

II. DISCUSSION

A. Applicable Law

The Lemon Law provides, in part, that a manufacturer of a motor vehicle must repurchase or replace a vehicle complained of with a comparable vehicle if the following conditions are met. First, the manufacturer is not able to conform the vehicle to an applicable express warranty by repairing or correcting a defect after a reasonable number of attempts.¹ Second, the defect or condition in the vehicle creates a serious safety hazard or substantially impairs the use or market value of the vehicle.² Third, the owner must have mailed written notice of the alleged defect or nonconformity to the manufacturer.³ Lastly, the manufacturer must have been given an opportunity to cure the defect or nonconformity.⁴

In addition to these conditions, a rebuttable presumption exists that a reasonable number of attempts have been undertaken to conform a motor vehicle to an applicable express warranty if the same nonconformity continues to exist after being subject to repair four or more times and: (1) two of the repair attempts were made in the 12 months or 12,000 miles, whichever comes first, following the date of original delivery to the owner; and (2) the other two repair attempts were made in the 12 months or 12,000 miles, whichever comes first, immediately following the date of the second repair attempt.⁵

A “serious safety hazard” is defined as a life threatening malfunction or nonconformity in a vehicle 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.⁶

¹ Tex. Occ. Code § 2301.604(a).

² *Id.*

³ Tex. Occ. Code § 2301.606(c)(1).

⁴ Tex. Occ. Code § 2301.606(c)(2).

⁵ Tex. Occ. Code § 2301.605(a)(1)(A) and (B). Texas Occupations Code § 2301.605(a)(2) and (a)(3) provide alternative methods for a complainant to establish a rebuttable presumption that a reasonable number of attempts have been undertaken to conform a vehicle to an applicable express warranty. However, § 2301.605(a)(2) applies only to a nonconformity that creates a serious safety hazard, and § 2301.605(a)(3) requires that the vehicle be out of service for repair for a 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.

⁶ Tex. Occ. Code § 2301.601(4).

B. Complainant's Evidence and Arguments

1. Stephen A. Darden's Testimony

Complainant leased a new 2016 Acura MDX from John Eagle Acura (Eagle), in Houston, Texas through Intervenor on September 10, 2016.⁷ The vehicle's mileage was 28 at the time of delivery.⁸ Respondent provided a new vehicle limited warranty for the vehicle, which provides coverage for four (4) years or 50,000 miles from the date of delivery, whichever comes first.⁹ On the date of hearing the vehicle's mileage was 38,304. On the date of hearing, Respondent's warranty was still in effect.

Complainant testified that within a month after purchasing the vehicle, his wife (Kani Darden, the primary driver of the vehicle) began experiencing intermittent issues with the vehicle hesitating and then suddenly accelerating. Complainant took the vehicle to Gunn Acura (Gunn) in San Antonio, Texas, Respondent's authorized dealer, for repair on October 6, 2016. Gunn's service technician was unable to duplicate the concern during the repair visit.¹⁰ The technician did not find any diagnostic trouble codes (DTC's) stored on the vehicle's computers to indicate a problem with the vehicle.¹¹ The vehicle's mileage on this occasion was 1,751.¹² The vehicle was in the dealer's possession for five (5) days during this repair visit. Complainant was provided with a loaner vehicle while his vehicle was being repaired.

Complainant stated that the problem with the vehicle's hesitation and sudden acceleration continued to occur about once every couple of weeks. He took the vehicle to Gunn for repair for the issue on January 26, 2017. Gunn's service technician again could not duplicate the concern after extensive road tests.¹³ No DTC's were stored on the vehicle's computers.¹⁴ The vehicle's mileage when it was taken to the dealer on this occasion was 8,922.¹⁵ The vehicle was in Gunn's possession for approximately 42 days. Complainant was provided with a loaner vehicle while his vehicle was being repaired.

⁷ Complainant Ex. 1, Closed-End Lease Agreement dated September 10, 2016.

⁸ *Id.*

⁹ Complainant Ex. 9, Excerpts from Warranty Manual, p. 2.

