

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 17-0057 CAF**

**MELISSA SMITH,
Complainant**

v.

**AMERICAN HONDA MOTOR CO., INC.,
Respondent**

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**BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Melissa Smith (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 American Honda Motor Co., Inc. (Respondent). A preponderance of the evidence shows that the subject vehicle has a warrantable defect but the defect does not create a serious safety hazard or substantially impair the vehicle's use or market value. Consequently, the Complainant's vehicle qualifies for warranty repair but not repurchase or replacement.

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, and the record closed, on May 17, 2017, in Houston, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented herself. Matthew Smith testified for the Complainant. Abigail Mathews, attorney, represented the Respondent. Kyle Krawczyk, District Parts and Service Manager, testified for the Respondent.

¹ TEX. GOV'T CODE § 2001.051.

II. Discussion

A. Applicable Law

1. Repurchase/Replacement Relief

A vehicle qualifies for repurchase or replacement if the manufacturer cannot “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.”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 continue to 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 mailed written notice of the defect to the manufacturer, (2) an opportunity to repair by the manufacturer, 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

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).

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 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: (A) two of the repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, following the date of original delivery to the owner; and (B) the other two repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the second repair attempt.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: (A) at least one attempt to repair the nonconformity was made in the 12 months or 12,000 miles, whichever occurs first, following the date of original delivery to the owner; and (B) at least one other attempt to repair the nonconformity was made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the first repair attempt.⁸

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).

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 and: (A) the vehicle is out of service for repair for a cumulative total of 30 or more days in the 24 months or 24,000 miles, whichever occurs first, following the date of original delivery to the owner; and (B) at least two repair attempts were made in the 12 months or 12,000 miles following the date of original delivery to an owner.⁹

However, 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.¹⁰ 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.¹¹

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 mailed written notice of the alleged defect or nonconformity to the manufacturer;¹² (2) the manufacturer was given an opportunity to cure the defect or nonconformity;¹³ and (3) the

⁹ TEX. OCC. CODE § 2301.605(a)(3).

¹⁰ *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.’”).

¹¹ *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.”).

¹² TEX. OCC. CODE § 2301.606(c)(1). The Lemon Law does not define the words “mailed” or “mail”, so under the Code Construction Act, the common usage of the word applies. TEX. GOV'T CODE § 311.011. Dictionary.com defines “mail” as “to send by mail; place in a post office or mailbox for transmission” or “to transmit by email.” *Mail. Dictionary.com Unabridged*. Random House, Inc. <http://www.dictionary.com/browse/mail> (accessed: April 01, 2016). Also, 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 that someone on behalf of the owner mailed notice of the defect/nonconformity to the Respondent.

¹³ TEX. OCC. CODE § 2301.606(c)(2). A repair visit to a dealer can satisfy the “opportunity to cure” requirement if the manufacturer authorized repairs by the dealer after written notice to the manufacturer, i.e., the manufacturer essentially authorized the dealer to attempt the final repair on the manufacturer’s behalf. See *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 226 (Tex. App.—Austin 2012).

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.¹⁴

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."¹⁵ The manufacturer, converter, or distributor has an obligation to "make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty."¹⁶

3. Burden of Proof

The law places the burden of proof on the Complainant.¹⁷ The Complainant must prove all facts required for relief by a preponderance, that is, the Complainant must present sufficient evidence to show that each required fact is more likely than not true.¹⁸ If any required fact appears equally likely or unlikely, then the Complainant has not met the burden of proof.

4. The Complaint Identifies the Issues in this Proceeding

The complaint identifies the issues to be addressed in this proceeding.¹⁹ The complaint should 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 which form the basis of the claim for relief under the lemon law."²⁰ However, the parties may expressly or impliedly consent

¹⁴ TEX. OCC. CODE § 2301.606(d)(2).

¹⁵ TEX. OCC. CODE § 2301.204.

¹⁶ TEX. OCC. CODE § 2301.603(a).

¹⁷ 43 TEX. ADMIN. CODE § 215.66(d).

¹⁸ *E.g., Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

¹⁹ "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.").

