

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 14-0285 CAF**

**JOSEPH R. SILVA, JR.,
Complainant**

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BEFORE THE OFFICE

v.

OF

**MAZDA NORTH AMERICAN
OPERATIONS,
Respondent**

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Joseph R. Silva, Jr. filed a “Lemon Law” complaint against Mazda North American Operations (Mazda), for alleged defects in his 2013 Mazda Miata MX-5. Mr. Silva seeks repurchase relief due to noise from the vehicle’s clutch/manual transmission, the convertible top not fully retracting, and a rattle noise inside the driver’s door. Mazda argues that Mr. Silva has not demonstrated the existence of a warrantable nonconformity. The hearings examiner finds that there is insufficient evidence of a presently existing warrantable defect in the vehicle. Accordingly, Mr. Silva’s request for repurchase relief must be denied and the complaint dismissed.

I. PROCEDURAL HISTORY, NOTICE AND JURISDICTION

Matters of notice and jurisdiction were not contested. Those issues are addressed in the Findings of Fact and Conclusions of Law without further discussion here.

The evidentiary hearing in this case convened before Hearings Examiner Anne K. Perez on September 19, 2014 in Houston, Texas. Mr. Silva appeared and was represented by attorney Terry W. Vanderpool. Mazda was jointly represented by District Support Manager David Sides, who appeared in person, and Mazda’s Administrator, Customer Mediation Robin Hahn, who appeared telephonically. Pursuant to the agreement of the parties, the hearing was recessed and the evidentiary record was held open until October 20, 2014, to allow comparison of the transmission/clutch function in Mr. Silva’s vehicle with the transmission/clutch function of a “Similar Vehicle.”¹

¹ The term “Similar Vehicle” is more complicated than it appears. Order No. 3 issued on September 22, 2014, required that Mr. Sides (whose position allows him to electronically access Mazda part numbers, as well as the current vehicle inventory of all Houston-area Mazda dealerships) locate a vehicle suitable for comparison with Silva’s vehicle. The order made clear that a “Similar Vehicle” was a 2013 or 2014 Mazda Miata MX-5 with a five-speed manual transmission (*i.e.*, with a part number identical to the transmission in Mr. Silva’s vehicle), and of similar mileage to Mr. Silva’s vehicle.

Order No. 3 required that the parties participate in a telephonic conference on October 14, 2014,² during which they would advise the hearings examiner whether the evidentiary hearing should be reconvened telephonically for the presentation of evidence on the transmission/clutch function in the two like vehicles. The parties discussion on October 14, 2014 established that the following events preceeded the teleconference: (1) Mr. Sides adhered to Order No. 3's instructions by locating a Similar Vehicle and communicating to Mr. Vanderpool, the Mazda dealership location and the Similar Vehicle's availability for a joint test-drive, *i.e.*, both parties were required to be present for the test-drive; (2) Mr. Vanderpool and Ms. Hahn agreed that the joint test-drive of the Similar Vehicle would be conducted on Saturday October 11, 2014, at 3:00 p.m.; (3) the parties further agreed that only two individuals, Mr. Silva and Mr. Sides, would be present and participate in the test-drive, as Mr. Vanderpool was unable to attend; (4) Mr. Sides was present at the Mazda dealership on October 11, 2014, at the designated time and waited for more than an hour; (5) Mr. Silva was not in attendance at the agreed location, nor did he attempt to notify Mr. Sides (or the dealership) that there was no need to wait because he was not coming; (6) neither Mr. Vanderpool nor Mr. Silva provided advance notice to Mazda that Mr. Silva would be unable to attend the scheduled test-drive; and (7) Mr. Silva's failure to be present at the Mazda dealership on October 11, 2014, remained a mystery until the October 14, 2014 teleconference, when Mr. Vanderpool stated that Mr. Silva decided not to participate in the test-drive without his attorney being present.

Based on the circumstances set forth above, the hearings examiner denied Mr. Silva's request to reschedule the joint test-drive, and ruled that no further evidence (regarding comparison of the transmission/clutch function in the two like vehicles) would be heard in this case. Pursuant to Order No. 4 issued on October 24, 2014, the hearings examiner also denied Mr. Vanderpool's motion to withdraw as counsel of record for Mr. Silva. Lastly, consistent with the deadlines imposed by Order No. 3, the evidentiary record in the case closed on October 20, 2014.

