



## 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>

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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) (“We find that this interpretation of the standard required for demonstrating substantial impairment is reasonable and consistent with the statute’s plain language which requires a showing of loss in market value. . . . [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).

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:

[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

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

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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.

<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

nature of the complaint and the specific problems or circumstances forming the basis of the claim 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 September 22, 2017, the Complainant, leased a new 2018 Honda Odyssey from Allen Honda, a franchised of the Respondent, in College Station, Texas. The vehicle had five miles on the odometer at the time of purchase. The vehicle’s limited warranty provides coverage for three years or 36,000 miles, whichever occurs first.

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be scheduled on any complaint made under this section that is not privately resolved between the owner and the dealer, manufacturer, converter, or distributor.”).

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

On October 20, 2019, the Complainant filed a complaint with the Department alleging that the control system (audio/information touchscreen) for the GPS (navigation), radio, USB, and Bluetooth would disconnect when the engine shuts down and restarts from the Auto Idle Stop feature; the vehicle would stall when this feature engaged; the anti-collision feature (Collision Mitigation Braking System (CMBS)) caused the vehicle to brake suddenly despite a significant distance from the object in front of it; the central control unit would not work with temperatures under 40 degrees; and the passenger door would not reliably open from the outside. On October 30, 2019, the Complainant provided a written notice of defect to the Respondent. In relevant part, the vehicle's service history reflects repair visits as follows:

Date	Miles	Issue
12/03/19	26,201	USB port inoperative, rear speakers inoperative, auto idle stop not functioning correctly, right front lock does not always lock, brake assist engaged passing a vehicle, radio and main display go dark
10/08/19	24,819	Power locks, sound system
06/11/19	22,415	Power locks, body electrical concern
04/22/19	20,492	Body electrical, door latch
10/01/18	13,743	Engine electrical concern: electrical system shuts down, body electrical concern: rear speakers not working
04/11/18	6,660	Body electrical concern
02/17/18	4,701	Engine electrical concern, body electrical concern
01/25/18	4,226	Trim electrical concern

The Respondent's repair attempt occurred on December 3, 2019.

The Complainant testified that the six photos in Complainant's Exhibit 4 were taken as follows: (1) October 19, 2019, (2) unknown, (3) May 20, 2020, (4) May 20, 2020, (5) October 19, 2019 (duplicate of 1), and (6) October 15, 2019. These photos of the touchscreen showed: the USB port initializing, an "Anti Theft System" lost power message, a "No audio connection for FM" message, the Honda logo, the USB port initializing, and an "Anti Theft System" lost power message. The three videos in Complainant's Exhibit 5, taken on May 20, 2020, showed the touchscreen's failure to respond to controls and a failure to connect a phone through Bluetooth. Mr. Riordan testified that the subject vehicle currently had 34,020 miles on the odometer. He stated that the passenger door issue appeared to be resolved. He added that some issues improved or became less frequent when the weather warmed. The Complainant clarified that Mr. Riordan, was referring to the control center (touchscreen) issues. She elaborated that "control system" and "central control" probably referred to the same thing. The Complainant described that after the

vehicle stops and the Auto Idle Stop feature turns on, the vehicle stalls when releasing the brake. And when turning the vehicle back on, there would be no electronic display at all. Sometimes, even the instrument cluster would not show. This issue did not happen now because the Auto Idle Stop was turned off. But before, the issue occurred about once a week. Although the Complainant and Mr. Riordan liked the benefit of the Auto Idle Stop, they had been turning the feature off when getting in the vehicle. The last stall occurred about eight or nine months ago since they had been disabling the Auto Idle Stop. She clarified that the GPS and Bluetooth issues did not always occur in relation to a stall. Rather, the GPS, Bluetooth, radio, and USB would go out more often but when a stall did occur, these other functions would also go out. She probably last noticed the GPS, Bluetooth, radio, and USB malfunction on May 20, 2020. These functions would also go out when the outside temperature was 40 degrees or lower. The Complainant described that the CMBS alarm would pop up and the brakes would lock up when approaching another vehicle though well within a safe distance. The brakes would also lock up when trying to pass with another vehicle in the oncoming lane. This inappropriate braking would occur about every three or four months and last occurred about three months ago. The braking seemed random but would occur when the car in front moved slowly and when trying to pass on a highway with two-lanes (in each direction). Mr. Riordan added that at least twice, the vehicle slowed when someone used the shoulder to turn. The Complainant testified that for all the service dates in the notice letter (February 7, 2018, April 11, 2018, October 1, 2018, April 22, 2019, June 11, 2019, and October 8, 2019), the vehicle was brought in for the touchscreen and Auto Idle Stop. The CMBS was also addressed, but the Complainant could not identify the service dates. However, the Complainant could not recall if any complaint issues were addressed at the October 8, 2019, visit. Mr. Riordan testified that he had raised the touchscreen issue at most service visits because the issue never went away. He explained that they had attempted to get the service records from the dealer and the service history (Complainant's Exhibit 6) was what the dealer provided, which did not specify what was done at each appointment.

