accept return of the vehicle from the owner and refund to the owner the full purchase price, less a reasonable allowance for the owner's use of the vehicle, and any other allowances or refunds payable to the owner.<sup>1</sup>

Accordingly, not only must a warrantable defect exist, but the defect must also: (1) create a serious safety hazard or (2) substantially impair the use or market value of the vehicle. However, for warranty repair, § 2301.204(a) of the Occupations Code provides that “[t]he owner of a motor vehicle . . . may make a complaint concerning a defect in a motor vehicle that is covered by a manufacturer's . . . warranty agreement applicable to the vehicle.”<sup>2</sup> Unlike replacement or repurchase relief, repair relief only requires a defect covered by warranty.

### B. Complainant's Evidence and Arguments

Complainant purchased a new 2014 Kia Optima Hybrid from Bert Ogden Harlingen Motors Inc. d/b/a Bert Ogden Harlingen Motors (Dealer) in Harlingen, Texas, on September 13, 2014.<sup>3</sup> At the time of purchase, the vehicle had 18 miles on the odometer.<sup>4</sup> The vehicle's basic limited warranty provides 60 months or 60,000 miles of coverage, whichever comes first, beginning from the date of first service (the date of delivery to the first retail purchaser).<sup>5</sup>

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<sup>1</sup> TEX. OCC. CODE § 2301.604(a) (emphasis added).

<sup>2</sup> TEX. OCC. CODE § 2301.204 (emphasis added).

<sup>3</sup> Complainant's Ex. 2, Sales Contract.

<sup>4</sup> Complainant's Ex. 3, Odometer Disclosure Statement.

<sup>5</sup> Complainant's Ex. 19, 2014 Warranty and Consumer Information Manual Optima Hybrid.

The Complainant is the only driver of the vehicle. The Complainant testified that the vehicle made a squeaking noise when braking and that the noise was more pronounced when braking after accelerating, but also occurred at other times, such as when braking during coasting. The Complainant stated that the noise occurred randomly. The Complainant first noticed the noise on November 9, 2014.

Prior to the final repair, the Complainant took her vehicle to the Dealer for service as follows:

- November 10, 2014: at the service visit, the technician could not duplicate the noise during a test drive and made no repairs.<sup>6</sup>
- November 17, 2014: during a service visit at the Dealer for an oil change, the technician test drove the vehicle but could not duplicate the noise. The brakes were bled, which did not appear on the invoice, but did appear in Kia's summary of repairs.<sup>7</sup> The Complainant noted that a hydraulic control unit (HCU) was ordered for her vehicle, but not installed because it required the Respondent's approval.
- November 24, 2014, through January 12, 2015: the technician heard the noise, but did not do any repairs because the technician did not find anything loose or abnormal.<sup>8</sup> For this service visit, the Dealer provided a mid-size loaner vehicle (Kia Optima Hybrid).
- January 19, 2015, through January 23, 2015: the technician found the HCU making noise and bled the vehicle's brakes.<sup>9</sup> The Dealer provided a subcompact loaner vehicle (Kia Soul) for this repair visit.

In a letter dated January 22, 2015, the Complainant provided written notice of the noise issue to the Respondent.<sup>10</sup> Ola Sprague, the Respondent's Consumer Affairs Analyst, contacted the Complainant and notified her that Kia would send a field engineer to perform a procedure on the vehicle. Ms. Sprague subsequently e-mailed the Complainant to drop off the vehicle at the Dealer to allow the Kia field engineer to perform the repair for the brake noise.<sup>11</sup>

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<sup>6</sup> Complainant's Ex. 4, Invoice, November 10, 2014.

<sup>7</sup> Complainant's Ex. 18, letter from Michael Mulligan to John DuFour dated March 9, 2015.

<sup>8</sup> Complainant's Ex. 6, Invoice, January 12, 2015.

<sup>9</sup> Complainant's Ex. 9, Invoice, January 23, 2015.

<sup>10</sup> Complainant's Ex. 11, letter from Complainant to Respondent dated January 22, 2015.

<sup>11</sup> Complainant's Ex. 13, e-mail from Ola Sprague to Respondent dated February 4, 2015.

The Complainant left the vehicle with the Dealer on January 27, 2015, through February 12, 2015. The repair invoice indicated that the brakes were making noise again. Kia's field engineer applied the repair in Kia's Technical Service Bulletin No. 052 (TSB 052)<sup>12</sup> and the brakes were bled.<sup>13</sup> The Complainant testified that the noise improved (the noise did not occur as often) but still occurred randomly after the repair.