¹⁰ Complainant Ex. 2, Repair Order dated October 6, 2016.

¹¹ *Id.*

¹² *Id.*

¹³ Complainant Ex. 3, Repair Order dated January 26, 2017.

¹⁴ *Id.*

¹⁵ *Id.*

Complainant continued experiencing the issue with the vehicle hesitating, particularly after a cold start. He took the vehicle to Gunn for repair for the issue on May 23, 2017. Gunn's service technician was unable to duplicate the concern.¹⁶ Rick Kahl, District Parts and Service Manager, also looked at the vehicle and was unable to recreate the problem.¹⁷ Complainant and Mr. Kahl both test drove the vehicle (taking turns) and were unable to recreate the problem. The technician did not find any DTC's stored on the vehicle's computers.¹⁸ The mileage on the vehicle on this occasion was 15,270.¹⁹ The vehicle was in the dealer's possession for eight (8) days. Complainant was provided a loaner vehicle while his vehicle was being repaired.

Complainant testified that the hesitation and sudden acceleration began to occur more frequently. He took the vehicle to Gunn for repair for the issue on July 10, 2017. Gunn's service technician could not duplicate the problem.²⁰ The technician did not find any DTC's stored on the vehicle's computers.²¹ The vehicle's mileage when it was delivered to the dealer on this occasion was 18,802.²² The vehicle was in the dealer's possession for nine (9) days. Complainant was provided a loaner vehicle while his vehicle was being repaired.

Complainant testified that the problem continued to occur intermittently. He took the vehicle to Gunn for repair for the issue on December 19, 2017. Gunn's service technician could not duplicate the concern.²³ There were no DTC's stored on the vehicle's computers and there were no fluid leaks found that might have been causing the problem.²⁴ The vehicle's mileage on this occasion was 28,176.²⁵ The vehicle was in the dealer's possession until December 22, 2017.²⁶ Complainant was provided with a loaner vehicle while his vehicle was being repaired on this occasion.

On January 4, 2018, Complainant wrote a letter to Respondent advising them of his concerns with the vehicle.²⁷ Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) on February 26, 2018.²⁸

¹⁶ Complainant Ex. 4, Repair Order dated May 23, 2017.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Complainant Ex. 5, Repair Order dated July 10, 2017.

²¹ *Id.*

²² *Id.*

²³ Complainant Ex. 6, Repair Order dated December 19, 2017.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ Complainant Ex. 7, Letter to American Honda Motor Co., Inc. dated January 4, 2018.

²⁸ Complainant Ex. 8, Lemon Law complaint dated February 26, 2018. Although the complaint was signed by Complainant on January 22, 2018, the complaint was actually entered into the Texas Department of Motor Vehicles system on February 26, 2018, which is the effective date of the complaint.

Complainant testified that he was contacted by Respondent's representatives on March 5, 2018, and was advised that a technical engineer would be inspecting the vehicle. He was later contacted by Respondent's representative on March 13, 2018, and informed that no such inspection would be performed.

Complainant testified that he feels that Respondent fails to see his concerns with the vehicle as an issue and that they're refusing to acknowledge that there's a problem with the vehicle. Complainant feels that the vehicle's resale value has been affected by the problem. He also feels that the problem is a safety issue, as he feels that when the vehicle hesitates it could be rear ended by another vehicle. Complainant stated that he has had to change the way he drives the vehicle due to the hesitation and sudden acceleration issue. Complainant stated that he felt the vehicle hesitate and suddenly accelerate at the beginning of the test drive taken at the time of hearing.

During cross-examination, Complainant stated that he did receive a loaner vehicle every time he took the vehicle to Gunn for repair. He stated that the problem seems to be occurring more frequently. Complainant also testified that in December of 2017, during a repair visit to Gunn, the service technician did recreate the hesitation problem, but did not put that information on the repair order.

Complainant stated that he has not had the vehicle appraised for its current value. He's never been stranded in the vehicle. He's never lost control of the vehicle while driving it.

2. Kani Darden's Testimony

Kani Darden, Complainant's wife, testified telephonically. She is the primary driver of the vehicle.

