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## **Rice v. Newmar Corp.**

United States District Court for the District of Arizona

December 23, 2009, Decided; December 23, 2009, Filed

No. CV-08-1159-PHX-SRB

### **Reporter**

2009 U.S. Dist. LEXIS 140957 \*

Gary and Stephanie Rice, Plaintiffs, vs. Newmar Corporation; Robert Crist & Co. d/b/a Worldwide RV; Bank of the West, Inc., Defendants.

**Notice:** NOT FOR PUBLICATION

**Subsequent History:** Costs and fees proceeding at, Motion granted by [Rice v. Newmar Corp., 2010 U.S. Dist. LEXIS 148505 \(D. Ariz., Mar. 11, 2010\)](#)

Motion denied by [Rice v. Newmar Corp., 2010 U.S. Dist. LEXIS 148506 \(D. Ariz., Mar. 11, 2010\)](#)

### **Core Terms**

repair, warranty, defects, summary judgment, Cross-Motion, limited warranty, summary judgment motion, motor home, revocation, reasonable time, partial summary judgment, breach of warranty, warrantor, replacement, consequential, remedies, courts, damages, argues, revocation of acceptance, incidental damages, essential purpose, claim for breach, matter of law, breached, terms, limited remedy, lack standing, material fact, Arizona's Lemon Law

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For Newmar Corporation, Defendant, Cross Defendant: Scott C Goering, Goering Roberts Rubin Brogna Enos & Treadwell-Rubin PC, Tucson, AZ.

For Robert Crist and Company, doing business as, Worldwide RV, Defendant, Cross Claimant: Elizabeth Lynn Warner, Scott C Goering, Goering Roberts Rubin Brogna Enos & Treadwell-Rubin PC, Tucson, AZ.

**Judges:** Susan R. Bolton, United States District Judge.**Opinion by:** SUSAN R. BOLTON

### **Opinion**

#### **ORDER**

The Court now considers Defendant Newmar Corporation's Motion for Summary Judgment ("Def.'s Mot.") (Doc. 65), Plaintiffs' Cross-Motion for Partial Summary Judgment on Plaintiffs' MMWA Breach of Warranty Claim and Motion for Partial Summary Judgment on Plaintiffs' Revocation Claim ("Pls.' Resp. & Mot.") (Doc. 69), and Plaintiffs' Motion for the Court to Consider Plaintiffs' Cross-Motion for Summary Judgment ("Mot. to Consider") (Doc. 80).

#### **I. BACKGROUND**

On June 8, 2007, Plaintiffs Gary and Stephanie Rice ("Plaintiffs") purchased a new 2007 Newmar All Star motor home for a financed price of \$268,270.77 from Defendant Robert Crist & Co. d/b/a Worldwide [\*2] RV, Inc. ("Worldwide RV"). (Pls.' Additional Statement of Facts ("PSOF") ¶ 1; Def.'s Statement of Facts in Supp. of Mot. for Summ. J. ("DSOF") ¶¶ 1, 2.) The Newmar All Star was manufactured and warranted by Defendant Newmar Corporation ("Newmar"). (PSOF ¶ 1; DSOF ¶¶ 15, 16; Second Am. Compl. ("SAC"), Ex. B, Newmar Corporation 2007 Recreational Vehicle Twelve Month Limited Warranty ("Newmar Limited Warranty").) During the initial walk-through following purchase, Plaintiffs assert that they noticed several flaws. (PSOF ¶¶ 9, 10.)

Shortly after acquiring the motor home, and before any repairs were made, Plaintiffs used the motor home for a road trip to the East Coast. (DSOF ¶ 4.) Plaintiffs allege that during the trip they noticed several additional problems. (PSOF ¶ 14-37.) Plaintiffs assert that the motor home suffered from a number of initial defects including: an excessively hot mid-engine cover; defective windshield wipers; defective air conditioning; a broken kitchen table; paint coming off near the entry door; stains on the carpet and the booth cushions; the bathroom door did not latch; the satellite system did not work; a gap near the entry steps; the television over the driver's [\*3] seat rattled; the DVD player did not function properly; the driver's seat was loose and leaned to the right; there were a variety of electrical defects; the cup holders were loose; the linoleum on the bathroom floor had bubbles in it; the generator leaked; a mud-flap was loose; the brakes squeaked and the motor home shook during braking; and the front tires emitted a banging sound during turns. (PSOF ¶¶ 7-36.)

As a result of these defects, Plaintiffs took the motor home to Worldwide RV for repairs. (DSOF ¶ 6; DSOF, Ex. 1, Gary Rice Dep. 41:19-42:13, Mar. 31, 2009.) The motor home initially remained at Worldwide RV for repairs from July 9, 2007 until September 5, 2007. (DSOF ¶¶ 6, 7.) The motor home was again serviced at Worldwide RV from September 7, 2007 through September 19, 2007, after Plaintiffs notified Worldwide RV of additional defects. (DSOF ¶ 8.)<sup>1</sup> Following the second session of repairs, Plaintiffs again asserted that several defects remained, including: "the mud flap not being properly installed; the DVD player would still not play on the other TV's and it did not fit properly in the cabinet. Moreover, the kitchen table that was repaired broke because it was not glued properly [\*4] and the service engine light was on." (PSOF ¶ 52.) On October 16, 2007, Worldwide RV took the motor home back to its dealership for additional repairs. (DSOF ¶ 10.) Worldwide RV returned the motor home to Plaintiffs on October 19, 2007. (DSOF ¶ 11.)