On cross examination, Mr. Riordan testified that he was the primary driver and usually took the vehicle to the dealership. The Complainant could not confirm that all issues were raised at the February 7, 2018, visit. She affirmed that a final inspection occurred in December 2019. She acknowledged that dealer provided the service history (Complainant's Exhibit 6) but she could not recall what happened specifically at each date. Mr. Riordan could not recall the February 7, 2018,

April 11, 2018, or October 1, 2018, service visits. He did not know when the Bluetooth issue was first raised. Mr. Riordan confirmed that the Complainant had an Apple iPhone, which was updated. The Complainant stated that she brought the vehicle in for the final inspection. Mr. Riordan answered that a malfunction indicator never appeared in relation to the Auto Idle Stop. He noted that the vehicle had instrument panel and touchscreen issues and the battery light would come on but no other indicators. Mr. Riordan explained that when the cold appeared to affect the vehicle, the entire touchscreen would go out and no number of restarts would resolve the issue. The screen would display two different error messages, the most common being an anti theft message and the other being a network error. However, the vehicle was not taken back when the weather was not 40 degrees or below because the issues could not be replicated.

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

Deborah Yoder, district parts and service manager, testified that she first became aware of the present vehicle in early 2019, relating to issues with the center screen/audio screen and that Apple CarPlay may not be working. She explained that Complainant's Exhibit 6 summarized visits with the dealership but did not specify details, such as the concern or fix. She noted that the vehicle first came in to the dealer for the CMBS and all dash lights coming on. The dealer replaced the gauge control module, remote tuner, and radio. She did not recall reviewing any repair orders (ROs) that the vehicle stalled. Ms. Yoder explained that the concerns identified in the final repair attempt RO came directly from the customer. She noted that at the first visit for a phone issue, Apple CarPlay worked after deleting various random devices paired with the vehicle. She affirmed the possibility that phone updates may interfere with CarPlay, a third-party application, as well as Bluetooth. She pointed out that many CarPlay and Bluetooth related complaints occurred after the Apple iOS update in September 2018. Ms. Yoder indicated that the vehicle did not present any diagnostic trouble codes. She also explained that the Auto Idle Stop may make the vehicle appear stalled. With the Auto Idle Stop on, the engine shuts down and runs off the battery. The owner's manual reflects that the engine will restart, depending on the circumstances, when releasing the brake pedal and when depressing the accelerator. Ms. Yoder indicated that the vehicle, when test driven, operated normally. Further, the vehicle never presented a malfunction indicator lamp. She affirmed that the CMBS had limitations, such as braking due to objects sensed on the side. The

owner's manual discusses various roadway and environmental conditions that may limit CMBS function, such as construction, reflections, and sunlight.

#### **D. Analysis**

As an initial matter, the law requires the Complainant to prove every required element by a preponderance. To qualify for any relief, whether warranty repair or repurchase/replacement, the vehicle must have a defect covered by the Respondent's warranty (warrantable defect)<sup>27</sup> that continues to exist, even 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."<sup>29</sup> According to these terms, the warranty only applies to defects in materials or workmanship (manufacturing defects).<sup>30</sup>

#### **1. Audio/Information Touchscreen – GPS (Navigation), Radio, USB, and Bluetooth**

The available evidence does not support repurchase or replacement relief but does support repair relief.

##### **a. The Complaint**

As explained in the discussion of applicable law, the complaint defines the issues to be addressed. The Department's rules specify that: "Complaints shall 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>31</sup> In relevant part, the October 20, 2019, complaint states: "Control system for GPS, radio, USB, bluetooth regularly disconnects when the engine shuts down and restarts from the idle auto-stop

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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.

