

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 21-0004984 CAF**

**JUSTIN AND LYRA HOSFORD,
Complainants**

v.

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

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Justin Hosford and Lyra Hosford (Complainants) filed a complaint with the Texas Department of Motor Vehicles (Department) seeking relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged warrantable defects in their vehicle distributed by American Honda Motor Company, Inc. (Respondent). A preponderance of the evidence does not show that the subject vehicle has a currently existing warrantable defect that qualifies for repurchase/replacement or warranty repair.

I. Procedural History, Notice and Jurisdiction

Matters of notice of hearing¹ 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 April 15, 2021, in San Antonio, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainants, represented themselves. Abigail Mathews, attorney, represented the Respondent.

¹ TEX. GOV'T CODE § 2001.051.

II. Discussion

A. Applicable Law

1. Repurchase/Replacement Relief Requirements

Repurchase and replacement relief only apply to new vehicles.² 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.”³ 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.⁴ 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.⁵

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

² TEX. OCC. CODE § 2301.603.

³ TEX. OCC. CODE § 2301.604(a).

⁴ TEX. OCC. CODE § 2301.604(a).

⁵ TEX. OCC. CODE § 2301.601(4).

vehicle with a non-functioning air conditioner would be available for use and transporting passengers, its intended normal use would be substantially impaired.”⁶

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.”⁷

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.⁸

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

⁶ *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012).

⁷ *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.”).

⁸ TEX. OCC. CODE § 2301.605(a)(1)(A) and (B).

miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.⁹

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.¹⁰

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.¹¹

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.¹² 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.¹³

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;¹⁴ (2) the respondent was given an opportunity to cure the defect or

⁹ TEX. OCC. CODE § 2301.605(a)(2).

¹⁰ TEX. OCC. CODE § 2301.605(a)(3).

¹¹ TEX. OCC. CODE § 2301.605(c).

¹² *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.’”).

¹³ *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.”).

¹⁴ 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 satisfies the requirement to provide notice of the defect or nonconformity to the Respondent. TEX. OCC. CODE § 2301.606(c)(1).

nonconformity;¹⁵ and (3) the Lemon Law complaint was filed within six months after the earliest of: the warranty's expiration date or the dates on which 24 months or 24,000 miles had passed since the date of original delivery of the motor vehicle to an owner.¹⁶

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.¹⁷ The manufacturer, converter, or distributor has an obligation to “make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty.”¹⁸

3. Burden of Proof

The law places the burden of proof on the Complainants.¹⁹ The Complainants must prove all facts required for relief by a preponderance of the evidence. That is, the Complainants must present sufficient evidence to show that every required fact more likely than not exists.²⁰ Accordingly, the Complainants cannot prevail where the existence of any required fact appears unlikely or appears equally likely or unlikely.

¹⁵ TEX. OCC. CODE § 2301.606(c)(2). A respondent may delegate its opportunity to cure to a dealer. A repair visit to a dealer may satisfy 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. A respondent forgoes its opportunity to repair by replying to a written notice of defect with a settlement offer instead of arranging a repair attempt. *Id* at 2.

¹⁶ TEX. OCC. CODE § 2301.606(d)(2).

¹⁷ TEX. OCC. CODE § 2301.204; 43 TEX. ADMIN. CODE § 215.202(b)(3).

¹⁸ TEX. OCC. CODE § 2301.603(a).

¹⁹ 43 TEX. ADMIN. CODE § 215.66(d).

²⁰ *E.g., Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

4. The Complaint Identifies the Relevant Issues in this Case

The complaint identifies the relevant issues to address in this case.²¹ 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 for relief under the lemon law.”²² However, the parties may expressly or impliedly consent to hearing issues not included in the pleadings.²³ Implied consent occurs when a party introduces evidence on an unpleaded issue without objection.²⁴ Because the complaint determines the relevant issues, the Department cannot order relief for an issue not included in the complaint unless tried by consent.²⁵

5. Incidental Expenses

When repurchase or replacement is ordered, the Lemon Law provides for reimbursing the Complainants for reasonable incidental expenses resulting from the vehicle’s loss of use because of the defect.²⁶ 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

²¹ “In a contested case, each party is entitled to an opportunity: (1) for hearing after reasonable notice of not less than 10 days; and (2) to respond and to present evidence and argument on each issue involved in the case.” TEX. GOV’T CODE § 2001.051; “Notice of a hearing in a contested case must include . . . either: (A) a short, plain statement of the factual matters asserted; or (B) an attachment that incorporates by reference the factual matters asserted in the complaint or petition filed with the state agency.” 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.”).

