No. 24-

IN THE

Supreme Court of the United States

GORDON WOOD,

Petitioner,

v.

WINNEBAGO INDUSTRIES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Magnuson Moss Warranty Act creates a private right of action for any "consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under [the Magnuson Moss Warranty Act], or under a written warranty, implied warranty, or service contract." 15 U.S.C. § 2310(d)(1). The Magnuson Moss Warranty Act "is remedial in nature and is designed to facilitate relief which would otherwise not be available as a practical matter for individual consumers." *Kelly v. Fleetwood Enters.*, 377 F.3d 1034 (9th Cir. 2004). Pursuant to 15 U.S.C. § 2307 of the Magnuson Moss Warranty Act, a warrantor may designate representatives to perform duties under the written or implied warranty, but no such designation shall relieve the warrantor of his direct responsibilities to the consumer or make the representative a cowarrantor.

The question presented is:

1. Does a warrantor remain liable for its warranty obligations when it designates a representative pursuant to 15 U.S.C. § 2307 to fulfill those obligations?

PARTIES TO THE PROCEEDING

Petitioner is Gordon Wood. Petitioner was plaintiff in the district court and plaintiff-appellant in the court of appeals.

Respondent is Winnebago Industries, Inc. Respondent was the defendant in the district court and defendant-appellee in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioner states as follows:

Petitioner Gordon Wood is an individual.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Wood v. Winnebago Industries, Inc.*, No. 22-16805 (9th Cir.)(opinion affirming judgment of district court, issued June 3, 2024);

- *Wood v. Winnebago Industries, Inc.*, No. 2:18-CV-1710 (D. Nev.)(order granting motion summary judgment on the breach of express warranty and Magnuson Moss Warranty Act claim, entered November 30, 2020);

- *Wood v. Winnebago Industries, Inc.*, No. 2:18-CV-1710 (D. Nev.)(order granting motion for partial summary judgment on the issue of agency, among other issues, entered March 23, 2020).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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The Magnuson Moss Warranty Act is a sweeping statute that applies to all consumer products over $5 that come with either a warranty or service contract. The Act's remedial purpose is to provide consumers with additional rights and remedies for a breach of warranty than traditionally permitted under state law. The Act has garnered particular attention due to the rise in recreational vehicle sales and subsequent recreational vehicle litigation involving the Act.

Litigation often revolves around whether a manufacturer-warrantor can be held liable for repairs performed by a designated representative (commonly referred to as an authorized dealership). Generally, a manufacturer-warrantor will argue that the manufacturer-warrantor should not be held responsible for the time or number of attempts the authorized dealership takes to repair a recreational vehicle. District courts have looked to state agency law to determine whether the manufacturer-warrantor can be held liable in such situations.

The Ninth Circuit held that Mr. Wood could not maintain a breach of warranty and Magnuson Moss Warranty Act claim because he could not establish that the authorized dealerships were agents of Winnebago, and thus, Winnebago could not be held liable for the RV not being repaired by the authorized dealerships in a timely manner. (Appx. 5a-11a). The issue of whether an authorized dealership is an agent is irrelevant since 15 U.S.C. § 2307 states that a manufacturer-warrantor's designation of a representative to perform its obligations under a warranty does not relieve the manufacturer-

warrantor of its direct responsibilities to the consumer or make the representative a cowarrantor.

The Ninth Circuit's holding nullifies the effect and purpose of 15 U.S.C. § 2307 of the Magnuson Moss Warranty Act, thereby stripping consumers of an effective remedy under the Act. Petitioner respectfully requests that the Court grant certiorari in order to resolve an important question of federal law which should be decided by this Court.

OPINIONS BELOW

The Ninth Circuit's decision affirming the district court's grant of summary judgment is not reported in the Federal Reporter, but is reported at 2024 U.S. App. LEXIS 13239 and reproduced in the Appendix at 1a – 18a. The district court's opinion on the motion for partial summary judgment is not reported in the Federal Reporter, but is reported at 2020 U.S. Dist. LEXIS 113046 and reproduced in the Appendix at 19a – 38a. The district court's opinion on the motion for summary judgment is not reported in the Federal Reporter, but is reported at 2020 U.S. Dist. LEXIS 259945 and reproduced in the Appendix at 39a – 52a.

JURISDICTIONAL STATEMENT

The judgment of the Ninth Circuit was entered on June 3, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The dispute arises out of the application of 15 U.S.C. § 2307 of the Magnuson Moss Warranty Act, 15 U.S.C. § 2301 et seq. Below is 15 U.S.C. § 2307:

> Nothing in this title [15 USCS §§ 2301 et seq.] shall be construed to prevent any warrantor from designating representatives to perform duties under the written or implied warranty: *Provided ,* That such warrantor shall make reasonable arrangements for compensation of such designated representatives, but no such designation shall relieve the warrantor of his direct responsibilities to the consumer or make the representative a cowarrantor.

15 U.S.C.S. § 2307 (LexisNexis, Lexis Advance through Public Law 118-70, approved July 12, 2024).

STATEMENT OF THE CASE

A. Statutory Background

The Magnuson Moss Warranty Act ("MMWA") creates a private right of action for any "consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under [the MMWA], or under a written warranty, implied warranty, or service contract." 15 U.S.C. § 2310(d)(1).

Congress passed the MMWA to enhance consumer rights regarding warranties given on all consumer

products exceeding $5, to create additional remedies for consumers for breach of warranty, to enhance consumer protection, and to provide consumers with an economically feasible private right of action. 15 U.S.C. § 2302(a); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1006 (D.C. Cir. 1986); *Automobile Importers of America, Inc. v. Minnesota*, 871 F.2d 717, 722 (8th Cir. 1989) (citing H.R. Rep. No. 1107, 93rd Cong., 2nd Sess., reprinted in 1974 U.S. Code Cong. & Admin. News 7702 and 7722); *Cunningham v. Fleetwood Homes of Ga.*, 253 F.3d 611, 616 (11th Cir. 2001) (citing *Wilson v. Waverlee Homes*, 954 F. Supp. 1530, 1538 (M.D. Ala. 1997) (quoting 119 Cong. Rec. 972 (1973)). Congress was also concerned with addressing the unequal bargaining power between warrantors and consumers in creating the MMWA. *Davis v. Southern Energy Homes, Inc.*, 305 F.3d 1268, 1277 (11th Cir. 2002) (citing S. Rep. No. 93-151, quoted in 40 Fed. Reg. 60168 (1975)).

According to Representative John E. Moss, sponsor of the Magnuson Moss Warranty Act, stated during the presentation of the Conference Report to the House of Representatives on the Magnuson Moss Warranty Act that, "[the Magnuson Moss Warranty Act] and similar bills [will] [] make consumer product warranties meaningful and enforceable . . . ." 120 Cong. Rec. 41405, 1974.

Senator Warren G. Magnuson, sponsor of the Magnuson Moss Warranty Act, presented the Report of the Senate Committee on Commerce to the Senate on what would eventually be the Magnuson Moss Warranty Act. The following excerpt from the Report refers to Section 107 Designation of Representatives, now codified as 15 U.S.C. § 2307:

> one of the purposes of this section is to insure that the manufacturer does not escape his liability under this title by shifting responsibility to dealers, wholesalers, retailers, or others in the chain of distribution. Since manufacturers have primary control over the quality of products, the intent of this section is to place full responsibility on them, while at the same time allowing others, such as dealers, to perform services related to warranties if they are equitably compensated. Therefore, this section also states that 'no such arrangements shall relieve the warrantor of his direct responsibility to the purchaser or necessarily make the representative a cowarrantor.'"

Senate, 93d Congress 1st Session, Report No. 93-151, 20-21 (1973). Further, the Report stated, "[w]hile a manufacturer can issue a warranty that says certain authorized service representatives will repair or replace the defective product, the consumer has recourse directly against the manufacturer as warrantor, if these representatives fail to perform. The manufacturer could not defend against an action for failure to perform by arguing that the designated representative, not the manufacturer, was responsible for the failure of performance." Senate, 93d Congress 1st Session, Report No. 93-151, 20-21 (1973).

B. Factual Background

This case involves a defective 2016 Winnebago Grand Tour recreational vehicle ("RV") which was warranted by Winnebago Industries, Inc. ("Winnebago"), and purchased new by Gordon Wood, but which Winnebago

and its authorized dealership failed to repair within a reasonable number of attempts and/or a reasonable amount of time under the Winnebago Warranty.

1. Mr. Wood Purchases the RV

On April 22, 2017, Mr. Wood purchased the brand-new RV from Giant RV for a price of $331,084.36, and at a total cost of $462,876.00 in payments. (2-ER-61, 216)[1]. At the time Mr. Wood took delivery of the RV from Giant RV, on April 27, 2017, the RV had 2,866 miles on it. (2-ER-216).

Part of the basis for the bargain and included with Mr. Wood's purchase of the RV was a New Vehicle Limited Warranty ("Warranty") issued by Winnebago. (2-ER-61, 300—301). Winnebago's Warranty is for three years from the date it is first placed in service (April 22, 2017), or 100,000 miles, whatever comes first. (2-ER-300—301). Under the terms of Winnebago's Warranty, Mr. Wood was required to bring his RV into an authorized Winnebago service center for any and all warranty repairs. Id. Further, if Mr. Wood felt the repairs made by an authorized service center failed or were otherwise inadequate, the Warranty required Mr. Wood to provide Winnebago with written notice, including a list of defects. Id.