<sup>29</sup> Complainant's Ex. 1, Warranty.

<sup>30</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>31</sup> 43 TEX. ADMIN. CODE § 215.202.

feature. Vehicle also stalls when this feature engages. Service records attached.” and “When temperature is under 40 degrees, the central control unit does not work.” The complaint does not distinguish GPS, Radio, USB, and Bluetooth problems as separate issues from the touchscreen issue. As reflected in testimony and exhibits, both the “control system” and “central control unit” appear to refer to the audio/information touchscreen. The complaint appears to allege two touchscreen issues: (1) a touchscreen malfunction associated with the Auto Idle Stop stalling and (2) a touchscreen malfunction caused by cold temperatures. However, as addressed below, these two touchscreen issues may actually be a single issue that occurs under two different conditions.

**b. Uncertainty in the Complaint and Evidence**

The complaint and the evidence in the record present significant uncertainties. As explained above, the October 20, 2019, complaint appears to identify two touchscreen issues. In comparison, the October 30, 2019, notice of defect states: “Approximately 2 months after the time of purchase I began having trouble with the central control unit, phone connectivity, and anti-collision braking system.” The notice of defect did not mention the Auto Idle Stop or cold temperature, suggesting that the touchscreen suffered from a single problem triggered by different conditions. However, the notice of defect did not describe the touchscreen’s specific problem (e.g. becoming non-responsive, going blank, etc.).

The controls for certain features, including navigation, phone, radio, Bluetooth, and Apple CarPlay, appear on the touchscreen,<sup>32</sup> so if the touchscreen freezes or fails to turn on, the controls for these features will not function. However, the evidence shows that malfunctions of these features arise, at least in part, from problems specific to these features and not necessarily a problem with the touchscreen. For example, testimony shows that a phone’s operating system may interfere with Bluetooth and Apple CarPlay. Additionally, the subject vehicle’s Apple CarPlay problem apparently ceased after deleting extraneous device connections from the vehicle.

In addition to the touchscreen issue associated with the Auto Idle Stop and cold temperatures alleged in the complaint, the Complainant testified that GPS, Bluetooth, radio, and USB problems occurred without the Auto Idle Stop stalling and cold temperatures, though not as consistently. Additionally, Complainant’s Exhibit 4 shows that the touchscreen exhibited various

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<sup>32</sup> Complainant’s Ex. 5.

messages/indicators including: (1) the USB port initializing; (2) “Anti Theft System” “This system has lost power. Push and hold the power button for more than two seconds to enable the system.”; (3) “No audio connection for FM”; and (4) the Honda logo. The complaint did not identify USB as a separate issue but included it in the touchscreen issue related to the Auto Idle Stop. Also, the complaint did not mention the Anti Theft System at all. The evidence does not indicate whether the Anti Theft System message reflects a problem with the touchscreen, as opposed to a problem with the Anti Theft System itself or some other electrical issue. Similarly, the evidence does not demonstrate whether the “No audio connection for FM” and USB “Initializing” messages represent a problem with the touchscreen rather than problems with the audio system and the USB port. However, the notice of defect appears to treat at least the GPS, radio, and USB problems as part of the touchscreen issue. The Complainant testified that the vehicle was taken for repair of the touchscreen on February 7, 2018, April 11, 2018, October 1, 2018, April 22, 2019, June 11, 2019, and October 8, 2019, as shown in the notice of defect. On the other hand, the service history (Complainant’s Exhibit 6) reveals at least one discrepancy with the touchscreen repairs cited in the notice of defect. The operation description for October 8, 2019, includes “SOUND SYSTEM” but not any descriptions indicative of the touchscreen itself. Moreover, the service history only provides general descriptions of the service performed, such as “BODY ELECTRICAL” which provides little in the way of identifying the actual repairs. Even more problematic, the service history does not describe the specific concerns raised by the customer.

