

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 19-0001276 CAF**

**CHRISTOPHER MARTIN,
Complainant**

v.

**HARLEY-DAVIDSON, INC.,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

CORRECTED DECISION AND ORDER

Christopher Martin (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in his new 2016 Harley-Davidson FLHX Special motorcycle. Complainant asserts that the vehicle is defective because he hears an abnormal noise from the vehicle's primary drive area. Harley-Davidson, Inc. (Respondent) argued that the vehicle does not have a defect or nonconformity and that no relief is warranted. The hearings examiner concludes that the vehicle does not have an existing warrantable defect or nonconformity and Complainant is not eligible for relief.

I. PROCEDURAL HISTORY, NOTICE AND JURISDICTION

Matters of notice 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 9, 2019, in Temple, Texas before Hearings Examiner Edward Sandoval. Christopher Martin, Complainant, represented himself at the hearing. Craig Rider, Complainant's father-in-law, was present to offer testimony for Complainant. Harley-Davidson, Inc., Respondent, was represented by Todd Evans, Remote Technical Lead. Michael Johnson, Remote Technical Lead, was also present to provide testimony for Respondent.

A continuance in the hearing was conducted telephonically on July 23, 2019. Complainant represented himself at the continuance. Respondent, was represented by Todd Evans, Remote Technical Lead. Michael Johnson, Remote Technical Lead, and Lori Oelhafen, Manager of Dealer Technical Services and Consumer Affairs, were also present to provide testimony for Respondent. The hearing record was closed on July 23, 2019.

II. DISCUSSION

A. Applicable Law

The Lemon Law provides, in part, that a manufacturer of a motor vehicle must repurchase or replace a vehicle complained of with a comparable vehicle if the following conditions are met.

First, the manufacturer is not able to conform the vehicle to an applicable express warranty by repairing or correcting a defect after a reasonable number of attempts.¹ Second, the defect or condition in the vehicle creates a serious safety hazard or substantially impairs the use or market value of the vehicle.² Third, the manufacturer has been given a reasonable number of attempts to repair or correct the defect or condition.³ Fourth, the owner must have mailed written notice of the alleged defect or nonconformity to the manufacturer.⁴ Lastly, the manufacturer must have been given an opportunity to cure the defect or nonconformity.⁵

In addition to the five conditions, a rebuttable presumption exists that a reasonable number of attempts have been undertaken to conform a motor vehicle to an applicable express warranty if the same nonconformity continues to exist after being subject to repair four or more times and: (1) two of the repair attempts were made in the 12 months or 12,000 miles, whichever comes first, following the date of original delivery to the owner; and (2) the other two repair attempts were made in the 12 months or 12,000 miles, whichever comes first, immediately following the date of the second repair attempt.⁶

B. Complainant's Evidence and Arguments

Complainant purchased a new 2016 Harley-Davidson FLHX Special motorcycle from Horny Toad Harley-Davidson (Horny Toad) in Temple, Texas on July 16, 2016, with mileage of 10 at the time of delivery.⁷ Respondent's warranty provided coverage for the vehicle for 24 months with unlimited mileage.⁸ On the date of hearing the vehicle's mileage was 10,601. Respondent's warranty was expired at the time of the initial hearing.

Complainant testified that about a year after purchasing the vehicle he began to notice a knocking noise from the vehicle's primary drive area. The primary drive area is where the vehicle's transmission, clutch, and gears are located. Complainant initially noticed the noise primarily would occur after the vehicle's engine had achieved running temperature.

Complainant testified that on July 21, 2017, his father-in-law, Craig Rider, took the vehicle to Horny Toad for scheduled maintenance. Complainant stated that Mr. Rider informed Horny

¹ Tex. Occ. Code § 2301.604(a).

² *Id.*

³ *Id.*

⁴ Tex. Occ. Code § 2301.606(c)(1).

⁵ Tex. Occ. Code § 2301.606(c)(2).