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<sup>1</sup> Defects reported prior to the second repair attempt included: the DVD player was extremely hot; the air conditioning cover on the roof was broken; oil leaked from the generator; the battery tray did not slide out; a mud flap was not correctly mounted to the motor home; the driver's seat was loose and leaned to the right; the carpet in the bedroom was bunching; the air conditioning in the master bedroom was not producing sufficient air flow; the tack strip was coming off in several places; the bathroom door trim was damaged. (PSOF, Ex. C, Gary Rice Affidavit ¶ 45.)

Plaintiffs again reported several remaining defects in the motor home, and Newmar offered to take the motor home to its factory in Indiana for further repairs, estimating that these repairs would take an additional thirty days. (PSOF ¶¶ 102-04; PSOF, Ex. C ¶¶ 101-03.) Plaintiffs refused this offer, noting that Newmar already had a significant amount of time to repair the defects and the proposed repairs at the Indiana factory would take too much additional time. (PSOF ¶ 105-06.) Overall, the motor home was serviced for 97 days during the first 138 days of ownership. (PSOF ¶ 77.) On April 11, 2008, Plaintiffs sent a letter through counsel purporting to revoke acceptance of the motor home. (PSOF ¶ 108; DSOF ¶ 25.)

Plaintiffs allege that after the three repair attempts discussed above the following defects remain: the side mirrors are vibrating and loose; the driver's side electric sun visor is stained; there is a gap near the entry steps; the [\*5] paint near the entry door is coming off; the trim above the driver's side seat has fallen off; the carpet has a stain and is bunched; the tack strips are loose in several places; the booth cushions are stained; the arm of the chair behind the co-pilot is torn; there is excess sealant on the cup holders following repairs; there are again bubbles in the new linoleum floor; the bathroom wall and door remain defective; there is a hand print on the bathroom ceiling; the television rattles; the replacement DVD player does not fit, is hot to the touch and does not play on all of the televisions; several televisions do not work with the DVD player and satellite system; the air conditioning is not cool enough in the master bedroom; the mid-engine cover is excessively hot; the mudflap is not correctly installed; and the generator leaks oil. (PSOF ¶¶ 133-135, 159.)

Newmar admits that thirteen items warranting repair remain, including: the carpet in the hallway and bedroom is bunching; the trim around the bathroom door is damaged; the linoleum floor has bubbles; the front television rattles; and the dash and lower bedroom air conditioner vents do not produce sufficient air flow. (DSOF ¶ 29; DSOF, [\*6] Ex. 6, Report of Doug Lown at 2-6).

Plaintiffs claim that the remaining defects, and Newmar's failure to repair the defects within a reasonable time, constitute a breach of Newmar's Limited Warranty and that Plaintiffs are entitled to revoke their acceptance of the motor home. (SAC ¶¶ 28-37). Both Newmar and Plaintiffs now move for summary judgment.

## II. LEGAL STANDARDS AND ANALYSIS

### A. Timeliness of Newmar's Motion for Summary Judgment and Plaintiffs' Cross-Motion for Partial Summary Judgment

#### 1. Newmar's Motion for Summary Judgment

Plaintiffs assert that the Court should deny Newmar's Motion for Summary Judgment because it was filed on August 27, 2009, one day after the August 26, 2009 deadline for dispositive motions established by the Court's scheduling order. (Pls.' Resp. & Mot. at 1-2.) Newmar admits that its Motion was filed one day late and explains that the delay was the result of a computer error that occurred during an upgrade of counsel's computerized calendaring system. (Def.'s Reply at 2, Exs. 1, 2.) Newmar provided the Court with documentation of the computerized calendaring error. (Def.'s Reply, Exs. 1, 2.) Plaintiffs' attempt to argue that they were unfairly prejudiced by [\*7] the one-day delay is unconvincing. Plaintiffs were not unfairly prejudiced by a motion filed only one day after the filing deadline and Newmar has adequately explained the error. Accordingly, the Court will not deny Newmar's Motion for Summary Judgment as untimely.

#### 2. Plaintiffs' Cross-Motion for Partial Summary Judgment and Motion for the Court to Consider Plaintiffs' Cross-Motion for Summary Judgment

Following Newmar's Motion for Summary Judgment, Plaintiffs filed their Cross-Motion for Partial Summary Judgment on Plaintiffs' MMWA Breach of Warranty Claim and Motion for Partial Summary Judgment on Plaintiffs' Revocation Claim. Plaintiffs' cross-motion was filed on September 25, 2009, over a month after the court-ordered deadline for dispositive motions. (See Pls.' Resp. & Mot.) Although Plaintiffs' Cross-Motion was untimely, the Court will consider it to the extent it requests the determination of legal issues initially raised and argued in Newmar's Motion for Summary Judgment. Newmar has had the opportunity to address Plaintiffs' Cross-Motion, and the issues have been fully briefed.