²² 43 TEX. ADMIN. CODE § 215.202(a)(3).

²³ 43 TEX. ADMIN. CODE § 215.42; TEX. R. CIV. P. 67.

²⁴ *See Gadd v. Lynch*, 258 S.W.2d 168, 169 (Tex. Civ. App.—San Antonio 1953, writ ref’d).

²⁵ *See* TEX. GOV’T CODE §§ 2001.141(b)-(c), 2001.051-2001.052; TEX. R. CIV. P. 301.

²⁶ TEX. OCC. CODE § 2301.604.

or similar written documents).²⁷ However, the Department’s rules expressly exclude compensation for “any interest, finance charge, or insurance premiums.”²⁸

B. Summary of Complainants’ Evidence and Arguments

On February 15, 2020, the Complainants, purchased a new 2020 Honda Pilot from Gillman Honda San Antonio, a franchised dealer of the Respondent, in Selma, Texas. The vehicle had 422 miles on the odometer at the time of purchase. The vehicle’s limited warranty generally provides coverage for three years or 36,000 miles, whichever comes first. On August 6, 2020, the Complainants or a person on behalf of the Complainants or the Department provided a written notice of defect to the Respondent. On August 6, 2020, the Complainants filed a complaint with the Department alleging the vehicle had electrical wiring defects, leading to: a drain on vehicle battery, preventing vehicle from starting; loss of audio signal, sound, and hands-free calling; loud bursting, popping/static noises emanate from the front speakers; infotainment system functionality problems, skips/blanks, and popping/static; and traction control system malfunction warnings. In relevant part, the Complainants took the vehicle to a dealer for repair of the alleged issues as follows:

Date	Miles	Issue
02/20/2020	1,169	Speakers crackling, popping; screen went black; audio not working; phone connection not working; FM not working
06/22/2020	8,268	No crank/no start
07/06/2020	9,603	Radio and speedometer go black; Android Auto and Apple CarPlay will not work; Bluetooth will not connect.
08/07/2020	11,004	Black radio
09/30/2020	13,689	Radio making cracking, popping noise
10/15/2020	14,513	Crackling noise
12/05/2020	15,944	Traction control and cruise control error messages

Additionally, the vehicle was taken for an oil change on May 9, 2020, at 5,512 miles. However, this service visit did not address any complaint issues.

Mr. Hosford testified that in addition to the issues identified in the complaint, the vehicle’s speedometer would go black. He did not believe any of the issues were successfully resolved. However, Mrs. Hosford pointed out that the infotainment system (audio/information screen) had

²⁷ 43 TEX. ADMIN. CODE § 215.209(a).

²⁸ 43 TEX. ADMIN. CODE § 215.208(b)(1).

not gone blank after repair of the wiring but other issues remained. She testified that the battery drain issue occurred on June 20, 2020, when the vehicle would not start. The battery drain only occurred once. Mrs. Hosford explained that with the loss of: audio signal, sound, and hands-free calling, the audio would go away and she could not hear or be heard when using hands-free calling with her iPhone. Mr. Hosford elaborated that this loss of audio occurred both when using Apple CarPlay and when not using Apple CarPlay while connected with Bluetooth. Mrs. Hosford stated that the malfunction used to occur at least a couple of times a week but only happened once in the last four months, on January 15, 2021. She noted that the popping noise issue differed from the loss of audio. She explained that anytime the popping noise occurred while on the phone, the phone would cut out. Mrs. Hosford described that the popping noise sounded like a loud static pop and could last 20 to 30 minutes. Mr. Hosford added that the noise lasted as long as three hours, sounding like rocks hitting the windshield. Mrs. Hosford noted that the engine did not have to be on and the noise may occur while on accessory mode. She could not identify a cause but the noise seemed to occur more frequently on longer drives. She affirmed that the repair in January temporarily fixed the problem. Mrs. Hosford elaborated that the dealer did not replace the wiring harness because there was a software update for the issue. Regarding the infotainment system's temporary skips/blanks, Mr. Hosford testified that the rear entertainment system would still go blank. Mrs. Hosford stated that in the beginning, the odometer and speedometer would go blank and the center console screen would go black. However, the instrument panel never went black after the first repair. Since the wiring repair on July 6, 2020, the infotainment system had not gone black. Mrs. Hosford stated that a traction control malfunction warning occurred twice. When asked if she saw a red light or warning message, she elaborated that a message appeared but she did not notice any difference in driveability. Mr. Hosford added that the traction control message happened to him twice but the message disappeared when "clicking" it and the dealer found no diagnostic trouble codes. He believed he first noticed the traction control message about September 2020 and last noticed it in early February 2021. Mrs. Hosford last saw the traction control message before taking the vehicle for an oil change on December 5, 2020. When asked if she was referring to vehicle stability when talking about traction control, she explained that she just noticed a warning pop up. Mr. Hosford added that the message said to take the vehicle to the dealer and that he had scanned the vehicle with a code reader but did not find any codes.