⁶ Tex. Occ. Code § 2301.605(a)(1)(A) and (B). Texas Occupations Code § 2301.605(a)(2) and (a)(3) provide alternative methods for a complainant to establish a rebuttable presumption that a reasonable number of attempts have been undertaken to conform a vehicle to an applicable express warranty. However, § 2301.605(a)(2) applies only to a nonconformity that creates a serious safety hazard, and § 2301.605(a)(3) requires that the vehicle be out of service for repair for a total of 30 or more days in the 24 months or 24,000 miles, whichever occurs first, following the date of original delivery to the owner.

⁷ Respondent Ex. 1, Purchase Order dated July 16, 2016.

⁸ Respondent Ex. 8, Excerpts from 2016 Harley-Davidson Owner's Manual – Touring Models, p. 245.

Toad's service technician of the knocking noise from the primary drive area. No repairs were performed for the issue.⁹ The vehicle's mileage when Complainant took it to the dealer on this occasion was 5,009.¹⁰ The vehicle was in Horny Toad's possession for the morning.¹¹ Complainant did not receive a loaner vehicle while his vehicle was being repaired.

Complainant continued to intermittently hear the knocking noise from the vehicle's primary drive area. He took the vehicle to Horny Toad for repair for the issue on April 25, 2018. The service technician test drove the vehicle, but did not hear any unusual sounds from the vehicle.¹² The service technician opened the primary as requested by Complainant and determined that there was no abnormal wear to any of the items within it.¹³ The technician indicated that the noise heard by Complainant was neutral rattle and a characteristic of the vehicle.¹⁴ The vehicle was in Horny Toad's possession until May 4, 2018.¹⁵ Complainant was not provided with a loaner vehicle while his vehicle was being repaired. The mileage on the vehicle at the time was 9,119.¹⁶

Complainant testified that he took the vehicle to a friend who works as a motorcycle mechanic who verified that there was an issue with the vehicle and that the noise Complainant was hearing was abnormal. Complainant took the vehicle back to Horny Toad for repair for the issue on July 31, 2018. During the repair visit, the technician indicated that he could not duplicate the issue.¹⁷ However, the technician could not test drive the vehicle because the rear tire did not have any tread and, as a result, the vehicle was considered unsafe to drive.¹⁸ The vehicle was returned to Complainant on August 3, 2018.¹⁹ Complainant was not provided with a loaner vehicle during this repair visit. The mileage on the vehicle at the time Complainant turned it over Horny Toad was 9,694.²⁰

Complainant testified that he continued to hear a knocking noise from the vehicle's primary drive area. He mailed a letter to Respondent on August 27, 2018, informing them that he was dissatisfied with the vehicle.²¹

⁹ Respondent Ex. 2, Repair Order dated July 21, 2017. The repair order did not include any mention of the knocking noise issue.

¹⁰ *Id.*

¹¹ *Id.*

¹² Respondent Ex. 3, Repair Order dated April 25, 2018, p. 2.

¹³ *Id.*, p 3.

¹⁴ *Id.*

¹⁵ *Id.*, p. 1.

¹⁶ *Id.*

¹⁷ Respondent Ex. 4, Repair Order dated July 31, 2018, p. 2.

¹⁸ *Id.*, p. 3.

¹⁹ *Id.*, p. 1.

²⁰ *Id.*

²¹ Respondent Ex. 6, Letter to Harley Davidson Motor Company dated August 27, 2018.

Complainant took the vehicle to Horny Toad on September 20, 2018. Complainant stated the technician replaced the vehicle's compensator sprocket in an attempt to resolve the issue. Complainant took the vehicle home when the repair was concluded. When he arrived at his home, Complainant heard the knocking noise again and immediately took the vehicle back to Horny Toad. The technician then replaced the vehicle's primary chain and tensioner.²² The vehicle was in the dealer's possession until October 11, 2018, as some of the parts had to be special ordered.²³ Complainant was not provided with a loaner vehicle while his vehicle was being repaired. The mileage on the vehicle when he delivered it to Horny Toad on this occasion was 9,910.²⁴

Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) on October 4, 2018.²⁵

Complainant testified that he no longer heard the knocking noise from the primary drive area after the repairs performed in September and October of 2018. However, he then began to intermittently hear a noise from the vehicle's transmission area that sounds like a skip or as if something is not meshing. Complainant says that he hears the noise whenever he's riding the motorcycle and is stopped at a stop sign or stop light.