After the final repair, the Complainant left the vehicle at the Dealer from February 18, 2015, through March 2, 2015. The repair order showed that the Complainant stated that the vehicle randomly made a noise when braking around 70 mph. However, the technician could not duplicate the noise.<sup>14</sup> The Dealer provided a compact loaner vehicle (Hyundai Elantra) for this repair visit.

The Complainant testified that she believed the noise was a safety concern given the noise's association with the brakes. The Complainant played a recording of the noise from the Saturday before the hearing (April 25, 2015), which sounded like a slight squeak. The Complainant confirmed that the recording fairly reflected the volume of the noise. On the recording, the noise occurred three times within a span of approximately 20 seconds. The Complainant testified that the noise was loud enough to hear from the passenger side and the back and from outside of the vehicle. She noted that her son could hear the noise when stopping. Mr. Peralta confirmed that the noise originated from the outside (not the vehicle's interior). Ms. Irma Rosas testified that she usually sat on the passenger side and heard the noise on President's Day (February 16, 2015) and three times on Monday, April 27, 2015.

### C. Respondent's Evidence and Arguments

The Respondent asserted that any nonconformity had been cured by the final repair.<sup>15</sup> Mr. Mulligan noted that the Respondent did not have a loaner vehicle policy and the dealer would decide whether to provide a loaner vehicle and that the Complainant had been provided alternate transportation throughout the service repairs.

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<sup>12</sup> Respondent's Ex. 2, Invoice, February 12, 2015, and Kia Technical Service Bulletin No. 052, 2014MY Optima Hybrid – Noise During Brake Actuation.

<sup>13</sup> Complainant's Ex. 12, Invoice, February 12, 2015.

<sup>14</sup> Complainant's Ex. 16, Invoice, March 2, 2015.

<sup>15</sup> Complainant's Ex. 18, letter from Michael Mulligan to John DuFour dated March 9, 2015.

The final repair, applying TSB 052, occurred on February 12, 2015. Mr. Peralta explained that the noise did not originate from the HCU. Mr. Peralta explained that the Respondent released this TSB in February 2015, after a great deal of investigation. The parts installed included a damping chamber and brake line. The damping chamber alleviates the pressure. Mr. Peralta testified that the noise was the sound of fluid rushing through the brake line. Mr. Peralta confirmed that there were no mechanical concerns associated with the noise and that it was merely a nuisance. Mr. Peralta, citing TSB 052, testified that the noise was a squeaking or honking noise when applying the brakes rapidly. Mr. Peralta played the sound file associated with TSB 052 from the Respondent's website.<sup>16</sup> The sound associated with the TSB 052 was a squeak similar to the noise recorded by the Complainant but with a slightly lower pitch.

Mr. Rotta explained that the Dealer's technician had been communicating back and forth with Kia and the HCU was not installed because TSB 052 was coming out and that replacing the HCU would have been an unnecessary repair. Mr. Rotta stated that the TSB 052 fix was done on other hybrids and there were no further issues. Mr. Mulligan added that the field vehicle he brought to the hearing, a 2014 Optima Hybrid, exhibited the same concerns and the TSB 052 fix cured the problem.

#### D. Analysis

In this case, the Complainant seeks repurchase relief. To qualify for replacement or repurchase, the Lemon Law requires that the warrantable defect: (1) create a serious safety hazard, or (2) substantially impair the use or market value.<sup>17</sup> Under 43 TEX. ADMIN. CODE § 215.206.66(d), the Complainant bears the burden of proving by a preponderance of evidence that the defect creates a serious safety hazard or substantially impairs the use or market value of vehicle.

The evidence in this case shows that Kia's basic 60 months or 60,000 miles limited warranty covered the repair for the noise. However, the evidence does not show that the noise creates a safety hazard or substantially impairs the vehicle's use or market value. The

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<sup>16</sup> [https://www.kiatechinfo.com/local\\_viewer/default.aspx?menu\\_id=331](https://www.kiatechinfo.com/local_viewer/default.aspx?menu_id=331).

<sup>17</sup> TEX. OCC. CODE § 2301.604(a).

Complainant surmised that the noise posed a safety concern because of its association with braking, but did not provide any evidence showing that the noise actually created a safety hazard. On the other hand, Mr. Peralta testified that the noise was superficial and without material effect, explaining that the noise resulted from the movement of fluid in the brake line. Furthermore, the Complainant testified that she did not notice any difference in performance associated with the noise when braking. During the test drive, the vehicle did not exhibit any unusual performance characteristics. The condition had no apparent effect on the safety or use of the vehicle. Moreover, though a prospective purchaser<sup>18</sup> might value the vehicle less with the noise than without the noise, the evidence does not show that the noise would substantially impair the vehicle's value,<sup>19</sup> particularly given the intermittent nature, short duration and limited volume of the noise as heard on the Complainant's recording, and the lack of any discernible effect on the performance of the vehicle. Accordingly, because a preponderance of the evidence does not show a serious safety hazard or a substantial impairment of the use or value of the vehicle, the vehicle does not qualify for replacement or repurchase.