Upon clarification questions, Mrs. Hosford stated that the popping noise varied in loudness and that the noise would disrupt the sound during a call but would not end the call. She stated that the noise occurred every couple of days but last occurred in March (2021), noting that she did not drive as much in April (2021). The noise seemed to occur on longer trips but the noise could not be (intentionally) replicated. Mrs. Hosford described that a car horn could be heard over the noise but the radio could not cover the noise. When asked how many times the Complainants brought the vehicle in for the noise issue, Mr. Hosford asserted that every service visit included the popping noise except for the first oil change. Mrs. Hosford was uncertain whether she mentioned that the vehicle had an issue with the same noise every time. Mr. Hosford added that he raised the noise issue every time he was present. He was not present for two service visits (Repair Order Nos. 203293 at 8,268 miles and 204197 at 9,603 miles).

On cross-examination, Mrs. Hosford affirmed that the popping noise remained. Regarding the traction control issue, she explained that the warning appeared on the infotainment screen. The vehicle was taken to the dealer once, in December 2020, for the traction control warning, but nothing was found. Mrs. Hosford testified that the instrument panel only went blank in February and never went blank after the first repair. However, the infotainment system would flash black, but this issue was remedied on August 7, 2020. Mr. and Mrs. Hosford confirmed that the vehicle was first brought in for the popping/cracking on February 20, 2020. Mr. Hosford pointed out that the August 7, 2020, repair order noted that the vehicle was brought in on June 25, 2020 (for the radio blacking out). Though the note did not mention popping noise, Mrs. Hosford thought that the noise had always occurred. When taking the vehicle to the dealer on June 25, 2020, she did not leave the vehicle for repair because the dealer did not have a loaner available and also because the dealer needed to know whether the infotainment screen or entertainment system screen malfunctioned. Mr. Hosford elaborated that the complaint did not separately identify the entertainment system issue because the infotainment issue subsumed the entertainment system issue. Mrs. Hosford explained that she had the impression that the infotainment and entertainment systems were one thing until explained by the service advisor and instructed to test the entertainment system by playing a video the whole way on a trip. Mrs. Hosford confirmed that the October 15, 2020, repair visit was in response to the Complainants' August 6, 2020, notice letter. Mrs. Hosford stated that shortly after the September 30, 2020, repair, the popping noise would occur when driving after the doors automatically locked. Sometimes the popping noise appeared

to come from the front two speakers and sometimes from behind, presumably from the passenger area speakers. The popping noise did not happen up front when the noise happened from behind. Though the noise sounded like it came from behind, now, the noise occurred loudly up front, as shown in the video exhibits. Mr. Hosford affirmed that Bluetooth is always on in the vehicle. Mrs. Hosford stated that she would almost always plug in her iPhone, and use Google Maps through Apple CarPlay. Mr. Hosford added that the videos included a phone plugged in and not plugged, using CarPlay and not using CarPlay, and in the videos recorded from the passenger seat, Mr. Hosford's Android phone was not connected at all. He elaborated that the Android phone was not connected through Bluetooth and not plugged in. Mrs. Hosford explained that she had tried unplugging the phone, turning off Bluetooth, unplugging a wire, and other scenarios when she did not use the phone and the popping would occur and the noise would continue after turning the engine off and switching to accessory mode and even turning off the radio. Mr. Hosford affirmed that a service advisor notified them of a wiring harness issue but did not mention Service Bulletin 20-058.

C. Inspection

Upon inspection, before the test drive, the subject vehicle's odometer displayed 23,295 miles. Mr. Hosford noted that he used Android Auto in the vehicle and he added that the vehicle would not update over the air. The vehicle was driven primarily on major arterials and freeways. The test drive ended with 23,308 miles on the odometer. The hands-free calling feature was tested. Mrs. Hosford pointed out that the vehicle may make a popping noise when answering a call. The vehicle appeared to operate normally during the inspection and test drive.