Ms. Darden testified that she has experienced the vehicle hesitate when she's driven it. It's an intermittent concern. She never knows when it will occur. Ms. Darden says the issue can arise three (3) to fifteen (15) times per week. The vehicle will hesitate when she presses on the accelerator pedal and the engine RPM's go up and then the vehicle actually will accelerate. She's had situations with the vehicle when she pulls into traffic with the hesitation and sudden acceleration. Ms. Darden stated that the day prior to the hearing (June 13, 2018) when she was leaving a parking lot the vehicle accelerated so quickly that the vehicle actually kicked up gravel from the parking area.

During cross-examination, Ms. Darden testified that this was the first vehicle that she has driven that has a nine (9) speed transmission. The last three (3) vehicles that she owned were Chevrolet Suburbans.

C. Respondent's Evidence and Arguments

Richard Kahl, District Parts and Service Manager, testified for Respondent. Mr. Kahl has worked in the automotive industry since 1975. Mr. Kahl has worked in his present position since December of 2016. He was an Automotive Service Excellence (ASE) Certified Master Technician for 15 years. Mr. Kahl's job duties include assisting Respondent's customers with issues that they may have regarding Respondent's vehicles, as well as, assisting dealer technicians when they have issues with vehicles, providing training to dealers with how to deal with customers and provide customer satisfaction, dealing with vehicle parts and inventory control.

Mr. Kahl inspected the vehicle in February of 2017 regarding the hesitation and excessive acceleration on take-off. He test drove the vehicle at the time and had the dealer's technicians perform diagnostic check to ascertain if any DTC's were stored on the vehicle's computers. The technicians did not discover any DTC's. Mr. Kahl testified that he drove the vehicle about 10 miles over a couple of hours and ensured that he stopped and started the vehicle several times. He was unable to duplicate Complainant's concerns. Mr. Kahl feels that the vehicle is operating as designed. Mr. Kahl stated that the repair order indicates that the vehicle was at Gunn for about 40 days on this occasion.²⁹ Mr. Kahl stated that he inspected the vehicle upon the request of Gunn's technicians because they had been unable to recreate the problem with the vehicle. He saw the vehicle on February 16, 2017. He doesn't know why the vehicle stayed in Gunn's possession after that date.

Mr. Kahl testified that he inspected the vehicle again on May 23, 2017. He met with Complainant at the time. Complainant informed Mr. Kahl that the vehicle was hesitating at acceleration. They both test drove the vehicle and were unable to duplicate the concern. They drove the vehicle about four (4) miles and performed a lot of stops and starts. A full DTC check was performed on the vehicle. No DTC's were stored on the vehicle's computers.

Mr. Kahl last inspected the vehicle on July 13, 2017. The vehicle had been taken to Gunn by Complainant a few days before because Mr. Kahl wanted to drive the vehicle after a cold start. He test drive the vehicle on the date in question. He performed ten (10) cycles where he placed the vehicle's transmission in reverse and then reverse to drive and was unable to duplicate the concern. Gunn's technicians performed another DTC check on the vehicle's computers and no DTC's were stored.

²⁹ Complainant Ex. 3, Repair Order dated January 26, 2017.

Mr. Kahl testified that Complainant's vehicle was manufactured with a nine (9) speed transmission in an effort to increase fuel economy. The engine is manufactured to operate in a particular RPM range in order to decrease the amount of fuel needed to run it. The more gears that can keep the engine in a specific RPM range which will limit fuel consumption. The transmission allows for 16% better fuel economy than previous vehicle models which had a six (6) speed transmission.

Mr. Kahl testified that he feels that Complainant has a perception of a hesitation in the vehicle due to the push button shifter in the vehicle. He feels that since there are sensors that operate the accelerator and the gear shifter and that the processing time for these sensors can create the impression of a hesitation. Mr. Kahl stated that drivers of vehicles with nine (9) speed transmissions can feel a shift during the first and second gears which can also feel like a hesitation. He stated that if the driver mashes their foot on the vehicle's accelerator pedal, the engine throttle will open up and the vehicle can accelerate quickly and that this is within design specifications for the vehicle.

