

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 18-0179865 CAF**

**KATE and MATTHEW GOODELL,  
Complainants**

**v.**

**GENERAL MOTORS LLC,  
Respondent**

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**BEFORE THE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Kate and Matthew Goodell (Complainants) 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 their vehicle manufactured by General Motors LLC (Respondent). A preponderance of the evidence does not show that the subject vehicle has a defect covered by warranty. Consequently, the Complainants' vehicle does not qualify for repurchase/replacement or warranty repair.

**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 March 19, 2018, in Carrollton, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. Jessica Hawkins, attorney, represented the Complainants. The Complainants testified for themselves. Kevin Phillips, represented the Respondent. David Piper, Field Service Engineer, and Emily Allgier, District Manager Aftersales, testified for 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 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>

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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 satisfied the “opportunity to cure” requirement when the manufacturer authorized repairs by the dealer after written notice to the manufacturer, i.e., the manufacturer essentially authorized the dealer to attempt a repair on the manufacturer's behalf. *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 226 (Tex. App.—Austin 2012).

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

## 2. Warranty Repair Relief

Even if repurchase or replacement relief does not apply, a vehicle may still qualify for warranty repair if the vehicle has a “defect . . . that is covered by a manufacturer’s, converter’s, or distributor’s . . . warranty agreement applicable to the vehicle” and the vehicle owner notified the manufacturer, converter, distributor, or its authorized agent of the defect.<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 Complainants.<sup>18</sup> The Complainants must prove all facts required for relief by a preponderance, that is, the Complainants must present sufficient evidence to show that every required fact is more likely than not true.<sup>19</sup> If any required fact appears more likely to be untrue or equally likely to be true or untrue, then the Complainants cannot prevail.

## 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 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>

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<sup>16</sup> TEX. OCC. CODE § 2301.204; 43 TEX. ADMIN. CODE § 215.202(b)(3).

<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).

<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).

### A. Complainants' Evidence and Arguments

On October 21, 2016, the Complainants, purchased a new 2017 Chevrolet Silverado 1500 from James Wood Chevrolet, a franchised dealer of the Respondent, in Denton, Texas. The vehicle had 59 miles on the odometer at the time of purchase. The vehicle's limited warranty provides bumper to bumper coverage for three years or 36,000 miles, whichever occurs first. On September 15, 2017, the Complainants provided a written notice of defect to the Respondent. On September 28, 2017, the Complainants filed a complaint with the Department alleging that the vehicle exhibited: radio static, wind noise from the front door/window, a bad odor from the air conditioner (AC), a suspension clunking noise, and vibration at higher speeds.<sup>24</sup> In relevant part, the Complainants took the vehicle to a dealer for repair of the alleged issues as follows:

Date	Miles	Issue
02/02/17	5,718	Radio static, AC odor
02/23/17	6,153	Radio static, wind noise from front windows
03/30/17	7,109	Radio static, crackling noise from front doors
04/19/17	7,300	Radio static, vibration at highway speeds, AC odor
07/20/17	12,011	Clunking noise from rear, AC smell, wind noise from driver's window
10/23/17	16,087	Radio static, wind noise from front windows/doors, odor from vents, clunking noise, vibration at highway speeds,

Mrs. Goodell testified that the subject vehicle was Mr. Goodell's vehicle and was the family's primary vehicle. The Complainants previously purchased a GMC truck in 2015 and drove it a little over a year and experienced many issues, some issues like the subject vehicle. So, the Complainants traded the GMC truck for the subject vehicle. They started experiencing issues with the subject vehicle within an hour of leaving the dealership. Mrs. Goodell heard wind noise, which was also an issue with the 2015 GMC. She has experienced all the complained of issues with the subject vehicle, two of them on the way to the hearing. The odor was especially concerning - their daughter has a reactive airway disease. The odor was there on the Saturday before the hearing and

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<sup>24</sup> The notice of defect mentioned rough idle and knocking noise issues in passing, which the Complainants did not include on the complaint form. Specifically, the notice stated that "[t]here have been a few other issues as well, which all add to the belief this vehicle is eligible for Lemon Law. . . . [W]e are experiencing new issues with intermittent rough idle, and a knocking noise . . . . These are new issues and have not been diagnosed at the dealer. These are being added in order to reflect the ongoing troubles with the vehicle." As indicated by the notice's language, the rough idle and knocking noise simply appear as contextual information about the continuing nature of the vehicle's issues, as opposed to an allegation of additional claims for consideration in this proceeding. The notice acknowledged that these issues had not been diagnosed at the dealer. Consequently, these issues would not have had sufficient repair attempts to support Lemon Law relief anyway.

she heard radio static the night before the hearing. The whole truck will shake, feeling like downshifting gears. At times she would hear a clunk, which has gotten louder. The radio crackled constantly.