A hearing on Complainant's Lemon Law complaint was conducted on April 9, 2019, in Temple, Texas. Complainant stated at the hearing that he wanted to be able to drive the vehicle and would be content if Respondent could repair the vehicle. The vehicle was inspected at the time of the hearing by Respondent's remote technical leads, Todd Evans and Michael Johnson. They agreed to attempt another repair on the vehicle and informed Complainant to take the vehicle to a dealer for repair whenever he heard the noise from the transmission area. The hearing was then continued to allow another repair attempt on the vehicle.

On April 27, 2019, Complainant took the vehicle for repair for the noise issue to Adam Smith's Harley-Davidson (Smith) of Waco located in Waco, Texas. Smith's technician test drove the vehicle and listened to the vehicle with a stethoscope.²⁶ The technician determined that the noise from the transmission area was neutral rattle and was not abnormal.²⁷ The vehicle was in Smith's possession until May 11, 2019, when Complainant was able to pick it up.²⁸ Complainant was not provided with a loaner vehicle while his vehicle was being repaired. The vehicle's mileage on this occasion was 10,784.²⁹

²² Respondent Ex. 5, Repair Order dated September 20, 2018, p. 3.

²³ *Id.*, p. 1.

²⁴ *Id.*

²⁵ Complainant Ex. 1, Lemon Law Complaint dated October 4, 2018.

²⁶ Respondent Ex. 7, Repair Order dated April 27, 2019.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

Complainant testified that he feels that the vehicle may be unsafe. He stated that his wife will not ride on the vehicle with him. Complainant testified that he was involved in an accident when riding a motorcycle in 2009. On that occasion the vehicle's compensator sprocket disintegrated and locked up the vehicle's rear tire. Complainant is afraid of something similar occurring with his current vehicle. He feels that the noise may be indicative of a larger problem and that the parts in the primary could suffer metal fatigue and break apart.

C. Respondent's Evidence and Arguments

Todd Evans, Remote Technical Lead, testified for Respondent. Mr. Evans has worked in the motorcycle industry since 1990. From 1990 to 1995, he worked for multiple dealerships as a technician. Mr. Evans worked for a Harley-Davidson dealer as a technician from 1995 through 2004. He was hired by Respondent in 2004. Mr. Evans became a Harley-Davidson Master Technician in 2018.

Mr. Evans testified that he first saw the vehicle on September 20, 2018, at Horny Toad. After receiving Complainant's letter dated August 27, 2018, in which Complainant indicated that he was dissatisfied with the vehicle, Respondent's representative contacted Complainant and asked him to take the vehicle to Horny Toad so that Mr. Evans could inspect the vehicle to determine if there was a repairable issue with it. Complainant took the vehicle to Horny Toad on September 20, 2018. Mr. Evans initially did not hear the knocking noise described by Complainant. However, he did hear the noise on a video that Complainant had taken of the vehicle and which Complainant showed to him. Mr. Evans determined that the noise sounded like there was an issue with the vehicle's compensator. Mr. Evans advised Horny Toad's technicians to replace the vehicle's compensator assembly. Mr. Evans also advised the Horny Toad's manager that the repairs performed to the vehicle would be covered by Respondent as "goodwill," since the vehicle was out of warranty. (Goodwill is an attempt by Respondent to help certain customers on a case by case basis to resolve concerns with Respondent's vehicles.)

Mr. Evans testified that the technicians made an error in repairing the vehicle and initially only replaced the vehicle's sprocket. As a result, Complainant took the vehicle back to Horny Toad because the knocking noise was still occurring. When contacted by Horny Toad's technicians, Mr. Evans informed them to replace the vehicle's switchback, primary chain, and tensioner in order to fully complete the repair.

