

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 17-0144645 CAF**

**STEPHANIE MUNIZ,  
Complainant**

v.

**GULF STATES TOYOTA, INC.,  
Respondent**

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**BEFORE THE OFFICE  
  
OF  
  
ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Stephanie Muniz (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) and/or Texas Occupations Code § 2301.204 (Warranty Performance) for alleged warrantable defects in her vehicle distributed by Gulf States Toyota, Inc. (Respondent). A preponderance of the evidence shows that the subject vehicle has a warrantable defect that qualifies for repair relief only.

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

Matters of notice of hearing<sup>1</sup> and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law. The hearing in this case convened on August 7, 2017, in San Antonio, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented herself. Jesus Mandujano, the Complainant's spouse, testified for the Complainant. Cathy McWilliams, Case Manager, and Dan Lee, Senior Manager Service - Support represented the Respondent.

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<sup>1</sup> 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.”<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

#### 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.”<sup>5</sup>

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<sup>2</sup> TEX. OCC. CODE § 2301.604(a).

<sup>3</sup> TEX. OCC. CODE § 2301.604(a).

<sup>4</sup> TEX. OCC. CODE § 2301.601(4).

<sup>5</sup> *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.”<sup>6</sup>

**c. Reasonable Number of Repair Attempts**

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

[T]he same nonconformity continues to exist after being subject to repair four or more times by the manufacturer, converter, or distributor or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.<sup>7</sup>

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

[T]he same nonconformity creates a serious safety hazard and continues to exist after causing the vehicle to have been subject to repair two or more times by the manufacturer, converter, or distributor or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.<sup>8</sup>

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:

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<sup>6</sup> *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.”).

<sup>7</sup> TEX. OCC. CODE § 2301.605(a)(1)(A) and (B).

<sup>8</sup> TEX. OCC. CODE § 2301.605(a)(2).

[A] nonconformity still exists that substantially impairs the vehicle's use or market value, the vehicle is out of service for repair for a cumulative total of 30 or more days, and the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.<sup>9</sup>

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

The existence of a statutory rebuttable presumption does not preclude otherwise finding a reasonable number of attempts to repair the vehicle based on different circumstances and fewer attempts.<sup>11</sup> 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.<sup>12</sup>

#### 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, someone on behalf of the owner, or the Department provided written notice of the alleged defect or nonconformity to the manufacturer;<sup>13</sup> (2) the manufacturer was given an opportunity to cure the defect or nonconformity;<sup>14</sup> and (3) the Lemon Law complaint was filed within six months after the earliest

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<sup>9</sup> TEX. OCC. CODE § 2301.605(a)(3).

<sup>10</sup> TEX. OCC. CODE § 2301.605(c).

<sup>11</sup> *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.’”).

<sup>12</sup> *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.”).

<sup>13</sup> TEX. OCC. CODE § 2301.606(c)(1).

<sup>14</sup> 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).

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.<sup>15</sup>

## 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."<sup>16</sup> The manufacturer, converter, or distributor has an obligation to "make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty."<sup>17</sup>

## 3. Burden of Proof

The law places the burden of proof on the Complainant.<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup> 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."<sup>21</sup> However, the parties may expressly or impliedly consent

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<sup>15</sup> TEX. OCC. CODE § 2301.606(d)(2).

<sup>16</sup> TEX. OCC. CODE § 2301.204.

<sup>17</sup> TEX. OCC. CODE § 2301.603(a).

<sup>18</sup> 43 TEX. ADMIN. CODE § 215.66(d).

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

<sup>20</sup> "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.").