2. Mr. Wood Begins Experiencing Problems with the RV

In early May 2018, Mr. Wood drove the RV to San Diego where his wife stayed in the RV for approximately six weeks while visiting their grandchildren. (2-ER-61).

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1. "ER" refers to the Appellant's Excerpts of Record filed with the Ninth Circuit Court of Appeals.

Mr. Wood began experiencing problems with the RV during this trip, including: entry steps rattle loudly when traveling on freeway, air leak from front corner of driver's side window at freeway speeds, navigation system does not work, satellite radio does not work, stove top in coach does not work, aqua hot system burns blue smoke on start up for about 20 minutes, aqua hot system only heats 1 zone of the floor, large door in the master bath has dents in it, large cupboard has broken runners, accent light in living room falling down, all of the blinds need adjusted, loose baseboards in master bedroom, lights flicker when the water pump is used, door between the bedroom and lounge is broken, dishwater leaks, and center light on steering wheel does not light up. Id.

Mr. Wood then stayed in Nevada for a couple of weeks, before taking the RV to British Columbia for approximately six weeks for him and his wife to visit their grandchildren. (2-ER-62). During the trip to British Columbia, Mr. Wood experienced additional problems with the RV, including: parking brake light and buzzer come on randomly while driving, auto leveling flashes and buzzes indicating that the posts are down, and the leveling posts will start contracting when parked. Id.

Upon their return from British Columbia, Mr. Wood contacted an authorized Winnebago dealership to schedule an appointment for warranty repairs. Id. Mr. Wood had to wait approximately a month before the authorized Winnebago dealership would let him bring in his RV to begin any actual warranty repairs under Winnebago's Warranty. Id.

3. Winnebago's Authorized Dealership Attempts to Repair the RV

On October 31, 2017, Mr. Wood took his RV to Camping World RV Sales – Las Vegas ("Camping World") for warranty repairs. (2-ER-62, 228—236). At the time, the RV had 7,205 miles on it. (2-ER-228). Camping World was a Winnebago authorized repair facility expressly authorized to make any and all repairs and/or replacements to Winnebago RVs under Winnebago's Warranty. (2-ER-255, 278). And, when Mr. Wood took his RV into Camping World for warranty repairs, Winnebago's Warranty was in full force and effect. (2-ER-228—242, 279, 300—301).

Mr. Wood made a list of 20 issues for the authorized Winnebago dealership to repair under Winnebago's Warranty. (2-ER-62, 66). Out of the 20 listed issues, 19 were covered under Winnebago's Warranty and Winnebago paid its authorized dealership to investigate the cause of, and/or replace or repair those defects. (2-ER-62, 66, 228—242). The only defect from the 20 that was not covered under Winnebago's Warranty was for the Aqua Hot generator, which the authorized Winnebago dealership claimed was a result of it being internally dirty and was not a warranty issue, but a maintenance repair and/or service issue. Id. Mr. Wood paid the authorized Winnebago dealership for that maintenance/service to the Aqua Hot. (2-ER-62, 229—230).

Mr. Wood's RV was at the authorized Winnebago dealership for warranty repairs from October 31, 2017 to July 10, 2018 – approximately 9 ½ months – to repair a mere 20 defects. (2-ER-66, 228—242). Mr. Wood never had possession of the RV between October 31, 2017 and July 10, 2018. (2-ER-62).

4. Mr. Wood Provided Winnebago with Written Notice

On February 13, 2018, while the RV was still at the authorized Winnebago dealership for warranty repairs, Mr. Wood sent Winnebago a letter to the address listed in the warranty for the Owner Relations department. (2-ER-243—244, 300—301). In the letter, Mr. Wood stated that he was not satisfied with how long the warranty repairs were taking at the authorized Winnebago dealership, provided a list of problems, and asked Winnebago for assistance. (2-ER-70, 243—244).

On March 31, 2018, Mr. Wood, through counsel, sent Winnebago a letter via certified mail and email stating that he believed that the repairs and repair attempts made at Winnebago's authorized service center had failed or were inadequate. (2-ER-70, 245—251, 267). In the letter, Mr. Wood provided Winnebago with a list of the defects. (2-ER-245—251).

Winnebago received the written notices from both Mr. Wood and his counsel. (2-ER-267—268). However, Winnebago never requested that Mr. Wood return the RV to the Winnebago factory. Id. In fact, Winnebago never even bothered to respond to Mr. Wood or his counsel at all. (2-ER-267—268).

5. Mr. Wood Continues to Experience Problems with the RV

After picking up the RV from the authorized Winnebago dealership on July 10, 2018, Mr. Wood then took another trip in the RV to British Columbia in the

summer of 2018. (2-ER-70). During that trip, Mr. Wood discovered that several of the RV's prior defects were not fixed, including: air leak from front corner of driver's side window at freeway speeds, parking brake light and buzzer come on randomly while driving, navigation system does not work, stove top does not work, auto leveling flashes and buzzes indicating that the posts are down, leveling posts will start contracting when parked, aqua hot system only heats 1 zone of the floor, the front windshield shade will not retract, lights flicker when the water pump is used, dishwasher leaks, and one of the lights on steering wheel does not light up. (2-ER-70—71).

After returning from the trip from British Columbia, Mr. Wood parked the RV in his shop, where it has sat ever since. (2-ER-71).

On July 31, 2018, after receiving no response from Winnebago to the two written notices, Mr. Wood filed his Complaint. (2-ER-40—55, 71, 267—268).

C. Procedural History

Mr. Wood filed his Complaint on July 31, 2018 in the Clark County District Court (2-ER-40—55). On September 6, 2018, Winnebago filed a Notice of Removal of Action to Federal Court Under 28 U.S.C. § 1441(a). (2-ER-36—59). The district court had federal question jurisdiction under 28 U.S.C. § 1331.

In the Complaint, Mr. Wood alleges claims against Winnebago for: (1) breach of express and implied warranties under state law, (2) violation of the Magnuson Moss Warranty Act ("MMWA"), 15 U.S.C. § 2301 *et seq.*,

and (3) violation of the Nevada Deceptive Trade Practices Act ("NDTPA"), NRS § 598.0901 *et seq.* (2-ER-42-57). On September 13, 2018, Winnebago filed its Answer. (2-ER-27—35).

On June 21, 2019, Winnebago filed a partial motion for summary judgment. (2-ER-305). Mr. Wood was granted two extensions of time to file his response and timely filed his response brief on August 2, 2019. (2-ER-305). On August 23, 2019, Winnebago filed its reply brief. (2-ER-305). On March 23, 2020, the district court entered its Order granting Winnebago's partial motion for summary judgment. (1-ER-11—23; 2-ER-305). Of relevance herein, the district court found that the Winnebago's authorized dealership, Camping World, was not Winnebago's agent; therefore, Camping World's unreasonable delay in repairing the RV could not be imputed to Winnebago to form the basis for the MMWA or breach of warranty claims.(Appx. 29a, 32a).

Subsequently, a dispute arose as to whether the March 23, 2020 Order disposed of all of Mr. Wood's claims. Out of an abundance of caution, Mr. Wood filed a notice of appeal on April 15, 2020. (2-ER-23—24, 305). It was later determined that the appeal was premature because the March 23, 2020 Order was not a final, appealable order and the appeal was dismissed. (2-ER-305).

On July 13, 2020, the district court granted Winnebago's motion to re-open the dispositive motion deadline. (2-ER-305). On July 31, 2020, Winnebago filed its motion for summary judgment. Id. Mr. Wood was granted an extension of time to file his response and timely filed his response brief on September 10, 2020. (2-ER-306).

On September 24, 2020, Winnebago filed its reply brief. Id. On November 30, 2020, the district court entered its Order granting, in part, Winnebago's motion for summary judgment. (1-ER-2-10; 2-ER-306). Of relevance herein, the district court found that Mr. Wood had not satisfied the written notice requirement under the Winnebago Warranty, and dismissed Mr. Wood's breach of express warranty and dependent MMWA claim. (Appx. 48a-52a).

As a result of the November 30, 2020 Order, Mr. Wood's claims for breach of implied warranty of merchantability under state and federal law remained pending. (1-ER-10). On November 2, 2022, the district court issued its Order granting the Stipulation of Dismissal, which disposed of Mr. Wood's remaining claims for breach of implied warranty of merchantability under state and federal law. (2-ER-25—26). At that time, all claims were either dismissed or disposed of by means of the two orders regarding the motions for summary judgment. (1-ER-10, 21—23; 2-ER-25—26). Mr. Wood then timely filed his notice of appeal on November 18, 2022. (2-ER-302—303).

The Ninth Circuit had appellate jurisdiction, pursuant to 28 U.S.C. § 1291, because the appeal was from a final decision of the district court. On appeal, Mr. Wood challenged the district court's findings regarding agency, and the dismissal of the breach of express warranty, MMWA, and Nevada Deceptive Trade Practices Act claims. The Ninth Circuit issued its decision on June 3, 2021, affirming the two decisions of the district court. (Appx. 1a – 18a). In doing so, the Ninth Circuit determined that there was a question of fact as to whether Mr. Wood had provided the adequate notice to Winnebago. (Appx. 7a). Yet, the Ninth Circuit held that Mr. Wood could not

maintain a breach of warranty and Magnuson Moss Warranty Act claim because the authorized dealership was not Winnebago's agent. (Appx. 7a – 11a).

The Ninth Circuit found that Winnebago only had an obligation regarding the length of its authorized dealers' repairs if such obligation arose from "an external source of law". (Appx. 8a). The Ninth Circuit then chose not to apply 15 U.S.C. §2307, and instead looked to state agency law. (Appx. 8a – 11a). Upon finding that the dealers' were not agents to perform warranty repairs, the Ninth Circuit found Winnebago could not be held responsible for the length of time the RV was at the authorized Winnebago dealership undergoing warranty repairs. (Appx. 8a – 11a).