Mr. Evans attended the April 9, 2019, hearing in Temple, Texas as Respondent's representative. Complainant indicated at the hearing that the knocking noise was repaired. However, Complainant stated that he was now hearing a noise that sounded like a transmission skip. When Complainant indicated that he wanted the vehicle repaired so that he could ride it without concern, Mr. Evans indicated that Respondent was willing to attempt one more repair of the

vehicle. He advised Complainant to take the vehicle to a different dealer whenever the transmission skip noise issue occurred.

Mr. Evans indicated that a service technician at the Smith dealership inspected the vehicle on April 27, 2019, in order to resolve the noise issue. The technician determined that the noise was neutral rattle and was a normal operating characteristic of the vehicle.³⁰

Mr. Evans testified that Respondent was not notified of the initial knocking noise issue until April 25, 2018. He also stated that the vehicle's warranty expired on July 16, 2018, so any repairs after that date would normally not have been covered by the vehicle's warranty. In addition, the vehicle's compensator assembly is considered to be a wear item which is also not covered by warranty. However, Respondent decided to pay for the repairs to the vehicle's compensator, power chain, and tensioner as goodwill. Mr. Evans also testified that he believed that a motorcycle's useful life is 15 to 20 years or about 100,000 miles.

D. Analysis

Under the Lemon Law, Complainant bears the burden of proof to establish by a preponderance of evidence that a defect or condition creates a serious safety hazard or substantially impairs the use or market value of the vehicle. In addition, Complainant must meet the presumption that the manufacturer was given a reasonable number of attempts to repair or correct the defect or condition to conform the vehicle to an applicable express warranty. Finally, Complainant is required to serve written notice of the defect or nonconformity on Respondent, who must be allowed an opportunity to cure the defect. If each of these requirements is met and Respondent is still unable to conform the vehicle to an express warranty by repairing the defect or condition, Complainant is entitled to have the vehicle repurchased or replaced.

The first issue to be addressed is whether Complainant's vehicle has a defect or condition that creates a serious safety hazard or substantially impairs the use or market value of the vehicle.

Complainant indicated that he was concerned with a noise that comes from the vehicle's primary drive area. The noise was initially described as a knocking noise and was repaired by Complainant during the September 20, 2018 repair visit. The noise currently heard by Complainant is a neutral rattle and is considered to be a normal operating characteristic of the vehicle. Since the noise that currently exists is an operating characteristic of the vehicle and not a defect or nonconformity in the vehicle, the hearings examiner must hold that repurchase or replacement relief for Complainant is not warranted.

On the date of hearing, the vehicle's mileage was 10,601. At this time, the vehicle's warranty has expired.

³⁰ Respondent Ex. 9, Service Bulletin M1304: Big Twin Neutral Rattle released August 31, 2011.

Complainant's request for repurchase or replacement relief is denied.

III. FINDINGS OF FACT

1. Christopher Martin (Complainant) purchased a new 2016 Harley-Davidson FLHX Special motorcycle on July 16, 2016, from Horny Toad Harley-Davidson (Horny Toad) in Temple, Texas, with mileage of 10 at the time of delivery.
2. The vehicle's mileage on the date of the initial hearing was 10,601.
3. The manufacturer of the vehicle, Harley-Davidson, Inc. (Respondent), issued a limited warranty for the vehicle providing coverage for the vehicle for 24 months and unlimited miles.
4. At the time of hearing the warranty for the vehicle was expired.
5. Complainant has heard noises that he feels are not normal in the vehicle's primary drive area.
6. About a year after purchasing the vehicle, Complainant began to hear a loud knocking noise in the primary drive area.
7. Complainant took the vehicle to Respondent's authorized dealer, Horny Toad, in order to address his concerns regarding noise coming from the vehicle's primary drive area on the following dates:
 - a. July 21, 2017, at 5,009 miles;
 - b. April 25, 2018, at 9,119 miles;
 - c. July 31, 2018, at 9,694 miles; and
 - d. September 20, 2018, at 9,910 miles.
8. On July 21, 2017, Complainant's father-in-law took the vehicle to Horny Toad for regular maintenance and informed the technician that there was an unusual knocking noise in the vehicle's primary drive area. No work was performed for the issue at the time.
9. On April 25, 2018, Horny Toad's service technician determined that the knocking noise complained of was a "neutral rattle" and a normal characteristic of the vehicle. No repairs were performed at the time for the issue.
10. On July 16, 2018, the vehicle's warranty expired.

