

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 18-0187935 CAF**

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|--|---|--------------------------------|
| <b>REKHA SHARMA,</b>                   | § | <b>BEFORE THE OFFICE</b>       |
| <b>Complainant</b>                     | § |                                |
|  | § |                                |
| v.                                     | § | <b>OF</b>                      |
|  | § |                                |
| <b>AMERICAN HONDA MOTOR CO., INC.,</b> | § |                                |
| <b>Respondent</b>                      | § | <b>ADMINISTRATIVE HEARINGS</b> |

**DECISION AND ORDER**

Rekha Sharma (Complainant) filed a complaint with the Texas Department of Motor Vehicles (Department) seeking relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged warrantable defects in her vehicle distributed by American Honda Motor Co., Inc. (Respondent). A preponderance of the evidence does not show that the subject vehicle has a warrantable defect. Consequently, the Complainant’s 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 January 15, 2019, in Carrollton, Texas, before Hearings Examiner Andrew Kang, and the record closed on January 30, 2019, the deadline for filing a response to the written submission. The Complainant, represented herself. Ashish Rimal Sharma, the Complainant’s husband, testified for the Complainant. Abigail Mathews, attorney, represented the Respondent. Allen Linsley, district parts and service manager, 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 Requirements

A vehicle qualifies for repurchase or replacement if the respondent 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 currently 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 respondent, (2) an opportunity to repair by the respondent, 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 respondent;<sup>13</sup> (2) the respondent 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

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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> A repair visit to a dealer satisfies the respondent's “opportunity to cure” requirement when the respondent allows a dealer to attempt repair after written notice to the respondent, i.e., the respondent may delegate its opportunity to repair to a dealer. *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 221 and 226 (Tex. App.—Austin 2012); Texas Department of Transportation, *Kennemer v. Dutchman Manufacturing, Inc.*, MVD Cause No. 09-0091 CAF (Motor Vehicle Division Sept. 25, 2009) (final order granting Chapter 2301, Subchapter M relief).

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” 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 Complainant.<sup>18</sup> The Complainant must prove all facts required for relief by a preponderance of the evidence. That is, the Complainant must present sufficient evidence to show that every required fact more likely than not exists.<sup>19</sup> Accordingly, the Complainant cannot prevail where the existence of any required fact appears equally likely or unlikely.

## 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 must 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 forming the basis of the claim

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

<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.”).

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>

## 5. Incidental Expenses

When repurchase or replacement is ordered, the Lemon Law provides for reimbursing the Complainant for reasonable incidental expenses resulting from the vehicle’s loss of use because of the defect.<sup>24</sup> Reimbursable expenses include, but are not limited to: (1) alternate transportation; (2) towing; (3) telephone calls or mail charges directly attributable to contacting the manufacturer, distributor, converter, or dealer regarding the vehicle; (4) meals and lodging necessitated by the vehicle’s failure during out-of-town trips; (5) loss or damage to personal property; (6) attorney fees, if the complainant retains counsel after notification that the respondent is represented by counsel; and (7) items or accessories added to the vehicle at or after purchase, less a reasonable allowance for use. The expenses must be reasonable and verifiable (for example, through receipts or similar written documents).<sup>25</sup> However, the Department’s rules expressly exclude compensation for “any interest, finance charge, or insurance premiums.”<sup>26</sup>

### B. Summary of Complainant’s Evidence and Arguments

On June 16, 2017, the Complainant, purchased a new 2017 Honda Pilot from David McDavid Honda, a franchised dealer of the Respondent, in Frisco, Texas. The vehicle had 31 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 comes first. On May 21, 2018, the Complainant provided a written notice of defect to the Respondent. On June 25, 2018, the Complainant filed a complaint with the Department alleging that: the moonroof visor was flapping, and the vehicle exhibited: a rattling sound while driving, noise from the front end while turning,

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<sup>21</sup> 43 TEX. ADMIN. CODE § 215.202(a)(3).

<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).

<sup>24</sup> TEX. OCC. CODE § 2301.604.

<sup>25</sup> 43 TEX. ADMIN. CODE § 215.209(a).