The Complainant could not confirm whether any complaint issues were addressed at the October 8, 2019, repair visit. When asked if the complaint issues were addressed at the February 7, 2018, April 11, 2018, October 1, 2018, April 22, 2019, June 11, 2019, or October 8, 2019, repair visits, Mr. Riordan answered that he did not know, but he had added that he had mentioned the touchscreen issue at most visits. The Complainant could not confirm whether all complaint issues were addressed at the February 7, 2018, visit, the only repair visit identified in the complaint. The Complainant and Mr. Riordan acknowledged that they did not know the details of any of the repair visits, such as the concern reported, and any repair performed (aside from the information in the notice of defect cited by the Complainant). Also, Mr. Riordan did not know when the Bluetooth issue was first addressed but acknowledged that the first visit for the Bluetooth issue may have occurred in June 2019, which means that this issue at most had three repair attempts according to

the service history. As reflected above, the Complainant could not substantiate much of the necessary facts.

Without the details from the repair orders, particularly the technical information, the existing evidence leaves considerable uncertainty about the nature of the GPS, Bluetooth, radio, and USB problems and the touchscreen malfunction, including whether the GPS, Bluetooth, radio, and USB problems constitute separate issues from the touchscreen malfunction. Furthermore, the record does not show if the Anti Theft System, “No audio connection for FM”, and USB “Initializing” messages reflect the existence of separate issues or indicate problems with the touchscreen. In sum, the record lacks the specificity/facts necessary to determine that scope of the alleged touchscreen defect (i.e. what problems constitute the touchscreen issue) and whether the touchscreen defect had sufficient repair attempts.

**c. Warranty Repair Relief**

Even if a vehicle does not qualify for repurchase or replacement, it may still qualify for repair relief. Unlike repurchase or replacement relief, repair relief only requires a currently existing warrantable defect and notice of that defect but does not require any repair attempts. In this case, the final repair attempt occurred on December 3, 2019. The Complainant testified that she probably last noticed a GPS, Bluetooth, radio, USB malfunction on May 20, 2020, as shown in the third and fourth photos in Complainant’s Exhibit 4 (respectively showing the message “No audio connection for FM” and the Honda logo) and the three videos in Complainant’s Exhibit 5 (showing an unresponsive touchscreen and a failure to play music from a phone). Although the evidence does not show that the “No audio connection for FM” relates to a problem with the touchscreen as opposed to the radio or some other component, the static Honda logo and unresponsive touchscreen appear more likely than not to arise from a defect in the touchscreen itself. In conclusion, a preponderance of the evidence shows that the touchscreen malfunction qualifies for repair relief.

**2. Stalling from Auto Idle Stop**

As described in the discussion of applicable law, the Lemon Law requires the alleged defect to continue to exist even after repairs. Consequently, the evidence must show that the stalling continued to occur after the December 3, 2019, final repair attempt, when the vehicle’s software was updated to address problems with the Auto Idle Stop. However, the evidence in this case shows the vehicle had not stalled in the last eight or nine months (since September or October of

2019). Furthermore, though the Complainant and Mr. Riordan began disabling the Auto Idle Stop, the record does not show that the vehicle would have stalled with the Auto Idle Stop enabled. In sum, the record contains insufficient evidence to show that the alleged stalling issue continues to exist.

**3. Collision Mitigation Braking System (CMBS)**

The owner's manual expressly states that CMBS may activate even without a risk of collision: "The CMBS™ may activate even when you are aware of a vehicle ahead of you, or when there is no vehicle ahead." The manual even cites passing vehicles and approaching turning vehicles as examples of when such braking may occur. Although undesirable, this unnecessary braking is not a warranted manufacturing defect but a limitation in the vehicle's design, which the warranty does not cover.

**4. Passenger Door**

The Complainant testified that the passenger door issue was resolved.

**III. Findings of Fact**

1. On September 22, 2017, the Complainant, leased a new 2018 Honda Odyssey from Allen Honda, a franchised of the Respondent, in College Station, Texas. The vehicle had five miles on the odometer at the time of purchase.
2. The vehicle's limited warranty provides coverage for three years or 36,000 miles, whichever occurs first.
3. The warranty generally states that: "Honda will repair or replace any part that is defective in material or workmanship under normal use."
4. The Complainant took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
12/03/19	26,201	USB port inoperative, rear speakers inoperable, auto idle stop not functioning correctly, right front lock does not always lock, brake assist engaged passing a vehicle, radio and main display go dark
10/08/19	24,819	Power locks, sound system
06/11/19	22,415	Power locks, body electrical concern
04/22/19	20,492	Body electrical, door latch
10/01/18	13,743	Engine electrical concern: electrical system shuts down, body electrical concern: rear speakers not working
04/11/18	6,660	Body electrical concern
02/17/18	4,701	Engine electrical concern, body electrical concern
01/25/18	4,226	Trim electrical concern