II. DISCUSSION

A. Applicable Law

The manufacturer of a motor vehicle must repurchase or replace the vehicle with a comparable vehicle if five conditions are met. First, the manufacturer has not conformed the vehicle to an applicable

² On October 13, 2014, attorney David H. Estes filed a Notice of Appearance on behalf of Mazda, and he participated in the October 14, 2014 teleconference along with Mr. Sides and Mr. Vanderpool.

express warranty because the manufacturer cannot repair a defect in the vehicle. Second, the nonconformity in the vehicle creates a serious safety hazard, or substantially impairs the use or market value of the vehicle. Third, the manufacturer has been given a reasonable number of attempts to repair the defect.³ Fourth, the owner must have mailed written notice of the alleged nonconformity to the manufacturer.⁴ Lastly, the manufacturer must have been given an opportunity to cure the defect.⁵

“Impairment of market value” means a substantial loss in market value caused by a defect specific to a motor vehicle.⁶ A rebuttable presumption exists that a reasonable number of attempts have been undertaken to conform a vehicle to an applicable express warranty if a defect that substantially impairs the use or market value of the vehicle 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 occurs first, following the date of original delivery to the owner; and (2) the two other repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the second repair attempt.⁷

B. Undisputed Facts

On November 14, 2013, Mr. Silva purchased a new 2013 Mazda Miata MX-5 (the vehicle) from Mazda of Clear Lake (Mazda Clear Lake) in Webster, Texas, with mileage of 38 at the time of delivery.⁸ Mazda, the manufacturer, issued a basic limited warranty for the vehicle covering defects in factory-supplied materials and workmanship for three years or 36,000 miles, whichever occurs first. Mazda also issued a powertrain limited warranty for the vehicle covering defects in the engine, transmission, and drive train for five years or 60,000 miles, whichever occurs first.⁹ On the date of hearing the vehicle’s mileage was 7,745, and coverage under both limited warranties was in effect.

Mr. Silva’s Lemon Law complaint against Mazda was filed with the with the Texas Department of Motor Vehicles (Department) on June 30, 2014.¹⁰ The problems raised in the complaint are summarized below:

³ Tex. Occ. Code § 2301.604(a).

⁴ Tex. Occ. Code § 2301.606(c)(1).

⁵ Tex. Occ. Code § 2301.606(c)(2).

⁶ Tex. Occ. Code § 2301.601(1).

⁷ Tex. Occ. Code § 2301.605(a)(1).

⁸ Complainant Ex. 1.

⁹ Complainant Ex. 8.

¹⁰ Complainant Ex. 7.

- (1) A thump noise when going into first gear;
- (2) A popping noise when pushing in the clutch to reduce vehicle speed, and while backing out and turning;
- (3) The convertible top does not always fully retract;
- (4) A rattle noise coming from inside the driver's door when the windows are rolled up and car is traveling at freeway speeds.¹¹

C. Mr. Silva's Evidence and Arguments

Mr. Silva testified that he is the primary driver of the vehicle, and within 10 days of purchase he noticed several problems with the car. On December 7, 2013, at mileage of 892, he brought the car in for service at Mazda Clear Lake. He reported that the vehicle's primary problem was a thumping noise while shifting into first gear, as well as a popping noise when pushing the clutch in to let the vehicle reduce speed, or while backing out or turning. He said the gearbox/shifting issues were not present at the time of purchase, but developed over a period of several weeks. He also informed the dealer that the convertible top did not always fully retract, and that the driver's sun visor was hitting the rear view mirror. His car was in service for 10 days. He was provided with a loaner vehicle during that time.

Mr. Silva stated that the sun visor issue was repaired to his satisfaction. Regarding the convertible top, the dealer's repair order states, "Found the top to be hard to touch due to it being a new material on [a] brand new vehicle. The top will be hard to touch until the material is stretched out due to time and wear."¹² It was the dealer's findings about noise from the gearbox, however, that caught Mr. Silva's attention. Referencing the thumping noise while shifting from neutral to first gear, the dealer wrote: "Found the internals on the transmittion [*sic*] need to be broken in."¹³ As to the popping noise when pushing the clutch in to reduce speed, or while backing out and turning, the dealer wrote: "Need to let transmittion [*sic*] internal break in, typical break in period is 7,500 miles."¹⁴

According to Mr. Silva, the dealer's notes on the repair order essentially acknowledge the existence of a transmission problem in his vehicle. He testified:

¹¹ *Id.*

¹² Complainant Ex. 2, repair order opened on December 7, 2013.