D. Summary of Respondent's Evidence and Arguments

Jason Kelly, District Parts and Service Manager, testified that Service Bulletin 20-058 addressed a sound described as rocks hitting the windshield, which corresponded to what he has experienced. However, he believed that the sound in the video exhibits differed from the rocks on windshield noise. He also stated that the repair in the bulletin had a very high success rate. Mr. Kelly testified that the Respondent could not control phone interference, acknowledging that the Respondent did not warrant the software installed in the vehicle or services accessed through the software. Mr. Kelly explained that the Respondent did not control third-party software and could

not monitor all the applications on a phone. Accordingly, the Respondent was not responsible for any interference from such applications. Additionally, the Respondent did not warrant Apple CarPlay or Android Auto. Mr. Kelly acknowledged that vehicle had an issue with the MOST bus network causing a crackling/popping sound addressed by installing FAKRA connectors and MOST cords. However, he opined that the noise demonstrated in the videos resulted from a phone-related issue and not the FAKRA issue. He elaborated that he never heard FAKRA-related noise from the rear and did not know of any static or call interruptions due to the FAKRA issue, instead the FAKRA issue produced a sound like a rock hitting the windshield.

On cross-examination, Mr. Kelly indicated that he had not heard the difference in the sound when physically present compared to the sound as recorded. Though he could not be certain that the current noise differed from the FAKRA-related noise, he explained that the FAKRA-related noise differed from the present noise. Mr. Kelly confirmed that the FAKRA-related noise did not interrupt the sound. He also confirmed there were known compatibility issues with certain phones and applications.

Doug Toler, Field Technical Specialist testified that he inspected the subject vehicle a few days before his November 7, 2021, report. Mr. Toler detailed that he checked the vehicle's MOST network which looked good. He could not reproduce the noise during a test drive. He checked the control units and the connections and found no issues. He noted that aftermarket accessories, including cables can cause issues. Mr. Toler stated that the dealership performed Service Bulletin 20-058 shortly before he arrived and he inspected every connector and cord/wire for proper installation. He explained that this bulletin addressed a bad connection that can cause a popping sound like rocks hitting the windshield, a screen to shut down, and communication errors. Mr. Toler did not hear the rocks hitting the windshield sound during his test drive nor did he see any traction control indicators. He surmised that the traction control warning referenced by the Complainants could be a Collision Mitigation Braking System warning that may occasionally occur without a vehicle ahead. However, he had never heard of any warnings on the infotainment screen. Rather warnings appear on the multi-information display on the gauge control module. Mr. Toler concluded that the MOST network was not the source of any popping/crackling noise. He found that the noise in the videos sounded like the FAKRA-related noise but differed in frequency and randomness. Phone-related noise can be random and can occur at certain (geographic) locations. Phone-related noise differed from the rocks hitting the windshield sound.

Instead, the sound can come from all speakers. Normally, the FAKRA-related noise originated from the front speakers, resulting in the sound like rocks hitting the windshield. Further, Mr. Toler attested that he had never experienced the MOST network cutting in and out during a phone call. He explained that in cases like this, noise continued after fixing the MOST network only when a phone was connected, whether through Bluetooth HandsFreeLink or cable to Android Auto or Apple CarPlay. Conversely, the noise would not occur without a phone on or connected. He believed the problem was more likely a software issue than a Honda hardware issue, given the different control units and different manufacturers that need to make their software compatible with each other. Moreover, bugs may appear with software updates. Further, the problem may occur with a device other than a phone or any outside influence that interferes with the system. Mr. Toler concluded that a manufacturing defect did not cause the issue here.

On cross-examination, Mr. Toler explained that turning off the phone would stop the noise, since it would turn off Bluetooth, but disconnecting the phone (cable) would not necessarily do so, since the phone may be connected by Bluetooth. He clarified that all phones paired with the vehicle must be turned off to prevent the noise. The noise cannot be duplicated on demand and would occur randomly. With respect to the rear entertainment system, Mr. Toler stated that neither a phone nor the MOST system would cause the rear screen to go black. Moreover, a blank screen at the rear was normally a component issue but not a MOST connection issue. Mr. Toler explained that each component (including the infotainment system) was a computer with its own software.

