

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 20-0012873 CAF**

**TUAN ANH TRAN,
Complainant**

v.

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

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**BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Tuan Anh Tran (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 that creates a serious safety hazard or substantially impairs the vehicle's use or market value. Consequently, the Complainant's vehicle does not qualify for repurchase/replacement but does qualify 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 January 20, 2021, by videoconference, before Hearings Examiner Andrew Kang, and the record closed on the January 29, 2021. The Complainant appeared on his own behalf. Mindy Trin, the Complainant's spouse, and Travis Tran (Mr. Tran), the Complainant's son, also appeared for the Complainant. 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 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 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 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 October 23, 2019, the Complainant, purchased a new 2020 Honda Pilot from Lute Riley Honda, a franchised dealer of the Respondent, in Richardson, Texas. The vehicle had 11 miles on the odometer at the time of purchase. The Complainant took delivery of the vehicle on October 26, 2020. The vehicle’s limited warranty provides coverage for three years or 36,000 miles, whichever comes first. On July 8, 2020, the Complainant provided a written notice of defect to the Respondent. On June 26, 2020, the Complainant filed a complaint with the Department alleging that the vehicle exhibited popping noises and malfunctions with electronic control buttons. In relevant part, the Complainant took the vehicle to a dealer for repair of the alleged issues as follows:

Date	Miles	Issue
December 2, 2019- December 17, 2019	2,076	Popping noise
December 18, 2019- December 31, 2019		Popping noise
February 17, 2020- February 28, 2020	4,649	Popping, crackling noise
May 9, 2020- May 18, 2020	6,976	Random crackling noise from speakers

Mr. Tran confirmed that the popping noise was the sole issue in this case. He described that the vehicle exhibited a sound like pebbles hitting the windshield or when more severe, like large rocks hitting the windshield, which was startling and distracting. The Complainant testified that the noise posed a danger because of the distraction while driving. He explained that the noise may happen any time. Sometimes the vehicle would exhibit one or two popping noises and at other times, the popping sounds like noise all around. Mrs. Trin testified that she was confused as to the source of the noise. She explained that the Complainant originally purchased the subject vehicle for her and her daughter. Mr. Tran elaborated that the Complainant was currently the primary driver of the vehicle. The Complainant testified that sometimes the noise occurred a couple of

²⁷ 43 TEX. ADMIN. CODE § 215.209(a).

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

times a day and may reoccur the next day, and sometimes did not occur at all. The noise was unpredictable. Mr. Tran stated that they first noticed the noise on November 20, 2019. Mrs. Trin added that her daughter texted the Complainant about the noise and recorded the noise. The Complainant stated that they last heard the noise the day before the hearing. he explained that the noise did not occur at any certain speed and had occurred when parked. Mr. Tran confirmed that the dealer provided a loaner vehicle three out of four times. The vehicle was out of service for repair for 16 days on the first visit, then 11 days, and then another 10 days. The vehicle currently had 13,956 miles. Mr. Tran testified that shortly after leaving the dealer on October 26th (2019), they heard the popping noise. Then on a trip to Galveston, the vehicle exhibited an “aggressive” popping noise that interfered with conversations. Thereafter, they began the repair attempts. He explained that on December 2nd (2019) they took the vehicle to the dealer and picked up the vehicle on December 17th (2019), but before arriving at home, the vehicle exhibited the popping noise and other issues. Mr. Tran called their service advisor to schedule an appointment for the next morning. Though the repair records show a single visit beginning on December 2nd and ending on December 31st, they picked up the vehicle on December 17th, returned home, and took the vehicle to the dealer again the next day (December 18, 2019), because the popping noises and an air conditioning issue were not corrected. They went to John Eagle for two more repair visits, after which they decided to send a notice of defect, delivered on July 14, 2020. They had no contact with the Respondent until January 11, 2021, until receiving an e-mail asking for final opportunity to cure. But about seven months had passed after the notice of defect, which requested repair within 30 days, and because the hearing date was close, the Complainant continued with the hearing.