5. The Respondent's final repair attempt occurred on December 3, 2019.
6. On October 20, 2019, the Complainant filed a complaint with the Department alleging that the control system (audio/information touchscreen) for the GPS (navigation), radio, USB, and Bluetooth would disconnect when the engine shuts down and restarts from the Auto Idle Stop feature; the vehicle would stall when this feature engaged; the anti-collision feature (Collision Mitigation Braking System (CMBS)) caused the vehicle to brake suddenly despite a significant distance from the object in front of it; the central control unit would not work with temperatures under 40 degrees; and the passenger door would not reliably open from the outside. On October 30, 2019, the Complainant provided a written notice of defect to the Respondent.
7. The passenger door issue was successfully resolved.
8. On October 30, 2019, the Complainant provided a written notice of defect to the Respondent.
9. On March 3, 2020, 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.
10. The hearing in this case convened on June 23, 2020, by telephone, before Hearings Examiner Andrew Kang, and the record closed on July 28, 2020. The Complainant,

represented herself and Shea Riordan also appeared for the Complainant. Abigail Mathews, attorney, represented the Respondent.

11. The vehicle's odometer displayed 34,020 miles at the time of the hearing.
12. The vehicle's warranty was in effect at the time of the hearing.
13. On May 20, 2020, the touchscreen displayed a static Honda logo, became unresponsive, and failed to play music from a phone.
14. The Auto Idle Stop related stalling had not occurred since September or October of 2019.
15. The Collision Mitigation Braking System may normally activate even without a risk of collision.

#### **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 Auto Idle Stop related stalling does not support replacement or repurchase. The Complainant did not prove that this issue continues to exist. TEX. OCC. CODE §§ 2301.603 and 2301.604(a).

7. The unexpected braking by the Collision Mitigation Braking System does not support replacement or repurchase. The Complainant did not prove that the Respondent's warranty covered this issue. TEX. OCC. CODE §§ 2301.603 and 2301.604(a).
8. The touchscreen issue does not support replacement or repurchase. The Complainant did not prove the vehicle met the requirement for a reasonable number of repair attempts for the touchscreen issue. TEX. OCC. CODE §§ 2301.604(a) and 2301.605(a).
9. 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.
10. 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).
11. The Complainant's vehicle qualifies for warranty repair. The Complainant proved that the vehicle has a defect (a non-responsive touchscreen) covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603. The Complainant or an agent of the Complainant notified the Respondent or Respondent's agent of the alleged defect(s). TEX. OCC. CODE §§ 2301.204 and 43 TEX. ADMIN. CODE § 215.202(b)(3).
12. The Respondent remains responsible to address and repair or correct any defects that are covered by the Respondent's warranty. TEX. OCC. CODE § 2301.603.

## V. Order

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that the Complainant's petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is **DISMISSED**. It is **FURTHER ORDERED** that the Respondent shall make any repairs needed to conform the subject vehicle to the applicable warranty; specifically, the Respondent shall resolve the audio/information touchscreen becoming non-responsive. Upon this Order becoming final under Texas Government Code § 2001.144:<sup>33</sup> (1) the Complainant shall deliver the vehicle

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<sup>33</sup> This Order does not become final on the date this Order is signed, instead: (1) this Order becomes final if a party does not file a motion for rehearing within 25 days after the date this Order is signed, or (2) if a party files a motion for rehearing within 25 days after the date this Order is signed, this Order becomes final when: (A) an order

to the Respondent within 20 days; and (2) the Respondent shall complete the repair of the vehicle within **20 days** after receiving it. However, if the Department determines the Complainant's refusal or inability to deliver the vehicle caused the failure to complete the required repair as prescribed, the Department may consider the Complainant to have rejected the granted relief and deem this proceeding concluded and the complaint file closed under 43 Texas Administrative Code § 215.210(2).

**SIGNED October 1, 2020**



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

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overruling the motion for rehearing is signed, or (B) the Department has not acted on the motion within 55 days after the date this Order is signed. Accordingly, this Order cannot become final (1) while a motion for rehearing remains pending; or (2) after the grant of a motion for rehearing.