REASONS FOR GRANTING THE PETITION

The Ninth Circuit chose not to apply 15 U.S.C. § 2307 to hold Winnebago responsible under its warranty for the excessive time the RV was at the authorized Winnebago dealership for warranty repairs. By choosing to disregard the mandate in 15 U.S.C. § 2307, the Ninth Circuit effectively nullified the purpose and effect of 15 U.S.C. § 2307.

Therefore, Mr. Wood respectfully requests that the Court grant certiorari in order to resolve an important question of federal law, to clarify the applicability of 15 U.S.C. § 2307 of the MMWA, and to correct the actions of the Ninth Circuit.

I. This Court should resolve whether a warrantor remains liable for its warranty obligations when it designates a representative pursuant to 15 U.S.C. § 2307 to fulfill those obligations.

This case is one of first impression within the Circuit Courts regarding whether 15 U.S.C. § 2307 preempts agency state law to hold a warrantor liable for warranty repairs performed by a designated representative.

The Ninth Circuit erred when it refused to apply 15 U.S.C.§ 2307 and instead held that Winnebago – a warrantor pursuant to 15 U.S.C. § 2301(5) – was not liable for repairs performed under its Warranty by its authorized dealership under its Warranty, because the authorized dealership was not an agent. As a result of this error, the Ninth Circuit found that Mr. Wood could not establish that he provided Winnebago with a reasonable amount of time to repair the RV's defects under the Winnebago Warranty despite the undisputed fact that Winnebago's authorized dealership spent 9 ½ months attempting to repair the RV's defects, but failed to do so.

Under federal law, Winnebago can – and should – be held liable for repairs performed under its Warranty by its authorized dealership. According to 15 U.S.C. § 2307,

> Nothing in this chapter shall be construed to prevent any warrantor from designating representatives to perform duties under the written or implied warranty: *Provided*, That such warrantor shall make reasonable arrangements for compensation of such designated representatives, but no such

> designation shall relieve the warrantor of his direct responsibilities to the consumer or make the representative a cowarrantor.

Thus, the time the RV spent out of service for warranty repairs should be attributed to Winnebago when considering whether Winnebago breached its warranty obligations. Given that this RV was out of service by reason of warranty repairs for 9 ½ months for a mere 20 defects, reasonable minds could conclude that Winnebago breached its warranty obligations when its authorized dealership failed to repair the RV's defects within a reasonable amount of time.

Therefore, the Ninth Circuit erred in affirming the district court's grant of summary judgment related to the breach of express warranty and MMWA claim, and the decisions must be reversed.

A. The plain language of 15 U.S.C. § 2307 mandates that a warrantor remain responsible for its direct obligations to a consumer.

The Ninth Circuit erred in holding that Winnebago could not be held liable for repairs under its Warranty performed by its authorized dealerships. The Ninth Circuit stated that Winnebago's obligations regarding the length of its authorized dealers' repairs must come from an external source of law. (Appx. 8a). The Ninth Circuit refused to apply the mandate in 15 U.S.C. § 2307, which does not allow a warrantor to shift its warranty obligations to a designated representative, such as the authorized Winnebago dealer. Instead, the Ninth Circuit

side-stepped the mandate in 15 U.S.C. §2307 and focused on Nevada agency law in reaching its decision.

15 U.S.C. §2307 states:

> Nothing in this chapter shall be construed to prevent any warrantor from designating representatives to perform duties under the written or implied warranty: *Provided*, That such warrantor shall make reasonable arrangements for compensation of such designated representatives, but no such designation shall relieve the warrantor of his direct responsibilities to the consumer or make the representative a cowarrantor.

As with any question of statutory interpretation, the Court's analysis must begin with the plain language of the statute. *Jimenez v. Quarterman*, 555 U.S. 113, 118, 129 S. Ct. 681 (2009). It is well established that, when the statutory language is plain, the Court must enforce it according to its terms. *Id.* The plain language of 15 U.S.C. §2307 does not relieve a warrantor of its direct responsibilities to a consumer even if its designates a representative to fulfill its warranty obligations. In other words, Winnebago's obligation to satisfy the repair or replace defective parts within a reasonable amount of time under its Warranty always remained with Winnebago.

It is undisputed that, in its Warranty, Winnebago instructs consumers to present the RV to an authorized Winnebago service facility to obtain warranty repairs. (2-ER-300). Further, it is undisputed that Giant RV and Camping World are Winnebago authorized dealerships

and were authorized to make repairs and/or replacements under Winnebago's Warranty. (2-ER-255, 278, 289—290).

Federal law attributes warranty repairs performed by an authorized dealership to Winnebago. Under the federal statutory scheme, Winnebago was permitted to designate authorized dealerships to perform warranty repairs on its behalf under its warranties. What Winnebago could not do was wipe its hands of its responsibility to perform its warranty duties within a reasonable time by designating a representative to perform the warranty repairs.

Consistent with the federal statutory scheme, Winnebago chose to designate its authorized dealerships to perform its duties under its warranties. Yet, despite the MMWA's plain language, the Ninth Circuit's holding allowed Winnebago to completely abdicate its duties in its warranty merely by designating an authorized dealership to perform the warranty repairs. This interpretation is inconsistent with the plain language of 15 U.S.C. § 2307 and the mandate that the designation does not relieve the warrantor of its direct responsibilities to the consumer.

Whether the authorized dealerships were agents for Winnebago is a red-herring since the plain language of 15 U.S.C. §2307 explicitly states that a warrantor cannot avoid its direct duties under a warranty to a consumer by designating a representative to perform the repairs. 15 U.S.C. § 2307 does not mention "agent" or "agency" at all. In other words, whether the authorized Winnebago dealerships were Winnebago's agents is irrelevant.

Thus, the Ninth Circuit's reliance on agency law to affirm the district court's dismissal of Mr. Wood's breach

of express warranty and MMWA claim was misguided. Under federal law, Winnebago cannot avoid liability simply because the warranty repairs were performed at its authorized dealership instead of Winnebago itself. The Ninth Circuit erred, and effectively nullified 15 U.S.C. § 2307, when it refused to apply the mandate in 15 U.S.C. § 2307 and instead relied upon state agency law.

B. The Ninth Circuit's refusal to apply 15 U.S.C. § 2307 and hold a warrantor liable for its direct responsibilities to the consumer is contrary to established law, the remedial purpose of the MMWA, and its legislative intent.

A district court confronting this issue in RV breach of warranty cases has held that the MMWA's focus remains ever on the warrantor so long as the dealership has not become a cowarrantor. A warrantor (like Winnebago) cannot avoid its obligations in warranty by designating a representative (like an authorized Winnebago dealership) "if the product (or a component part thereof) contains a defect or malfunction after a reasonable number of attempts by the warrantor to remedy defects or malfunctions in such product, such warrantor must permit the consumer to elect either a refund for, or replacement without charge of, such product or part." *Litsinger v. Forest River, Inc.*, 536 F. Supp. 3d 334, 366 (N.D. Ind. 2021) (citing 15 U.S.C. § 2304(a)(4); see also 15 U.S.C. § 2307 ("no such designation shall . . . make the representative a cowarrantor")).

Further, courts across the county have found that an authorized dealership cannot be held liable under

the MMWA by simply performing repairs under a manufacturer's warranty. See *Mountford v. LTD, Inc.*, 2020 U.S. Dist. LEXIS 107503, *12 (E.D. Va. Apr. 16, 2020) ("the MMWA specifically provides for dealerships to provide service under warranty without being a cowarrantor"); *My P.I.I., LLC. v. Tognum Am., Inc.*, 2016 U.S. Dist. LEXIS 190828 (S.D. Fla. Mar. 31, 2016) ("Magnuson-Moss contemplates that a manufacturer may utilize an agent to service its warranty" (citing 15 U.S.C. § 2307)); *Spradlin v. Oak Ridge Chrysler-Dodge-Jeep*, 2005 U.S. Dist. LEXIS 60872, *15 (E.D. Tenn. Mar. 7, 2005); *Reed v. General Motors*, 1993 Mont. Dist. LEXIS 470, *9 (1st Judicial Dist. 1993). This interpretation is consistent with the mandate of 15 U.S.C. § 2310(f), which states that "any rights arising thereunder may be enforced under this section only against such warrantor and no other person."

In Mr. Wood's situation, Giant RV and Camping World cannot be held liable for the extensive warranty repair time under the plain language of 15 U.S.C. § 2307 and 15 U.S.C. § 2310(f). But, the Ninth Circuit's refusal to apply the mandate in 15 U.S.C. § 2307 also means that Winnebago cannot be held liable for the excessive warranty repair time. As a result, Mr. Wood is left with a defective RV that was in the shop for 9 ½ months for warranty and still is not repaired, and he is unable to hold either Winnebago or its authorized dealership responsible for not living up to the warranty obligations.