<sup>26</sup> 43 TEX. ADMIN. CODE § 215.208(b)(1).

and a creaking noise while braking and driving. In relevant part, the Complainant took the vehicle to a dealer for repair of the alleged issues as follows:

| Date                                   | Miles  | Issue   |
|--|--------|---|
| July 27, 2017                          | 1,654  | Rattle in headliner   |
| October 12, 2017<br>October 14, 2017   | 4,732  | Buzzing/rattling noise from right side while driving  |
| January 5, 2018<br>January 11, 2018    | 8,439  | Moonroof (visor) flapping at 70-80 mph  |
| February 12, 2018<br>February 15, 2018 | 9,176  | Metal to metal clicking noise in driver's seat coming from the engine                         |
| March 26, 2018<br>March 31, 2018       | 10,764 | Clicking noise from the front   |
| April 16, 2018<br>April 17, 2018       | 11,444 | Noise in left rear wheel at low speeds  |
| May 2, 2018<br>May 4, 2018             | 11,954 | Creaking noise when braking and driving; clicking noise from front end when auto-stop engages |
| May 24, 2018<br>May 30, 2018           | 12,559 | Chirping noise from front end   |

On July 11, 2018, the Respondent inspected the vehicle at David McDavid Honda of Frisco at 14,089 miles.

The Complainant described the noise as a rattle. She stated that the noise had not been resolved. During a recent trip to New Mexico, the vehicle rattled when driving 70-80 mph. However, the replacement of the rotor and hub did minimize the sound. The noise from the moonroof visor remained, though it had been replaced. She clarified that there were not four different sounds coming from the vehicle (although the complaint listed four issues). The Complainant stated that since buying the vehicle, she had taken the vehicle to the dealer for repair almost every month. She did get a loaner vehicle when the subject vehicle was under repair. She had taken the vehicle 12 times for the same issue but sometimes the dealer did not provide any documentation because the noise could not be duplicated. She pointed out that none of the loaner vehicles made such noise. One time, the dealer described the noise as a rattle in the headliner (on the repair order) and the technician found a rattle coming from the front door and sunglasses holder. On the October 12, 2017 repair order, the dealer described the issue as buzzing/rattling from the right side while driving. The next day, October 13, 2017, the Complainant went to the dealership after being notified the vehicle was repaired. The dealer diagnosed the noise as coming from the roof in the second-row dome light area and headliner. On January 5, 2018, the dealer found the moonroof flapping and replaced the moonroof visor. The dealer also replaced the brake

pads and machined the rotors but the noise was not resolved. On January 9, 2018, the dealer replaced the moon roof visor again. On February 12, 2018, the dealer diagnosed the noise as coming from the engine. The dealer apparently compared the subject vehicle with another same model 2017 Pilot and did no repairs. On March 26, 2018, the dealer described the noise as a click while turning and driving straight and explained it as the brake pads shifting. On April 16, 2018, the dealer described the noise as a noise in the left rear wheel at low speeds and tightened bolts and cleaned the brake caliper. On May 2, 2018, the dealer found a different noise and replaced the left rear hub and rotor. On January 1-5, 2019, the Complainant heard a rattling noise, while her husband was driving. She opened the moon roof and saw the visor shaking and thought it would come off, so she held the visor throughout the drive to make sure the visor would not blow away. On May 24, 2019, the Complainant went to the dealer because of a noise and the indicators on the instrument panel. The dealer replaced the rear tire, in which the dealer found a piece of metal, the same side where the dealer replaced the rear hub. She returned to the dealer on June 18, 2019, for the same noise; the dealer repaired/plugged the left rear tire. On December 30, 2018, while driving at 70 mph, the Complainant could still hear rattling noise and recorded the noise.

Upon clarifying questions, the Complainant explained that she never described the problems as stated in the complaint. She elaborated that she only complained of two things (a noise from the roof and a noise she could not localize) and that the descriptions in the complaint are what the dealer's service advisors wrote (on the repair orders). She added that she never said that the brake pads squeaked and that she never stated the problems as described in the complaint. The Complainant testified that she received a loaner vehicle of the same type as the subject vehicle twice. Otherwise, the dealer provided a small car, a Honda Civic or some other car. She stated that she last heard the rattling noise on December 30, 2018, but did not know what direction the sound came from. The Complainant and Mr. Sharma confirmed that the noise occurred at highway speeds. The Complainant added that they normally did not drive the vehicle locally but drove the vehicle on longer trips on the highway. She clarified that she did not notice the noise other than at highway speeds. She did not notice any squeaking noises in humid weather or after rain.