¹³ *Id.*

¹⁴ *Id.*

I understood that I bought the car brand-new. But there is this transmission problem – they recognize it – they document it – and they’re telling me to wait 7,500 miles - but this was not disclosed to me. This was not disclosed to me when I purchased the vehicle.

Several days later, Mr. Silva telephoned the dealership. He told service advisor Ryan Carter that the sun visor was successfully repaired, but that the car’s most significant issue was not addressed: problems with the gearbox. According to Mr. Silva, Mr. Carter’s response was a voice message stating, “Don’t worry about those tedious issues. Just let them work out over time.” Mr. Silva recalled thinking, “Well, if that’s the case, then I should have purchased a used vehicle instead of a brand-new one.”

Mr. Silva’s next contact with the dealer occurred when the vehicle was due for regularly scheduled maintenance at 5,000 miles. On May 6, 2014, at 5,486 miles, he brought the car in for service at Mazda Clear Lake.¹⁵ He testified that he reported the same problems raised on the first service visit (minus the sun visor), *i.e.*, that he heard a popping noise when depressing the clutch to reduce the vehicle’s speed, or while backing out and turning, and a thumping noise while shifting into first gear, and that the convertible top did not always fully retract. However, the repair order’s description of the service visit is limited to the following statement:

Customer states that there is a popping when disengaging the clutch and it feels like the vehicle doesn’t want to shift into gear. Test-drove vehicle and heard rear-end torque when shifting into first. This is a normal operation of vehicle. No work done.¹⁶

Regarding the May 6, 2014 service visit, Mr. Silva said his vehicle remained at Mazda Clear Lake for about two months. He was provided with a rental car (a Mazda3), but complained it was not a “comparable vehicle” because it had an automatic transmission, whereas his own vehicle was equipped with a manual transmission. Nonetheless, Mr. Silva agreed to use the Mazda3 while his car was being serviced, and he signed Mazda Clear Lake’s “Service Department Loaner & Rental Agreement.”¹⁷

¹⁵ Complainant Ex. 4, repair order opened on May 6, 2014.

¹⁶ *Id.*

¹⁷ Complainant Ex. 5. The dealer’s “Service Department Loaner & Rental Agreement” executed by Mr. Silva contains the following provisions: “(1) I take full responsibility of checking with Mazda Clear Lake’s Service Department and returning rent car within 24 hours after my car is ready; and in any event, when my own vehicle is picked up following completion of repairs; (2) If I do not return loaner/rental car within 24 hours, I agree to pay \$39.95 a day and \$.50 a mile for each day. I retain the loaner/rental car after notice to return it; and (3) It is understood and agreed that all charges which occur on this rental agreement shall become a part of the total charges on the repair order on the Renter’s car being repaired and, as such, are subject to regular company credit policies. I hereby grant a lien and security interest on my [Year] model Vehicle (that is in Mazda Clear Lake’s Service Department) ... to secure payment of such rental charges.”

After a couple of weeks went by without hearing from the dealer, Mr. Silva called to check on his car and was told, "We're still working on it." On May 28, 2014, dealer service advisor Clayton Cooper¹⁸ left him a voice message stating, "We still have some information on your vehicle." The two men spoke by telephone the following day (May 29, 2014). According to Mr. Silva, the service advisor said, "The issues you are complaining about ... We have looked at other similar Mazda Miatas and they present the same issues, especially the one with the gearbox." Mr. Silva reported that his response was the following proposal: "Here's my schedule [I'm off work on Tuesdays and Saturdays] ... Just have a day for me to come in [to the dealership] so I can look at the same Mazda Miatas that you say you have looked at, so I can see the same issues, especially the one with the gearbox." Mr. Cooper reportedly replied, "Okay, I'll call you back."

Mr. Silva stated that following his discussion with Mr. Cooper on May 29, 2014, he waited for the service advisor to contact him with scheduling arrangements, but Mr. Cooper did not telephone him during the month of June, or during the first half of July 2014. During that time frame, Mr. Silva likewise made no effort to contact Mr. Cooper, or anyone else at the dealership. Towards the end of June 2014, Mr. Silva made the decision to seek legal counsel regarding the problems with his car.