Such an interpretation is contrary to the remedial purpose of the MMWA. The MMWA, also known as the federal "lemon law," is a remedial statute designed "to improve the adequacy of information available to

consumers, prevent deception, and improve competition in the marketing of consumer products." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. Abrams*, 899 F.2d 1315, 1317 (2d Cir. 1990) (quoting 15 U.S.C. § 2302(a)); see also *Boelens v. Redman Homes, Inc.*, 748 F.2d 1058, 1067 (5th Cir. 1984); *Anderson v. Gulf Stream Coach, Inc.*, 662 F.3d 775, 780 (7th Cir. 2011); *Pyskaty v. Wide World of Cars, LLC*, 856 F.3d 216, 222 (2d Cir. 2017). It provides a federal private cause of action for a warrantor's failure to comply with the terms of a "written warranty, implied warranty or service contract." *Anderson v. Gulf Stream Coach, Inc.*, 662 F.3d 775, 780 (7th Cir. 2011) (citing *Voelker v. Porsche Cars N. Am., Inc.*, 353 F.3d 516, 522 (7th Cir. 2003) (quoting 15 U.S.C. § 2310(d)(1))).

Moreover, the legislative history clearly reveals that the Legislature always intended for a manufacturer to remain liable for its warranty obligations. Senator Warren G. Magnuson, sponsor of the Magnuson Moss Warranty Act, presented the Report of the Senate Committee on Commerce to the Senate on what would eventually be the Magnuson Moss Warranty Act. The following excerpt from the Report refers to Section 107 Designation of Representatives, now codified as 15 U.S.C. 2307:

> one of the purposes of this section is to insure that the manufacturer does not escape his liability under this title by shifting responsibility to dealers, wholesalers, retailers, or others in the chain of distribution. Since manufacturers have primary control over the quality of products, the intent of this section is to place full responsibility on them, while at the same time allowing others, such as dealers, to

> perform services related to warranties if they are equitably compensated. Therefore, this section also states that 'no such arrangements shall relieve the warrantor of his direct responsibility to the purchaser or necessarily make the representative a cowarrantor.'"

Senate, 93d Congress 1st Session, Report No. 93-151, 20-21 (1973).

Further, the Report stated, "[w]hile a manufacturer can issue a warranty that says certain authorized service representatives will repair or replace the defective product, the consumer has recourse directly against the manufacturer as warrantor, if these representatives fail to perform. The manufacturer could not defend against an action for failure to perform by arguing that the designated representative, not the manufacturer, was responsible for the failure of performance." Senate, 93d Congress 1st Session, Report No. 93-151, 20-21 (1973).

15 U.S.C. § 2307 is designed to prohibit Winnebago from designating representatives (such as Giant RV and Camping World) to perform its warranty obligations, and then skirting liability simply because the warranty repairs were performed by the designated, authorized representative. To adopt the Ninth Circuit's logic would mean that a warrantor such as Ford Motor Company would never be held liable for a breach of warranty simply because the warranty repairs occurred at a Ford authorized dealership. To hold otherwise is contrary to the plain language of 15 U.S.C. § 2307, contrary to the remedial purpose of the MMWA, and turns long-established warranty law on its head.

Therefore, the Ninth Circuit erred when it held that Winnebago was not liable for warranty repairs performed under its Warranty by its authorized dealerships.

C. To the extent that state law impliedly conflicts with 15 U.S.C. § 2307, then the mandate in the federal statute controls.

The plain language of 15 U.S.C. § 2307 indicates that a warrantor always remains liable for its warranty obligations even if it designates a representative to perform warranty repairs. Mr. Wood maintains that an authorized dealership does not need to be a warrantor's agent for the warrantor to be held responsible for failing to reasonably comply with its warranty obligations based on the plain language of 15 U.S.C. § 2307. However, to the extent state law impliedly conflicts with such interpretation of 15 U.S.C. § 2307, then the federal statue must control.

Preemption can take on three different forms: express preemption, field preemption, and conflict preemption. *Aux Sable Liquid Products v. Murphy*, 526 F.3d 1028, 1033 (7th Cir. 2008). This Court has found implied conflict preemption where it is "impossible for a private party to comply with both state and federal requirements," or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Sprietsma v. Mercury Marine*, 537 U.S. 51, 123 S. Ct. 518, 527 (2002) (citations omitted).

Mr. Wood does not contend that it would be impossible, without violating federal law, for Winnebago

to comply with both state agency law and the designation of a representative pursuant to 15 U.S.C. § 2307. Instead, state agency law creates an obstacle to the accomplishment and execution of the full purposes and objectives of 15 U.S.C. § 2307. As in this case, Nevada state agency law stood as an obstacle for Mr. Wood to establish that Winnebago failed to comply with its warranty obligations within a reasonable amount of time simply because it designated a representative to perform the warranty repairs on its behalf. As a result, Mr. Wood is unable to hold either Winnebago or its authorized dealership responsible for not living up to the obligations in the Winnebago Warranty.

The Ninth Circuit's holding has a far greater impact than on Mr. Wood and the recreational vehicle industry. The refusal to hold a manufacturer liable for warranty repairs before at an authorized dealership or service center directly impacts the roughly 67 million Americans that live and purchase consumer goods with a warranty within the Ninth Circuit's territory. The decision also impacts the millions of consumer goods sold annually with a warranty that may be subject to warranty repairs or service, such as vehicles, appliances, jewelry, and computers. As such, it must be made clear that a manufacturer remains liable for its warranty obligations even if it chooses to designate a representative to perform repairs or services on its behalf under 15 U.S.C. § 2307.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari.

Respectfully Submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JUNE 3, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22-16805
No. 2:18-cv-01710-JCM-BNW

GORDON WOOD,

Plaintiff-Appellant,

v.

WINNEBAGO INDUSTRIES, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the District of Nevada
James C. Mahan, District Judge, Presiding

Argued and Submitted November 8, 2023
Phoenix, Arizona

Before: HAWKINS and COLLINS, Circuit Judges, and S. MURPHY*, District Judge.
Partial Concurrence and Partial Dissent by Judge COLLINS.

* The Honorable Stephen Joseph Murphy III, United States District Judge for the Eastern District of Michigan, sitting by designation.

Appendix A

MEMORANDUM[**]

Appellant-Plaintiff Gordon Wood appeals the adverse summary judgment orders on each of his claims in a warranty dispute. We have jurisdiction under 28 U.S.C. § 1291, and for the reasons below, we affirm.

On April 22, 2017, Plaintiff-Appellant Gordon Wood purchased a Winnebago recreational vehicle ("RV") that came with a three-year, 100,000-mile limited manufacturer's warranty ("Warranty"). The Warranty outlined several steps customers needed to take before they could claim that Winnebago breached its Warranty obligations. First, customers needed to "present the [RV] to an authorized Winnebago service facility during normal business hours" and provide that facility with "a written list of items to be inspected or repaired." Second, if a customer felt the repairs failed or were "otherwise inadequate," they needed to "contact Winnebago Owner Relations ***in writing*** and advise them of the failure or inadequacy, including a list of the defects." Third, they needed to "provide Winnebago an opportunity to repair the motorhome prior to claiming a breach of this warranty."

During the summer and fall of 2017, Wood discovered that his new RV had twenty noticeable defects. So, pursuant to the Warranty's instructions, he scheduled a service appointment with Camping World, an authorized

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Winnebago dealership, dropping off the RV for repairs on October 31, 2017, and providing Camping World employees with a list of the RV's defects.

When, after three months, Camping World had not completed the repairs, Wood sent a letter to Winnebago Owner Relations, including a list of the RV's defects. The letter stated Wood's belief that Camping World's repairs were taking too long: he noted that he could not check in until three weeks after he booked the service appointment and was told that repairs could not be completed until Camping World received certain parts, which were scheduled for delivery on January 30, 2018. To Wood, "[f]our months to get some factory warranty work done that should have been done in the PDI" was unacceptable. Thus, he ended his letter by providing a phone number for Camping World's Service Advisor and asking Winnebago to "[p]lease help me out."

On March 31, 2018, Wood (through counsel) sent a second letter to Winnebago Owner Relations, outlining the RV's alleged defects and explaining that Camping World's repairs were taking too long. This letter raised new allegations that Winnebago "breached its express and/or implied warranties to Gordon Wood" by failing to manufacture the RV correctly and for failing to ensure that Camping World's repairs were promptly completed, which was an "essential purpose" of the Warranty.[1]

1. Importantly, the second letter couched Wood's grievances in the Warranty's precise language by noting that Camping World's attempted repairs "failed or [were] otherwise inadequate."

According to the letter, Winnebago's conduct and Camping World's deficient service substantially impaired the RV's use, value, and safety and ultimately amounted to twenty-five violations of state and federal laws. The letter went on to detail various economic and non-economic damages caused by Winnebago and Camping World's alleged conduct and demanded that Winnebago repurchase the RV. Winnebago admits that it received these letters and that it never responded to Wood or his counsel.

Camping World completed the repairs on July 10, 2018. A few weeks later, Wood concluded that Camping World failed to fix the original twenty defects and noticed several new ones. Having "lost faith" in Camping World's ability to fix the RV, Wood parked it on one of his properties, where it has been located at all relevant times.