Mr. Kahl feels that the vehicle is operating as designed and that it does not have a defect. He stated that he did not feel any hesitation in the vehicle during the test drive taken at the time of hearing. Mr. Kahl stated that he doesn't feel that the concern raised by Complainant is a safety hazard or a life threatening defect in the vehicle.

D. Analysis

Under the Lemon Law, Complainant bears the burden of proof to establish by a preponderance of evidence that a defect or condition creates a serious safety hazard or substantially impairs the use or market value of the vehicle. In addition, Complainant must meet the presumption that a reasonable number of attempts have been undertaken to conform the vehicle to an applicable express warranty. Finally, Complainant is required to serve written notice of the nonconformity on Respondent, who must be allowed an opportunity to cure the defect. If each of these requirements is met and Respondent is still unable to conform the vehicle to an express warranty by repairing the defect, Complainant is entitled to have the vehicle repurchased or replaced.

The evidence indicates that Complainant's vehicle has a defect or nonconformity which substantially impairs its use and market value and which could be considered a serious safety hazard. Although Respondent has indicated that the vehicle does not have a defect and is operating as designed, Complainant and his wife testified that there have been several occasions where the vehicle has hesitated and then suddenly accelerated unexpectedly. They provided video evidence of incidents where it was apparent that the vehicle's engine's RPM's jumped up over

2,000 and then the vehicle accelerated. In addition, Ms. Darden testified about incidents where the vehicle hesitated while pulling into traffic. The vehicle's intermittent hesitation and sudden acceleration make it less desirable to drive than comparable vehicles. In addition, the issue can be considered to be a serious safety hazard as it could be considered to be a nonconformity that substantially impedes Complainant's ability to control or operate the vehicle for ordinary use or intended purposes.

Complainant leased the vehicle on September 10, 2016, and presented the vehicle to Gunn Acura, an authorized dealer of Respondent, due to his concerns with the vehicle hesitating and suddenly accelerating, on the following dates: October 16, 2016; January 26, 2017; May 23, 2017; July 10, 2017; and December 19, 2017. Occupations Code § 2301.604(a) requires a showing that Respondent was unable to conform the vehicle to an applicable express warranty "after a reasonable number of attempts." Section 2301.605(a)(1) specifies that a rebuttable presumption that a reasonable number of attempts to repair have been made if "two or more 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 two other repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the second repair attempt." The evidence presented at the hearing establishes that Complainant has met the requirements of this test. As such, Complainant has established that a reasonable number of attempts to repair the vehicle were made by Respondent.

In addition, the evidence presented at the hearing indicates that Complainant also provided Respondent with a final opportunity to cure the defect. Complainant informed Respondent via letter dated January 24, 2018, of his concerns with the vehicle and providing them with an opportunity to cure of which Respondent did not avail themselves.

Although Respondent has been provided several opportunities to repair the vehicle and to ensure that it operates properly, they have not been able to do so. As such, Complainant has met his burden of proof to establish a warrantable and existing defect or condition that substantially impairs the vehicle's use and market value and which creates a serious safety hazard.

Based on the evidence and the arguments presented, the hearings examiner finds that repurchase of the vehicle is the appropriate remedy in this case. Complainant's request for repurchase relief is hereby granted.