However, Plaintiffs' Cross-Motion also argues for partial summary judgment on Plaintiffs' claim for [\*8] revocation of acceptance against Worldwide RV and

Bank of the West. To the extent Plaintiffs' Cross-Motion requests partial summary judgment on claims against Defendants Worldwide RV and Bank of the West, Plaintiffs' Cross-Motion is not a true cross-motion. Defendants Worldwide RV and Bank of the West have not had the opportunity to respond to Plaintiffs' untimely motion. As a result, the Court will not consider Plaintiffs' untimely motion for partial summary judgment on the claim for revocation.

Plaintiffs' Motion for the Court to Consider Plaintiffs' Cross-Motion for Summary Judgment is granted as to Plaintiffs' cross-motion for summary judgment on Plaintiffs' breach of warranty claim under the MMWA and denied as to Plaintiffs' motion for partial summary judgment on Plaintiffs' revocation claim.

### B. Summary Judgment

The standard for summary judgment is set forth in [Rule 56\(c\) of the Federal Rules of Civil Procedure](#). Under [Rule 56](#), summary judgment is properly granted when: (1) no genuine issues of material fact remain; and (2) after viewing the evidence in the light most favorable to the non-moving party, the movant is clearly entitled to prevail as a matter of law. [Fed. R. Civ. P. 56](#); [Celotex Corp. v. Catrett](#), 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); [Eisenberg v. Ins. Co. of N. Am.](#), 815 F.2d 1285, 1288-89 (9th Cir. 1987). A fact is "material" when, under the governing substantive law, it could [\*9] affect the outcome of the case. [Anderson v. Liberty Lobby, Inc.](#), 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A "genuine issue" of material fact arises if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

In considering a motion for summary judgment, the court must regard as true the non-moving party's evidence, if it is supported by affidavits or other evidentiary material. [Celotex](#), 477 U.S. at 324; [Eisenberg](#), 815 F.2d at 1289. However, the non-moving party may not merely rest on its pleadings; it must produce some significant probative evidence tending to contradict the moving party's allegations, thereby creating a material question of fact. [Anderson](#), 477 U.S. at 256-57 (holding that the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment); [First Nat'l Bank of Ariz. v. Cities Serv. Co.](#), 391 U.S. 253, 289, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968).

When, as here, the court is faced with cross-motions for

summary judgment involving the same claim, the court must consider each motion on its own merits and determine for each side whether summary judgment is appropriate. [Fair Hous. Council of Riverside County, Inc. v. Riverside Two](#), 249 F.3d 1132, 1136 (9th Cir. 2001).

### C. Breach of Warranty Under [A.R.S. Section 44-1261](#)

Newmar argues that summary judgment is appropriate with regard to Plaintiffs' breach of warranty claim brought pursuant to Arizona's Lemon Law, Arizona Revised Statutes ("A.R.S.") [§§ 44-1261 et seq.](#) (Def.'s Mot. at 5-6.) Newmar correctly asserts that Arizona's [\*10] Lemon Law does not apply to vehicles with a gross weight in excess of 10,000 pounds. In response, Plaintiffs state, "Plaintiffs do not believe there is a good faith basis for arguing that the Lemon Law should apply here." (Pls.' Resp. & Mot. at 17.) Plaintiffs' concession that Arizona's Lemon Law is inapplicable to the current suit warrants summary judgment in Newmar's favor on this claim. The Court grants Newmar's Motion for Summary Judgment on Plaintiffs' claim for breach of warranty under Arizona's Lemon Law.

### D. Breach of Warranty Under the MMWA

The Court next turns to Plaintiffs' claim for breach of warranty under the Magnuson-Moss Warranty - Federal Trade Commission Improvement Act (the "MMWA"). Both Newmar and Plaintiffs seek summary judgment on Plaintiffs' MMWA claim. The Court will consider each motion on its own merits and determine for each side whether summary judgment is appropriate. See [Fair Hous. Council of Riverside](#), 249 F.3d at 1136.

#### 1. Standard for Claims Brought Under the MMWA

The MMWA creates minimum disclosure and content requirements for written consumer product warranties. [15 U.S.C. §§ 2301-2312](#). Under the MMWA, written warranties are classified as either "full" warranties or "limited" warranties. *Id.* [§ 2303\(a\)\(1\)-\(2\)](#). A warrantor must specify whether [\*11] a written warranty is full or limited, and only full warranties are required to meet the minimum standards established in [§ 2304](#) of the MMWA. *Id.* [§ 2303](#); [Bailey v. Monaco Coach Corp.](#), 350 F. Supp. 2d 1036, 1042 (N.D. Ga. 2004). The MMWA does not provide minimum substantive standards for

limited warranties. *Id.* [§ 2303\(a\)\(2\)](#); [Bailey](#), 350 F. Supp. 2d at 1042.