Mr. Goodell testified that he felt like the 2015 GMC was a fluke and they would not have the same issues again. He stated that he first experienced issues with the subject vehicle within a half-hour after taking the vehicle from the dealership. The vehicle was at the dealer for repairs about 68 days. Mr. Goodell described the radio static as "pretty much" present on all stations, with some worse than others. The static sounded like a blown speaker. The dealer tried repairs for a loose connection and the antenna but did not resolve the issue. He noted that some of the stations he enjoyed the most were the worst. The Chevrolet Customer Assistance Center notified the Complainants that the same issue occurred with other vehicles of the same make and model. After multiple repair attempts, the dealer could not do anything to resolve the issue and referred the Complainants to the Respondent. The static remained the same and he last experienced it on the way to the hearing. The dealer made several attempts to address the odor, including turning on the afterblow. He could hear the afterblow activate but it did not work in resolving the odor. The dealer also tried spraying cleaner on the coils. However, the problem was not fixed and he last experienced it on the way to the hearing. Mr. Goodell explained that the wind noise initially sounded like crackling, not a wind rush, but a seepage heard as hissing and now whistling. The moldings were replaced sometimes but the dealer informed him that further repair may cause other problems. The molding repairs did not improve the issue. Replacement of the sideview mirrors changed the noise. Wind noise can now sound like a hiss and a whistle. The vehicle definitely whistles in a cross-wind. He did not believe the wind noise problem was fixed. He last heard wind noise on the day of the hearing because of the windy conditions but the noise comes and goes and can be difficult to duplicate. Mr. Goodell described the suspension noise as a clunk. He found this to be common with trucks from the 2014 to 2018 model years. The vehicle exhibited a loud, banging clunk, which could be heard going in and out of the driveway. The noise was especially noticeable in cold weather. Moving the bed made an audible squeak in the tire area. He had not heard the noise as often in warm weather, but still heard it most anytime driving in and out of the driveway. Mr. Goodell characterized the vibration as like an "out of rotation feel." The dealer replaced and road force balanced the tires. In addition, the dealer rotated and balanced the tires every time. However, the vibration remained a constant issue. The shake can come and go away.

The vibration would occur at highway speeds – 65 m.p.h. or higher. He stated that he primarily used the truck for driving his children around and in conjunction with a couple of small businesses, but he did not carry heavy loads, tow, or drive off-road. He noted that the repair orders did not always reflect the vibration and balancing but he notified the dealer of the vibration issue every time.

On cross-examination, Mr. Goodell confirmed that he did not hear the static on XM satellite radio but did hear it on FM and AM radio.

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

Mr. Piper testified that during his October 23, 2017, inspection, the vehicle began exhibiting wind noise at 30 to 35 m.p.h. from both front doors. He did not notice static on XM or non-HD channels. He did duplicate the suspension noise and felt excessive idle vibration. Mr. Piper compared the subject vehicle with a similar new truck from the dealer. Both exhibited messages regarding acquiring an HD signal. Both trucks showed interference in areas with high traffic and blocked paths. He added that items inside the vehicle may also influence the radio. Mr. Piper found that: a gap at the top of the mirrors caused the wind noise; the clunking noise was normal; and replacing the leaf spring pads, and cleaning and lubricating the leaf springs eliminated the suspension noise. He pointed out that the leaf springs may need occasional cleaning (as a maintenance item). The ventilation system did not produce any odor. Mr. Piper remarked that he had seen the mirror gap four or five times and submitted this issue to engineering. Mr. Piper measured the vibration of the subject vehicle and the comparison truck, which had 411 miles. The Complainant's vehicle exhibited less vibration than the comparison vehicle. Installing new motor mounts reduced the vibration from 5 milli-g's to 2 milli-g's. Mr. Piper explained that the idle speed was set low for fuel economy. However, the lower idle speed also resulted in a rough idle.

When going through different radio stations, Mr. Piper did not notice much consistency between stations. He did not hear any static listening to XM stations. The XM, FM, and AM channels shared the same sound system components (e.g., speakers, wiring, etc.). Given that the XM stations played clearly, the sound system's shared components were unlikely to have been the source of the static. He concluded that the radio did not have a defect.

