TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 21-0008042 CAF

JACOB MATHEW, **Complainant**	§	**BEFORE THE OFFICE**
v.	§	**OF**
AMERICAN HONDA MOTOR COMPANY, INC., **Respondent**	§	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Jacob Mathew (Complainant) filed a complaint with the Texas Department of Motor Vehicles (Department) seeking relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged warrantable defects in his vehicle distributed by American Honda Motor Company, Inc. (Respondent). A preponderance of the evidence does not show that the subject vehicle has a warrantable defect. Consequently, the Complainant's vehicle does not qualify for repurchase/replacement or warranty repair.

I. Procedural History, Notice and Jurisdiction

Matters of notice of hearing[1] 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 July 5, 2021, in Carrollton, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented himself herself. Abigail Mathews, Outside Counsel, 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

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[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

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[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

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[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 Complainant.[19] 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.[20] Accordingly, the Complainant cannot prevail where the existence of any required fact appears unlikely or appears equally likely or unlikely.

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[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 authorizes 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 Complainant 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

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[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 Complainant's Evidence and Arguments

On November 30, 2019, the Complainant, purchased a new 2020 Honda Odyssey from AutoNation Honda Lewisville, a franchised dealer of the Respondent, in Lewisville, Texas. The vehicle had 8 miles on the odometer at the time of purchase. The vehicle's limited warranty provides bumper to bumper coverage for three years or 36,000 miles, whichever occurs first.

On or about March 22, 2021, the Complainant provided a written notice of defect to the Respondent. On March 18, 2021, the Complainant filed a complaint with the Department alleging that the audio unit and front display was making a crackling sound and shutting off. In relevant part, the Complainant took the vehicle to a dealer for repair of the alleged issues as follows:

Date	Miles	Issue
10/12/2020	17,165	The audio/display unit cuts off while driving and has a continuous popping/crackling noise.
10/21/2020	17,589	The audio/display unit cuts off while driving and has a continuous popping/crackling noise.
10/30/2021	18,083	The audio/display unit cuts off while driving and has a continuous popping/crackling noise.
01/04/2021	21,448	The audio/display unit cuts off while driving and has a continuous popping/crackling noise.
01/26/2021	22,361	The audio/display unit cuts off while driving and has a continuous popping/crackling noise.
04/15/2021	27,222	The audio/display unit cuts off while driving and has a continuous popping/crackling noise.
04/30/2021	27,535	The audio/display unit cuts off while driving and has a continuous popping/crackling noise.

Mrs. Mathew stated that the first time they noticed the sound issue was in February or March of 2020. She testified that she drove the car around 40 miles every day. She clarified that those were mostly highway miles. Mrs. Mathew described the noise as a crackling sound that sounded like the speaker was breaking. The Complainant described the noise as sounding like a short circuit. They agreed that the sound came out of both sides of the front speakers. She explained that there was no pattern to when the crackling would start, but when it did, it would always be

[27] 43 TEX. ADMIN. CODE § 215.209(a).

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

followed by the display going off. She did confirm that the crackling still occurred but the screen did not turn off. She testified that she would hear the sound every trip she would go on and that it was the same sound since the problem started. She recounted that the screen had not turned black since the last repair on April 30, 2021. She added that she last heard the noise on the day of the hearing but the issue was less frequent. The Complainant also added that the screen cutting off would sometimes cut off the GPS or the backup camera making him feel unsafe.

The Complainant testified that he was provided a loaner car four times of the times he took the car into the dealership. He recalled that one or two times the dealer said the issue was outside of warranty and had to wait for the Respondent to approve the rental. He stated that the Respondent did not approve a rental for the first visit to the Dealership for repairs

The Complainant opined that it was very difficult to work with the Respondent. He stated that there were several times where no one called back after the Respondent claimed they would. He pointed out that the last time the car was taken to the dealership for repairs, it took almost a month to get the car fixed. He expressed a desire to have the car repurchased.