The MMWA provides a federal, private right of action for consumers damaged by a warrantor's failure "to comply with any obligation under . . . a written warranty." [15 U.S.C. § 2310\(d\)\(1\)](#); see also [Milicevic v. Fletcher Jones Imports, Ltd.](#), 402 F.3d 912, 917 (9th Cir. 2005). Prior to bringing suit under the MMWA for a failure to comply with the terms of a warranty, a potential plaintiff must provide the warrantor "a reasonable opportunity to cure such failure to comply" with the warranty. [15 U.S.C. § 2310\(e\)](#); see, e.g., [DeShazer](#), 391 F. Supp. 2d 791, 798 (D. Ariz. 2005).

While the MMWA provides a federal cause of action for the breach of a written warranty, state warranty law provides the basis of all warranty claims under the MMWA. [Walsh v. Ford Motor Co.](#), 807 F.2d 1000, 1016, 257 U.S. App. D.C. 85 (D.C. Cir. 1986) ("[S]tate warranty law lies at the base of all warranty claims under Magnuson-Moss."); [DeShazer](#), 391 F. Supp. 2d at 794 ("[W]hile the MMWA creates additional requirements for consumer protection warranties and creates a private cause of action for breach of a warranty, 'state warranty law lies at the base of all warranty claims under Magnuson-Moss.'" (quoting [Walsh](#), 807 F.2d at 1016)); [Fedrick v. Mercedes-Benz USA, LLC](#), 366 F. Supp. 2d 1190, 1200 n.14 (N.D. Ga. 2005) ("The Act does not provide an independent cause of action for state law [\*12] claims, only additional damages for breaches of warranty under state law.").<sup>2</sup>

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<sup>2</sup> Plaintiffs argue that their warranty claims are rooted not in state law, but in the MMWA itself, and therefore, that this Court should apply federal rather than state standards. (Pls.' Resp. & Mot. at 7; Pls.' Reply at 4-7.) Plaintiffs' argument confuses the creation of a federal cause of action with the creation of an entirely new area of federal substantive law governing all aspects of warranties. The MMWA, at least to the extent at issue in this case, creates a federal cause of action, not federal substantive law. As such, in an action for breach of warranty under the MMWA, courts apply state substantive law except as expressly modified by the MMWA. [Walsh](#), 807 F.2d at 1013-14. Unless a plaintiff can point to an express modification in the MMWA evidencing Congressional intent to displace state law, courts must apply state law. Plaintiffs do not allege a violation of the substantive provisions of the MMWA.

Plaintiffs rely on [Milicevic](#), 402 F.3d 912, for the proposition that there is a separate federal standard for breach of warranty under the MMWA. (Pls.' Resp. & Mot. at 7.) However, the

As a result, the Court will evaluate Plaintiffs' claim for breach of warranty under Arizona law.<sup>3</sup>

## 2. Breach of Warranty Under Arizona Law

Under Arizona law, "[e]xpress warranties are treated like any other contract and interpreted according to general contract principles." *Chaurasia v. Gen. Motors Corp.*, 212 Ariz. 18, 126 P.3d 165, 169 (Ariz. Ct. App. 2006); see also *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 525, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992) ("A manufacturer's liability for breach of an express warranty derives from, and is measured by, the terms of the warranty."). A limited warranty is breached if the consumer can prove that the manufacturer did not comply with the terms of the express limited warranty. *Chaurasia*, 126 P.3d at 169.

In *Chaurasia v. General Motors Corp.*, the Arizona Court of Appeals applied Arizona law to a claim for breach of warranty under the MMWA. *Id.* at 173.<sup>4</sup> The Arizona Court of Appeals considered a limited, express warranty, which provided that the warrantor would repair any covered defects at no charge to the purchaser, and found that to prove a breach of the limited warranty, the plaintiff had to demonstrate that the warrantor "refused or otherwise failed to pay for the repair to a covered item." *Id.* at 169-170. The court ultimately held that because the warrantor paid for all claimed [\*13] warranty repairs and never refused to make warranty repairs, the warrantor was entitled to judgment as a matter of law. *Id.* Newmar argues that the *Chaurasia* case is controlling. (Def.'s Reply at 7.) While *Chaurasia* provides a basic analysis of a warranty to repair under Arizona law, the opinion cannot be applied without limitation. The *Chaurasia* court did not explicitly address whether a warranty limiting a buyer's remedies to repair

or replacement of defective parts may be breached by repeated failures to repair defects.

Arizona courts have recognized that "[i]mplicit in the terms of [a warranty providing the limited remedy of repair or replacement of defective parts] is the presumption that the [products] could be cured by replacement or repair in the event they became defective." *Kalil Bottling Co. v. Burroughs Corp.*, 127 Ariz. 278, 619 P.2d 1055, 1059 (Ariz. Ct. App. 1980). As such, a warranty to repair may be breached if the warranted item suffers from an incurable defect.