On clarifying questions, when asked if outside electromagnetic interference can cause noise, Mr. Toler replied that numerous factors can cause issues, such as switching cell towers and driving by or being near electrical equipment.

E. Analysis

As explained in the discussion of applicable law, the law imposes the burden of proof on the Complainant. Accordingly, the Complainant must affirmatively prove every Lemon Law element by a preponderance of the evidence. In other words, the Complainant must prove that every required fact is more likely than not true. If a required fact appears equally likely or unlikely, the burden of proof has not been met. In this case, a preponderance of the evidence does not show that the subject vehicle has a currently existing defect covered under warranty (warrantable defect).

Lemon Law relief does not apply to all problems that may occur with a vehicle but only to warrantable defects that continue to exist (i.e., currently exist) after repairs.²⁹ The Lemon Law does not require that a respondent provide any particular warranty coverage nor does the Lemon Law impose any specific standards for vehicle characteristics. The Lemon Law only requires a respondent to conform its vehicles to whatever coverage the warranty provides. In part, the subject vehicle's warranty 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.³⁰

According to these terms, the warranty only applies to defects in materials or workmanship (manufacturing defects).³¹ Additionally, the Owner's Manual includes the following software-related disclaimers: "HONDA and the third-party authors, licensors, and distributors of such software disclaim all warranties and all liability arising from any and all use or distribution of the software"³² and "HONDA makes no warranties that the SOFTWARE or SERVICES will meet your requirements, or that the SOFTWARE or SERVICES will be uninterrupted, timely, secure, noninfringing or error free."³³

A defectively manufactured vehicle has a flaw so that it does not conform to the manufacturer's specifications, and is not identical to other same model vehicles.³⁴ A

²⁹ TEX. OCC. CODE §§ 2301.603(a), 2301.604(a); TEX. OCC. CODE § 2301.204.

³⁰ Complainant's Ex. 3, New Vehicle Limited Warranty.

³¹ 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.").

³² Respondent's Ex. 2 at 359.

³³ Respondent's Ex. 2 at 365.

³⁴ *Ford Motor Co. v. Pool*, 688 S.W.2d 879, 881 (Tex. App.—Texarkana 1985), *aff'd* in part on other grounds, *rev'd* in part on other grounds, 715 S.W.2d 629 (Tex. 1986) ("Manufacturing defect cases involve products which are flawed, i.e., which do not conform to the manufacturer's own specifications, and are not identical to their mass-produced siblings.").

manufacturing defect occurs when the vehicle varies from the manufacturer's design standards, causing that vehicle to differ from other vehicles of the same kind.³⁵ In other words, a manufacturing defect is an isolated aberration, an unintended configuration occurring only in those vehicles not produced according to the manufacturer's specifications.³⁶ 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. Accordingly, manufacturing defects occur during manufacturing and exist when the vehicle leaves the manufacturing plant. In contrast, design issues result from the manufacturer's design of the vehicle, even though manufactured without any flaws.³⁷ Design defects/characteristics exist in the vehicle's specifications, before the vehicle is even manufactured, and do not arise from any error during manufacturing.³⁸ Accordingly, a design defect/characteristic exists in all vehicles of the same design, but the vehicle's intended configuration may produce unintended and unwanted results.³⁹ Unlike manufacturing defects, issues that do not arise from manufacturing, such as the vehicle's design characteristics (which exist before manufacturing) or dealer representations and improper dealer repairs (which occur after manufacturing), are not warrantable defects. Because the warranty only covers manufacturing defects, the Lemon Law does not provide relief for design characteristics, design defects, or any other non-manufacturing problem. Even though an issue may be unintended and unwanted, the Lemon Law provides no relief unless the issue constitutes a manufacturing defect.

³⁵ *Ridgway v. Ford Motor Co.*, 82 S.W.3d 26, 31-32 (Tex. App.—San Antonio 2002), *rev'd on other grounds*, 135 S.W.3d 598 (Tex. 2004) (“A manufacturing defect may be distinguished from a design defect. A manufacturing defect occurs when the product varies from the manufacturer-established design standards, causing that product to deviate from the normal safety of other products of its kind.”).

³⁶ *Harduvel v. Gen. Dynamics Corp.*, 878 F.2d 1311, 1317 (11th Cir. 1989) (“This distinction between ‘aberrational’ defects and defects occurring throughout an entire line of products is frequently used in tort law to separate defects of manufacture from those of design. . . . Stated another way, the distinction is between an unintended configuration [a manufacturing defect], and an intended configuration that may produce unintended and unwanted results [a design defect].”).