Regarding the test drive at the hearing, Mr. Piper stated that Mr. Goodell's comment that the AC smell differed between when he left his vehicle to have lunch and when he came back to the vehicle prompted Mr. Piper to turn the AC off (leaving the fan on) thereby producing a musty smell. He explained that turning the AC on and off changes the air from conditioned air to unconditioned air. Though the unconditioned air may have smelled moldy or musty, looking at the evaporator core would show no mold.

On cross-examination, Mr. Piper confirmed that the static heard during the inspection at the hearing differed from what he heard at his inspection in October. He affirmed that the static heard at the hearing was not normal. He elaborated that XM, FM, and AM all play through the same components. Consequently, if static occurred with all three, then a problem existed. If one had a problem and not on every channel, the radio probably did not have a problem. Mr. Piper confirmed that he visually inspected the evaporator coils and found no mold. He did not know whether the dealer found mold. He did not find a coil coating during his inspection. When asked why the evaporator coils would be coated multiple times by the dealer, Mr. Piper responded that the smell of unconditioned air could not be fixed. When asked why the Complainants experienced the odor while driving, he answered that the AC cycled on and off. Mr. Piper pointed out that he found the sideview mirror pulled away from the frame but did not know the cause. He did not know whether the replacement mirrors would warp but did note that they had a different part number than the prior mirrors. Regarding the suspension noise, Mr. Piper confirmed that the Respondent had not approved the field repair because of longevity concerns but added that the plastic pad made a lot of noise while the rubber pad could not be heard. He affirmed that the suspension noise was a known issue.

### **C. Inspection and Test Drive**

Upon inspection at the hearing, before the test drive, the vehicle had 21,942 miles on the odometer. With the radio tuned to 102.9 FM, a slight static could be heard. The noise did not occur with the radio tuned to an XM station. During the test drive, Mr. Goodell stated he would often notice the AC smell upon start-up, and when turning the vehicle off and then on. He recounted that the Complainants stopped to get lunch before the hearing and when the Complainants returned to the vehicle and started it, the air smelled sour. He added that he would notice the smell after the vehicle sat for a while before turning the AC on. Mr. Piper turned the AC off and Mr. Goodell

identified the smell of the unconditioned air as the complained of odor. Mr. Piper pointed out that the smell was that of unconditioned air. He explained that the AC not only cools the air but conditions/dries the air as well. Mr. Goodell stated that the smell would occur even with the AC on. Mr. Piper elaborated that even with the AC system turned on, the air will not be conditioned whenever the AC (compressor) cycles off. The test drive ended with 21,957 miles on the odometer.

#### D. Analysis

The issues in this case do not qualify for Lemon Law relief. Lemon Law relief does not apply to all problems that a consumer may have with a vehicle but only to defects covered by warranty (warrantable defects).<sup>25</sup> Consequently, to qualify for replacement or repurchase or warranty repair, the vehicle must have a warrantable defect.<sup>26</sup> The Lemon Law does not require that a warranty provide any particular 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. In this case, the vehicle's warranty specifies that: "The warranty covers repairs to correct any vehicle defect, not slight noise, vibrations, or other normal characteristics of the vehicle due to materials or workmanship occurring during the warranty period."<sup>27</sup> According to these terms, the warranty only applies to defects in materials or workmanship (manufacturing defects).<sup>28</sup> A manufacturing defect is an isolated aberration occurring only in those vehicles not produced according to the manufacturer's specifications. A defectively manufactured vehicle has a flaw because of some error in making it, such as incorrect assembly or the use of a broken part. In contrast, design characteristics result from the vehicle's

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<sup>25</sup> TEX. OCC. CODE §§ 2301.603(a), 2301.604(a); TEX. OCC. CODE § 2301.204.

<sup>26</sup> TEX. OCC. CODE § 2301.604(a); TEX. OCC. CODE § 2301.204.

<sup>27</sup> Respondent's Ex. 7, New Vehicle Limited Warranty.

<sup>28</sup> Courts have affirmed that warranty language covering "defects in material or workmanship" do not cover design issues. *E.g., Whitt v. Mazda Motor of America*, 5th Dist. Stark No. 2010CA00343, 211-Ohio-3097, ¶¶ 18-21 ("The manufacturer's express warranty in the case sub judice provides: 'Mazda warrants that your new Mazda Vehicle is free from defects in material or workmanship . . . .' The trial court found the warranty did not cover claims of design defects. . . . The problems about which Appellants complained did not fall within the applicable expressed warranty."); see *GT & MC, Inc. v. Texas City Refining, Inc.*, 822 S.W.2d 252, 257 (Tex. App.—Houston [1st Dist.] 1991, writ denied) ("the language in the contract of May 12, 1980, expressly limited TCR's recovery only for defects in materials or workmanship to damages for repair or replacement value. No mention was made in the guarantee of remedies for design defects.").

specified design and not from any error during manufacturing.<sup>29</sup> Accordingly, instances of the same design issues should occur in other vehicles of the same design/model. However, because the warranty only covers manufacturing defects, any design issues, even if they rise to the level of a design defect, do not qualify for Lemon Law relief.