<sup>21</sup> 43 TEX. ADMIN. CODE § 215.202(a)(2).

to trying issues not included in the pleadings.<sup>22</sup> Implied consent occurs when a party introduces evidence on an unpleaded issue without objection.<sup>23</sup>

### A. Complainant's Evidence and Arguments

On February 29, 2016, the Complainant, purchased a new 2016 Toyota Prius from Red McCombs Toyota, a franchised dealer of the Respondent, in San Antonio, Texas. The vehicle had 11 miles on the odometer at the time of purchase. The vehicle's limited warranty provides basic coverage of the vehicle for 36 months or 36,000 miles, whichever occurs first. On or about February 17, 2017, the Complainant provided a written notice of defect to the Respondent. On February 2, 2017, the Complainant filed a complaint with the Department alleging that at 13 to 14 mph, the vehicle exhibited a noise like that of a straw inserted into a fan and that the brakes made a similar noise when pressed. In relevant part, the Complainant took the vehicle to a dealer for repair of the alleged issues as follows:

Date	Miles	Issue
04/20/16	5,524	5,000 mile service and multi-point inspection
06/03/16	9,189	Grille air shutter stuck
06/20/16	10,495	Occasional noise usually when AC turned on
09/20/16	20,242	Strange noise when hitting 14 mph; Vehicle makes noise when first starting and reaching 13 mph, sounds like a rattle
11/07/16	24,354	Clunk noise at about 15 mph when first starting.
12/19/16	28,364	Loud noise from ABS (anti-lock braking system) actuator during self-test
01/24/17	30,880	Fluttering noise when coming to a stop
07/19/17	45,280	Noise when starting vehicle and accelerating around 15 mph

The Complainant explained that the complained of issue occurred on initial takeoff after reaching 13 to 14 mph. She described the noise as like a straw in a fan, with varying noise level, and with the brakes having a fluttering noise. She affirmed that the noise occurred every time (after every start-up). The Complainant first noticed the issue a few miles before the first scheduled maintenance at which she mentioned the issue. She last noticed the issue the day of the hearing. She testified that none of the repairs improved the noise issue. The Complainant answered that she noticed that vehicle takes longer to reach a fast complete stop and that she sometimes feels the brakes "kind of" jerk.

<sup>22</sup> 43 TEX. ADMIN. CODE § 215.42; TEX. R. CIV. P. 67.

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

Mr. Mandujano testified that he heard the complained of noise from the beginning. He represented that the dealership wanted him and the Complainant out as fast as possible. He noted that they owned a Prius in the past and the brake issues make them nervous about the vehicle. Also, they would have to go back to have the dealership document the issue. After the dealer removed the rock stuck in the grille shutter, they thought that the issue was resolved, but still continued after that. Mr. Mandujano considered the dealership's service to be of poor quality, for example, leaving parts/connectors unconnected.

The Complainant elaborated that she had not gotten proof of the problem, but there was a noise, and she knew there was a problem of some kind. She pointed out that the accident (causing the noted damage) occurred after initiating the inquiry into the ABS system. She felt this (noise) was a problem, especially with children in the car. She asserted that this issue was never proven in another Prius but occurred every time she got in her vehicle. The service advisor documented that the subject vehicle's noise differed from another Prius. After bleeding the brakes, the problem still occurred. Subsequently, the dealer repaired (replaced) the ABS actuator. The Complainant affirmed that the vehicle's ABS braking felt like a steady pulse when new but now felt "jerky". The Complainant clarified that when she met with the Respondent's field technical specialist, he did not test drive other Priuses with her present in the vehicle.

### **B. Respondent's Evidence and Arguments**

Ms. McWilliams testified that noise at issue was believed to be normal. The vehicle had been in several times and inspected for noise on startup, a brake self-test. The dealer replaced the actuator thinking this would help the noise. Ms. McWilliams noted that there is a tolerance, a range of noise, that even though not the same as other vehicles was still within normal. The fluttering noise was not mentioned until January 24, 2017, and differed from the other noise. The dealer felt that this noise did not relate to the brakes, but instead came from the left front drive axle, and whether accident damage may have caused the noise was unknown. However, noise, especially normal noise, will not impair value.

