

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 21-0014837 CAF**

**MISSIE CRAIG,
Complainant**

v.

**MERCEDES-BENZ USA, LLC,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Missie Craig (Complainant) filed a complaint with the Texas Department of Motor Vehicles (Department) seeking relief pursuant to Texas Occupations Code § 2301.204 (Warranty Performance) for alleged warrantable defects in her vehicle distributed by Mercedes-Benz USA, LLC (Respondent). A preponderance of the evidence shows that the subject vehicle has a warrantable defect that qualifies for 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 26, 2022, in Plano, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented herself. Matthew Swanger, Attorney, represented the Respondent. Ben Mitchell, Service Advisor and Jeff Quimby, Service Advisor, also testified for 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

The Department applies a reasonable purchaser standard for determining whether a defect substantially impairs use. Under this standard, the factfinder considers “whether a defect or nonconformity hampers the intended normal operation of the vehicle” from the perspective of a reasonable prospective purchaser. For instance, “while a vehicle with a non-functioning air

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).

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

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”; the vehicle owner provided written notice of the defect to the manufacturer, converter, distributor, or its authorized agent before the warranty's expiration; and the owner filed a complaint with the Department specifying the defect.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.

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

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 December 26, 2020, the Complainant, purchased a used 2020 Mercedes-Benz CLS from Mercedes-Benz of Plano, a franchised dealer of the Respondent, in Plano, Texas. The vehicle had 8,723 miles on the odometer at the time of purchase. The vehicle's limited warranty provides bumper to bumper coverage from the initial purchase for four years or 50,000 miles, whichever occurs first.

On or about July 26, 2021, the Department provided a written notice of defect to the Respondent. On July 22, 2021, the Complainant filed a complaint with the Department alleging that: camera made loud noises, brakes squealed, (front) passenger side windows would not seal properly, vehicle required new front tires and an alignment, and air conditioner (AC) blew hot air. In relevant part, the Complainant took the vehicle to a dealer for repair of the alleged issues as follows:

Date	Miles	Issue
02/08/2021	12,067	There was wind noise and water coming from the passenger side window. There was also noise coming from the brakes. The rear-view mirror made a motor noise in the mornings.
04/28/2021	16,470	There was noise coming from the brakes. There was wind noise coming from the passenger side window. The passenger side window fogged up.
07/08/2021	20,334	The air conditioning was blowing warm. Replace front two tires and aligned tires.
07/19/2021	20,872	The air conditioning was blowing warm.
01/10/2022	30,470	Replaced rear tires and aligned tires.

The Complainant established that the camera had been replaced and the tires had been replaced as needed. She added that the AC blowing hot had been fixed when the buttons were replaced. She testified that the window not sealing properly was still an ongoing issue in the vehicle. She added that the noise coming from the brakes was also still an issue.

²⁷ 43 TEX. ADMIN. CODE § 215.209(a).

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

The Complainant recalled that she first noticed the brakes squealing a couple of weeks after she purchased the vehicle. She pointed out that she was unable to take the vehicle into the shop for repairs because of a snow storm and lack of availability of a loaner vehicle until February 8, 2021. She described that the brakes squeal at low-speed and high-speed stopping. She testified that the brakes squeal all the time, regardless of the temperature. She stated that she most recently noticed the brakes squealing the day of the hearing. She noted that the squeal happens every day but not every time that she brakes.

The Complainant described the issues with the passenger window not sealing properly. She claimed that the issue has not improved over the three repair attempts. She explained that the window made a very loud sound when driving and small amounts of water would come through the window on occasion. She testified that the driver's side window will not go all the way in to the door when it is rolled down but the passenger window will. She estimated that she first noticed the issue at some point before the first repair visit. She confirmed that the noise occurs every time she uses the vehicle. She stated that she most recently noticed the issue the morning of the hearing.

On cross-examination, the Complainant confirmed that the warranty does not cover wheel alignment, regular maintenance, or damage to interior surfaces (including spills). The Complainant confirmed that the repair orders (ROs) contained all the repair visits.

C. Inspection

The vehicle's odometer displayed 35,982 miles at the time of the hearing. During the test drive, the brakes squealed in one instance when coming to a stop. Wind noise could be heard from the front passenger side window. When the windows were rolled all the way down, the passenger side window remained about a quarter of an inch higher than the driver side window.

D. Summary of Respondent's Evidence and Arguments

Ben Mitchell, Service Advisor, testified for the respondent. Mr. Mitchell confirmed that the repair orders accurately reflected the complaints about the vehicle that the dealership received. Mr. Mitchell recalled that the AC control knobs were not wet but they had a sticky substance on them. He explained that a sticky substance can short out electrical systems. He recounted the text messages he had with the Complainant where she admitted to splashing/spraying coffee on the

control panel. He asserted that the damage to the control panel would not be covered by the warranty.