Though replacement/repurchase relief does not apply, the record shows that the basic portion of Respondent's limited warranty, which lasts for 60 months or 60,000 miles, whichever comes first, covered the repair of the braking noise.<sup>20</sup> The evidence shows that after the Respondent applied the repair in TSB 052, the noise continued to occur, though less frequently. Accordingly, since this condition was covered by warranty and has continued to occur, the Respondent has an obligation to repair this braking noise under warranty consistent with Section 2301.204 of the Texas Occupations Code.

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<sup>18</sup> The Department applies a reasonable purchaser standard for determining whether the condition of the vehicle would substantially impair the value of the vehicle. *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012).

<sup>19</sup> The law does not specify what constitutes substantial impairment of market value, but the Department's rules for calculating the refund for repurchase of a vehicle reflects that a substantial impairment would reduce the value of a vehicle's use by an estimated 50%. 43 TEX. ADMIN. CODE § 215.208(b)(2)(B); *Chrysler Motors Corporation v Texas Motor Vehicle Commission*, 846 S.W.2d 139, 143 (Tex. App.—Austin 1993) (stating that: "Estimating that a 'substantial' impairment would reduce the value of the vehicle's use by 50% is not unreasonable.").

<sup>20</sup> Complainant's Ex. 19, 2014 Warranty and Consumer Information Manual Optima Hybrid at 3.

### III. Findings of Fact

1. Michelle Espindola, the Complainant, purchased a 2014 Kia Optima Hybrid from Bert Ogden Harlingen Motors Inc. d/b/a Bert Ogden Harlingen Motors (Dealer) in Harlingen, Texas, on September 13, 2014.
2. The vehicle's manufacturer, Kia Motors America, Inc., the Respondent, provided a 60 month, 60,000 mile basic warranty with coverage starting from the date of first service (date vehicle is delivered).
3. On November 9, 2014, the Complainant noticed a squeaking noise while braking.
4. The Complainant took her vehicle to the Dealer, Respondent's authorized franchised dealer, for service on November 10, 2014, at 6,779 miles. At the service visit, the Dealer's technician could not duplicate the noise during a test drive and made no repairs.
5. The Complainant took her vehicle to the Dealer for service on November 17, 2014, at 7,562 miles. The technician test drove the vehicle and could not duplicate the noise but the brakes were bled.
6. The Complainant took her vehicle to the Dealer for service on November 24, 2014, at 8,458 miles. The technician heard the noise, but did not do any repairs because the technician did not find anything loose or abnormal.
7. The Complainant took her vehicle to the Dealer for service on January 19, 2015, at 9,281 miles. The technician found the hydraulic control unit making noise and bled the vehicle's brakes.
8. The Complainant took her vehicle to the Dealer for service on January 27, 2015, at 9,308 miles. During the service visit, on February 12, 2015, the Respondent performed an inspection and final repair. Kia's field engineer applied the repair in Kia's Technical Service Bulletin No. 052 (TSB 052), which included the installation of a damping chamber and new brake line. Additionally, the brakes were bled.
9. The Complainant took her vehicle to the Dealer for service on February 18, 2015, at 9,731 miles, because the vehicle randomly made a noise when braking. However, the technician could not duplicate the noise.

10. Since the final repair attempt, the Complainant has continued to intermittently experience the same noise during braking, but less frequently.
11. The noise is limited in frequency, duration and volume, and has no effect on the vehicle's performance.
12. On January 22, 2015, the Complainant provided written notice of the alleged defect to the Respondent.
13. On January 29, 2015, the Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
14. On April 16, 2015, 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.
15. The hearing convened on April 29, 2015, in Pharr, Texas before Hearings Examiner Andrew Kang. Complainant, Michelle Espindola represented herself. Michael Mulligan, Consumer Affairs Manager, represented the Respondent. The hearing record was closed on April 29, 2015.

#### **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. 43 TEX. ADMIN. CODE § 215.206.66(d).
6. Complainant failed to prove by a preponderance of the evidence that the vehicle has a verifiable defect or condition covered by Respondent's warranty that presents a serious safety hazard or substantially impairs the use or market value of the vehicle. TEX. OCC. CODE § 2301.604.
7. Respondent remains responsible to address and repair or correct any defects covered by Respondent's warranties. TEX. OCC. CODE § 2301.204.
8. Complainant's vehicle does not qualify for replacement or repurchase. TEX. OCC. CODE § 2301.604.

#### V. Order

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that Complainant's petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is **DISMISSED**.

**SIGNED June 10, 2015**

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