In addition, courts have recognized that a warranty to repair may be breached by a failure to repair in a reasonable amount of time. *Haugland v. Winnebago Indus.*, 327 F. Supp. 2d 1092, 1098 (D. Ariz. 2004) ("Under the Arizona U.C.C. [provisions governing limitations on remedies], a warrantor who issues a limited warranty [which also limits the purchaser's remedies [\*14] for breach to repair or replacement of defective parts] must perform repairs after given a reasonable opportunity to do so . . . ." (citing *Roberts v. MorgensenMotors*, 135 Ariz. 162, 659 P.2d 1307, 1311 (Ariz. Ct. App. 1982))).<sup>5</sup> Several courts have understood a failure to repair within a reasonable time as a breach of a warranty limiting a purchaser's remedies to repair or replacement of defective products. While courts have applied this breach of warranty analysis to invalidate the limitation on remedies, the courts also understood the failure to repair defects within a reasonable time as a breach of warranty depriving the purchaser of the substantial benefit of his or her bargain. See e.g., *Kalil Bottling*, 619 P.2d at 1059 (holding that the warranty's limitation on remedies was void and stating, "[w]hen the warrantor fails to correct the defect as promised within a reasonable time he is liable for a breach of that warranty." (quoting *Beal v. General Motors Corp.*, 354 F. Supp. 423, 426 (D. Del. 1973))); *Ehlers v. Chrysler*

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court in *Milicevic* applied state law to evaluate an MMWA claim for breach of warranty, and analyzed whether the warranty was breached by applying Nevada's Lemon Law. *Milicevic*, 402 F.3d at 919.

<sup>3</sup> While the parties may not agree that state law provides the basis of breach of warranty claims under the MMWA, both parties agree that Arizona state law applies to the dispute. (Def.'s Mot. 6-7 (applying Arizona law); SAC ¶ 30-37 (alleging cause of action under Arizona law).)

<sup>4</sup> While the *Chaurasia* court did not explicitly state that it was applying Arizona law, the court acknowledged that "[t]he MMWA is a federal statute codifying a consumer's rights under state law to bring warranty actions." 126 P.3d at 173.

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<sup>5</sup> See also *Hines v. Mercedes-Benz USA, LLC*, 358 F. Supp. 2d 1222, 1228 (N.D. Ga. 2005) ("[R]efusal to repair, unsuccessful repair, or repeated failures of the repair constitute a breach of the express warranty. . . . A jury question arises as to a breach of warranty where there is a refusal to repair or an inability to repair."); *Ford Motor Co. v. Gunn*, 123 Ga. App. 550, 181 S.E.2d 694, 696 (Ga. 1971) ("[I]t is the [warrantor's] refusal to remedy within a reasonable time, or a lack of success in the attempts to remedy which would constitute a breach" of a warranty providing for repair or replacement of defective products.); *Seely v. White Motor Co.*, 63 Cal. 2d 9, 45 Cal. Rptr. 17, 403 P.2d 145, 148 (Cal. 1965) (same).

Motor Corp., 88 S.D. 612, 226 N.W.2d 157, 161, 162 (S.D. 1975) (holding that where a warranty limited the purchaser's remedies to repair or replacement of defective parts, the warrantor breached the warranty by failing to repair the defects within a reasonable time and depriving the purchaser of the benefit of his bargain); Courtesy Ford Sales, Inc. v. Farrior, 53 Ala. App. 94, 298 So. 2d 26, (Ala. Civ. App. 1974).

Finally, some courts have found a reasonable time requirement for warranties to repair in Uniform [\*15] Commercial Code ("U.C.C.") Section 2-309, codified by Arizona law in A.R.S. Section 47-2309. Section 2-309 provides that "[t]he time for . . . any other action under a contract if not provided in this chapter or agreed upon shall be a reasonable time." A.R.S. § 47-2309(A); Stephens v. Crittenden Tractor Co., 187 Ga. App. 545, 370 S.E.2d 757, 759 (Ga. Ct. App. 1988) ("[T]he express warranty to provide free labor was an express warranty to repair, or at least service, the purchased equipment. In the absence of any language specifying the time for making such repairs, the warranty was thus subject to the provision of [the state codification of U.C.C. Section 2-309] imposing a 'reasonable time' requirement on action taken pursuant to this warranty."); Clark v. Int'l Harvester Co., 99 Idaho 326, 581 P.2d 784 (Idaho 1978) (same).

Contrary to Newmar's contention, Arizona law requires that repairs, under warranties that provide for the limited remedy of repair or replacement of defective parts, must be made within a reasonable time.

### 3. Breach of the Newmar Limited Warranty

Newmar provided Plaintiffs with a twelve month Limited Warranty, which provides, in relevant part:

Newmar Corporation warrants this recreational vehicle for twelve (12) months from the original retail owner's date of purchase under normal use and service while in operation in the United States or Canada excluding the exceptions set out below.