Mr. Mitchell explained that glazing on the brakes is a film building up on the brake pads and rotors. He contended that a snow storm like the one that occurred in 2021 could cause a buildup on the brakes. He confirmed that the buildup and glazing on the brakes is normal wear and tear that is not covered by the warranty. He noted that it is not uncommon for the brake pads to be worn out between 30,000 and 40,000 miles.

Mr. Mitchell stated that the level of the driver window will not always be the same as the level of the passenger window. He claimed that the difference in the windows could be repaired if the vehicle was brought in to the dealership. He testified that he did not hear the wind noise coming from the passenger side window during the test drive.

On cross-examination, Mr. Mitchell confirmed that the insides of the AC buttons were not wet when he looked at them.

Jeff Quimby, Service Advisor, also testified for the respondent. Mr. Quimby established that he saw the car on December 30, 2021. He confirmed that any complaint a person made would be represented in the repair order. On cross-examination, Mr. Quimby confirmed that the brakes did not need to be replaced when he inspected the vehicle.

E. Analysis

A preponderance of the evidence shows that the subject vehicle qualifies for warranty repair relief as described below.

1. Warranty Repair Relief Only

As an initial matter, as explained in the discussion of applicable law, repurchase and replacement only apply to new vehicles. Accordingly, the subject vehicle can only qualify for repair relief.

2. Warrantable Defect

To qualify for any relief, whether warranty repair or repurchase/replacement, the law requires the vehicle to have a defect covered by the Respondent's warranty (warrantable defect)

that continues to 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 this case, the warranty generally states:

DEFECTS: Mercedes-Benz USA, LLC (MBUSA) warrants to the original and each subsequent owner of a new Mercedes-Benz vehicle that any authorized Mercedes-Benz Dealership will make any repairs or replacements necessary to correct defects in material or workmanship, but not design, arising during the warranty period.

. . . .

WARRANTY STARTS: The warranty period starts on the date the vehicle is delivered to the first retail purchaser or put in service as an authorized Mercedes-Benz Dealership demonstrator or MBUSA or Mercedes-Benz U.S. International, Inc. (MBUSI) or Mercedes-Benz Research & Development North America, Inc. (MBRDNA) company vehicle but no later than 18 months from the vehicle production date. Warranty coverage will be adjusted to reflect the actual warranty period start date.

WARRANTY PERIOD: This warranty is for 48 months or 50,000 miles, whichever occurs first. Not all components or adjustments carry a 48 month or 50,000 mile warranty.³⁰

According to these terms, the warranty only applies to defects in materials or workmanship (manufacturing defects).³¹ A defectively manufactured vehicle has a flaw because of some error in making it at the factory, such as incorrect assembly or the use of a broken part. Manufacturing defects exist when the vehicle leaves the manufacturing plant. Unlike manufacturing defects, issues that do not arise from manufacturing, such as design characteristics or design defects are not warrantable defects. Design characteristics and design defects result from the vehicle's specified design, which exists before manufacturing, and not from any error during

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

³⁰ Respondent's Ex. 1, Service and Warranty Information.

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.").

manufacturing.³² Because the warranty only covers manufacturing defects, any non-manufacturing problems do not qualify for relief. Additionally, the warranty specifies that:

Warranty coverage for specific components or adjustments is based on the vehicle's time in service or mileage and should always be verified with your authorized Mercedes-Benz Dealership prior to any repairs. Examples include, but are not limited to:

- Wheel alignment and balancing
- Brake pads
- Brake discs
- Glass
- Wiper blades and inserts
- Remote control key batteries³³

. . . .

WHEEL ALIGNMENT: Adjustments for road crown (a side-to-side arch for drainage) are not covered.

BRAKE PADS AND DISCS: Replacement due to normal wear or as part of regular maintenance is not covered. Driving usage and habits can impact brake wear.

In this case, the complaint alleged the following issues: the camera made loud noises, brakes squealed, passenger side windows would not seal properly, vehicle required new front tires and an alignment, and AC blew hot air. The evidence shows that the complaint issues have been resolved except for the brake squeal and window seal, which are addressed below.

a. Brake Squeal

The brake squeal does not appear to arise from a warrantable defect. The repair history shows that the brake pads and rotors were glazed, leading to the squealing noise. However, glazing is a product of normal wear, which the warranty expressly excludes from coverage and therefore does not support any relief.

³² 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).

³³ Respondent's Ex. 1, Service and Warranty Information.

b. Passenger Window Seal

The evidence indicates that the front passenger side window more likely than not has a nonconformity. Inspection of the vehicle at the hearing showed that the passenger side window remained about a quarter inch higher than the driver side window when fully rolled down. The record reflects that previously, the passenger side window would go all the way into the door while the driver side window would stop a little bit above the door. The Complainant also observed noise and even a little water coming from the passenger side window. Further, the Complainant averred that the passenger window did not seal properly on the morning of the hearing. Given these considerations, the vehicle qualifies for repair of the window seal issue.