On cross-examination, the Complainant testified that the subject vehicle is not her primary vehicle and that she had another vehicle that she drove to work. Instead, the Complainant used the subject vehicle for long trips. The Complainant and Mr. Sharma affirmed that they frequently traveled, to places such as Oklahoma and Austin. She testified that the two second-row seats had

a car seat (secured with the LATCH system) and a booster seat (used with a seatbelt) for her children and the third-row seats normally stayed up. When recording the noise while driving on Montgomery Street in New Mexico, the Complainant, her husband and children occupied the vehicle with luggage. She confirmed that she did not have any later recordings. When asked if she could differentiate the complained of noise from other sounds, she responded that some were similar and cited two recordings (Complainant's Exhibits 6 and 13). The Complainant explained that the issue descriptions in the repair orders did not exactly correspond to her words. She agreed that the dealership tried to write a description of the noise based on her recordings. She acknowledged that she did not hear the moonroof/visor noise during the test drive at the hearing. Mr. Sharma thought that the noise on the Montgomery Street recording could be the moonroof. The Complainant confirmed that she had not returned to the dealer to address the moonroof visor after January 2018. The moonroof was repaired on January 5, 2018, and replaced on January 9, 2018. The Complainant explained that the squeaking brake description was the dealer's language and not hers. She stated that she would hear the noise, a recording of which she played for the dealer, when stopping. The February 2018 repair visit included three different issues and repairs, including replacement of a resistor on the blower. The descriptions of the issues included: noise from the driver's side of the engine, metal to metal clicking sounds from the engine, and clicking while turning and driving straight. The Complainant stated that none of these descriptions were her words. Similarly, a description of low speed noise in the left rear wheel also was not her description. Instead, she had only said that there was a noise. The Complainant did not know of any accident or impact that could have damaged left rear hub and rotor. The clicking noise when autostop engages also was not the Complainant's description of the issue. She stated that she would hear the noise as soon as the engine started. She could only describe the noise as a rattling. Regarding the existing noise, she explained that she can hear something at 70 mph but did not know if this came from the moonroof visor. She acknowledged that the vehicle did not make the noise when turning on the engine at the inspection at the hearing. The Complainant testified that she last heard the noise when recording on December 30, 2018. She also stated that she heard the noise, not from the moonroof visor, within the last 60 days but did not know the date and did not record the noise. On May 24, 2018, she brought the vehicle in for a flat tire caused by a metal object in the tire. Regarding the low tire pressure indicator shown in the Complainant's Exhibit 4 at slide 15, she explained that she pulled over and stopped but did not check the tire pressure. The

police and Mr. Sharma came to her and replaced the flat tire with the spare. She added that other indicators came on, i.e., LKAS. However, the Complainant conceded that she did not read the manual for an explanation of the indicators. She returned on June 18th for a tire repair. She affirmed taking the vehicle to a dealer for the Respondent's inspection on July 11, 2018. Regarding a test drive on the day of this inspection, she noted that the noise did not occur every day. She confirmed that she continued to take trips in the vehicle.

The Complainant testified that other than the moonroof visor noise, all of the repairs were for the same noise. She did not believe an outside influence damaged the hub and rotor because she should have been able to notice it. Regarding the different descriptions of the issues, she explained that she did not know the location of the headliner or the components in the rear (i.e., the different descriptions were not hers). She averred that noises were all the same while sitting in the vehicle. The Complainant asserted that she did not know about the moonroof visor repairs. She explained that she never used terms like brake pads and headliner. Instead, she just let the dealer know a noise existed but she did not know where. Some noises were clicking and some rattling. She did not know about any brake pad shifting noise. Rather the Complainant only knew that the noise was not normal. Upon clarification questions, the Complainant answered that one noise was clearly from the roof but she did not know where the other noise originated, except that she could hear it upon the engine starting. The Complainant responded that the recordings from December 30th and July 30th captured noise from the roof and that the December 30, 2018, was the last time she heard noise from the moonroof. She elaborated that the other (non-moonroof) noise cannot be pinpointed but all the other recordings captured the other noise. She heard this other noise within the last 60 days but she did not recall the date.

On cross-examination, the Complainant testified that she had not recorded the other noise. She affirmed that this noise could be heard even when not driving.

### **C. Inspection**

Upon inspection at the hearing before the test drive, the odometer displayed 25,262 miles. The vehicle was test driven predominately on a freeway at speeds up to the 70-mph range. The test drive ended with 25,301 miles on the odometer. The vehicle appeared to perform normally and did not exhibit any unusual noise.