If any part of your new Newmar [\*16] Corporation product fails because of a manufacturing defect within twelve (12) months from the original retail owner's date of purchase, it will be repaired without charge for either parts or labor by Newmar Corporation, providing the required maintenance as outlined in the Newmar Owner's guide and claim procedures are followed.

(SAC, Ex. B, Newmar Limited Warranty.) The warranty

is conspicuously designated as a limited warranty, and Plaintiffs do not argue that the MMWA provisions governing full warranties apply.

Based on Arizona law and the language of the warranty, a breach can occur if, during the course of normal use and within the warranty period, Plaintiffs discovered a defect that it promptly brought to Newmar's attention, and Newmar either refused or failed to repair or replace the defective part within a reasonable time.

#### a. Newmar's Motion for Summary Judgment

Newmar argues that it is entitled to summary judgment on Plaintiffs' claim under the MMWA because no reasonable juror could find that Newmar refused to repair any defects or failed to pay for any repairs. (Def.'s Mot. at 6-9.) Newmar argues that there is no requirement under the MMWA or Arizona law requiring warrantors [\*17] to repair defects within a reasonable time. Newmar is correct in asserting that there is no requirement under the MMWA that warrantors repair defects under limited warranties within a reasonable time. (See Def.'s Reply at 6.) Newmar is also correct that the reasonable time requirement of Arizona's Lemon Law does not apply to repairs under this warranty. (See *id.*) However, as discussed above, there is a limitation under Arizona law requiring a warrantor, who has promised to repair or replace defective parts and excluded all other remedies, to make the warranted repairs within a reasonable time.

Newmar made repairs to the motor home on three separate occasions. (DSOF ¶¶ 6, 8, 10.) In total, the motor home was out of use for 97 days during the first 138 days of ownership as a result of repair attempts. (PSOF ¶ 77.) Evidence produced by both Plaintiffs and Newmar indicates that several of the attempted repairs were unsuccessful. It is undisputed that thirteen defects remain. (DSOF ¶ 29.) While Newmar remains willing to continue attempting to repair any remaining defects, there is a question of fact as to whether Newmar's failures to repair defects in the motor home resulted in a failure [\*18] to repair the motor home within a reasonable time. (See PSOF ¶ 102-04.) In addition, despite Newmar's contention that all of the defects are easily curable, (DSOF, Ex. 6 at 7), a jury may find that the extensive repair history, coupled with the evidence of remaining defects, demonstrates that some of the motor home's defects are incurable. If the motor home suffers from irreparable defects, Newmar may be liable for breach of warranty. See Kalil Bottling Co., 619 P.2d

[at 1059](#). Newmar cannot demonstrate that it complied with the terms of the Limited Warranty because Newmar cannot show that, as a matter of law, it remedied the known defects within a reasonable time.

There are genuine issues of material fact concerning whether, and when, several of the defects were repaired and whether the defects were addressed and remedied within a reasonable time. As a result, Newmar is not entitled to summary judgment on the MMWA claim.

#### **b. Plaintiffs' Cross-Motion for Partial Summary Judgment**

Summary judgment for Plaintiffs is only appropriate if Plaintiffs can demonstrate that the evidence is so compelling that a reasonable juror could only find that Newmar breached the warranty by failing or refusing to repair defects. See [Shakur v. Schriro, 514 F.3d 878, 890 \(9th Cir. 2008\)](#) (citing 11-56 [\*19] Moore's Federal Practice-Civil § 56.13). Plaintiffs have failed to meet this burden, and, as a result, summary judgment is inappropriate.

While Plaintiffs have produced evidence indicating that several defects remain, Plaintiffs have not demonstrated as a matter of law that Newmar failed to repair those defects within a reasonable time or that Newmar refused to make or pay for any necessary repairs. Newmar authorized and paid for repairs to the motor home on three separate occasions and evidence produced by both Plaintiffs and Newmar indicates that at least some of those repairs were successful. (DSOF ¶¶ 6, 8, 10; PSOF, Ex. I.) Plaintiffs provided the Court with a copy of Plaintiffs' demand letter and four defect lists. (PSOF, Ex. I, at pp. 5-8.) Plaintiffs' lists indicate that some defects were repaired, some new defects were discovered, and reported defects changed between the repair opportunities. (PSOF, Ex. I, at pp. 5-8.) In addition, Newmar remains willing to continue attempting to repair any remaining defects. (PSOF ¶ 102-04.) Plaintiffs refuse to allow Newmar any further opportunity to repair the motor home's defects. (PSOF ¶ 105-06; DSOF ¶ 12.) Plaintiffs cannot demonstrate that a failure to remedy a defect in [\*20] three repair attempts is unreasonable as a matter of law.

In addition, in order to bring a claim under the MMWA Plaintiffs must first provide Newmar with a reasonable opportunity to repair defects. [15 U.S.C. § 2310\(e\)](#). A genuine issue of material fact remains as to whether providing Newmar three opportunities to repair the

motor home's numerous and changing defects provided Newmar with a reasonable opportunity to cure the defects.