On cross-examination, Mrs. Mathew confirmed that she was the primary driver of the vehicle but that the Complainant also drove the vehicle an equal amount. She clarified that she heard the crackling sound every day before the repair, and now she hears it occasionally. She established that during the most recent occurrence of the sound, that all three members of the family were in the car and had a phone connected to the car. She recounted that the Complainant's phone was connected during that drive and that he was driving. She testified that her Bluetooth was on but not connected to the car at the time. Their daughter, Ms. Serena Mathew, commented that her Bluetooth was on as well but her phone was not registered to the car. Mrs. Mathew explained that she mostly heard the noise on phone calls but she clarified that the sound occurred with some audio playing. She acknowledged that prior to the repair, she heard the sound more often and under more circumstances. She claimed that the crackling sound did not really interfere with phone calls except at the beginning of the call where the other side of the call can hear some of the interruption. Mrs. Mathew stated that she used an iPhone 11.

Mrs. Mathew testified about an accident that occurred in September 2020 that damaged the front bumper. The Complainant stated that the cost to repair was about $6000. Mrs. Mathew stated

that she had the recalls serviced on her car but after the recalls were performed, the display started to malfunction.

On cross-examination, the Complainant claimed that you would hear the crackling sound on about 50% of calls (depending on the length of the call). He reiterated that the person on the other side of the call could hear the sound through the call. He acknowledged that the sound does not interfere with calls as much since the last repair. He further affirmed that the display has not cut off since the repair on May 28, 2021.

C. Inspection

Upon inspection at the hearing, before the test drive, the vehicle's odometer displayed 31,153 miles. The Complainant confirmed that his phone was paired with the vehicle. The Complainant noted that the issue was sporadic and did not happen on every drive. He stated that his phone was usually connected to the audio system when he drove. He affirmed that media or persons on a call and noise could be heard at the same time. He confirmed that he was streaming media from his phone using the Spectrum TV application. He noted that the noise could be heard when someone called but he was unsure if the person on the other side of the call could hear the noise. The noise would not interrupt the call and the audio would not cut off, but the display used to turn off. The Complainant received two phone calls, which occurred normally. The vehicle did not have any pending updates shown on the display. The front license plate had some damage. The test drive ended with 31,165 miles on the odometer. The vehicle was driven predominantly on major arterial roads. The vehicle appeared to perform normally during the test drive.

D. Summary of Respondent's Evidence and Arguments

Jeff Queen, a District Parts and Service Manager for the respondent, testified that he was contacted by the dealer to assist with this vehicle in mid-April 2021. He stated that his role was to approve any parts or repairs that would be necessary. When asked about the vehicle specifically, he answered that he found that the dealership had not performed a FAKRA service bulletin correctly. He explained that the service bulletin was supposed to tell the technician to replace three certain connections with more secure connections. He elaborated that the connectors from the factory could be loose and the new connections would make them more rugged. He confirmed that the service bulletin was meant to cover the exact issue of the popping sound. He reported that the

dealership did not properly preform the service bulletin because they added extra length and an extra connection that added additional fail points and additional stress to the system. He recalled the service engineer's recommendation when he discovered the faulty repair job was to completely replace the system with all brand-new components. He testified that when the issue persisted, he noticed that the dealership had not replaced the correct number of parts. He mentioned that he immediately informed the dealer to install the remaining new parts. He commented that the parts are hard to get due to several issues outside of the Respondent's control. He affirmed that the May 25, 2021, repair conformed with the service engineer's instructions.

Mr. Queen confirmed that the popping/crackling sound is known as the FAKRA issue. He expressed that the suggested repair is over 99% effective if performed correctly. He was not aware of any other circumstance where this issue would be able to be heard through the other end of a phone call. He claimed that the complaint made during the hearing was not comparative to a FAKRA complaint.

Mr. Queen explained that a phone interference could make the described sound, such as from cell towers. He noted that the Respondent did not provide a warranty for the software systems as listed in the owner's manual. He also added that the Respondent does not warrant the carplay/android auto features or that the infotainment system will work with any certain apps. He identified that the iPhone 6+ is the latest iPhone that is listed as compatible with the system in the owner's manual.

Mr. Queen stated that he did not believe the vehicle had a manufacturing defect. He denied that the issue was a defect that would substantially affect the market value of the car. He expressed that the complaint at the hearing was not the same as the complaint in the original complaint. He affirmed that the crackling issues never creates a serious safety concern and there is no risk of fire or explosion.