³⁷ *Ford Motor Co. v. Pool*, 688 S.W.2d 879, 881 (Tex. App.—Texarkana 1985), *aff'd in part on other grounds*, *rev'd in part on other grounds*, 715 S.W.2d 629 (Tex. 1986) (“Defective design cases, however, are not based on consumer expectancy, but on the manufacturer's design of a product . . . even though not flawed in its manufacture.”).

³⁸ 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).

³⁹ *Harduvel v. Gen. Dynamics Corp.*, 878 F.2d 1311, 1317 (11th Cir. 1989) (“This distinction between ‘aberrational’ defects and defects occurring throughout an entire line of products is frequently used in tort law to separate defects of manufacture from those of design. . . . Stated another way, the distinction is between an unintended configuration [a manufacturing defect], and an intended configuration that may produce unintended and unwanted results [a design defect].”).

In the present case, the complaint describes the issue as an electrical wiring defect with multiple symptoms:

Serious defect with electrical wiring within vehicle, and has led to the following issues with the vehicle: - Drain on vehicle battery, preventing vehicle from starting (serious hazard in summer months) - Sustained loss of audio signal, sound, and ability to make hands-free phone calls through audio system - Ongoing and distracting loud bursting audio popping/static noises emanate from windshield speakers (unsafe on long trips distracting driver) - Infotainment system unable to be used properly without interruption, temporary skips/blanks, and audio popping/static - Regular alert of traction control system malfunction.

The complaint essentially identifies five issues rather than a single wiring issue with different symptoms: (1) battery drain/no-start; (2) interference with phone features; (3) popping noise; (4) infotainment system malfunctions; and (5) traction control warnings. At the hearing, Mr. Hosford identified a sixth issue not included in the complaint: the vehicle's speedometer blacking out. Additionally, the complainants mistakenly believed that the rear entertainment system was a part of the infotainment system and therefore did not specify the rear entertainment system malfunctions as an issue in the complaint.

1. Battery Drain

The evidence shows that the battery drain leading to a no-start condition only occurred once, on June 20, 2020, and did not reoccur after repair. Accordingly, the battery drain is not a currently existing condition that qualifies for any relief.

2. Phone Features

A preponderance of the evidence does not show that the issues with the vehicle's phone features arise from a manufacturing defect. Mrs. Hosford explained that the audio would cut out and she could not hear or be heard when using hands-free calling with her iPhone. Mr. Toler observed that the MOST network had not caused phones to cut in and out. Rather, he concluded that the phone issues more likely related to software than the vehicle's hardware. Significantly, a variety of unwarranted conditions (such as software bugs, software/hardware compatibility problems, electromagnetic interference, switching between cell towers, etc.) may interfere with

the phone features.⁴⁰ The owner's manual lists the iPhone 7 and 7 Plus as the latest iPhones compatible with the audio system, whereas Mrs. Hosford used an iPhone X (iPhone "10"). Moreover, the owner's manual cautions: "This system may not work with all software versions of these devices."⁴¹ In the same vein, the owner's manual specifies that "HONDA and the third-party authors, licensors, and distributors of such software disclaim all warranties and all liability arising from any and all use or distribution of the software"⁴² and "HONDA makes no warranties that the SOFTWARE or SERVICES will meet your requirements, or that the SOFTWARE or SERVICES will be uninterrupted, timely, secure, noninfringing or error free."⁴³ Given the available evidence, the phone-related issues appear as likely to arise from an unwarranted condition as from a manufacturing defect.

3. Popping Noise

The record is unclear whether the current popping noise arises from a warrantable defect or whether the noise results from an unwarranted software issue or outside influence. On the one hand, the noise in the Complainant's videos ostensibly matches the description of "popping or crackling from the speakers" in Service Bulletin 20-058. However, the subject vehicle's noise differed in frequency and randomness from the FAKRA-related noise Mr. Toler had heard. In his experience, noise after a FAKRA repair only occurred with a phone connected. Mrs. Hosford observed the noise occurring even when trying different combinations of unplugging the phone, turning Bluetooth off, unplugging the cable, turning the power mode to accessory, and turning off the radio. However, the evidence indicates that the phone would need to be turned off to ensure complete disconnection. Significantly, the same loose MOST bus network connection causes both the screen blacking out and the popping noise. In the present case, the FAKRA repair appears to have resolved the loose MOST bus network connection as evidenced by the infotainment screen no longer blacking out, indicating that any existing popping noise was not due to a loose MOST bus network connection. Additionally, Mrs. Hosford stated that the noise appeared to come from