#### 1. Radio Static

A preponderance of the evidence does not show that the radio static arises from a manufacturing defect but instead shows that the issue results from the radio's design. As an initial matter, the owner's manual specifies that the radio may exhibit static due to variable factors such as: devices plugged into accessory outlets; distance from the radio transmitter; physical obstructions like buildings or hills; environmental conditions; power lines; and cell phones in the vehicle.<sup>30</sup> The difference in radio static between Mr. Piper's inspection at the dealership in Denton and the test drive at the hearing in Carrollton appears consistent with such variable factors affecting the radio's static. In addition, the owner's manual reflects that the radio as designed may exhibit static: "[a]lthough the radio has a built-in electronic circuit that automatically works to reduce interference, some static can occur."<sup>31</sup> Further, correspondence from the Respondent's customer service to the Complainant disclosed that the complained of radio static occurred in other same model vehicles, reinforcing that the static concerned a design issue rather than a manufacturing defect. Also, the XM satellite radio did not exhibit the same static as the terrestrial radio, essentially eliminating the existence of a manufacturing defect in the common components through which the radio plays. In sum, the static appears to be due to the radio's design and not a warrantable manufacturing defect.

#### 2. Wind noise

A preponderance of the evidence does not show that any existing wind noise constitutes a warrantable defect. The record reflects that an apparent design defect in the mirrors resulted in the complained of noise. Mr. Piper found that the base of the side mirrors pulled away from the door,

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<sup>29</sup> In contrast to manufacturing defects, "[a] design defect exists where the product conforms to the specification but there is a flaw in the specifications themselves." *Torres v. Caterpillar, Inc.*, 928 S.W.2d 233, 239 (Tex. App.—San Antonio 1996), *writ denied*, (Feb. 13, 1997).

<sup>30</sup> Respondent's Ex. 5, 2017 Silverado Owner's Manual - Infotainment System.

<sup>31</sup> Respondent's Ex. 5, 2017 Silverado Owner's Manual - Infotainment System.

leaving a gap causing wind noise. Taken in isolation, the gapping looks like a manufacturing defect. However, Mr. Piper repeatedly found this same condition in other vehicles, indicating the existence of a design defect common to mirrors with the same design as opposed to an isolated manufacturing defect. In any event, the complained of crackling and hissing noise appears to have been successfully resolved. Mr. Goodell, explained that he would hear a whistle-like noise (not crackling and hissing), which occurred in crosswinds. He last heard the whistling wind noise on the day of the hearing, which he explained he heard because conditions were windy, noting that the noise was difficult to duplicate, implicating varying environmental conditions as the underlying cause of the noise. As explained previously, the Complainants have the burden of proof, which includes proving that the complained of condition constitutes a defect under the warranty. However, the currently existing noise that Mr. Goodell described appears indistinguishable from noise that the warranty excludes.

### **3. AC Odor**

The evidence shows that the complained of "AC odor" is the normal smell of unconditioned air. The occurrence of the complained of odor corresponds to when the air is not conditioned. Mr. Goodell testified that he would notice the smell when starting the vehicle, that is, after the vehicle had been sitting with the AC turned off. Critically, Mr. Goodell specifically identified the smell of the air with the AC off (and fan on) as the complained of odor. The record shows that the complained of odor is the smell of unconditioned air. The AC not only cools the air but also conditions (dehumidifies) it. However, the difference between the stale unconditioned air and the fresher conditioned air is not the existence of any mold, but a difference in temperature and humidity related to the normal operation of the AC and not any defect.