On June 23, 2014, attorney Terry W. Vanderpool sent written notice to Mazda that Mr. Silva's 2013 Mazda Miata MX-5 was defective. The letter to Mazda describes a popping noise heard coming from the vehicle's passenger side while disengaging the clutch, backing out, and turning; a thumping noise while shifting into first gear; the convertible top not going all the way down; and a rattle noise inside the driver's door when the driver's window is closed and the car is traveling at highway speed.¹⁹ And, on June 30, 2014, Mr. Silva filed a Lemon Law complaint against Mazda with the Department.²⁰

The situation with Mazda Clear Lake came to a head in mid-July 2014. Mr. Silva testified:

Through the time my car was there [at Mazda Clear Lake] I was never told that the vehicle was ready to be picked up. And I was never given any chance, whatsoever, to look at all their Mazda Miatas they say were presenting the same issues. What I got was a surprise. I got a voice message on July 14. It was service manager Dustin [Stookey] trying to get me to return the loaner [car]. I called him back but he was not available, so I spoke to Mr. Cooper. Mr. Cooper

¹⁸ Mr. Silva referred to the service advisor as "Clay" but the repair order opened on May 6, 2014, identifies "Clay" as Clayton Cooper. See Complainant Ex. 4.

¹⁹ Complainant Ex. 6.

²⁰ Complainant Ex. 7.

didn't say whether my car was ready to be picked up, and I didn't ask him whether my car was ready. I wanted to talk to Dustin about it because he was the one who called me. I said to Mr. Cooper, here's my schedule, I can do it [return the loaner car] only on a Tuesday or a Saturday, because Tuesday is my day off They [went ahead and] repossessed the loaner vehicle from me on the evening of Tuesday July 15. They took it from my residence and left me without a car. That was the only means of transportation that I had. So that Tuesday evening, Wednesday, Thursday, and Friday I had to be in a rental car at my [own] expense.

Under questioning by his own attorney, Mr. Silva said he was off work on Tuesday July 15, 2014, and that he could have returned the loaner car to Mazda Clear Lake before it was repossessed that same evening. He admitted, however, that he had no intention of returning the loaner car that day because the dealer had yet to inform him *that his own car was ready to be picked up*. Mr. Silva insisted that Mazda Clear Lake never once communicated to him that his car was ready to be picked up, despite that fact that Mr. Silva's vehicle was on the dealer's premises for more than two months.

On Saturday, July 19, 2014, Mr. Silva said he dropped off the rental vehicle that he was forced to procure following Mazda's repossession of the loaner car. He then took a cab to Mazda Clear Lake to retrieve his own vehicle. Once there he was presented with a Mazda Clear Lake invoice²¹ reflecting that no repairs to his vehicle were performed. However, the dealer's invoice billed Mr. Silva for "Rental Car" charges totaling \$2,277.15. The invoice contains the following explanation:

Rental Vehicle (57 Days)

Customer failed to return vehicle within 24 hours of being informed that vehicle was ready for pickup. Failure resulted in repossession of loaner vehicle at customer's place of residence on 7/15/14 @ 7:38 p.m.

Customer was informed that vehicle was ready for pickup and no further service would be rendered to vehicle on 5/19/14 at 4:46 p.m.

Customer failed to communicate with dealer as multiple attempts to contact customer as noted on repair order were made.

Vehicle was repossessed on 7/15/14 @ 7:38 p.m. as per vehicle rental agreement. Customer has 24 hours from the time the vehicle is ready to return vehicle or charges of \$39.95/day would be charged to customer.²²

Mr. Silva said he asked to see proof of the dealer's "multiple attempts to contact him" regarding his vehicle being ready for pickup.²³ He was shown nothing, and was instead told: "Mr. Sides, our

²¹ Complainant Ex. 3, invoice dated July 17, 2014.

²² *Id.*

²³ Apart from the communication that purportedly occurred on May 19, 2014, none of the repair orders in evidence document other attempts by the dealer to contact Mr. Silva.

representative, he knows everything about it. He has everything on record that we have contacted you so many times and you never responded.” Mr. Silva testified that he had no choice but to pay the \$2,277.15 bill for rental car charges. Mazda Clear Lake had possession of his only means of transportation, and the dealer refused to release his vehicle until he paid the invoiced amount.

