

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 19-0015059 CAF**

**RAKESH RAMAKRISHNAN,  
Complainant**

v.

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

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**BEFORE THE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Rakesh Ramakrishnan (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 his vehicle manufactured by American Honda Motor Co. (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, 2020, in Carrollton, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented himself. Abigail Mathews, attorney, represented the Respondent.

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<sup>1</sup> TEX. GOV'T CODE § 2001.051.

## II. Discussion

### A. Applicable Law

#### 1. Repurchase/Replacement Relief 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 written notice of the defect to the respondent, (2) an opportunity to cure 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 or someone on behalf of the owner, or the Department has 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

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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). 43 TEX. ADMIN. CODE § 215.204 provides that “[u]pon receipt of a complaint for lemon law or warranty performance relief, the department will provide notification of the complaint to the appropriate manufacturer, converter, or distributor.” The Department’s notice of the complaint to the Respondent may satisfy the requirement to provide notice of the defect or nonconformity to the Respondent.

<sup>14</sup> A respondent may delegate its opportunity to cure to a dealer. A repair visit to a dealer satisfies the opportunity to cure requirement when the respondent allows a dealer to attempt repair after written notice to the respondent. *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). An opportunity to cure does not require an actual repair attempt but only a valid opportunity. *Id* at 2.

of: the warranty's expiration date or the dates on which 24 months or 24,000 miles had passed since the date of original delivery of the motor vehicle to an owner.<sup>15</sup>

## 2. Warranty Repair Relief

Even if repurchase or replacement relief does not apply, a vehicle may still qualify for warranty repair if the vehicle has a "defect . . . that is covered by a manufacturer's, converter's, or distributor's . . . warranty agreement applicable to the vehicle" and the vehicle owner notified the manufacturer, converter, distributor, or its authorized agent of the defect before the warranty's expiration.<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 hearing 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 January 22, 2019, the Complainant, purchased a new 2019 Honda Pilot from David McDavid Honda, a franchised dealer of the Respondent, in Frisco, Texas. The vehicle had 30 miles on the odometer at the time of purchase. The vehicle’s limited warranty provides bumper to bumper coverage for three (3) years or 36,000 miles, whichever occurs first. On or about July 26, 2019, the Complainant provided a written notice of defect to the Respondent. On August 26, 2019, the Complainant filed a complaint with the Department alleging that the vehicle made a chirping/squeaking noise decelerating with the air conditioning (AC) on.

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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).

The Complainant testified that the vehicle squeaked in hot weather but not rainy or cold conditions. Repairs did not improve the noise. The squeaking occurred more frequently when hot on long drives. The Complainant first noticed the noise in May of 2019. He described the noise as occurring frequently when decelerating between 45 to 35 mph. Though the noise grew louder while driving on vacation, the Complainant did not notice any drastic changes in performance. He described the noise as not loud enough to hear over the radio, but noticeable with the cabin silent. He affirmed getting a loaner vehicle during service visits though he was restricted from leaving the city with the loaner vehicles. He last noticed the noise in September 2019 on a sunny day. The Complainant stated that he drove the vehicle primarily on weekends and his wife, Jasna Rakesh, drove the vehicle most of the time. Mrs. Rakesh affirmed that she noticed the noise when decelerating between 45 and 35 mph but also that when the temperature increases, the frequency increases. She last noticed the noise in the first week of October 2019.

On cross-examination, the Complainant stated that the noise sounded like a bird and affirmed that the noise was always the same. He acknowledged that the noise occurred when the weather heated up and he heard the noise more consistently then. He only took the vehicle to the selling dealer for repair. The dealer replaced components related to the AC but did not resolve the noise. The Complainant test drove the subject vehicle with Jeff Queen, district parts and service manager, and duplicated the complained of noise. The Complainant confirmed that they also duplicated the same noise when test driving another same make, model, year vehicle. The Complainant acknowledged that Mr. Queen explained that the AC compressor on Elite and Touring trim Honda Pilots made the noise. He pointed out that this was not explained until after the fourth service visit. He continued to drive the vehicle but added that his concern was not the noise but pressure build-up. The Complainant confirmed that the vehicle made a chirp when letting off the accelerator.

### **C. Inspection**

Upon inspection before the test drive at the hearing, the vehicle's odometer displayed 8,602 miles. The vehicle was driven primarily on major arterial roads with the AC turned on. The vehicle showed the outside temperature at 69° Fahrenheit. The test drive ended with 8,614 miles on the odometer. The vehicle operated normally and did not exhibit any unusual noise.