²⁰ 43 TEX. ADMIN. CODE § 215.202(a)(2).

to trying issues not included in the pleadings.²¹ Implied consent occurs when a party introduces evidence on an unpleaded issue without objection.²²

A. Summary of Complainant's Evidence and Arguments

On May 15, 2015, the Complainant, purchased a new 2015 Honda Odyssey from Russell & Smith Honda, a franchised dealer of the Respondent, in Houston, Texas. The vehicle had three miles on the odometer at the time of purchase. The vehicle's limited warranty covers the vehicle for three years or 36,000 miles, whichever occurs first. On October 7, 2016, the Complainant mailed a written notice of defect to the Respondent. On October 21, 2016, the Complainant filed a Lemon Law complaint with the Department alleging that the passenger sliding doors (B pillars) creaked, the rear speakers have to be turned on manually, driver's side dash rattles, DVD steering wheel volume does not work, and the air conditioning (AC) smells musty when turning the car on. The Complainant acknowledged that all issues were reproducible in other Honda Odysseys, except for the AC smell and sliding door creaking issues. The Complainant also noted that only the sliding door issue had enough repair attempts for Lemon Law relief.

In relevant part, the Complainant took the vehicle to a dealer for repair of the alleged issues as follows:

Date	Miles	Issue
07/09/15	972	Creak noise from passenger sliding door; steering wheel volume control does not work; have to turn on rear speakers after turn vehicle back on
08/11/15	1,580	Sliding door creaks (found noise from both right and left); rattle from left side of dash; DVD steering wheel volume does not work; rear speakers will turn off
09/25/15	1,963	Rattle from passenger side
01/25/16	4,464	Both sliding doors make a rattle/creaking noise
05/23/16	7,142	Creaking/squeaking noise from both sliding doors; musty smell when first turning on the AC
06/30/16	7,943	Both sliding door creaking
10/03/16	10,094	Creaking noise coming from both sliding doors; musty smell from AC vents
02/17/17	13,441	Creaking noise from driver side B pillar

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

²² See *Gadd v. Lynch*, 258 S.W.2d 168, 169 (Tex. Civ. App.—San Antonio 1953, writ ref'd).

The Complainant testified that the sliding door would make creaking noises during acceleration and driving over uneven surfaces. She added that the noise would also occur when braking at lower speeds, such as at stop signs. The Complainant indicated that the noise did not improve after repairs. She first noticed noise on the right door at about 970 miles. She explained that the dealer identified the left door creaking at the second service visit at 1,580 miles. The Complainant last noticed the creaking noise from the left door when driving to the hearing. She last heard the noise from the right side on October 3, 2016. The Complainant explained that typically after rains, turning on the AC produces a musty, moldy smell through the vents. The vehicle had the air vents cleaned with a kind of antibacterial cleanse. She elaborated that after a heavy rain, she would notice a slight odor when turning on the vehicle. She responded that smell sometimes goes away after running the AC. She also confirmed that the smell is always associated with heavy rain. On cross-examination, Mr. Krawczyk opined that some of the noise was a design characteristic, though louder than should be, and different than the noise during the February test drive (originating from the base of the B pillar). He agreed that actually identifying plastic on plastic rubbing would require opening the B pillar. The Complainant pointed out that friends and family with Odysseys have not encountered these same issues

B. Summary of Respondent's Evidence and Arguments

On cross-examination, the Complainant affirmed that the right side no longer creaked after repair and that the current creak relates to the left side of the vehicle. The Complainant acknowledged that the rear speaker and DVD steering wheel volume operation were characteristics of the vehicle model but she still thought they were flawed. The Complainant confirmed that the dash did not currently have a rattle and the vehicle did not currently exhibit mustiness.

Mr. Krawczyk testified that during a test drive of the vehicle in February 2017, he heard a light noise from the base of the B pillar. He explained that Honda published a service bulletin on how to fix this issue. Mr. Krawczyk distinguished service bulletins from safety related recalls or product updates, pointing out that the B pillar did not have any safety related recalls or updates. He elaborated that the service bulletin's repair involved putting foam in a metal contact point at the bottom of the B pillar. He noted that the noise heard during the test drive at the hearing was more pronounced and from higher in the B pillar, not consistent with the bulletin. He opined that the current noise was normal noise from body flex, which sounded like plastic on plastic and not

metal on metal. He did not believe the noise would affect the market value. Mr. Krawczyk confirmed that the rear speaker turning off when changing mode was a normal operating characteristic. He also acknowledged that the Respondent never addressed the rattle in the dash or the musty smell. He affirmed that the Odyssey may normally have a musty smell because of the ambient humidity. He acknowledged that changing the cabin filter may improve the air quality.

C. Inspection and Test Drive

Before the test drive of the vehicle at the hearing, the vehicle's odometer displayed 16,064 miles. The Complainant drove the subject vehicle for five miles, primarily in residential areas with roads controlled by stop signs. The vehicle exhibited creaking noise from the left door/B pillar fairly consistently when braking, accelerating, driving over railroad tracks and speed bumps, and occasionally when turning. The right side door/B pillar did not exhibit the same noise. The vehicle otherwise performed normally and did not exhibit any unusual conditions.