III. FINDINGS OF FACT

1. Stephen A. Darden (Complainant) leased a new 2016 Acura MDX on September 10, 2016, from Honda Lease Trust (Intervenor) with mileage of 28 at the time of delivery.
2. The manufacturer of the vehicle, American Honda Motor Co., Inc. (Respondent) issued a new vehicle limited warranty which provides coverage for the vehicle for four (4) years or 50,000 miles from the date of delivery to the owner, whichever occurs first.
3. The vehicle's mileage on the date of hearing was 38,304.
4. At the time of hearing the vehicle's new vehicle limited warranty was still in effect.
5. Within a month after purchasing the vehicle, Complainant began experiencing a problem where the vehicle would hesitate and suddenly accelerate.
6. Complainant took the vehicle to Respondent's authorized dealer, Gunn Acura in San Antonio, Texas in order to address his concerns with the vehicle hesitating and suddenly accelerating, on the following dates:
 - a. October 6, 2016, at 1,751 miles;
 - b. January 26, 2017, at 8,922 miles;
 - c. May 23, 2017, at 15,270 miles;
 - d. July 10, 2017, at 18,802 miles; and
 - e. December 19, 2017, at 28,176 miles.
7. Gunn's technicians were unable to duplicate Complainant's concerns on any of the repair visits.
8. Respondent, through its authorized dealers, undertook a reasonable number of attempts to conform Complainant's vehicle to an applicable express warranty, but the nonconformity in the vehicle continues to exist.
9. The defective condition of Complainant's vehicle substantially impairs its use and market value. The vehicle's intermittent hesitation and sudden acceleration makes it less desirable to drive than comparable vehicles.
10. The defective condition of Complainant's vehicle constitutes a serious safety hazard.

11. Complainant provided written notice of the defect to Respondent on January 4, 2018,
12. Respondent did not request that they be allowed to perform a final repair attempt on the vehicle.
13. On February 26, 2018, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
14. On September 14, 2015, the Department's Office of Administrative Hearings issued a notice of hearing directed to Complainant and Respondent, giving all parties not less than 10 days' notice of hearing and their rights under the applicable rules and statutes. The notice stated the time, place and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; particular sections of the statutes and rules involved; and the matters asserted.
15. The hearing in this case convened and the record closed on June 14, 2018, in San Antonio, Texas before Hearings Examiner Edward Sandoval. Stephen A. Darden, Complainant, appeared and represented himself at the hearing. Also testifying for Complainant via telephone was his wife, Kani Darden. Respondent was represented by Abigail Mathews, attorney with FrancisMathews PLLC. Appearing and testifying for Respondent was Richard Kahl, District Parts and Service Manager. Honda Lease Trust (Intervenor) did not participate in the hearing.

IV. CONCLUSIONS OF LAW

1. The Texas Department of Motor Vehicles (Department) has jurisdiction over this matter. Tex. Occ. Code §§ 2301.601-.613 (Lemon Law).
2. A hearings examiner of the Department's Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a decision with findings of fact and conclusions of law, and the issuance of a final order. Tex. Occ. Code § 2301.704.

3. Complainant timely filed a complaint with the Department. Tex. Occ. Code § 2301.204; 43 Tex. Admin. Code § 215.202.
4. The parties received proper notice of the hearing. Tex. Gov't Code §§ 2001.051, 2001.052; 43 Tex. Admin. Code § 215.206(2).
5. Complainant bears the burden of proof in this matter. 43 Tex. Admin. Code § 206.66(d).
6. Complainant's vehicle has an existing nonconformity that substantially impairs the use and market value of the vehicle. Tex. Occ. Code § 2301.604(a).
7. Complainant's vehicle has an existing nonconformity that constitutes a serious safety hazard. Tex. Occ. Code § 2301.604(a).
8. After a reasonable number of attempts, Respondent has been unable to repair the nonconformity in Complainant's vehicle so that it conforms to the applicable express warranty. Tex. Occ. Code §§ 2301.604(a) and 2301.605.
9. Based on the above Findings of Fact and Conclusions of Law, Complainant is entitled to relief under Texas Occupations Code § 2301.604(a).
10. Based on the above Findings of Fact and Conclusions of Law, Respondent is required to repurchase Complainant's 2016 Acura MDX. Tex. Occ. Code § 2301.604(a)(1).