Wood filed suit on July 30, 2018, claiming expressed and implied breaches of the Warranty, violations of the Magnuson Moss Warranty Act ("MMWA"), and violations of the Nevada Deceptive Trade Practices Act ("NDTPA"), which were based on representations Winnebago made about the quality of its vehicles in several brochures. Wood now appeals from the grant of summary judgment in favor of Winnebago on all of Wood's claims in two orders issued on March 23, 2020, and November 20, 2020.[2]

We review a grant of summary judgment de novo. *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc). "Viewing the evidence in the light most favorable to

2. The parties stipulated to dismiss a claim for breach of the implied warranty of habitability without prejudice.

the nonmoving party, we must determine whether there are any genuine issues of material fact." *Rodriquez v. Bowhead Transp. Co.*, 270 F.3d 1283, 1286 (9th Cir. 2001). When the nonmoving party has the burden of proof at trial, the moving party only needs to point out "that there is an absence of evidence to support the nonmoving party's case." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). "Once the moving party carries its initial burden, the adverse party 'may not rest upon the mere allegations or denials of the adverse party's pleading,' but must provide affidavits or other sources of evidence that 'set forth specific facts showing that there is a genuine issue for trial.'" *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (quoting *Celotex*, 477 U.S. at 323-34.). We first consider Wood's breach of express and implied warranty claims; specifically, whether Wood's non-compliance with several pre-conditions to litigation bars his claims as a matter of law. Nevada law controls this Court's interpretation of the Warranty. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941) (rules for determining the measure of damages in a breach of contract claim are substantive and therefore determined by the place of performance). In Nevada, contractual terms that limit the availability of litigation are permissible. *Chiquita Mining Co. v. Fairbanks, Morse & Co.*, 60 Nev. 142, 104 P.2d 191 (1940) ("The rights and liabilities of the plaintiff and defendant depend upon the terms of the contract."). Like all contracts, agreements that impose pre-conditions to litigation must be given their "usual and ordinary signification." *MB Am., Inc. v. Alaska Pac. Leasing*, 132 Nev. 78, 82, 367 P.3d 1286 (2016).

The Warranty unambiguously forecloses Wood's breach claims if he failed to meet the three pre-conditions to litigation. Wood undisputedly complied with the first requirement on October 31, 2017, when he took the RV to Camping World and provided it with a list of the RV's defects. However, the parties disagree about whether two letters Wood sent to Winnebago in early 2018 satisfy the second ("notice") and third ("opportunity to cure") requirements.

For its part, the district court noted that the "repairs provision is formulated in the past tense: 'In the event you feel the repairs ***made*** by an authorized service center ***failed*** or are otherwise inadequate . . . .'" (emphasis in the original). Given that it was "undisputed that the letters from Wood and his attorney were sent and received while Wood's RV was still in Camping World's possession undergoing repairs," the letters could not have provided Winnebago with notice of "any failed or inadequate repairs completed by Camping World." Thus, the court held that Wood failed to "satisfy his written notice obligations under the unambiguous [Warranty] and cannot prevail on his breach of express warranty claim."

The district court's conclusion was correct to the extent that Wood claims Winnebago breached the Warranty by failing to repair the RV's alleged defects. The undisputed facts show that Wood never gave Winnebago an opportunity to cure Camping World's allegedly deficient repairs. However, this was not Wood's only theory of breach, nor did the Warranty limit proper notice to "failed repairs." By its plain text, the Warranty allowed customers to meet the notice requirement by

informing Winnebago that a service facility's repairs were "otherwise inadequate."

Wood's first letter to Winnebago clearly alleges that Camping World's repairs were taking an unacceptable amount of time. Thus, it provides a basis from which a reasonable jury could find that Wood provided Winnebago with sufficient notice that Camping World's repairs were "inadequate" within the Warranty's meaning of that term. A reasonable jury could likewise find that Wood's second letter provided Winnebago with an opportunity to cure this inadequacy. Because the second letter reiterates Wood's position that the repairs were taking too long and asks Winnebago to take direct action, it was error to find that Wood's non-compliance barred his claims.

Nevertheless, because "we may affirm a district court's judgment on any ground supported by the record, whether or not the decision of the district court relied on the same grounds or reasoning we adopt," *Atel Fin. Corp. v. Quaker Coal Co.*, 321 F.3d 924, 926 (9th Cir. 2003), we do so here. Even if Wood complied with the Warranty's pre-conditions to litigation by providing Winnebago with notice and an opportunity to cure Camping World's unreasonable delays, he has not established that Winnebago had any legal obligation to ensure that Camping World's repairs were finished within a reasonable amount of time: neither the Warranty's text nor Nevada agency law create such an obligation.

The Warranty includes one express guarantee: Winnebago promises to repair and replace covered parts at no cost to its customers. In the Warranty, Winnebago

makes no representations about how warranted repairs will be completed; it merely states that Winnebago will pay for them, including parts and labor. Furthermore, the Warranty reflects a clear intention to separate Winnebago's repairs from repairs made by its authorized dealerships and service centers: "In the event you feel the repairs made by an authorized service center failed or are otherwise inadequate, you must . . . provide Winnebago an opportunity to repair the motorhome prior to claiming a breach of this warranty."

Of course, the Warranty's language does not necessarily mean that Winnebago has *no obligations* regarding the length of its authorized dealers' repairs. However, any such obligation must come from an external source of law. Thus, on appeal, Wood argues Winnebago's responsibility for Camping World's delays arises under agency law because Camping World acted on Winnebago's actual or apparent authority when it undertook the repairs.

Nevada agency law determines the nature of Camping World and Winnebago's relationship. *Klaxon*, 313 U.S. at 496. In Nevada, "the existence of an agency relationship is a question of fact, whether there is sufficient evidence of such a relationship so as to preclude summary judgment is a question of law." *PetSmart, Inc. v. Eighth Judicial Dist. Court in & for Cnty. of Clark*, 137 Nev. 726, 730, 499 P.3d 1182 (2021). "To bind a principal, an agent must have actual authority . . . or apparent authority." *Simmons Self-Storage v. Rib Roof, Inc.*, 130 Nev. 540, 549, 331 P.3d 850 (2014), *as modified on denial of reh'g* (Nov. 24, 2014). Generally speaking, a dealership acts as a manufacturer's

agent "[o]nly when a manufacturer controls the day-to-day or operative details of the dealer's business." *Hunter Min. Labs., Inc. v. Mgmt. Assistance, Inc.*, 104 Nev. 568, 571, 763 P.2d 350 (1988) (cleaned up). However, "[a]n agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act." *Simmons*, 130 Nev. at 549. Additionally, a dealership acts under a manufacturer's apparent authority where a customer subjectively believes the dealer has the authority to act on the principal's behalf, and this belief is objectively reasonable. *PetSmart, Inc.*, 137 Nev. at 733.

The undisputed facts show that Winnebago exercised insufficient control over Camping World to establish a traditional agency relationship under Nevada law. Winnebago does not control any of Camping World's day-to-day business decisions, it merely compensates Camping World for repairs that were covered under Winnebago's Warranty and occasionally advises Camping World about whether certain repairs are covered. Additionally, Wood fails to establish actual authority because he does not allege that Camping World reasonably believed that Winnebago wished for Camping World to be its agent for the purposes of repairs. *Simmons*, 130 Nev. at 549 ("When examining whether actual authority exists, we focus on an agent's reasonable belief."). Instead, Wood details Winnebago's process of pre-authorizing certain repairs, which only illuminates the conditions under which Winnebago will compensate a dealer. The process indicates nothing about Camping World's beliefs and does

not tend to show that a reasonable dealer in Camping World's position would believe it acted under Winnebago's actual authority when completing repairs.

Finally, Wood also fails to establish apparent authority. Although Wood could offer his own testimony to show his subjective belief that Camping World acted on Winnebago's apparent authority when conducting repairs, this belief is objectively unreasonable in light of the Warranty's plain language. For example, the Warranty clearly notes that "although authorized to sell and to service Winnebago motorhomes under warranty, the dealer is an independent business." This statement is at least inconsistent with any belief that Camping World acted on Winnebago's authority, and, under Nevada law, "[r]eliance will not be reasonable if the party claiming apparent agency 'closed [their] eyes to warnings or inconsistent circumstances.'" *PetSmart, Inc.*, 137 Nev. at 733. *See also Platt v. Winnebago Indus., Inc.*, 960 F.3d 1264, 1272 (10th Cir. 2020) (finding no agency relationship in the face of identical warranty language, which "clearly distinguishes between Winnebago and other authorized service facilities.").

Accordingly, even if Wood satisfied the Warranty's pre-conditions to litigation, his breach of expressed and implied warranty claims fail. And, given that MMWA "claims stand or fall with . . . express [] warranty claims under state law," Wood's MMWA claims also fail. *Shoner v. Carrier Corp.*, 30 F.4th 1144, 1146 (9th Cir. 2022) (quoting *Daniel v. Ford Motor Co.*, 806 F.3d 1217, 1227 (9th Cir. 2015)) (internal punctuation omitted). We, therefore,

affirm the district court's grant of summary judgment on Wood's breach of express and implied warranty and MMWA claims, albeit on slightly different grounds.[3]

Lastly, we affirm the district court's summary judgment orders on Wood's NDPTA claims. To prove an NDTPA claim, a consumer-plaintiff must prove: (1) an act of consumer fraud by the defendant (2) caused (3) damage to the plaintiff. *Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651, 657-58 (D. Nev. 2009). Under Nevada law, "representations as to the reliability and performance of the system [that] constitute mere commendatory sales talk about the product ('puffing')" are not actionable. *Bulbman, Inc. v. Nevada Bell*, 108 Nev. 105, 825 P.2d 588, 592 (Nev. 1992). That is, customers cannot rely on "generalized, vague and unspecific assertions," *Glen Holly Entm't, Inc. v. Tektronix Inc.*, 343 F.3d 1000, 1015 (9th Cir.), *opinion amended on denial of reh'g*, 352 F.3d 367 (9th Cir. 2003) (citations omitted), and a claim is not actionable when it is "either vague or highly subjective" out of recognition that "consumer reliance will be induced by specific rather than general assertions," *Cook, Perkiss & Liehe, Inc. v. N. California Collection Serv. Inc.*, 911 F.2d 242, 246 (9th Cir. 1990).