On cross-examination, the Complainant confirmed that he was currently the primary operator of the vehicle. He drove the vehicle every day for work and the vehicle operated normally other than the popping noise. He did not have a problem driving the vehicle, though the noise would startle him sometimes. He affirmed becoming accustomed to the noise. He acknowledged listening to the radio occasionally but not often because of the loud noises. He elaborated that with the radio on, the loud noises bothered him. He responded that the noise was the same loudness as with the radio on. He confirmed that he brought the vehicle in four times though only three repair orders (ROs) related to the popping noise. Mr. Tran calculated that the vehicle was at the dealer for repair for 36 days of which they did not have a loaner vehicle for about 10 days. The Complainant did not know of a fix for the noise. They did not bring the vehicle in for the noise

since May of 2020, though they did bring the vehicle for regular maintenance. The Complainant did not inquire about the availability of a fix and the dealer did not want to address the issue because of the pending Lemon Law complaint. The Complainant acknowledged an accident occurred that left two scratches on the vehicle. He affirmed that the popping noise was distracting. The noise appeared to come from the speaker but he was not sure. Mr. Tran confirmed that a representative from the Respondent did not inspect the vehicle, but the Respondent did not contact them or the Department's case advisor though they had sent a notice of defect seven months ago. He believed the present issue impaired the vehicle's safety and value because the noise may startle and distract the driver. Neither Mrs. Trin nor Mr. Tran recalled a phone call from the Respondent in July 2020.

C. Summary of Respondent's Evidence and Arguments

Allen Linsley, District Parts and Service Manager, testified that he first became involved after the Complainant wrote his letter to the Respondent. Notes from the Respondent's customer service department showed a voicemail left for the Tran family to contact the Respondent. Mr. Linsley stated that a bulletin addressing the crackling/popping noise came out about the end of July or beginning of August 2020. The repair involved replacing a wiring connector to make a better connection to eliminate the issue. Mr. Linsley confirmed that this repair did not exist at the time of the repair visits. He opined that the noise did not create a loss of control and that he did not know of any loss of control due to the noise. Moreover, a safety issue would involve a safety recall as opposed to a service bulletin. Mr. Linsley did not believe the issue affected the market value because of the available repair. On cross-examination, Mr. Linsley distinguished between the dealers and the Respondent's customer relations. Though he could not address the Trans' assertions that customer relations did not contact them, he found instances of customer relations leaving voicemails for the Trans.

Upon clarification questions, Mr. Linsley testified that the noise issue was fairly common and common enough to have a service bulletin. He explained that the problem concerned the connector. Replacing the connector constitutes the repair. The parts were updated to avoid the problem in the future. Vehicles did not return with the same symptoms after performing the service bulletin repair.

On redirect examination, Mr. Linsley stated he did not believe every Pilot had the present issue. He also explained that NHTSA (National Highway Traffic Safety Administration) recalls mandatorily require fixing every vehicle within a VIN (vehicle identification number) range. In contrast, a bulletin, as in this case, is informational and applies case by case.

D. Analysis

As explained in the discussion of applicable law, the law requires the Complainant to prove every element under the Lemon Law (or Warranty Performance Law for repair relief) by a preponderance. In other words, the Complainant must prove that every required fact is more likely than not true. In this case, a preponderance of the evidence shows that the complained of noise arises from a warrantable defect, but this nonconformity does not rise to the level of a serious safety defect or a substantial impairment of use or value. Therefore, the vehicle qualifies for repair relief only.

1. Warrantable Defect

As an initial matter, Lemon Law relief only applies to warranted defects that continue to exist (i.e., currently exist) after repairs.²⁹ The Lemon Law only requires the 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

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

³⁰ Complainant's Ex. 1, 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

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

In this case, the testimony reflects that not every Honda Pilot had the popping noise issue, which would be resolved by replacement of the connector. The fact that the popping noise issue occurred with some but not all same model vehicles suggests that the problem arises from a manufacturing defect as opposed to a design issue. In sum, a preponderance of the evidence shows the alleged popping noise arises from a warrantable defect.

2. Repair attempts

The evidence shows that the subject vehicle has had reasonable repair attempts. Although the repair history only shows three ROs for the popping noise issue, the record reflects that the dealer included two repair visits under a single RO. Specifically, the evidence shows that RO 526179, opened on December 2, 2019, and closed on December 31, 2019, actually covered two separate repair visits: the Complainant presented the vehicle for repair on December 2, 2019, and again on December 18, 2019. Accordingly, the evidence shows a total of four repair visits for the popping noise issue within the first 24 months and 24,000 miles.

or workmanship to damages for repair or replacement value. No mention was made in the guarantee of remedies for design defects.”).

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].”).

3. Opportunity to Repair

The record shows that the Complainant sent a written notice of defect on July 8, 2020, which the Respondent received on July 14, 2020. The repair history shows the last repair visit for the noise issue occurred in May 2020. The Complainant asserted that the Respondent did not contact him until January of 2021 and did not contact the Department's case advisor. However, the record also shows that in July 2020, the Respondent left voice messages for the Trans in response to the written notice but the Trans did not recall any such messages/calls. Given the inconsistency of the available evidence, the Complainant has not proven by a preponderance that the Respondent had an opportunity to cure, making repurchase/replacement unavailable.