#### **D. Summary of Respondent's Evidence and Arguments**

Mr. Linsley testified that the complaint was unclear, with multiple references to different noises. He explained that the source of the noise could not be isolated. He did not hear the complained of noise on a test drive with the Complainant or during a test drive by himself. Mr. Linsley did not find anything abnormal with the subject vehicle as compared to other 2017 Honda Pilots. Regarding repair order 777269, the service advisor found the noise to be different than previous but the Complainant stated that the noise was the same noise from the beginning. In this instance, the noise resulted from a bent hub and damaged rotor caused by some outside influence. However, the clicking noise from the front end could not be duplicated. Mr. Linsley stated that some of the recorded noises sounded normal and other sounded odd. However, diagnosing based on the sound recordings was difficult. Mr. Linsley agreed that the nature of the noise appeared to be changing and that the repairs addressed different issues and not a single thing. He also affirmed that the warranty did not cover accidental damage. Mr. Linsley confirmed that any complained of noise did not impair the vehicle's operation or value that all vehicles make noise and that the subject vehicle operated as designed.

#### **E. Analysis**

To qualify for any relief, the law requires the Complainant to affirmatively prove by a preponderance of the evidence that a warrantable defect currently exists. Furthermore, the Department's precedent indicates that a noise by itself does not constitute a substantial impairment or a safety hazard.<sup>27</sup> Consequently, even if the alleged noise arises from a warranted defect, the vehicle cannot qualify for repurchase or replacement, but would only qualify for warranty repair. In this case, a preponderance of the evidence does not show that the vehicle has a warrantable defect that qualifies for relief.

As further explained below, the Complainant testified that she only heard two types of noises, one from the moonroof visor and another from an undetermined source. Further, the Complainant testified that all recordings in evidence related to two discrete noises: one from the moonroof visor and another from an unknown origin. The Complainant pointed out that two

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<sup>27</sup> Texas Department of Transportation, *Alvarez v Ford Motor Company*, MVD Cause No. 08-0440, (Motor Vehicle Division Dec. 11, 2008) (final order denying § 2301.604 relief); State Office of Administrative Hearings *Alvarez v Ford Motor Company*, Docket No. 601-08-4215.CAF, (Oct. 9, 2008) (proposal for decision).

recordings captured the moonroof visor noise on July 30, 2017, and December 30, 2018 (Complainant's Exhibits 6 and 3). These two recordings do in fact appear to reflect the same noise. The Complainant also testified that the other seven recordings pertain to the same noise that she could not determine. However, these seven recordings appear to capture multiple different noises (possibly six).

**1. Moonroof Visor Noise**

The evidence appears to show that any remaining noise from the moonroof visor appear as likely due to external conditions, e.g., cross-winds or vibration from road conditions, as much as any defect in the visor itself. The visor noise last occurred on December 30, 2018, and did not occur at all during the test drive at the hearing. In conclusion, a balance of the evidence does not indicate that the visor currently has a defect.

**2. Other Noise**

As an initial matter, the Department's rules require a complaint to "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 forming the basis of the claim for relief under the lemon law."<sup>28</sup> However, the Complainant explained that she did not actually come up with the descriptions of the problems in the complaint. Instead, she based the descriptions on the dealer's characterization of the issues shown in the repair orders because she had a difficult time describing the noise. In essence, she simply described the noise as a rattling without reference to a particular area. The Complainants broad characterization of the issue as a rattling noise without any further direction appears to broadly capture normal noises as well as any defective noises. One noise, recorded on November 20, 2017, sounded like a lawnmower and seemed particularly loud and out of place. However, since that recording, the vehicle has had six repair visits and the same noise has not recurred in subsequent recordings. The other noises appear as likely to be normal noises from the vehicle itself, road conditions, or from the vibration of the vehicle's contents. Additionally, some of the Complainant's testimony appears inconsistent. On the one hand the Complainant and Mr. Sharma testified that they only heard the complained of noise at highway speeds but the Complainant also testified that she could hear the noise upon starting the engine.

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<sup>28</sup> 43 TEX. ADMIN. CODE § 215.202(a)(3).

Further, the Complainant wrote on a repair order that “noise doesn’t come every day.” Given all of the uncertainties described above, the evidence does not show that a warrantable defect more likely than not exists.