Viewing the evidence in the light most favorable to Newmar, a reasonable juror could find that Newmar did not breach its warranty to repair or replace any defective products or, alternatively, that Plaintiffs failed to provide Newmar with a reasonable opportunity to repair the defects as required before bringing a claim under the MMWA. As a result, Plaintiffs are not entitled to summary judgment on the claim for breach of warranty under the MMWA.

#### **E. Consequential and Incidental Damages Under the MMWA**

The Court next turns to Plaintiffs' request for consequential damages under the MMWA. Newmar seeks summary judgment on the issue of consequential damages, arguing that the terms of the Limited Warranty explicitly prevent Plaintiffs from recovering consequential or incidental damages [\*21] for breach of the Limited Warranty. (Def.'s Mot. at 9.)

While the MMWA acknowledges that warrantors may exclude consequential and incidental damages in limited warranties, [15 U.S.C. § 2304\(a\)\(3\)](#), it is "virtually silent as to the amount and type of damages which may be awarded for breach of an express limited warranty." [Gusse v. Damon Corp., 470 F. Supp. 2d 1110, 1116-17 \(C.D. Cal. 2007\)](#) (quoting [MacKenzie v. Chrysler Corp., 607 F.2d 1162, 1166 \(5th Cir.1979\)](#)). As a result, "courts must look to state substantive law to determine the remedies for breach of an express limited warranty." [Id. at 1117](#).

Arizona law allows for consequential and incidental damages for breach of warranty claims. [Seekings v. Jimmy GMC of Tucson, Inc., 130 Ariz. 596, 638 P.2d 210, 219 \(Ariz. 1981\)](#). Arizona law also permits a limited warranty to explicitly exclude consequential and incidental damages. [Id. at 215](#). However, provisions limiting the remedies available for breach of warranty are invalidated if the exclusive or limited remedy provided by the warranty fails in its essential purpose. [Roberts, 659 P.2d at 1311-1312](#); [DeShazer, 391 F. Supp. 2d at 800](#). Arizona courts would apply the same principles to invalidate limitations on remedies where the limited remedies fail of their essential purpose under both Arizona's U.C.C. provisions and Arizona's common law. [DeShazer, 391 F. Supp. 2d at 799-800](#). In [Roberts](#),

the Arizona Court of Appeals explained that a limited warranty providing the exclusive remedy of replacement or repair of defective parts may fail of its [\*22] essential purpose when the warrantor fails to correct the defect as warranted within a reasonable time. [Roberts, 659 P.2d at 1311-12.](#)

The Newmar Limited Warranty purports to limit the remedies available to Plaintiffs for a breach of the Limited Warranty, conspicuously providing that "Newmar Corporation will not be responsible for any incidental or consequential damages including (but not limited to) loss of use of vehicle, loss of time, inconvenience, expenses for travel . . . ." (SAC, Ex. B, Newmar Limited Warranty.) Under Arizona law, Plaintiffs are not entitled to consequential or incidental damages unless the limited remedies provided in the Limited Warranty fail of their essential purpose. Under *Roberts*, a warranty providing an exclusive remedy of repair or replacement of defective parts may fail of its essential purpose if the warrantor fails to repair defects in a reasonable time. [Roberts, 659 P.2d at 1311-12.](#)

Here, as discussed above, there are disputes of material fact as to whether Newmar repaired certain defects and whether these repairs, which totaled more than 97 days during the first 138 days of ownership consumed an unreasonable amount of time. (See PSOF ¶ 77.) As such, it cannot be said that, as a matter of law, the warranty [\*23] did not fail of its essential purpose. Newmar's motion for summary judgment on the Plaintiffs' claim for incidental or consequential damages is denied.

## F. Revocation of Acceptance

Finally, the Court addresses Plaintiffs' claim for revocation of acceptance pursuant to [A.R.S. Section 47-2608](#). (SAC ¶ 30-37.) Plaintiffs assert the claim for revocation only against Worldwide RV and Bank of the West. (*Id.*) Both Newmar and Plaintiffs seek summary judgment on the claim for revocation of acceptance. Because Newmar lacks standing to move for summary judgment on a claim against another party and because Plaintiffs' argument for partial summary judgment is not a proper cross-motion, both motions for summary judgment as to revocation are denied as to this claim.

## 1. Newmar's Motion for Summary Judgment on the Claim for Revocation

Plaintiffs argue that Newmar's Motion for Summary Judgment on Plaintiffs' revocation claim should be denied because Newmar lacks standing to challenge a claim against Worldwide RV. (Pls.' Resp. & Mot. at 9.) Plaintiffs do not bring suit against Newmar for revocation of acceptance.