IT IS THEREFORE ORDERED that:

1. Respondent shall accept the return of the vehicle from Complainant. Respondent shall have the right to have its representatives inspect the vehicle upon the return by Complainant. If from the date of the hearing to the date of repurchase the vehicle is substantially damaged or there is an adverse change in its condition beyond ordinary wear and tear, and the parties are unable to agree on an amount of an allowance for such damage or condition, either party may request reconsideration by the Office of Administrative Hearings of the repurchase price contained in this final order;

2. Respondent shall repurchase the subject vehicle in the amount of **\$44,436.98**. The refund shall be allocated as follows: **\$8,314.02** to Complainant (which includes the **\$35** Lemon Law filing fee) and **\$36,122.98** to Intervenor (lessor). Refunds shall be made to the Complainant, lessor, and any lienholders as their interest may appear. At the time of the return, the Respondent or its agent is entitled to receive clear title to the vehicle. If the above noted refund to the lessor does not pay all liens in full, the lessor is responsible for providing the Respondent with clear title to the vehicle. The lessor shall transfer title of the vehicle to the Respondent, as necessary to effectuate the Complainant's rights. The lease shall be terminated without penalty to the Complainant;

Purchase price, including tax, title, license and registration	\$50,266.15
Total paid at inception of lease	\$2,899.97
Monthly payment amount	\$598.11
Number of payments made at time of decision issuance	23
Delivery mileage	28
Mileage at first report of defective condition	1,751
Mileage on hearing date	38,304
Useful life determination	120,000

Purchase price, including tax, title, license and registration	\$50,266.15			
Mileage at first report of defective condition	1,751			
Less mileage at delivery	<u>-28</u>			
Unimpaired miles	1,723			
Mileage on hearing date	38,304			
Less mileage at first report of defective condition	<u>-1,751</u>			
Impaired miles	36,553			
Reasonable Allowance for Use Calculations				
Unimpaired miles				
	<u>1,723</u>			
	120,000	X	\$50,266.15	= \$721.74
Impaired miles				
	<u>36,553</u>			
	120,000	X	\$50,266.15 X .5	= <u>\$7,655.74</u>
Total reasonable allowance for use deduction				\$8,377.48
Lessee's calculation:				

Total paid at inception of lease	\$2,899.97
Total amount for monthly payments	\$13,756.53
Less allowance for use	-\$8,377.48
Refund filing fee	<u>\$35.00</u>
TOTAL REPURCHASE AMOUNT TO LESSEE:	\$8,314.02
Lessor's Calculation:	
Purchase price, including tax, title, license and registration	\$50,266.15
5% allowance by Rule 215.208(B)(ii)	\$2,513.31
Less total paid by Lessee	<u>\$16,656.50</u>
TOTAL REPURCHASE AMOUNT TO LESSOR:	\$36,122.96

3. Within twenty (20) calendar days from the receipt of this order, the parties shall complete the return and repurchase of the subject vehicle. If the repurchase of the subject vehicle is not accomplished as stated above, barring a delay based on a party's exercise of rights in accordance with Texas Government Code § 2001.144, starting on the 31st calendar day from receipt of this order, Respondent is subject to a contempt charge and the assessment of civil penalties. However, if the Office of Administrative Hearings determines the failure to complete the repurchase as prescribed is due to Complainants' refusal or inability to deliver the vehicle with clear title, the Office of Administrative Hearings may deem the granted relief rejected by Complainants and the complaint closed pursuant to 43 Texas Administrative Code § 215.210(2);
4. Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall obtain a Texas title for the reacquired vehicle prior to resale and issue a disclosure statement on a form provided or approved by the Department;³⁰
5. Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall affix the disclosure label to the reacquired vehicle in a conspicuous. Upon Respondent's first retail sale of the reacquired vehicle, the disclosure statement shall be completed and returned to the Department.
6. Within sixty (60) days of transfer of the reacquired vehicle, Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall provide to the Department written notice

³⁰ Correspondence and telephone inquiries regarding disclosure labels should be addressed to: Texas Department of Motor Vehicles, Enforcement Division-Lemon Law Section, 4000 Jackson Avenue Building 1, Austin, Texas 78731,

of the name, address and telephone number of any transferee (wholesaler or equivalent), regardless of residence.

SIGNED July 25, 2018



EDWARD SANDOVAL
CHIEF HEARINGS EXAMINER
OFFICE OF ADMINISTRATIVE HEARINGS
TEXAS DEPARTMENT OF MOTOR VEHICLES