⁴⁰ Respondent's Ex. 2, Owner's Manual 2020 Pilot - Apple CarPlay, Android Auto, Compatible iPod, iPad, iPhone, and USB Flash Drives, Honda App License Agreement, Legal Information on Apple CarPlay/Android Auto, About Open Source Licenses, License Information*; Respondent's Ex. 3, Owner's Manual 2020 Pilot - Compatible iPod, iPad, iPhone, and USB Flash Drives.

⁴¹ Respondent's Ex. 3.

⁴² Respondent's Ex. 2 at 359.

⁴³ Respondent's Ex. 2 at 365.

the front and the back but now came from the front. In comparison, FAKRA-related noise would come from the front tweeters, thereby causing the sound of rocks hitting the windshield but phone-related noise may come from all speakers. Given the available evidence, the popping noise does not appear more likely than not to result from a warrantable defect.

4. Infotainment System

Mrs. Hosford testified that the infotainment screen had not gone blank after repair of the wiring (installing FAKRA connectors and MOST cords to repair the loose connections in the MOST bus network). Accordingly, the repair appears to have resolved the issue with the infotainment system.

5. Traction Control

The evidence is unclear as to the nature of the traction control issue and whether the issue continues to exist. The Complainants testified that a traction control message appeared on the infotainment screen to take the vehicle to a dealer. However, no indicators came on, Mrs. Hosford could not discern any difference in driveability, and Mr. Hosford found no diagnostic trouble codes using a code reader. Testimony shows the traction control message last appeared in February 2020. Mr. Toler noted that warnings appear on the multi-information display on the instrument panel and he did not know of any warnings appearing on the infotainment screen. The absence of performance changes, indicator lights, and trouble codes, and the given the location of the message on the infotainment display rather than the instrument cluster suggests the message was informational rather than a warning about a malfunction. However, the evidence here is insufficient to determine whether the traction control message arises from a warranted defect.

6. Blank Instrument Panel

The evidence shows that the blank instrument panel issue was successfully resolved by a software update. Mrs. Hosford testified that the instrument panel did not go black after the first repair. Because this issue no longer exists, it cannot support any relief.

7. Rear Entertainment System

The complaint did not specify the issue regarding the rear entertainment system, making it ineligible for relief. As outlined in the discussion of applicable law, the Department's rules require the complaint to state sufficient facts to know the nature of the complaint and the specific problems

or circumstances underlying the Lemon Law claim. Although a respondent may consent to hearing unpleaded issues, the Lemon Law prohibits granting repurchase/replacement relief without written notice of the defect and an opportunity to repair the defect. Further, the Warranty Performance Law requires notice of the defect and pleading of the defect in the complaint for the Department to exercise jurisdiction over a warranty repair relief claim. In the present case the neither the notice of defect itself nor the repair orders that would have been attached to the notice mention the rear entertainment system. Consequently, the rear entertainment system issue cannot support repurchase or replacement. Additionally, since the complaint did not specify the rear entertainment system issue, the Department cannot grant warranty repair relief based on the rear entertainment system.

III. Findings of Fact

1. On February 15, 2020, the Complainants, purchased a new 2020 Honda Pilot from Gillman Honda San Antonio, a franchised dealer of the Respondent, in Selma, Texas. The vehicle had 422 miles on the odometer at the time of purchase.
2. The vehicle's limited warranty generally provides coverage for three years or 36,000 miles, whichever comes first.
3. The Complainants took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
02/20/2020	1,169	Speakers crackling, popping; screen went black; audio not working; phone connection not working; FM not working
06/22/2020	8,268	No crank/no start
07/06/2020	9,603	Radio and speedometer go black; Android Auto and Apple CarPlay will not work; Bluetooth will not connect.
08/07/2020	11,004	Black radio
09/30/2020	13,689	Radio making cracking, popping noise
10/15/2020	14,513	Crackling noise
12/05/2020	15,944	Traction control and cruise control error messages

Additionally, the vehicle was taken for an oil change on May 9, 2020, at 5,512 miles. However, this service visit did not address any complaint issues.

4. On August 6, 2020, the Complainants or a person on behalf of the Complainants or the Department provided a written notice of defect to the Respondent.