Mr. Lee testified that he heard the regular ABS rattle (self-test noise) once on the first test drive of the subject vehicle at the hearing. He noted that the newer comparison vehicle provided by the Respondent did not exhibit the ABS rattle. Mr. Lee reiterated that the ABS actuator was mounted on brackets on the bulkhead with multiple lines coming from the actuator. The ABS

actuator performs an extensive self-test looking for continuity and voltage; a problem here results in setting a fault code. When getting to 13 to 15 mph, the actuator goes through a dynamic test – activation of the solenoids. The vehicle may exhibit multiple rattles because the test goes through multiple solenoids. The noise may differ because of variations in the temperature of the brake fluid and line and differences in the vehicle itself. The Respondent's master technician found nothing that would hinder the vehicles performance and no fault codes. The dealer replaced some parts as a courtesy but this did not make a difference because there was nothing wrong with the (original) actuator. If the actuator was at fault, replacing the actuator should have changed something. Mr. Lee stated that the vehicle had sustained collisions in the rear and right front. But he did not believe the right front panel made noise and noted that the only noise he heard during the test drive was the ABS actuator activating, which was not excessive and considered normal. Mr. Lee pointed out that temperature by itself affects plastic and metal. Accordingly, engine temperature and ambient temperature will affect the noise and can change the characteristics of it. Mr. Lee expounded that a problem would exist if the actuator did not go through the self-test. Although the noise may be annoying, the noise indicates that the actuator is self-testing. A failure would set a fault code. Also, as demonstrated in the test drive, the ABS worked. No fault codes indicated that the ABS was a problem. Ms. McWilliams added that the subject vehicle had been compared to other Priuses. Mr. Lee concluded that the vehicle was operating as designed. On cross-examination, Mr. Lee answered that information about ABS self-test noise can be found at various sources on the Internet.

In closing, Ms. McWilliams stated that the noises were believed to be normal operating noises. At every visit, the dealer did not find a (real) problem. However, the dealer did note a problem so that it would be compensated. The dealer took care of the brake bleeding internally. However nothing stated that the brakes did not function properly. The Respondent's field technical specialist test drove the vehicle with the Complainant and reviewed the ABS and self-test. Also the field technical specialist compared the subject vehicle with another Prius that had 15,000 miles and the noise was identical. The noise does not impair the vehicle's use or value. Mr. Lee added that page 407 of the owner's manual states that sounds and vibrations may occur in conjunction with ABS, brake assist, VSC, TRAC and hill-start assist control systems.

### C. Inspection and Test Drive

Upon inspection at the hearing, prior to the test drive, the vehicle's odometer displayed 46,912 miles. The vehicle had some body damage on the front right corner of the vehicle with a panel detached by about 0.25 inches. The vehicle was driven primarily in the parking lot and on the local roads around the hearing site. The vehicle's ABS actuator made audible clicking noises on the initial drive. The Complainant explained that the noise would only occur once per drive, after startup, at about 13 to 14 mph. Thereafter, the noise could not be duplicated despite repeated attempts of shutting off and restarting the vehicle. However, on one subsequent attempt, the vehicle appeared to make a squeak-like noise. During several sudden stops to test the ABS, the ABS, and the brakes generally, performed normally.

### D. Analysis

A preponderance of the evidence does not show that the ABS self-test noise constitutes a warrantable defect. On the other hand, the jerking during ABS operation appears to be a nonconformity but one that does not qualify for repurchase or replacement. The Lemon Law does not apply to all problems that may occur with a vehicle, but only applies to defects covered by warranty (warrantable defects).<sup>24</sup> However, if the manufacturer's warranty does not cover the complained of condition; the Lemon Law does not provide any relief. 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.<sup>25</sup> In this case, the vehicle's warranty specifies that: "This warranty covers repairs and adjustments needed to correct defects in materials or workmanship of any part supplied by Toyota, subject to the exceptions indicated under 'What Is Not Covered' on pages 15-16."<sup>26</sup> 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

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<sup>24</sup> TEX. OCC. CODE § 2301.603(a).

<sup>25</sup> TEX. OCC. CODE § 2301.604(a); TEX. OCC. CODE § 2301.204.