Mr. Queen commented that previous damage on a vehicle would significantly impair the market value of the car. He opined that the $6000 accident would have a significant impact on the market value of the Complainant's car.

On cross-examination, Mr. Queen clarified that a loss of GPS or a backup camera is not a safety feature because they are relatively new features and cars functioned safely for years without them. He described the backup camera as a safety assistance feature. He confirmed that the

Respondent could not verify that a phone beyond the iPhone 6 Plus would function correctly with the system. He explained that he was not contacted until after the Lemon Law complaint had been filed. He reiterated that the Respondent only warrants hardware issues but does not offer any warranty on software problems.

On closing, the Respondent argued that the issues with the car at the time of the hearing are not the same as the issues in the Lemon Law complaint. The Respondent claimed that the issue is not a manufacturing defect.

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 this case, a preponderance of the evidence does not show that the subject vehicle has a 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."[30] According to these terms, the warranty only applies to defects in materials or workmanship (manufacturing defects).[31]

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

[30] Complainant's Ex. 1, 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.").

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.[32] A 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.[33] 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.[34] 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.[35] Design characteristics exist in the vehicle's specifications, before the vehicle is even manufactured, and do not arise from any error during manufacturing.[36] Accordingly, a design characteristic exists in all vehicles of the same design, but the vehicle's intended configuration may produce unintended and unwanted results.[37] Unlike manufacturing defects, issues that do not arise from manufacturing, such as the vehicle's design characteristics (which exist before manufacturing) or dealer

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[32] *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.").

[33] *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.).

[34] *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].").

[35] *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.").

[36] 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).

[37] *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].").

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.

The record reflects that the Complainant encountered substantial problems addressing the vehicle's issues. However, the Lemon Law requires a warrantable defect to continue to exist. In this case, the record reflects that the present issue differs from the original FAKRA-related issue addressed in Service Bulletin 20-049. Service Bulletin 20-049 concerned a known defect, a loose connection in the MOST bus network, that may the cause popping/crackling noise and display (audio/information screen) issues remedied by installing FAKRA connectors. Consistent with the FAKRA-related issue, the complaint in this case described that the display would cut off after the popping/crackling noise occurred. However, the evidence indicates that any remaining noise arises from design-related issue and not from a warrantable defect. Mrs. Mathew testified that, before the final repair, the crackling noise was always followed by the display blacking out. After the final repair, the display no longer blacked out, suggesting that the service bulletin repair corrected the loose connection.[38] Nevertheless, the vehicle continued to produce a noise. However, the currently existing noise appears to result from phone-related issues and not the FAKRA-related issue. Mrs. Mathew observed that the noise occurred less frequently after repair, consistent with the elimination of the FAKRA-related noise but with phone-related noise continuing. Further, Mrs. Mathew explained that the noise occurred during phone calls or with audio playing. The noise would occur on calls when first connecting as opposed to occurring randomly. Mr. Mathew stated that he usually had his phone connected when driving. Additionally, he indicated that the noise would occur when streaming media through his phone. In contrast, the record does not show that the existing noise occurred without some involvement of a phone. Mr. Queen pointed out that phone-related interference could have caused the existing noise. Additionally, the owner's manual lists the iPhone 6 and iPhone 6 Plus as the latest iPhones compatible with the vehicle's audio system. Further, the owner's manual explains that: "This system may not work with all software

[38] The dealer previously performed the service bulletin repair incorrectly, thereby leaving the FAKRA-related issue unresolved.

versions of these devices."[39] Accordingly, software issues may interfere with audio system operation even when using a compatible phone. Regarding the vehicle's own software, the owner's manual expressly states that the Respondent makes no warranty:

> You understand and agree that your use of the SOFTWARE and SERVICES are solely at your own risk and that you will be solely responsible for any damage to your VEHICLE's multimedia system or any other equipment or any loss of data that may result from your use of the SOFTWARE or SERVICES. THE SOFTWARE AND SERVICES ARE PROVIDED ON AN "AS IS" AND "AS AVAILABLE" BASIS WITHOUT ANY WARRANTY OF ANY KIND, EXPRESSED, IMPLIED OR STATUTORY. WE SPECIFICALLY DISCLAIM ANY IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NON-INFRINGEMENT. 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.