11. On July 31, 2018, Horny Toad's service technician was unable to duplicate the knocking noise. No repairs were performed at the time for the issue.
12. On August 27, 2018, Complainant sent a letter to Respondent advising them that he was dissatisfied with the vehicle.
13. On September 20, 2018, Horny Toad's service technician replaced the vehicle's compensator to resolve the knocking noise issue.
14. Complainant picked up the vehicle from Horny Toad on September 29, 2018, and heard the knocking noise when he got home. He returned the vehicle the same day to Horny Toad.
15. Horny Toad's technician had to special order the primary chain and tensioner to complete the repair for the vehicle. Once the parts arrived, they were installed by the technician in October of 2018.
16. After the repairs performed by Horny Toad's technician in September and October of 2018, Complainant no longer heard the knocking noise.
17. The repairs performed on the vehicle during September and October of 2018 were paid by Respondent as "goodwill."
18. After the September and October repairs, Complainant began to hear a noise in the vehicle's primary drive area that sounded like a transmission skip.
19. On October 4, 2018, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
20. At the hearing conducted on April 9, 2019, Complainant indicated that he wanted the vehicle to be repaired and Respondent's representatives indicated that Respondent would attempt to repair the issue if Complainant wanted to take the vehicle to a different dealer. The hearing was continued in order to allow Complainant an opportunity to take the vehicle for repair.
21. On April 27, 2019, Complainant took the vehicle to Adam Smith's Harley-Davidson of Waco, Texas (Smith) in order to see if the transmission skip noise could be resolved.
22. During the repair visit described in Findings of Fact #19, Smith's service technician determined that the transmission skip noise Complainant was hearing is a neutral rattle which is a normal operating characteristic of the vehicle. No repairs were performed at the time.

23. When at a stop sign or stop light, Complainant still hears a noise that sounds like a transmission skip.
24. On January 7, 2019, the Department's Office of Administrative Hearings issued a notice of hearing directed to Complainant and Respondent, giving all parties 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 matters asserted.
25. The hearing in this case convened on April 9, 2019, in Temple, Texas before Hearings Examiner Edward Sandoval. Christopher Martin, Complainant, represented himself at the hearing. Craig Rider, Complainant's father-in-law, was present to offer testimony for Complainant. Harley-Davidson, Inc., Respondent, was represented by Todd Evans, Remote Technical Lead. Michael Johnson, Remote Technical Lead, was also present to provide testimony for Respondent. A continuance in the hearing was conducted telephonically on July 23, 2019. Complainant represented himself at the continuance. Respondent, was represented by Todd Evans, Remote Technical Lead. Michael Johnson, Remote Technical Lead, and Lori Oelhafen, Manager of Dealer Technical Services and Consumer Affairs, were also present to provide testimony for Respondent. The hearing record was closed on July 23, 2019.

IV. CONCLUSIONS OF LAW

1. The Texas Department of Motor Vehicles (Department) has jurisdiction over this matter. Tex. Occ. Code §§ 2301.601-2301.613 (Lemon Law).
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. Complainant timely filed a complaint with the Department. Tex. Occ. Code § 2301.204; 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. Complainant bears the burden of proof in this matter.

6. Complainant failed to prove that the vehicle has an existing warrantable defect. Tex. Occ. Code § 2301.604(a).
7. Respondent remains responsible to address and repair or correct any defects that are covered by Respondent's warranties. Tex. Occ. Code §§ 2301.204, 2301.603.
8. Complainant's vehicle does not qualify for replacement or repurchase. Tex. Occ. Code § 2301.604.

ORDER

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

SIGNED July 25, 2019



EDWARD SANDOVAL
CHIEF HEARINGS EXAMINER
OFFICE OF ADMINISTRATIVE HEARINGS
TEXAS DEPARTMENT OF MOTOR VEHICLES