<sup>26</sup> Complainants' Ex. 4, 2016 Prius Warranty.

design defects.<sup>27</sup> That is, defects in materials or workmanship (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.”<sup>28</sup> 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.”<sup>29</sup> 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.

In the present case, the record does not show that the ABS self-test noise more likely than not constitutes a warrantable defect. However, the Complainant testified that when braking, the ABS does not steadily pulse as when originally purchased, but exhibits a jerkiness. Nevertheless, neither the complaint nor the notice of defect identified ABS braking performance as an issue. Consequently, because the Complainant did not provide notice and an opportunity to repair the jerkiness in ABS braking, the Lemon Law prohibits repurchase/replacement relief on this basis.

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<sup>27</sup> *E.g., Whitt v. Mazda Motor of America*, 5th Dist. Stark No. 2010CA00343, 211-Ohio-3097, ¶¶ 18-21 (“The manufacturer’s express warranty in the case sub judice provides: ‘Mazda warrants that your new Mazda Vehicle is free from defects in material or workmanship . . . .’ The trial court found the warranty did not cover claims of design defects. . . . The problems about which Appellants complained did not fall within the applicable expressed warranty.”); see *GT & MC, Inc. v. Texas City Refining, Inc.*, 822 S.W.2d 252, 257 (Tex. App.—Houston [1st Dist.] 1991, writ denied) (“the language in the contract of May 12, 1980, expressly limited TCR’s recovery only for defects in materials or workmanship to damages for repair or replacement value. No mention was made in the guarantee of remedies for design defects.”).

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

<sup>29</sup> *Torres v. Caterpillar, Inc.*, 928 S.W.2d 233, 239 (Tex. App.—San Antonio 1996), writ denied, (Feb. 13, 1997).

**1. ABS Self-Test Noise**

The Complainants have the burden of proving by a preponderance that the complained of ABS self-test noise constitutes a warrantable defect. However, the record reflects that ABS actuators may normally exhibit noise. In accordance with the intended design, the actuator performs a self-test to ensure proper functioning, which may or may not result in audible noise. An absence of the self-test would indicate that the ABS actuator is not operating as designed. The record further reflects that the actual noise produced may vary between vehicles and may even vary with the same vehicle. As demonstrated during the test drives of the subject vehicle and the comparison vehicle at the hearing, the subject vehicle made the characteristic rattling noise after the first startup but not after several others, while the newer comparison vehicle did not make a rattling noise. Moreover, the record shows that the Respondent's field technical specialist test drove another comparison vehicle, with approximately 15,000 miles, that exhibited the same noise as the subject vehicle. Significantly, the vehicle's owner's manual expressly contemplates that sounds/vibrations may normally occur with ABS operation. Accordingly, the subject vehicle's ABS actuator noise appears to fall within the range of normal noise. Additionally, during several sudden stops during the test drive at the hearing, the ABS, and the brakes in general, functioned normally.

**2. Jerking During ABS Operation**

As outlined below, neither the complaint nor the notice of defect raised the issue of a jerking sensation during ABS operation. Rather, the complaint in this case identified the issue as follows: "At 13 to 14 mph the car makes a loud noise like a straw being put into a fan. The brakes are making a similar noise when you press on them." Likewise, the written notice of defect mailed to the Respondent specified the issues as "a loud noise sounding like a straw you stick in to a fan" and "the brakes making a rattling noise." The Lemon Law specifically prohibits granting repurchase or replacement relief unless the complainant provided the Respondent (not the dealer) a mailed written notice of the defect and an opportunity to repair that defect. However, if a vehicle does not qualify for repurchase/replacement, it may still qualify for repair relief. The jerking during ABS operation qualifies appears to be a nonconformity and therefore qualifies for warranty repair.