5. On August 6, 2020, the Complainants filed a complaint with the Department alleging the vehicle had electrical wiring defects, leading to: a drain on vehicle battery, preventing vehicle from starting; loss of audio signal, sound, and hands-free calling; loud bursting, popping/static noises emanate from the front speakers; infotainment system functionality problems, skips/blanks, and popping/static; and traction control system malfunction warnings.
6. On February 4, 2021, 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 April 15, 2021, in San Antonio, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainants, represented themselves. Abigail Mathews, attorney, represented the Respondent.
8. The vehicle's odometer displayed 23,295 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 battery drain leading to a no-start condition only occurred once, on June 20, 2020, and did not reoccur after repair.
12. The audio would cut out when using hands-free calling. The MOST network did not cause phones to cut in and out. A variety of unwarranted conditions (such as software bugs, software/hardware compatibility problems, electromagnetic interference, switching between cell towers, etc.) may interfere with the phone features. The owner's manual lists the iPhone 7 and 7 Plus as the latest iPhones compatible with the audio system. Mrs. Hosford used an iPhone X (iPhone "10"). The owner's manual cautions: "This system may not work with all software versions of these devices." The owner's manual specifies that "HONDA and the third-party authors, licensors, and distributors of such software disclaim

all warranties and all liability arising from any and all use or distribution of the software” and “HONDA makes no warranties that the SOFTWARE or SERVICES will meet your requirements, or that the SOFTWARE or SERVICES will be uninterrupted, timely, secure, noninfringing or error free.”

13. The complained of noise appears to match the description of “popping or crackling from the speakers” caused by a loose MOST bus network connection addressed by the FAKRA repair in Service Bulletin 20-058. However, noise after a FAKRA repair may be caused by the connection of a phone. Phones must be turned off to ensure complete disconnection. Significantly, the same loose MOST bus network connection causes both the infotainment screen blacking out and the popping noise. In the present case, the FAKRA repair appears to have resolved the loose MOST bus network connection as evidenced by the infotainment screen no longer blacking out, indicating that any existing popping noise was not due to a loose MOST bus network connection. Additionally, the noise initially appeared to come from both the front and the back of the vehicle. In comparison, FAKRA-related noise would normally come from the front tweeters, thereby causing the sound of rocks hitting the windshield.
14. The infotainment screen no longer went blank after repair of the wiring (installing FAKRA connectors and MOST cords to repair the loose connections in the MOST bus network).
15. A traction control message appeared on the infotainment screen to take the vehicle to a dealer. However, no indicators came on, the vehicle’s performance did not change, and the vehicle had no diagnostic trouble codes. The traction control message last appeared in February 2020. Warnings messages appear on the multi-information display on the instrument panel and not on the infotainment screen.
16. The blank instrument panel issue was successfully resolved by a software update.
17. The complaint did not specify the issue regarding the rear entertainment system. Neither the notice of defect nor the repair orders that would have been attached to the notice mention the rear entertainment system.

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 Complainants filed a sufficient complaint with the Department. 43 TEX. ADMIN. CODE § 215.202.
4. The parties received proper notice of the hearing. TEX. GOV'T CODE §§ 2001.051, 2001.052. 43 TEX. ADMIN. CODE § 215.206(2).
5. The Complainants bears the burden of proof in this matter. 43 TEX. ADMIN. CODE § 206.66(d).
6. The Complainants' vehicle does not qualify for replacement or repurchase. The Complainants 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 rear entertainment system issue cannot support replacement or repurchase. The Complainants or a person on behalf of the Complainants did not provide sufficient notice of the relevant alleged defect(s) to the Respondent. This Order may not require repurchase or replacement of the vehicle without written notice of the defect/nonconformity to the Respondent. TEX. OCC. CODE § 2301.606(c)(1).
8. The Complainants do 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.
9. The Complainants' vehicle does not qualify for warranty repair. The Complainants 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 Complainants' vehicle does not qualify for warranty repair of the rear entertainment system. The Complainants did not specify the relevant alleged defect(s) in the complaint. TEX. OCC. CODE §§ 2301.204 and 43 TEX. ADMIN. CODE § 215.202(b)(3).
11. The Respondent remains responsible to address and repair or correct any defects that are covered by the Respondent's warranty. TEX. OCC. CODE § 2301.603.

V. Order

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that the Complainants' petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is **DISMISSED**.

SIGNED June 21, 2021



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