Wood's NDPTA claims arise from brochures wherein Winnebago makes various representations about the quality of its RVs. For example, in a brochure entitled, "When Your Name Means RVing," Winnebago represents

3. Because these claims fail, we decline to issue the limiting instruction Wood requests in his briefings. The instruction is improper absent a viable theory of breach.

that its new recreational vehicles and motorhomes undergo a "113 point ship out inspection" where "everything has to be perfect" and claimed to employ an "extensive test regimen, which includes structural tests, component tests, durability tests, corrosion and temperature tests and more." Additionally, in its "Four Simple Questions" brochure, Winnebago represents that its motorhomes go "through the most demanding set of tests in the industry" and that "every Winnebago Industries motorhome is engineered to stand up to the rigors of the road." Finally, in its "Grand Tour" brochure, Winnebago represents that the Grand Tour is "nothing but the best" and reiterates that "every coach undergoes an extensive 113-point inspection."

Wood claims he reviewed these brochures and relied on them when deciding to purchase the RV. However, he fails to establish that any of their representations are fraudulent. For example, there is no evidence that Winnebago does not conduct 113-point ship-out inspections on its RVs. Likewise, Wood has not introduced evidence concerning the kinds of repairs Winnebago allegedly expects its vehicles to require after leaving Winnebago's manufacturing facilities. Further, Winnebago's representations that its vehicles "stand up to the rigors of the road" are merely vague, unspecific assertions. Thus, there are no facts from which a jury might find that Winnebago committed an act of consumer fraud, which is a required element of his claim, and, thus, his NDPTA claims fail as a matter of law.

AFFIRMED.

COLLINS, Circuit Judge, concurring in part and dissenting in part:

I concur in the memorandum disposition to the extent that it affirms the summary judgment against Plaintiff Gordon Wood on his cause of action under the Nevada Deceptive Trade Practices Act against Winnebago Industries, Inc. ("Winnebago"). But I dissent from the majority's affirmance of the summary judgment against Wood with respect to his breach of express warranty claims under Nevada law and under the Magnuson-Moss Warranty Act ("MMWA").

The parties do not dispute that, as applicable here, the relevant requirements of Nevada law and of the MMWA are the same and that, under these laws, Winnebago's express warranty properly specified that Wood had to take certain steps before he could file a lawsuit against Winnebago alleging breach of warranty. The parties further agree that, in construing the parties' respective obligations under the written warranty at issue here, we should apply Nevada law. Here, the applicable written warranty states that, "to obtain warranty repairs," Wood had to bring his motorhome to an authorized service center with a list of the items to be repaired. There is no dispute that this step was fulfilled. The warranty then further provides that, "[i]n the event [Wood] feels the repairs made by an authorized service center failed or are otherwise inadequate," he must "contact Winnebago Owner Relations ***in writing*** and advise them of the failure or inadequacy, including a list of the defects, and provide Winnebago an opportunity to repair the motorhome

prior to claiming a breach of this warranty" (emphasis in original). In my view, the district court erred in concluding that, as a matter of law, Wood failed to satisfy these requirements.

I agree with the majority that a reasonable trier of fact could conclude that, by sending two letters complaining about the extraordinary delays in the repair efforts of Winnebago's authorized service facility (non-party "Camping World") and by attaching or including a list of the requested repairs, Wood complied with the requirement that he "contact Winnebago Owner Relations ***in writing*** and advise them of the failure or inadequacy, including a list of the defects." *See* Memo. Dispo. at 7. An unreasonable delay in completing ongoing repair efforts—*i.e.*, that too few repairs *have* been completed thus far—is certainly an "inadequacy" in the "repairs made by an authorized service center."

The only question, then, is whether Wood also "provide[d] Winnebago an opportunity to repair the motorhome prior to claiming a breach of this warranty." A trier of fact could also resolve this issue in Wood's favor. The first letter concisely spells out the problems with the unreasonable delay in repairs, provides the contact information for Camping World, and concludes, "Please help me out." This open-ended request for Winnebago's assistance was fully sufficient to "provide Winnebago an opportunity to repair the motorhome." The letter put the ball in Winnebago's court, and Winnebago had every opportunity to do whatever it thought was necessary to ensure that its warranty obligations were fulfilled. The warranty expressly states that, after a buyer has provided

Winnebago such an opportunity, "*Winnebago may require* [the buyer] to deliver the motorhome to *another* authorized service center or its facilities in Forest City, Iowa" (emphasis added). But Winnebago did not request either of those things; indeed, it did not respond in any way to Wood's letter. In doing so, Winnebago effectively allowed Camping World to proceed at its unreasonably slow pace, and Winnebago thereby forfeited its opportunity to cure the assertedly unreasonable delay in repairs.

The second letter likewise provided Winnebago a further "opportunity to repair the motorhome" before Wood filed this lawsuit some four months later. Winnebago complains that the second letter did not, by its terms, affirmatively offer or request further repairs; instead, it requested that Winnebago take the motorhome back and pay Wood reliance damages. But the warranty merely requires that Winnebago be provided an "opportunity to repair the motorhome," and nothing stopped Winnebago from responding to Wood's letter by instructing him to deliver the motorhome to another dealership or to Winnebago's facilities in Iowa. Had Wood then refused to comply, Winnebago could have argued that it had been denied any opportunity at that point to repair the vehicle, and Wood's only defense to that argument would have been to rest on a legal contention that the delays were already so unreasonable that they could not be remedied by *more* time spent on repair efforts. Once again, however, Winnebago inexplicably decided not to respond to Wood's letter *at all*, and so it forfeited any opportunity it had to attempt to repair the vehicle. Winnebago apparently thinks that it had no obligation to ever say anything to enforce its contractual right to an "opportunity" to repair

the vehicle, but nothing in the language of the warranty supports its extraordinary sit-on-your-hands approach.

The majority does not directly disagree with any of this. Instead, it relies on the alternative ground that Winnebago did not have "any legal obligation to ensure that Camping World's repairs were finished in a reasonable amount of time." *See* Memo. Dispo. at 8. The majority asserts that nothing in the text of the warranty creates such an obligation; that the obligation therefore "must come from an external source of law"; and that "agency law" cannot be the external source that supplies that obligation. *Id.* In my view, the majority's (and the parties') discussion of agency law is largely beside the point. Under the plain terms of the MMWA, Winnebago's designation of Camping World as an authorized service center does not detract in any way from *Winnebago's* obligations to Wood, because the statute expressly states that "no such designation shall relieve the warrantor of his direct responsibilities to the consumer or make the representative a cowarrantor." 15 U.S.C. § 2307. Thus, the obligation to satisfy the warranty *always* remained with Winnebago. Although Camping World's satisfactory performance might supply Winnebago with a *defense* that its warranty obligations had been fulfilled, Winnebago would be left holding the bag, so to speak, if Winnebago was affirmatively alerted to the warranty issues and Winnebago then, through its inaction (and Camping World's failure), let them go unremedied.

Moreover, to the extent that a warranty requires a manufacturer to make repairs, they clearly must be done

within a *reasonable* period of time. After a reasonable amount of time has passed, Winnebago cannot plausibly contend that it has not had an "opportunity" to make the necessary repairs: an opportunity is neither an indefinite nor an infinite period of time. Moreover, the notion that warranty repairs must be done within a reasonable period of time is clear under Nevada's version of the Uniform Commercial Code ("U.C.C."). *See Newmar Corp. v. McCrary*, 129 Nev. 638, 309 P.3d 1021, 1027 (Nev. 2013) (holding that failure to successfully complete repairs within a reasonable time was a breach of warranty that, under the U.C.C., allowed the remedy of revocation); *Waddell v. L.V.R.V. Inc.*, 122 Nev. 15, 125 P.3d 1160, 1165 (Nev. 2006) (after seller "was unable to repair the defects after a total of seven months, the [buyers] were entitled to say 'that's all' and revoke their acceptance, notwithstanding [the seller's] good-faith attempts to repair the RV"). Even if the U.C.C. arguably may not itself be directly applicable to Winnebago as a manufacturer, *cf. Newmar Corp.*, 309 P.3d at 1026 (declining to adopt a bright-line position on this issue), the Nevada Supreme Court would very likely construe a manufacturer's warranty to contain that same basic obligation to perform with a reasonable period of time. *See* John Herbrand, Annotation, *Construction and Effect of New Motor Vehicle Warranty Limiting Manufacturer's Liability to Repair or Replacement of Defective Parts*, 2 A.L.R.4th 576 § 5(d) (1980 and 2024 Supp.) (collecting cases from various jurisdictions holding that "a new motor vehicle manufacturer or dealer which has limited its obligation under its warranty to repair or replacement of defective parts does not have an unlimited period of time in which to make the repairs and

replacements, but that the manufacturer or dealer will be held to have breached its warranty if the repairs or replacements are not made within a reasonable period of time"). Indeed, under a contrary view, Winnebago could take as much time as it wants—say, four or five years—to perform warranty repairs. Winnebago has pointed to nothing that would suggest that the Nevada Supreme Court would adopt such a position.

On this record, there is a triable issue of material fact as to whether the repairs were performed within a reasonable period of time. Camping World took nearly 10 months to complete the repairs (which Wood's expert opined were still not satisfactory), and Winnebago completely ignored Wood's complaints about Camping World's delays. Further, there is a triable issue as to whether the delays were so substantial that Wood was effectively deprived of the benefit of the warranty, such that the delay itself at that point resulted in a breach of warranty without regard to *further* expenditures of time to make repairs. And if that is true, then it necessarily follows that the warranty's purported limitation on the available remedies—namely, that the only remedy is *another* (delayed) effort at repairs—is obviously unenforceable. *Cf. Newmar Corp.*, 309 P.3d at 1026 (holding, in the context of the U.C.C., that where, due to the fault of the warrantor, a warranty's limitation on remedies would effectively deprive the buyer of any remedy for the breach of warranty, the limitation will not be enforced).