4. Substantial Impairment

The Department's precedents hold that a noise by itself does not constitute a substantial impairment or a safety hazard.³⁵ On the other hand, though the Respondent presented testimony that the popping noise did not affect the market value because of an available repair, "the ability to repair problems is not the standard the Division applies for judging impairment of value or use. Instead, as discussed above, it applies a reasonable-purchaser standard and considers whether a defect or nonconformity hampers the intended normal operation of the vehicle."³⁶ In the present case, in addition to the noise itself, the Complainant asserted that the popping noise was distracting/startling and therefore posed a safety hazard. As explained previously, the Complainant has the burden of proving every required element by a preponderance. However, given the evidence in this case, the alleged noise does not appear more likely than not to be a serious safety hazard as defined by the Lemon Law or a substantial impairment of use or value. To begin, the subjective nature of the noise's distracting quality makes evaluation of this issue difficult. That is, the perceived impairment of normal operation will vary by individual sensitivities. Significantly, the Complainant acknowledged that he was becoming accustomed to the noise. Moreover, the noise only occurred intermittently and varied in magnitude. In sum, a preponderance of the

³⁵ *E.g.*, Texas Department of Transportation, *Alvarez v Ford Motor Company*, MVD Cause No. 08-0440, Final Order Denying § 2301.604 Relief (Motor Vehicle Division Dec. 11, 2008); State Office of Administrative Hearings *Alvarez v Ford Motor Company*, Docket No. 601-08-4215.CAF, Proposal for Decision (Oct. 9, 2008).

³⁶ *Dutchmen Mfg. v. Tex. DOT*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012, no pet).

evidence does not show that the complained of noise poses a serious safety hazard or substantially impairs the vehicle's use or value.

III. Findings of Fact

1. On October 23, 2019, the Complainant, purchased a new 2020 Honda Pilot from Lute Riley Honda, a franchised dealer of the Respondent, in Richardson, Texas. The vehicle had 11 miles on the odometer at the time of purchase. The Complainant took delivery of the vehicle on October 26, 2020.
2. The vehicle's limited warranty provides coverage for three years or 36,000 miles, whichever comes first.
3. 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.
4. The Complainant took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
December 2, 2019- December 17, 2019	2,076	Popping noise
December 18, 2019- December 31, 2019		Popping noise
February 17, 2020- February 26, 2020	4,649	Popping, crackling noise
May 9, 2020- May 18, 2020	6,976	Random crackling noise from speakers

5. On July 8, 2020, the Complainant provided a written notice of defect to the Respondent.
6. On June 26, 2020, the Complainant filed a complaint with the Department alleging that the vehicle exhibited popping noises and malfunctions with electronic control buttons.
7. On September 29, 2020, the Department's Office of Administrative Hearings issued a notice of hearing directed to all parties, giving them not less than 10 days' notice of hearing and their rights under the applicable rules and statutes. The notice stated the time, place

and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; particular sections of the statutes and rules involved; and the factual matters asserted.

8. The hearing in this case convened on January 20, 2021, by videoconference, before Hearings Examiner Andrew Kang, and the record closed on the January 29, 2021. The Complainant appeared on his own behalf. Mindy Trin, the Complainant's spouse, and Travis Tran, the Complainant's son, also appeared for the Complainant. Abigail Mathews, attorney, represented the Respondent.
9. The vehicle's odometer displayed 13,956 miles at the time of the hearing.
10. The vehicle's warranty was in effect at the time of the hearing.
11. The complained of popping noise arises from a manufacturing defect.
12. The popping noise occurs intermittently and varies in degree.
13. The Respondent did not have an opportunity to repair the vehicle.

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 warrantable defect that creates a serious safety hazard or substantially impairs the use or market value of the vehicle. TEX. OCC. CODE § 2301.604(a).
7. The Complainant does not qualify for reimbursement of incidental expenses because the vehicle does not qualify for replacement or repurchase. TEX. OCC. CODE §§ 2301.603, 2301.604(a); 43 TEX. ADMIN. CODE § 215.209.
8. If the Complainant's vehicle does not qualify for replacement or repurchase, this Order may require repair to obtain compliance with the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603; 43 TEX. ADMIN. CODE § 215.208(e).
9. The Complainant's vehicle 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 resolve the complained of popping noise. Upon this Order becoming final under Texas Government Code § 2001.144:³⁷ (1) the Complainant shall deliver the vehicle to the Respondent

³⁷ 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.

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

SIGNED March 30, 2021

A handwritten signature in black ink, appearing to read "Andrew Kang", is written over a horizontal line. The signature is stylized and cursive.

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