D. Analysis

The record reflects that only the creaking B pillar constitutes a warrantable defect. The Lemon Law does not apply to all problems that may occur with a vehicle, but only applies to warrantable defects.²³ The Lemon Law does not require that a manufacturer provide any particular warranty coverage nor does the Lemon Law specify any standards for vehicle characteristics. The Lemon Law only requires the manufacturer to conform its vehicles to whatever coverage the warranty provides. Consequently, to qualify for replacement or repurchase or for warranty repair, the vehicle must have a defect covered by warranty.²⁴ In this case, the vehicle's warranty specifies that: "Honda will repair or replace any part that is defective in material or workmanship under normal use."²⁵ Accordingly, the warranty applies to conditions resulting from a defect in materials or workmanship. On the other hand, the warranty does not cover conditions arising from the vehicle's design. Courts have affirmed that warranty language covering "defects in material or workmanship" do not cover design defects.²⁶ That is, defects in materials or workmanship

²³ TEX. OCC. CODE § 2301.603(a).

²⁴ TEX. OCC. CODE § 2301.604(a); TEX. OCC. CODE § 2301.204.

²⁵ Complainant's Ex. 4, Warranty.

²⁶ *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

(manufacturing defects) differ from characteristics of the design. The courts have explained that a “manufacturing defect is one created by a manufacturer’s failure to conform to its own specifications, i.e., the product would not have been defective if it had conformed to the manufacturer’s design specifications.”²⁷ In other words, a manufacturing defect is an 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. As a result, a defective vehicle differs from a properly manufactured vehicle. Unlike manufacturing defects, issues that do not arise from manufacturing, such as characteristics of the vehicle’s design (which occurs before manufacturing) are not warrantable defects. Design characteristics result from the vehicle’s specified design and not from any error during manufacturing, so that the same-model vehicles made according to the manufacturer’s specifications may ordinarily exhibit the same characteristics. 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.”²⁸ If the complained of condition constitutes a design characteristic or even a design defect, the Lemon Law does not apply because the warranty only covers manufacturing defects.

1. Conditions Common to the Same Model Vehicle

In the present case, the Complainant acknowledged that all of the vehicle’s complained of conditions, except for the B pillar noise and the musty odor from the AC vents, were reproduced in other like model vehicles. As explained above, characteristics of the Odyssey’s design, as opposed to manufacturing defects specific to a particular vehicle, are not warrantable defects subject to relief.

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.”).

²⁷ *Torres v. Caterpillar, Inc.*, 928 S.W.2d 233, 239 (Tex. App.—San Antonio 1996), writ denied, (Feb. 13, 1997).

²⁸ *Torres v. Caterpillar, Inc.*, 928 S.W.2d 233, 239 (Tex. App.—San Antonio 1996), writ denied, (Feb. 13, 1997).

2. Odor from AC Vents

The evidence reflects that environmental factors, not any warrantable manufacturing defects, caused the complained of odor from the AC vents. Accordingly, the odor does not qualify the vehicle for relief. Regardless of how the vehicle's air conditioning may perform, a warrantable defect exists only if the vehicle is incorrectly assembled or if the vehicle contains an out-of-specification part. In this case, the evidence indicates that environmental factors, specifically rain, caused the odor. The Houston area's high temperatures and high humidity, naturally create conditions favorable for the growth of mold and bacteria along with their resulting odor. Ultimately, the AC vent odor occurs because of environmental factors (heat and humidity/moisture, and mold, bacteria, and particulate matter in the air), and not because of any warrantable defect. Consequently, the odor issue does not qualify for relief.

3. Noise from B Pillar

A preponderance of the evidence indicates that the B Pillar noise is a warrantable defect, but does not create a serious safety hazard, or substantially impair the use or market value of the vehicle. Accordingly, the B pillar noise qualifies for repair relief but not repurchase or replacement. During the test drive at the hearing, the left side B pillar frequently exhibited a creaking noise when braking, accelerating, driving over railroad tracks and speed bumps, and occasionally when turning. The right side B pillar made no such noise and, as testified by the Complainant, other like model vehicles did not make such noise, indicating that the noise is not a normal characteristic of the design. Mr. Krawczyk noted that this noise appeared to originate from somewhere in the middle of the B pillar from plastic on plastic contact (as opposed to the metal contact noise at the bottom of the B pillar addressed by the service bulletin). Mr. Krawczyk acknowledged that such noise was louder than he would have liked. The Complainant commented that her vehicle creaked like an old vehicle. Even if a vehicle may normally develop such a noise over time, the noise, particularly the frequency of its occurrence, appears out of place for a new vehicle, considering that other like new vehicles exhibited no such noise. Nevertheless, the noise does not pose a serious safety hazard as defined by the Lemon Law. The evidence does not show that the noise poses a life threatening malfunction that impedes the ability to control or operate the vehicle or creates a substantial risk of fire or explosion. The noise appears to be a nuisance rather than a substantive problem and does not affect the actual use of the vehicle. Moreover, the noise

is not so significant that it would substantially impair the vehicle's value under the reasonable purchaser standard. Accordingly, the B pillar noise only qualifies the vehicle for repair relief.