Standing is a threshold matter of jurisdiction, and "[b]efore reaching the merits of a motion for summary judgment, a [\*24] district court must first determine that the party moving for summary judgment has standing to file its motion." [Hess v. Union Standard Ins. Co., No. 09-3789, 2009 U.S. Dist. LEXIS 100327, 2009 WL 3597637, at \\*2 \(E.D. La. Oct. 26, 2009\).](#) [Rule 56\(b\) of the Federal Rules of Civil Procedure](#) states that a party "against whom relief is sought" may move for summary judgment on all or part of a claim. [Fed. R. Civ. P. 56\(b\).](#) [Rule 56](#) does not explicitly state whether a party "against whom relief is sought" refers to a party to the action as a whole or a party against whom relief is sought in a specific count of the complaint. [Hess, 2009 U.S. Dist. LEXIS 100327, 2009 WL 3597637, at \\*2.](#) Courts have interpreted [Rule 56](#) "to mean that the 'relief sought' refers to specific counts of the complaint, and that a party not named in a specific count of a complaint lacks standing to move for dismissal of that count." *Id.* (citing [Dover Ltd. v. A.B. Watley, Inc., No. 04-civ-7366, 2006 U.S. Dist. LEXIS 76004, 2006 WL 2987054, at \\*8 \(S.D.N.Y. October 18, 2006\)](#) (holding that a defendant not named in several other counts of a complaint had no standing to move for their dismissal); [Norfolk Fed'n of Bus. Dists. v. Dep't of Hous. and Urban Dev., 932 F. Supp. 730, 741-42 \(E.D. Va.1996\)](#) (holding that defendants not named in a particular count of the complaint lacked standing to defend against that count; noting similarity to standing to move for summary judgment)); see also [Standard Chlorine of Del., Inc. v. Sinibaldi, No. 91-188-SLR, 1994 U.S. Dist. LEXIS 20538, 1994 WL 796603, at \\*7 n.5 \(D. Del. Dec. 8, 1994\)](#) (finding defendant lacked standing to move to dismiss or move for summary judgment with respect to a count in which he was [\*25] not named).

Newmar argues that "[b]ecause Newmar will be responsible for any potential damages awarded Plaintiffs in this litigation pursuant to Plaintiffs' revocation claim, it is clear Newmar has standing to raise this issue." (Def.'s Reply at 8.) However, Newmar has only offered evidence that Newmar "accept[ed] Worldwide's tender of defense" and that Newmar's counsel now also represents Worldwide RV. (Def.'s Reply at 8-9.) Worldwide RV did not move for summary judgment, and Worldwide RV did not join Newmar's

motion for summary judgment. If Worldwide RV wanted to move for summary judgment on Plaintiffs' claim for revocation it could have done so. In addition, despite Newmar's contentions, it is not clear that Newmar will be responsible for damages awarded Plaintiffs under the revocation claim. Newmar offers no evidence indicating that it will indemnify Worldwide RV, and Newmar has argued that it is not obligated to indemnify Worldwide RV. (Def. Newmar's Answer to Cross-Claim Submitted by Def. Crist in its Sep. Ans. to Pls.' Second Am. Compl. ¶ XVII.)

Newmar does not have standing to move for summary judgment on Plaintiffs' claim for revocation against Worldwide RV. Newmar is not named [\*26] in the claim for revocation, and Newmar's tender of defense for Worldwide RV does not make Newmar a party "against whom relief is sought" under Plaintiffs' revocation claim. Accordingly, the Court denies Newmar's Motion for Summary Judgment on Plaintiffs' claim for revocation.

## **2. Plaintiffs' Cross-Motion for Partial Summary Judgment on Several Elements of the Claim for Revocation**

Plaintiffs argue that they are entitled to summary judgment on several discrete elements of their claim for revocation of acceptance. (Pls.' Resp. & Mot. at 10.) As discussed above, the Court will only consider Plaintiffs' Cross-Motion for Partial Summary Judgment to the extent that it is a true cross-motion. The Court will not consider Plaintiffs' Cross-Motion to the extent it argues for partial summary judgment on the revocation claim. Plaintiffs' Motion for partial summary judgment on Plaintiffs' claim for revocation is denied.

**IT IS ORDERED** granting in part and denying in part Plaintiffs' Motion for the Court to Consider Plaintiffs' Cross-Motion for Summary Judgment (Doc. 80). Plaintiffs' Motion is granted to the extent Plaintiffs' Cross-Motion addresses issues properly raised in Newmar's Motion for Summary [\*27] Judgment. Plaintiffs' Cross-Motion is denied to the extent Plaintiffs' Cross-Motion requests partial summary judgment on the claim for revocation against Worldwide RV.

**IT IS FURTHER ORDERED** granting in part and denying in part Defendant Newmar's Motion for Summary Judgment (Doc. 65). Newmar's Motion for Summary Judgment is granted with respect to Plaintiffs' claim for breach of warranty under [A.R.S. Section 44-1261](#). Newmar's Motion for Summary Judgment is

denied with respect to Plaintiffs' breach of warranty claim brought under the MMWA and Plaintiffs' claim for revocation.

**IT IS FURTHER ORDERED** denying Plaintiffs' Cross-Motion for Partial Summary Judgment on Plaintiffs' MMWA Breach of Warranty Claim and Motion for Partial Summary Judgment on Plaintiffs' Revocation Claim (Doc. 69).

DATED this 23rd day of December, 2009.

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