### **4. Suspension Noise**

The suspension noise resulted from the vehicle's design and not from any manufacturing defect. A service bulletin states that "this noise is an operating characteristic of leaf springs." Moreover, the vehicle's original leaf spring pads consisted of a hard plastic that produced significantly more noise than the soft rubber pads in the field repair applied to the vehicle. However, the vehicle incorporated hard plastic leaf spring pads by design. Although this design may be suboptimal for quiet operation, design issues are not warrantable defects. Furthermore, the leaf springs may produce noise because of the need for lubrication and/or cleaning. However, the

warranty specifies that lubrication and cleaning are maintenance items, which the warranty does not cover.<sup>32</sup>

### 5. Vibration

Although undesirable, the vehicle's vibration is not a warrantable defect. The warranty does not guarantee that the vehicle will not vibrate. Rather, the warranty contemplates that the vehicle will normally vibrate and excludes such vibration from coverage. Although a person may subjectively find the vibration troublesome, the existence of a defect depends on whether the vehicle's vibration fails to meet the manufacturer's specifications. Conversely, the vibration is not a defect if it falls within the manufacturer's specifications. In this case, the record shows that the vehicle's vibration, as measured with an accelerometer, fell within the applicable specifications and vibrated less than a new like-model vehicle. Accordingly, any remaining vibration is not a warrantable defect that qualifies for relief.

### III. Findings of Fact

1. On October 21, 2016, the Complainants, purchased a new 2017 Chevrolet Silverado 1500 from James Wood Chevrolet, a franchised dealer of the Respondent, in Denton, Texas. The vehicle had 59 miles on the odometer at the time of purchase.
2. The vehicle's limited warranty provides bumper to bumper coverage for three years or 36,000 miles, whichever occurs first.
3. The Complainants took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
02/02/17	5,718	Radio static, AC odor
02/23/17	6,153	Radio static, wind noise from front windows
03/30/17	7,109	Radio static, crackling noise from front doors
04/19/17	7,300	Radio static, vibration at highway speeds, AC odor
07/20/17	12,011	Clunking noise from rear, AC smell, wind noise from driver's window
10/23/17	16,087	Radio static, wind noise from front windows/doors, odor from vents, clunking noise, vibration at highway speeds,

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<sup>32</sup> Respondent's Ex. 7, New Vehicle Limited Warranty.

4. On September 15, 2017, the Complainants provided a written notice of defect to the Respondent.
5. On September 28, 2017, the Complainants filed a complaint with the Department alleging that the vehicle exhibited: radio static, wind noise from the front door/window, a bad odor from the air conditioner, a suspension clunking noise, and vibration at higher speeds.
6. On December 6, 2017, the Department's Office of Administrative Hearings issued a notice of hearing directed to all parties, giving them not less than 10 days' notice of hearing and their rights under the applicable rules and statutes. The notice stated the time, place and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; particular sections of the statutes and rules involved; and the factual matters asserted.
7. The hearing in this case convened on March 19, 2018, in Carrollton, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. Jessica Hawkins, attorney, represented the Complainants. The Complainants testified for themselves. Kevin Phillips, represented the Respondent. David Piper, Field Service Engineer, and Emily Allgier, District Manager Aftersales, testified for the Respondent.
8. The vehicle's odometer displayed 21,942 miles at the time of the hearing.
9. The vehicle's warranty was in effect at the time of the hearing.
10. Upon inspection at the hearing, before the test drive, the vehicle had 21,942 miles on the odometer. With the radio tuned to 102.9 FM, a slight static could be heard. The noise did not occur with the radio tuned to an XM station. During the test drive, Mr. Goodell stated he would often notice the AC smell upon start-up, and when turning the vehicle off and then on. He recounted that the Complainants stopped to get lunch before the hearing and when the Complainants returned to the vehicle and started it, the air smelled sour. He added that he would notice the smell after the vehicle sat for a while before turning the AC on. Mr. Piper turned the AC off and Mr. Goodell identified the smell of the unconditioned air as the complained of odor. Mr. Piper pointed out that the smell was that of unconditioned air. He explained that the AC not only cools the air but conditions/dries the air as well. Mr. Goodell stated that the smell would occur even with the AC on. Mr. Piper elaborated that

even with the AC system turned on, the air will not be conditioned whenever the AC (compressor) cycles off. The test drive ended with 21,957 miles on the odometer. The vehicle otherwise appeared to operate normally.

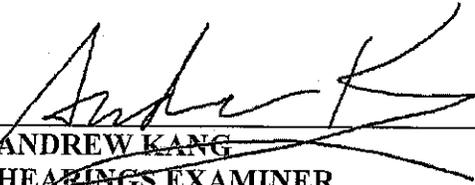
#### IV. Conclusions of Law

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 Complainants 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 Complainants bears the burden of proof in this matter. 43 TEX. ADMIN. CODE § 206.66(d).
6. The Complainant's vehicle does not qualify for replacement or repurchase. The Complainant did not prove that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.603 and 2301.604(a).
7. 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 Complainants' petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is **DISMISSED**.

SIGNED May 15, 2018

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