### III. Findings of Fact

1. On June 16, 2017, the Complainant, purchased a new 2017 Honda Pilot from David McDavid Honda, a franchised dealer of the Respondent, in Frisco, Texas. The vehicle had 31 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 comes first.
3. The Complainant took the vehicle to a dealer for repair as shown below:

| Date                                   | Miles  | Issue   |
|--|--------|---|
| July 27, 2017                          | 1,654  | Rattle in headliner   |
| October 12, 2017<br>October 14, 2017   | 4,732  | Buzzing/rattling noise from right side while driving  |
| January 5, 2018<br>January 11, 2018    | 8,439  | Moonroof (visor) flapping at 70-80 mph  |
| February 12, 2018<br>February 15, 2018 | 9,176  | Metal to metal clicking noise in driver’s seat coming from the engine                         |
| March 26, 2018<br>March 31, 2018       | 10,764 | Clicking noise from the front   |
| April 16, 2018<br>April 17, 2018       | 11,444 | Noise in left rear wheel at low speeds  |
| May 2, 2018<br>May 4, 2018             | 11,954 | Creaking noise when braking and driving; clicking noise from front end when auto-stop engages |
| May 24, 2018<br>May 30, 2018           | 12,559 | Chirping noise from front end   |

4. On July 11, 2018, the Respondent inspected the vehicle at David McDavid Honda of Frisco at 14,089 miles.
5. On May 21, 2018, the Complainant provided a written notice of defect to the Respondent.
6. On June 25, 2018, the Complainant filed a complaint with the Department alleging that: the moonroof visor was flapping, and the vehicle exhibited: a rattling sound while driving, noise from the front end while turning, and a creaking noise while braking and driving.

7. On June 25, 2018, 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.
8. The hearing in this case convened on January 15, 2019, in Carrollton, Texas, before Hearings Examiner Andrew Kang, and the record closed on January 30, 2019, the deadline for filing a response to the written submission. The Complainant, represented herself. Ashish Rimal Sharma, the Complainant's husband, testified for the Complainant. Abigail Mathews, attorney, represented the Respondent. Allen Linsley, district parts and service manager, testified for the Respondent.
9. The vehicle's odometer displayed 25,262 miles at the time of the hearing.
10. The vehicle's warranty was in effect at the time of the hearing.
11. At the hearing, the vehicle was test driven predominately on a freeway at speeds up to the 70-mph range. The test drive ended with 25,301 miles on the odometer. The vehicle appeared to perform normally and did not exhibit any unusual noise.
12. Although the complaint included four different noise related issues, the Complainant asserted that only two noises existed: one from the moonroof visor and some other noise of unknown origin.
13. Two sound recordings appear to reflect noise from the moonroof visor (Complainant's Exhibits 3 and 6).
14. Seven sound recordings appear to reflect multiple different types of noises.
15. The November 20, 2017, recording captured a particularly loud noise that appeared abnormal. However, the subject vehicle underwent six repairs after this recording and the noise did not recur in any other recordings.
16. The Complainant last noticed noise from the moonroof visor on December 30, 2018.
17. The Complainant last noticed the other noise on a day within 60 days of the hearing.
18. All of the noises occurred intermittently.

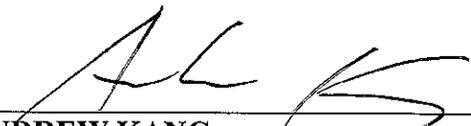
#### IV. Conclusions of Law

1. The Texas Department of Motor Vehicles has jurisdiction over this matter. TEX. OCC. CODE §§ 2301.601-2301.613 and 2301.204.
2. A hearings examiner of the Department's Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a decision with findings of fact and conclusions of law, and the issuance of a final order. TEX. OCC. CODE § 2301.704.
3. The Complainant filed a sufficient complaint with the Department. 43 TEX. ADMIN. CODE § 215.202.
4. The parties received proper notice of the hearing. TEX. GOV'T CODE §§ 2001.051, 2001.052. 43 TEX. ADMIN. CODE § 215.206(2).
5. The Complainant bears the burden of proof in this matter. 43 TEX. ADMIN. CODE § 206.66(d).
6. The Complainant'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 Complainant's vehicle does not qualify for warranty repair. The Complainant did not prove that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603.
8. 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**.

**SIGNED April 1, 2019**



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