According to Mr. Silva, from mid-July 2014 up through the present, the gearbox in his vehicle has continued to exhibit the same problems as before. He hears a popping noise when depressing the clutch to reduce speed “every so often” (he did not address the prevalence of this noise when backing out, or turning). The thumping noise is still present when he shifts from neutral to first gear. The convertible top still does not always go completely down, but he has learned that the difficulty is associated with cold weather. Regarding the rattle noise inside the driver’s door, Mr. Silva said he has “heard it before at freeway speed, when all the windows are rolled up, there’s some vibration in there.” He stated that currently, the car’s mileage is just above 7,700, but the gearbox/shifting issues have not “worked themselves out over time,” as promised by service advisor Ryan Carter.

On cross-examination, Mr. Silva said he met with Mr. Sides at a Mazda dealership on July 22, 2014, concerning his Lemon Law complaint. He agreed that during Mr. Sides’ inspection and test-drive of the car, the two men were unable to duplicate three of his complaint issues: (1) the rattle noise coming from inside the driver’s door; (2) the convertible top not fully retracting (Mr. Silva noted that it was bright and sunny on the inspection date); and (3) the popping noise that occurs when the clutch is pushed in.

Mr. Silva acknowledged that Mr. Sides was able to duplicate the issue Mr. Silva described as “a thump noise when going from neutral into first gear.” He further acknowledged that during the July 22, 2014 inspection, Mr. Sides explained the source of the “thump noise” in a manner consistent with the direct testimony he offered at hearing (see below). Mr. Silva complained, however, that during the inspection there were two other Mazda Miata MX-5s on the dealer’s lot, yet he was not allowed to compare his vehicle’s transmission/clutch function with the transmission/clutch function of the two other vehicles.

D. Mazda’s Evidence and Arguments

Mazda offered the testimony of District Support Manager David Sides. Mr. Sides testified that he was formerly employed by Chrysler as a Chrysler-certified technician. Although he has no formal training in automotive technology, he has worked in the automotive service field for the past 15 years, serving as a

technician, a service advisor, and a service manager. He indicated that he is familiar, through experience, with transmission/gearbox functions in both American and Japanese-made vehicles.

Mr. Sides testified that his meeting with Mr. Silva on July 22, 2014, included an inspection and test-drive of the vehicle. During the first part of the test-drive, Mr. Silva drove the vehicle and demonstrated for Mr. Sides, the “thump” noise that occurs when the car’s transmission shifts from neutral to first gear. Afterwards, they drove into a parking lot and switched sides. Mr. Sides took the wheel.

Mr. Sides expressed the belief that he was able to replicate the driving conditions that are the heart of Mr. Silva’s transmission concerns. During the test drive, Mr. Silva indicated that while stopped at a red light, his practice is to shift the car into neutral and release the clutch pedal. Once the light changes and he can go, Mr. Silva depresses the clutch pedal and shifts into first gear. This is the moment when the “thump” noise occurs.

Mr. Sides explained how the car’s manual transmission and clutch function in the same traffic light scenario. When the driver stops at a red light, shifts in to neutral, and releases the clutch pedal, he said the clutch disc engages and causes the transmission’s input shaft to spin (rotate). Although the engine is still running, the transmission’s drive shaft and the differential have ceased to rotate because the vehicle is stationary. When the light turns green and the driver depresses the clutch pedal, Mr. Sides said, the clutch disc disengages and allows the driver to shift into first gear. It is the sudden “mating” of moving components with non-moving components that produces a “thump.” Stated another way, when the car is stopped and driver shifts from neutral to first gear, the rotation of the input shaft and the sliding gears are engaging with the rest of the driveline, which is not rotational because the car has been stationary. The resulting sensation or sound (“thump”) is the natural result of this process. According to Mr. Sides, the harshness of the transition may be reduced if the driver, after depressing the clutch pedal, delays shifting into first gear for a few moments. Even a slight delay can slow the input shaft’s rate of rotation.

Mr. Sides also explained that the presence of synchronizers between 2nd, 3rd, 4th, and 5th gears allows smooth shifting compared with the harsh engagement that occurs when shifting from neutral to first gear, or from neutral to reverse gear. The synchronizers between the higher gears permits components that are potentially moving at different rotational speeds to engage without gear clash or “clunking”

noise. The harsh transition associated with shifting from neutral to either reverse gear or first gear results from the lack of synchronization.