III. Findings of Fact

1. On December 26, 2020, the Complainant, purchased a used 2020 Mercedes-Benz CLS from Mercedes-Benz of Plano, a franchised dealer of the Respondent, in Plano, Texas. The vehicle had 8,723 miles on the odometer at the time of purchase.
2. The vehicle's limited warranty provides bumper to bumper coverage from the initial purchase for four years or 50,000 miles, whichever occurs first.
3. The warranty generally states that the respondent "warrants to the original and each subsequent owner of a new Mercedes-Benz vehicle that any authorized Mercedes-Benz Dealership will make any repairs or replacements necessary to correct defects in material or workmanship, but not design, arising during the warranty period."
4. The warranty expressly excludes normal wear of brake pads and discs.
5. The Complainant took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
02/08/2021	12,067	There was wind noise and water coming from the passenger side window. There was also noise coming from the brakes. The rear-view mirror made a motor noise in the mornings.
04/28/2021	16,470	There was noise coming from the brakes. There was wind noise coming from the passenger side window. The passenger side window fogged up.
07/08/2021	20,334	The air conditioning was blowing warm. Replace front two tires and aligned tires.
07/19/2021	20,872	The air conditioning was blowing warm.
01/10/2022	30,470	Replaced rear tires and aligned tires.

6. On July 22, 2021, the Complainant filed a complaint with the Department alleging that: the camera made loud noises, brakes squealed, passenger side windows would not seal properly, vehicle required new front tires and an alignment, and AC blew hot air.
7. On or about July 26, 2021, the Department provided a written notice of the complaint to the Respondent.
8. On October 29, 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.
9. The hearing in this case convened on April 26, 2022, in Plano, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented herself. Matthew Swanger, Attorney, represented the Respondent. Ben Mitchell, Service Advisor and Jeff Quimby, Service Advisor, also testified for the Respondent.
10. The vehicle's odometer displayed 35,982 miles at the time of the hearing.
11. The vehicle's warranty was in effect at the time of the hearing.

12. During the test drive the brakes squealed in one instance when coming to a stop. When the windows were rolled all the way down, the front passenger side window remained about a quarter of an inch higher than the front driver side window.
13. In the past, the passenger side window would go all the way into the door while the driver side window would stop a little bit above the door. The Complainant also observed noise and even a little water coming from the passenger side window. Further, the Complainant last noticed the passenger window did not sealing properly on the morning of the hearing.

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. Replacement and repurchase relief only apply to new vehicles. TEX. OCC. CODE § 2301.603.
7. The Complainant does not qualify for reimbursement of incidental expenses because the vehicle does not qualify for replacement or repurchase. TEX. OCC. CODE §§ 2301.603, 2301.604(a); 43 TEX. ADMIN. CODE § 215.209.
8. If the Complainant's vehicle does not qualify for replacement or repurchase, this Order may require repair to obtain compliance with the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603; 43 TEX. ADMIN. CODE § 215.208(e).

9. The Complainant's vehicle qualifies for warranty repair. The Complainant proved that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603. The Complainant or an agent of the Complainant notified the Respondent or Respondent's agent of the alleged defect(s). TEX. OCC. CODE §§ 2301.204 and 43 TEX. ADMIN. CODE § 215.202(b)(3).
10. The Respondent remains responsible to address and repair or correct any defects that are covered by the Respondent's warranty. TEX. OCC. CODE § 2301.603.

V. Order

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that the Complainant's petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is **DISMISSED**. It is **FURTHER ORDERED** that the Respondent shall make any repairs needed to conform the subject vehicle to the applicable warranty; specifically, the Respondent shall repair the defect in the passenger window seals allowing entry of air, water, and noise. Upon this Order becoming final under Texas Government Code § 2001.144:³⁴ (1) the Complainant shall deliver the vehicle to the Respondent within 20 days; and (2) the Respondent shall complete the repair of the vehicle within **20 days** after receiving it. However, if the Department determines the Complainant's refusal or inability to deliver the vehicle caused the failure to complete the required repair as prescribed, the Department may consider the Complainant to have rejected the granted relief and deem this proceeding concluded and the complaint file closed under 43 Texas Administrative Code § 215.210(2).

³⁴ This Order does not become final on the date this Order is signed, instead: (1) this Order becomes final if a party does not file a motion for rehearing within 25 days after the date this Order is signed, or (2) if a party files a motion for rehearing within 25 days after the date this Order is signed, this Order becomes final when: (A) an order overruling the motion for rehearing is signed, or (B) the Department has not acted on the motion within 55 days after the date this Order is signed. Accordingly, this Order cannot become final (1) while a motion for rehearing remains pending; or (2) after the grant of a motion for rehearing.

SIGNED June 28, 2022



ANDREW KANG

HEARINGS EXAMINER

OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS DEPARTMENT OF MOTOR VEHICLES