### III. Findings of Fact

1. On February 29, 2016, the Complainant, purchased a new 2016 Toyota Prius from Red McCombs Toyota, a franchised dealer of the Respondent, in San Antonio, Texas. The vehicle had 11 miles on the odometer at the time of purchase.
2. The vehicle's limited warranty provides basic coverage of the vehicle for 36 months or 36,000 miles, whichever occurs first.
3. The Complainant took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
04/20/16	5,524	5,000 mile service and multi-point inspection
06/03/16	9,189	Grille air shutter stuck
06/20/16	10,495	Occasional noise usually when AC turned on
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11/07/16	24,354	Clunk noise at about 15 mph when first starting.
12/19/16	28,364	Loud noise from ABS actuator during self-test
01/24/17	30,880	Fluttering noise when coming to a stop
07/19/17	45,280	Noise when starting vehicle and accelerating around 15 mph

4. On February 2, 2017, the Complainant filed a complaint with the Department alleging that at 13 to 14 mph, the vehicle exhibited a noise like that of a straw inserted into a fan and that the brakes made a similar noise when pressed.
5. On or about February 17, 2017, the Complainant provided a written notice of the complained of conditions to the Respondent.
6. On May 11, 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 on August 7, 2017, in San Antonio, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented herself. Jesus Mandujano, the Complainant's spouse, testified

- for the Complainant. Cathy McWilliams, Case Manager, and Dan Lee, Senior Manager Service - Support represented the Respondent.
8. The vehicle's odometer displayed 46,912 miles at the time of the hearing.
  9. The vehicle's warranty expired upon reaching 36,000 miles after delivery.
  10. For the test drive at the hearing, the vehicle was driven primarily in the parking lot and on the local roads around the hearing site. The vehicle's ABS actuator made audible clicking noises on the initial drive. The noise could not be duplicated on several other attempts after shutting off the vehicle and restarting. But on one subsequent attempt, the ABS actuator made a squeak-like noise. During sudden stops, the ABS braking performed normally.
  11. The subject vehicle, as designed, may normally exhibit the complained of noise from the ABS actuator. The ABS actuator may produce an audible noise because of a self-test. The self-test noise may vary in quality and magnitude. The self-test noise may vary between vehicles and may even vary with the same vehicle.
  12. During ABS braking, the brakes may produce a jerking sensation, which did not originally occur with the vehicle. The vehicle previously exhibited a steady pulse during ABS braking.

#### **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 complained of ABS actuator noise does not qualify the Complainant's vehicle for replacement or repurchase. The Complainant did not prove that the complained of noise constitutes a defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.603(a) and 2301.604(a).
7. The jerkiness during ABS braking does not qualify the Complainant's vehicle for replacement or repurchase. 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).
8. The jerkiness during ABS braking does not qualify the Complainant's vehicle for replacement or repurchase. The Complainant, a person on behalf of the Complainant, or the Department did not provide mailed written notice of this alleged defect to the Respondent. This Order may not require repurchase or replacement of the vehicle without written notice of the defect/nonconformity to the Respondent. TEX. OCC. CODE § 2301.606(c)(1). Additionally, the Respondent did not have an opportunity to cure the alleged defect(s). This Order may not require repurchase or replacement of the vehicle without an opportunity to cure by the Respondent. TEX. OCC. CODE § 2301.606(c)(2).
9. If the Complainant's vehicle does not qualify for replacement or repurchase, this Order may require repair to obtain compliance with the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603; 43 TEX. ADMIN. CODE § 215.208(e).
10. The Complainant's vehicle qualifies for warranty repair. The jerkiness during ABS braking constitutes a defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.
11. The Respondent remains responsible to address and repair or correct any defects that are covered by the Respondent's warranty. TEX. OCC. CODE § 2301.603.

**V. Order**

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that the Complainant's petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is **DISMISSED**. It is **FURTHER ORDERED** that the Respondent shall make any repairs needed to conform the vehicle's ABS braking 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.<sup>30</sup> 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 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 September 19, 2017**

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

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<sup>30</sup>: (1) This Order becomes final if a party does not file a motion for rehearing within 20 days after receiving a copy of this Order, or (2) if a party files a motion for rehearing within 20 days after receiving a copy of this Order, 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 Order.