Mr. Sides also stated that when he goes to a dealership to perform a vehicle inspection for Lemon Law purposes, he is limited by the dealer's inventory. On the day he met Mr. Silva, the dealer had two other Mazda Miatas in stock but they were not suitable for comparison to Mr. Silva's vehicle: one was a Mazda Miata MX-5 Club with a 6-speed manual transmission, and the other was Mazda Miata MX-5 with an automatic transmission.

E. Analysis

In order to prevail in his request for repurchase relief, Mr. Silva must show by a preponderance of the evidence that Mazda has not conformed the vehicle to an applicable express warranty because Mazda cannot repair a warrantable defect in the vehicle. In addition, Mr. Silva must show that the nonconformity creates a serious safety hazard or substantially impairs the use or market value of the vehicle. Neither of these statutory elements were established by the required standard of proof.

Mr. Silva's complaint filed with the Department raised four alleged warrantable defects in the vehicle. With respect to the convertible top not fully retracting, the defective condition was not present on the hearing date, nor was it present on July 22, 2014, the date of Mazda's inspection. Moreover, Mr. Silva acknowledged that the problem occurred when the weather was cold, just after he purchased the car. All of these factors indicate that smooth operation of the vehicle's convertible top is a function of time, age, and weather. No evidence demonstrates that a warrantable defect is causing the vehicle's convertible top to malfunction.

The popping noise that occurred when the clutch was pushed in to reduce the vehicle's speed, or while backing out and turning, also appears to have abated with time. By Mr. Silva's own admission, he currently hears a popping noise when he depresses the clutch to reduce speed "every so often." His testimony did not even address the prevalence of this noise when backing out, or turning. He acknowledged that the popping noise could not be duplicated during the July 22, 2014 vehicle inspection, and the noise was not present at the time of hearing.

A third complaint issue, the presence of a rattle noise inside the driver's door when the windows are rolled up and car is traveling at freeway speeds, was not duplicated at the July 2014 vehicle inspection, or the inspection that occurred on the hearing date. Mr. Silva's testimony that he has "heard it before at freeway speed, when all the windows are rolled up, there's some vibration in there," does not suggest the presence of a warrantable defect.

The final complaint issue concerns a "thump" noise that occurs when the vehicle is shifted from neutral to first gear. Mr. Sides replicated this noise during Mazda's July 2014 inspection of the vehicle, and the noise was present during the inspection performed at the hearing. However, Mr. Sides credibly testified that the thumping noise heard while shifting from neutral to first gear occurs because there is no synchronizer between those gears (unlike the higher gears in a manual transmission, which are synchronized). In the absence of synchronization, shifting from neutral to first gear results in the harsh engagement of moving components and non-moving components, resulting in a slight "thump" noise. This is the normal operation of a manual transmission, and the noise does not interfere with the vehicle's transmission or clutch function. The noise may be unpleasant or imperceptible, depending on the driver, but it does not constitute a warrantable defect.

In summary, no evidence establishes the existence of a warrantable defect in Mr. Silva's vehicle, much less a warrantable defect that creates a safety hazard or substantially impairs the use or market value of the vehicle. Therefore, his request for repurchase relief must be denied.

III. FINDINGS OF FACT

1. On November 14, 2013, Joseph R. Silva, Jr. purchased a new 2013 Mazda Miata MX-5 (the vehicle) from Mazda of Clear Lake (Mazda Clear Lake) in Webster, Texas, with mileage of 38 at the time of delivery.
2. The vehicle is equipped with a manual five-speed transmission and has a convertible top.
3. Mazda North American Operations (Mazda) manufactured the vehicle.
4. Mazda issued a basic limited warranty for the vehicle covering defects in factory-supplied materials and workmanship for three years or 36,000 miles, whichever occurs first. Mazda also issued a powertrain limited warranty for the vehicle covering defects in the engine, transmission, and drive train, for five years or 60,000 miles, whichever occurs first.