For the foregoing reasons, I respectfully concur in part and dissent in part.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA, FILED MARCH 23, 2020

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Case No. 2:18-CV-1710 JCM (BNW)

GORDON WOOD,

Plaintiff(s),

v.

WINNEBAGO INDUSTRIES, INC.,

Defendant(s).

ORDER

Presently before the court is Winnebago Industries, Inc.'s ("defendant") motion for partial summary judgment. (ECF No. 33). Gordon Wood ("plaintiff") filed a response (ECF No. 38), to which defendant replied (ECF No. 40).

I. Background

The instant action arises from defendant's purported breach of an express limited warranty and implied warranties regarding plaintiff's 2016 Winnebago Grand Tour WKR42HL Motorhome ("the RV"). Non-party Giant Inland Empire RV Center, Inc. ("Giant RV") is an authorized Winnebago dealership and service center. (ECF No. 33 at 12). Giant RV received the RV at issue

in July 2015, and performed a pre-delivery inspection of the RV. (ECF No. 38 at 6). Giant RV determined that 20 defects needed to be repaired as follows: missing front face for pantry, speaker covers missing, bathroom mirror door cracked, entry step inoperable, engine battery low, DEF fluid low, galley counter top has deep scratches, cabinet below pantry scratched, dinette table scratched, bathroom door frame damaged, hallway shade damaged, hallway screen pulled off, pocket door locking rod bent, several cabinet knobs loose, dash vents broken, interior grab handle missing, and stove top cracked. *Id.* at 6-7. The record indicates that Giant RV repaired these defects.

Plaintiff purchased the RV from Giant RV in April 2017. (ECF No. 1-1 at 4-5). In May 2018, plaintiff drove the RV to San Diego. (ECF No. 38 at 7). During the trip, plaintiff discovered the following problems with the RV: the entry steps rattled loudly when traveling on the freeway; at freeway speeds, air leaked from the front corner of the drivers' side window; the navigation system, the satellite radio, and the stove top in coach did not work; the "aqua hot system" burned blue smoke on start up for about 20 minutes and heated only one zone of the floor; the large door in the master bath had dents in it; the large cupboard had broken runners; the accent light in living room were falling down; all of the blinds needed to be adjusted; there were loose baseboards in the master bedroom; the lights flickered when the water pump was used; the door between the bedroom and lounge was broken; the dishwater leaked; and the center light on steering wheel did not light up. *Id.*

Appendix B

After his trip to San Diego, plaintiff traveled back to Nevada before taking the RV to British Columbia. *Id.* Plaintiff discovered additional problems with the RV: the parking brake light and buzzer came on randomly while driving, auto leveling flashed and buzzed that the posts were down, and the leveling posts would start contracting when the RV was parked. *Id.* at 7-8.

When plaintiff purchased the RV, it included a three-year/100,000-mile new-vehicle limited warranty, which read, in part, as follows:

> Except as otherwise provided herein, to obtain warranty repairs, you must, at your own cost, present your motorhome to an authorized Winnebago service facility during normal business hours and provide a written list of items to be inspected or repaired to the service facility and Winnebago. In the event you feel the repairs made by an authorized service center failed or are otherwise inadequate, you must contact Winnebago Owner Relations **in writing** and advise them of the failure or inadequacy, including a list of the defects, and provide Winnebago an opportunity to repair the motorhome prior to claiming a breach of this warranty. Winnebago may require you to deliver the motorhome to another authorized service center or its facilities in Forest City, Iowa. If Winnebago requests you to bring the motorhome to Forest City, Iowa, Winnebago

> may cover the reasonable cost of transporting the motorhome to and from Forest City, Iowa. Refusal to allow Winnebago an opportunity to repair the motorhome voids warranty coverage for that repair.

(ECF No. 33 at 18 (emphasis in original)).

Plaintiff returned from his trip to British Columbia and, in accordance with the warranty, scheduled maintenance at an authorized Winnebago service center, Camping World. (ECF No. 38 at 8). Camping World kept the RV for nine and a half months to complete repairs. *Id.* at 9.

After Camping World returned the RV to plaintiff, plaintiff took it on another trip to British Columbia. *Id.* While on that trip, plaintiff discovered that several of the defects either went unrepaired or resurfaced. *Id.* In particular, the air leak continued to leak at freeway speeds from front corner of drivers' side window; the parking brake light and buzzer still came on randomly while driving; the navigation system and stove top in coach were not functioning; the auto leveling continued to flash and buzz that the posts were down; the leveling posts still started contracting when parked; the aqua hot system only heated 1 zone of the floor; the front windshield shade would not retract; the lights flickered when the water pump was used; the dishwasher leaked; and one of the lights on steering wheel did not light up. *Id.*

Plaintiff returned home from his trip and parked the RV, where it has remained. *Id.* Plaintiff retained an RV

expert, Thomas Bailey, who discovered 133 additional defects in the RV's manufacturing or workmanship. *Id.*

Plaintiff filed the instant action in state court on July 21, 2018, alleging three causes of action: (1) breach of contract/warranty, (2) a claim under the Magnuson-Moss Warranty Act ("MMWA"), and (3) a claim under the Nevada Deceptive Trade Practices Act ("NDPTA"). (ECF No. 1-1). Defendant timely removed this action on the basis of federal-question jurisdiction on September 6, 2018. (ECF No. 1).

II. Legal Standard

The Federal Rules of Civil Procedure allow summary judgment when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that "there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). A principal purpose of summary judgment is "to isolate and dispose of factually unsupported claims." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

For purposes of summary judgment, disputed factual issues should be construed in favor of the nonmoving party. *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 888, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990). However, to withstand summary judgment, the nonmoving party must "set forth specific facts showing that there is a genuine issue for trial." *Id.*

Appendix B

In determining summary judgment, a court applies a burden-shifting analysis. "When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case." *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted).

By contrast, when the nonmoving party bears the burden of proving the claim or defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party's case on which that party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323-24. If the moving party fails to meet its initial burden, summary judgment must be denied and the court need not consider the nonmoving party's evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159-60, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970).

If the moving party satisfies its initial burden, the burden then shifts to the opposing party to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). The opposing party need not establish a dispute of material fact conclusively in its favor. *See T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors*

Ass'n, 809 F.2d 626, 631 (9th Cir. 1987). It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Id.*

In other words, the nonmoving party cannot avoid summary judgment by relying solely on conclusory allegations that are unsupported by factual data. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and allegations of the pleadings and set forth specific facts by producing competent evidence that shows a genuine issue for trial. *See Celotex*, 477 U.S. at 324.

At summary judgment, a court's function is not to weigh the evidence and determine the truth, but to determine whether a genuine dispute exists for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The evidence of the nonmovant is "to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255. But if the evidence of the nonmoving party is merely colorable or is not significantly probative, summary judgment may be granted. *See id.* at 249-50.

The Ninth Circuit has held that information contained in an inadmissible form may still be considered for summary judgment if the information itself would be admissible at trial. *Fraser v. Goodale*, 342 F.3d 1032, 1036 (9th Cir. 2003) (citing *Block v. City of Los Angeles*, 253 F.3d 410, 418-19 (9th Cir. 2001) ("To survive summary judgment, a party does not necessarily have to produce

evidence in a form that would be admissible at trial, as long as the party satisfies the requirements of Federal Rules of Civil Procedure 56.")).

III. Discussion

A. Whether plaintiff has claims under the MMWA that are independent of his breach-of-contract claim

Plaintiff's complaint does not specifically allege any technical violations of the MMWA. (*See* ECF No. 1 at 10-11). Now, at summary judgment, plaintiff argues only one violation of the MMWA that is distinct and independent from his breach of warranty claim. (ECF No. 38 at 19). Plaintiff avers that defendant failed to include statutorily mandated language when limiting the duration of its implied warranties. *Id.* But the evidence before the court proves that defendant included the statutorily mandated language at issue, so plaintiff's argument is unavailing. (ECF No. 40 at 16).

Thus, the court grants defendant's motion insofar as it requests a finding that "[p]laintiff has no claims under the [MMWA] that are independent of his claims for breach of contract." (ECF No. 33 at 3, 11-12).

B. Whether plaintiff's claims are governed by Nevada law

First, plaintiff's NDTPA and breach of contract claims clearly arise from Nevada law. The court must determine only whether Nevada law applies to plaintiff's MMWA

claim. Here, the parties agree that "[i]t is undisputed that, while the MMWA creates a private cause of action, the underlying claim relies on state contract and warranty law." (ECF No. 38 at 12).

Accordingly, the court grants defendant's motion to the extent it seeks a holding that each of plaintiff's claims are governed by Nevada law.

C. Whether defendant's business arrangements with its dealers gives rise to an agency relationship

In *Salyers v. Metro. Life Ins. Co.*, the Ninth Circuit adopted the Restatement (Third) of Agency into the federal common law. 871 F.3d 934, 940 (9th Cir. 2017). Thus, in this circuit, agency is "the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." *Id.* at 939 (quoting Restatement (Third) of Agency § 1.01 (2006)) (quotation marks omitted). Indeed, the Supreme Court has cited the Restatement to emphasize the "essential element of agency": "the principal's right to control the agent's actions." *Hollingsworth v. Perry*, 570 U.S. 693, 713, 133 S. Ct. 2652, 186 L. Ed. 2d 768 (2013) (citing Restatement (Third) of Agency § 1.01, comment f (2006)).