Consequently, any issues due to the vehicle's software cannot support any relief. In sum the, evidence does not show that a warranted manufacturing defect more likely caused the existing noise as opposed to any unwarranted design issues.

III. Findings of Fact

1. On November 30, 2019, the Complainant, purchased a new 2020 Honda Odyssey from AutoNation Honda Lewisville, a franchised dealer of the Respondent, in Lewisville, Texas. The vehicle had 8 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 vehicle's warranty states that: "Honda will repair or replace any part that is defective in material or workmanship under normal use."

[39] Respondent's Ex. 4, Owner's Manual 2020 Odyssey, at 379.

4. The Complainant took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
10/12/2020	17,165	The audio/display unit cuts off while driving and has a continuous popping/crackling noise.
10/21/2020	17,589	The audio/display unit cuts off while driving and has a continuous popping/crackling noise.
10/30/2021	18,083	The audio/display unit cuts off while driving and has a continuous popping/crackling noise.
01/04/2021	21,448	The audio/display unit cuts off while driving and has a continuous popping/crackling noise.
01/26/2021	22,361	The audio/display unit cuts off while driving and has a continuous popping/crackling noise.
04/15/2021	27,222	The audio/display unit cuts off while driving and has a continuous popping/crackling noise.
04/30/2021	27,535	The audio/display unit cuts off while driving and has a continuous popping/crackling noise.

5. On March 18, 2021, the Complainant filed a complaint with the Department alleging that the audio unit and front display made a crackling sound and would shut off.

6. On March 22, 2021, the Complainant provided a written notice of defect to the Respondent.

7. On May 11, 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.

8. The hearing in this case convened on July 5, 2021, in Carrollton, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented himself. Abigail Mathews, Attorney, represented the Respondent.

9. The vehicle's odometer displayed 31,153 miles at the time of the hearing.

10. The vehicle's warranty was in effect at the time of the hearing.

11. The vehicle operated normally during the test drive at the hearing.

12. A loose connection in the MOST bus network, may cause popping/crackling noise and display (audio/information screen) issues. Under Service Bulletin 20-049, the loose connection is repaired by installing FAKRA connectors. The dealer initially performed the

FAKRA repair improperly. However, the FAKRA repair was subsequently performed correctly.

13. After the correct FAKRA repair, the audio/information screen no longer blacked out and the vehicle exhibited less noise.

14. The FAKRA repair resolved the display and noise issues described remaining noise described in Service Bulletin 20-049. The remaining noise did not relate to the loose connection but resulted from phone-related issues.

15. The currently existing noise would occur with a phone connected to the vehicle during calls and when streaming media.

16. Phone-related interference may cause noise.

IV. Conclusions of Law

1. The Texas Department of Motor Vehicles has jurisdiction over this matter. TEX. OCC. CODE §§ 2301.601-2301.613 and 2301.204.

2. A hearings examiner of the Department's Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a decision with findings of fact and conclusions of law, and the issuance of a final order. TEX. OCC. CODE § 2301.704.

3. The Complainant filed a sufficient complaint with the Department. 43 TEX. ADMIN. CODE § 215.202.

4. The parties received proper notice of the hearing. TEX. GOV'T CODE §§ 2001.051, 2001.052. 43 TEX. ADMIN. CODE § 215.206(2).

5. The Complainant bears the burden of proof in this matter. 43 TEX. ADMIN. CODE § 206.66(d).

6. The Complainant's vehicle does not qualify for replacement or repurchase. The Complainant did not prove that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.603 and 2301.604(a).

7. The Complainant does not qualify for reimbursement of incidental expenses because the vehicle does not qualify for replacement or repurchase. TEX. OCC. CODE §§ 2301.603, 2301.604(a); 43 TEX. ADMIN. CODE § 215.209.

8. The Complainant's vehicle does not qualify for warranty repair. The Complainant did not prove that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603.

9. The Respondent remains responsible to address and repair or correct any defects that are covered by the Respondent's warranty. TEX. OCC. CODE § 2301.603.

V. Order

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

SIGNED August 13, 2021

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