5. On the date of hearing the vehicle's mileage was 7,745, and coverage under both of Mazda's limited warranties was in effect.
6. Mazda Clear Lake is an authorized dealer of Mazda.
7. Within 10 days of purchase, Mr. Silva noticed several problems with his new vehicle:
 - a. A thump noise when shifting from neutral into first gear;
 - b. A popping noise when pushing in the clutch to reduce vehicle speed, and while backing out and turning;
 - c. The convertible top does not always fully retract; and
 - d. A rattle noise coming from inside the driver's door when the windows are rolled up and car is traveling at freeway speeds.
8. On December 7, 2013, at mileage of 892, the vehicle was serviced by Mazda Clear Lake for each of the problems described in Finding of Fact No. 7.
9. During the December 7, 2013 service visit, Mazda Clear Lake found that the convertible top's difficulty in fully retracting resulted from the installation of new material on a brand new vehicle. The dealer concluded that the top's material would stretch out naturally with time and wear, resolving the issue.
10. During the December 7, 2013 service visit, Mazda Clear Lake found that the vehicle's thumping noise while shifting from neutral to first gear was due to "internals on the transmission that need to be broken in."
11. On May 6, 2014, at 5,486 miles, the vehicle was again serviced by Mazda Clear Lake. Mr. Silva reported the same problems listed in Finding of Fact No. 7, but the only concern noted on the dealer's repair order was "a popping when disengaging the clutch and it feels like the vehicle doesn't want to shift into gear." Technicians test-drove the vehicle and determined that the car was shifting normally. No repairs were performed.
12. On July 22, 2014, a Mazda factory representative inspected and test-drove the vehicle.
13. On July 22, 2014, the vehicle's convertible top retracted fully and without difficulty.
14. Operation of the vehicle's convertible top is affected by weather conditions, in addition to time and age. The convertible top functions best in warm, humid weather, and any stiffness in the material is likely to occur to cold weather.
15. On July 22, 2014, a rattle noise coming from inside the vehicle driver's door was not present.
16. On July 22, 2014, the vehicle did not exhibit a popping noise when the clutch was pushed in to reduce speed, or while backing out and turning. At the time of hearing, Mr. Silva indicated that the popping noise occurs "every so often."

17. Contrary to the diagnostic findings of Mazda Clear Lake described in Finding of Fact No. 10, the vehicle's thumping noise while shifting from neutral to first gear is best explained by the absence of a synchronizer between neutral and first gear. Without synchronization, shifting between gears results in the harsh engagement of moving components with non-moving components and produces a "thump" noise.
18. The phenomena described Finding of Fact No. 17 is a normal operation of the vehicle's manual transmission.
19. The vehicle does not have an existing warrantable defect or condition that creates a serious safety hazard or substantially impairs the use or market value of the vehicle.
20. On June 23, 2014, Mr. Silva sent written notice of the vehicle's alleged defects to Mazda.
21. On June 30, 2014, Mr. Silva filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
22. On July 25, 2014, 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.
23. The hearing convened before Hearings Examiner Anne K. Perez on September 19, 2014 in Houston, Texas. Mr. Silva appeared and was represented by attorney Terry W. Vanderpool. Mazda was jointly represented by District Support Manager David Sides, who appeared in person, and Robin Hahn, Mazda's Administrator, Customer Mediation, who appeared telephonically. The record closed on October 20, 2014.

IV. CONCLUSIONS OF LAW

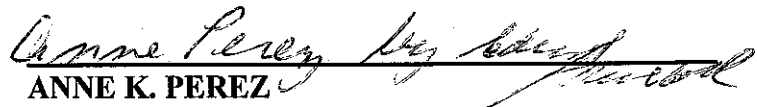
1. The Department has jurisdiction over this matter. Tex. Occ. Code §§ 2301.601-.613 (Lemon Law).
2. A hearings examiner of the Department's Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a decision with findings of fact and conclusions of law, and the issuance of a final order. Tex. Occ. Code § 2301.704.
3. Mr. Silva 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. Mr. Silva failed to prove by a preponderance of the evidence that the vehicle has a warrantable defect or condition that presents a serious safety hazard or substantially impairs the use or market value of the vehicle. Tex. Occ. Code § 2301.604.
6. Mr. Silva'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 Mr. Silva's petition for repurchase relief pursuant to Texas Occupations Code §§ 2301.601-613 is hereby **DISMISSED**.

SIGNED December 8, 2014.



ANNE K. PEREZ
HEARINGS EXAMINER
OFFICE OF ADMINISTRATIVE HEARINGS
TEXAS DEPARTMENT OF MOTOR VEHICLES