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

Mr. Queen testified that he duplicated the complained of noise in the subject vehicle, a 2019 Honda Pilot Touring Elite. When test driving the subject vehicle, Mr. Queen duplicated the noise, which he described as a chirp. He confirmed the noise occurred on a hot day in August with the AC set to 65° F. He heard a quick chirp when decelerating. He agreed that the noise would not have been audible over loud noise but noticeable with a quiet cabin. He test drove a new, same model, year, and trim vehicle in the same area as the subject vehicle with the temperature at the same temperature and duplicated the complained of noise. Mr. Queen explained that older vehicles' compressors operated at one level, which was not efficient. The subject vehicle has a two-stage compressor with software that varies the compressor operation, very hard or normal, in response to air conditioning demand. In part, the variable compressor operating at the lower level reduces wear on the compressor (in contrast to a fixed speed compressor). Mr. Queen affirmed that most variable compressors made some noise. The dealer replaced various parts but the vehicle still made the same noise. However, because the present air conditioning system was new for 2019, the technicians probably diagnosed the noise based on prior knowledge (not applicable to the current compressor). Mr. Queen affirmed that the noise did not affect the AC or components. He explained that a variable compressor was used in the Touring and Elite trims as well as other Honda models. Importantly, Mr. Queen testified that the complained of noise was identical to other Honda Pilots with the Touring or Elite trim.

#### **E. Analysis**

As explained below, the vehicle does not have a warranted defect that qualifies for any relief. As an initial matter, to qualify for relief, whether warranty repair or repurchase/replacement, the law requires the vehicle to have a defect covered by the Respondent's warranty (warrantable defect)<sup>27</sup> that continues to exist after repair.<sup>28</sup> In part, the warranty generally states that:

Honda will repair or replace any part that is defective in material or workmanship under normal use. See Operation and Maintenance of your Honda on page 36. All repairs/replacements made under this warranty are free of charge. The replaced or repaired parts are covered only until this New Vehicle Limited Warranty expires.

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<sup>27</sup> TEX. OCC. CODE §§ 2301.603(a), 2301.604(a); TEX. OCC. CODE § 2301.204.

<sup>28</sup> TEX. OCC. CODE § 2301.605.



According to these terms, the warranty only applies to defects in materials or workmanship (manufacturing defects).<sup>29</sup> A manufacturing defect is generally 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. Manufacturing defects exist when the vehicle leaves the manufacturing plant. Unlike manufacturing defects, issues that do not arise from manufacturing, such as the vehicle's design characteristics (which exist before manufacturing) or improper dealer repairs (which occur after manufacturing) are not warrantable defects. Design characteristics result from the vehicle's specified design and not from any error during manufacturing.<sup>30</sup> Vehicles that share the same design should ordinarily exhibit the same design characteristics. Even though a condition may be undesirable, the Lemon Law provides no relief unless the condition constitutes a manufacturing defect. Because the warranty only covers manufacturing defects, any design issues do not qualify for relief.

A preponderance of the evidence shows that the complained of noise is a characteristic of the vehicle's design and not a manufacturing defect. The evidence reflects that the complained of noise is a characteristic shared by other similarly equipped, same-model vehicles and is common to variable compressors generally. Moreover, the Complainant acknowledged that a new same-model, similarly equipped, vehicle made the same noise as the subject vehicle.

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<sup>29</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.").

<sup>30</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).

### III. Findings of Fact

1. On January 22, 2019, the Complainant, purchased a new 2019 Honda Pilot from David McDavid Honda, a franchised dealer of the Respondent, in Frisco, Texas. The vehicle had 30 miles on the odometer at the time of purchase.
2. The vehicle's limited warranty provides bumper to bumper coverage for three (3) years or 36,000 miles, whichever occurs first.
3. The warranty generally provides that:

Honda will repair or replace any part that is defective in material or workmanship under normal use. See Operation and Maintenance of your Honda on page 36. All repairs/replacements made under this warranty are free of charge. The replaced or repaired parts are covered only until this New Vehicle Limited Warranty expires.
4. On or about July 26, 2019, the Complainant provided a written notice of defect to the Respondent.
5. On August 26, 2019, the Complainant filed a complaint with the Department alleging that the vehicle made a chirping/squeaking noise decelerating with the air conditioning (AC) on.
6. On September 27, 2019, 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 January 15, 2020, in Carrollton, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented himself. Abigail Mathews, attorney, represented the Respondent.
8. The vehicle's odometer displayed 8,602 miles at the time of the hearing.
9. The vehicle's warranty was in effect at the time of the hearing.
10. The vehicle operated normally during the test drive at the hearing.

11. The subject vehicle is equipped with a variable air conditioning compressor that may normally make the complained of noise when the vehicle decelerates.
12. Other similarly equipped, same-model vehicles exhibit the same complained of noise.
13. The noise results from the design of the compressor.

#### **IV. . Conclusions of Law**

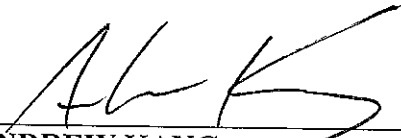
1. The Texas Department of Motor Vehicles has jurisdiction over this matter. TEX. OCC. CODE §§ 2301.601-2301.613 and 2301.204.
2. A hearings examiner of the Department's Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the 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 does not qualify for reimbursement of incidental expenses because the vehicle does not qualify for replacement or repurchase. TEX. OCC. CODE §§ 2301.603, 2301.604(a); 43 TEX. ADMIN. CODE § 215.209.
8. If the Complainant's vehicle does not qualify for replacement or repurchase, this Order may require repair to obtain compliance with the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603; 43 TEX. ADMIN. CODE § 215.208(e).

9. 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.
10. 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 January 29, 2020**

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