III. Findings of Fact

1. On May 15, 2015, the Complainant, purchased a new 2015 Honda Odyssey from Russell & Smith Honda, a franchised dealer of the Respondent, in Houston, Texas. The vehicle had three miles on the odometer at the time of purchase.
2. The vehicle's limited warranty covers the vehicle for three years or 36,000 miles, whichever occurs first.
3. The Complainant took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
07/09/15	972	Creak noise from passenger sliding door; steering wheel volume control does not work; have to turn on rear speakers after turn vehicle back on
08/11/15	1,580	Sliding door creaks (found noise from both right and left); rattle from left side of dash; DVD steering wheel volume does not work; rear speakers will turn off
09/25/15	1,963	Rattle from passenger side
01/25/16	4,464	Both sliding doors make a rattle/creaking noise
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06/30/16	7,943	Both sliding door creaking
10/03/16	10,094	Creaking noise coming from both sliding doors; musty smell from AC vents
02/17/17	13,441	Creaking noise from driver side B pillar

4. On October 7, 2016, the Complainant mailed a written notice of defect to the Respondent.
5. On October 21, 2016, the Complainant filed a Lemon Law complaint with the Department alleging that the passenger sliding doors (B pillars) creaked, the rear speakers have to be turned on manually, driver's side dash rattles, DVD steering wheel volume does not work, and the air conditioning (AC) smells musty when turning the car on. The Complainant acknowledged that all issues were reproducible in other Honda Odysseys, except for the AC smell and sliding door creaking issues. The Complainant also noted that only the sliding door issue had enough repair attempts for Lemon Law relief.

6. On January 6, 2017, the Department's Office of Administrative Hearings issued a notice of hearing directed to the Complainant and the 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 factual matters asserted.
7. The hearing in this case convened, and the record closed, on May 17, 2017, in Houston, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented herself. Matthew Smith testified for the Complainant. Abigail Mathews, attorney, represented the Respondent. Kyle Krawczyk, District Parts and Service Manager, testified for the Respondent.
8. The vehicle's odometer displayed 16,064 miles at the time of the hearing.
9. The vehicle's warranty was in effect at the time of the hearing.
10. During the test drive of the vehicle at the hearing, the vehicle exhibited creaking noise from the left (driver's side) B pillar fairly consistently when braking, accelerating, driving over railroad tracks and speed bumps, and occasionally when turning. The right (passenger) side B pillar did not exhibit the same noise. The vehicle otherwise performed normally and did not exhibit any unusual conditions.
11. Other new like model vehicles did not exhibit noise from the B pillar as in the subject vehicle.

IV. Conclusions of Law

1. The Texas Department of Motor Vehicles has jurisdiction over this matter. TEX. OCC. CODE §§ 2301.601-2301.613; TEX. OCC. CODE § 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 Complainant did not prove that the vehicle has a warrantable defect that creates a serious safety hazard or substantially impairs the use or market value of the vehicle. TEX. OCC. CODE § 2301.604(a).
7. 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).
8. The Complainant proved that the vehicle has a warrantable defect. The Complainant's vehicle qualifies for warranty repair. TEX. OCC. CODE §§ 2301.204 and 2301.603.
9. 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 vehicle's B pillar noise to the applicable warranty. The Complainant shall deliver the subject vehicle to the Respondent within 20 days after the date this Order becomes final under Texas Government Code § 2001.144.²⁹ Within 20 days after receiving the vehicle from the Complainant, the Respondent shall complete repair of the subject vehicle. However, if the Department determines the Complainant's refusal or inability to deliver the vehicle caused the

²⁹ (1) If a party does not timely file a motion for rehearing, this Order becomes final when the period for filing a motion for rehearing expires, or (2) if a party timely files a motion for rehearing, this Order becomes final when: (A) the Department renders an order overruling the motion for rehearing, or (B) the Department has not acted on the motion within 45 days after the party receives a copy of this Decision and Order.

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).

SIGNED July 14, 2017



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