In sum, an agency-principal relationship is formed when "(1) the agent acts on behalf of his principal and (2) the agent has the power to bind the principal." *Stansifer*

v. Chrysler Motors Corp., 487 F.2d 59, 65 (9th Cir. 1973). The *Stansifer* court, construing a contract between an automobile manufacturer and a dealership, acknowledged "the courts have held consistently that controls of the kinds reserved by [automobile manufacturers] do not create a relationship of agency, but rather one of buyer and seller." *Id.*

Here, plaintiff argues that Camping World and Giant RV are defendant's agents because: (1) they are authorized service centers; (2) certain work is pre-authorized; (3) defendant instructs its customers to take their RVs to authorized service centers; and (4) defendant benefits from work being done at authorized service centers, rather than its factory. (ECF No. 38 at 22-23). By plaintiff's estimation, these facts are sufficient to establish an agency relationship between defendant's authorized service centers and defendant. Plaintiff's arguments are unavailing.

The RV purchase agreement and new-vehicle limited warranty included the following provision:

> **No responsibility for dealer statements or conduct**:
>
> Although authorized to sell and to service Winnebago motorhomes under warranty, the dealer is an independent business. Winnebago does not own or control, and shall not be responsible for, or bound by, representations, misrepresentations, or assurances, made by dealer personnel or be liable for a dealer's

> illegal, fraudulent, or unethical business conduct. **NO DEALER IS AUTHORIZED TO MODIFY THIS [NEW-VEHICLE LIMITED WARRANTY] OR TO MAKE A WARRANTY OR CREATE ANY OTHER LEGAL OBLIGATION ON WINNEBAGO'S BEHALF**.

(ECF No. 33 at 15). In light of this unambiguous disclaimer, defendant did not give actual or apparent authority to Camping World or Giant RV. Nor is it reasonable for plaintiff to think such agency existed. Indeed, the new-vehicle limited warranty provides defendant an opportunity to repair any RVs that were not adequately repaired by an authorized service center prior to a customer claiming a breach of this warranty, which further differentiates between the service center and defendant. *Id.* at 18.

Accordingly, the court grants defendant's motion for partial summary judgment as to this issue and finds that neither Camping World nor Giant RV are agents of defendant.

D. Whether a failure to repair defects within a reasonable number of attempts or a reasonable amount of time can sustain plaintiff's MMWA and breach-of-warranty claims

"A breach of contract may be said to be a material failure of performance of a duty arising under or imposed by agreement." *Bernard v. Rockhill Dev. Co.*, 103 Nev. 132, 734 P.2d 1238, 1240 (Nev. 1987). In the warranty

context, "a plaintiff must prove that a warranty existed, the defendant breached the warranty, and the defendant's breach was the proximate cause of the loss sustained." *Nevada Contract Servs., Inc. v. Squirrel Companies, Inc.*, 119 Nev. 157, 68 P.3d 896, 899 (Nev. 2003) (footnote citation omitted). However, "[w]hen parties exchange promises to perform, one party's material breach of its promise discharges the non-breaching party's duty to perform." *Cain v. Price*, 415 P.3d 25, 29 (Nev. 2018) (citing Restatement (Second) of Contracts § 237 (1981)).

Here, the warranty unambiguously provides a mechanism for consumers like plaintiff to address defects in their RVS:

> In the event you feel the repairs made by an authorized service center failed or are otherwise inadequate, you must contact Winnebago Owner Relations **in writing** and advise them of the failure or inadequacy, including a list of the defects, and provide Winnebago an opportunity to repair the motorhome prior to claiming a breach of this warranty.

(ECF No. 33 at 18 (emphasis in original)). It is undisputed that plaintiff took the RV in to Camping World for repairs, Camping World retained the RV for over nine months,[1] and that several of the defects either went unrepaired or resurfaced. (ECF Nos. 33; 38; 40). However, plaintiff did

1. Defendant notes that plaintiff could have picked up the RV on March 21, 2018, while Camping World awaited delivery of a replacement door, but declined to do so. (ECF No. 40 at 7).

not notify defendant in writing to advise it of Camping World's failure to repair or the inadequacy of its repairs. Thus, the plain language of the new-vehicle limited warranty seems to bar a claim for breach of warranty.

But defendant does not request total summary judgment in its motion. Instead, defendant asks the court to hold that a failure to repair within a reasonable number of attempts or a reasonable amount of time cannot sustain plaintiff's claims.

First, it is undisputed that plaintiff attempted to repair his RV only one time, so plaintiff did not afford defendant a reasonable number of attempts in the first place. Indeed, this requirement is codified by the MMWA at 15 U.S.C. § 2310(e), which provides, in relevant part, as follows:

> No action . . . may be brought under subsection (d) for failure to comply with any obligation under any written or implied warranty or service contract . . . unless the person obligated under the warranty or service contract is afforded a reasonable opportunity to cure such failure to comply.

15 U.S.C. § 2310(e).

Further, plaintiff's own expert report indicates that each and every defect plaintiff noted with the RV was fixed "within a reasonable number of attempts," to wit, the first attempt. (ECF No. 33-2 at 36-38). Thus, the court

finds no evidence of a failure to repair within a reasonable number of attempts.

Next, the court considers whether defendant failed to repair the RV within a reasonable amount of time. As discussed above, the RV was in Camping World's custody for over nine months undergoing repairs. Indeed, defendant acknowledges that this service period was "unusual" given the number and nature of the repairs. (ECF No. 38 at 10 (citing ECF No. 38-9 at 10)). However, Camping World—not defendant—held the RV for over nine months for repairs. As discussed above, Camping World is not defendant's agent; therefore, its actions cannot be imputed to defendant. Accordingly, Camping World's unreasonable delay in repairing the RV cannot form the basis for plaintiff's MMWA or breach of warranty claims.

In light of the foregoing, the court grants defendant's motion for summary judgment as to these issues.

E. Relevance of the 133 additional defects

Plaintiff's expert discovered 133 additional defects in the RV's manufacturing or workmanship. (ECF No. 38 at 9). However, plaintiff did not present any of those defects to Giant RV, Camping World, or defendant for repair; thus, defendant did not have an opportunity to cure those defects, as required by 15 U.S.C. § 2310(e). Accordingly, the 133 additional defects with the RV cannot be used to support a breach of warranty claim. Instead, plaintiff argues that the 133 additional defects are relevant to

"the reasonable basis for Mr. Wood's shaken faith" and "the unconscionability of [defendant's new-vehicle limited warranty]." (ECF No. 38 at 24).

As an initial matter, "Nevada law requires both procedural and substantive unconscionability to invalidate a contract as unconscionable." *U.S. Home Corp. v. Michael Ballesteros Tr.*, 415 P.3d 32, 40-41 (Nev. 2018) (citing *Burch v. Second Judicial Dist. Court*, 118 Nev. 438, 49 P.3d 647, 650 (Nev. 2002)). "A contract is unconscionable only when the clauses of that contract and the circumstances existing at the time of the execution of the contract are so one-sided as to oppress or unfairly surprise an innocent party." *Bill Stremmel Motors, Inc. v. IDS Leasing Corp.*, 89 Nev. 414, 514 P.2d 654, 657 (Nev. 1973) (citations omitted

Plaintiff advances two reasons to find the warranty unconscionable. First, plaintiff contends that his RV was in Camping World's possession for repair for nearly 10 months for 20 defects, so fixing 133 defects would take exponentially longer, which renders the warranty unconscionable. *Id.* at 24-25. Second, plaintiff urges that the warranty "is procedurally and substantively unconscionable because it requires a consumer to be able to find, identify, and report the RV's defects . . . ." *Id.* at 25.

However, whether defendant expected problems with its RVs to arise does not create procedural or substantive unconscionability. Defendant specifically provided the new-vehicle limited warranty to address any problems that may—or even would—arise. The warranty is not ambiguous, confusing, or misleading. It simply requires

an RV owner to bring his or her RV into an authorized service center to correct any defects that arise.

F. Limitation on damages

Plaintiff admits that "pursuant to NRS 104.2719(1), a warrantor may limit or alter the measure of damages recoverable." (ECF No. 38 at 20). The new-vehicle limited warranty includes an express limitation on damages: "Repair or replacement of ***parts*** is the ***sole and exclusive remedy under the warrants; and actual, incidental or consequential damages are excluded***." (ECF No. 33 at 16). This includes only "money damages equal to the reasonable cost for material and labor necessary to correct defects." *Id.* at 4.

Plaintiff argues, however, that this warranty does not leave a "fair quantum of remedy" and urges that the only appropriate measure of damages "is diminished value of the RV, plus incidental and consequential damages, plus reasonable attorney fees." (ECF No. 38 at 20). Plaintiff contends that *Newmar Corp. v. McCrary*, 129 Nev. 638, 309 P.3d 1021 (Nev. 2013), supports his position. But *Newmar* is inapposite.

In *Newmar*, the Nevada Supreme Court explained as follows:

> Newmar, even though it was the manufacturer, **interjected itself into the sales process** and through its representations assisted in the completion of the sales transaction. **Under the unique facts of this case**, we conclude that this direct involvement on the part of the

> manufacturer in the sales process created a direct relationship with the buyer sufficient to establish privity between the manufacturer and the buyer.

Newmar, 309 P.3d at 1026 (citation omitted) (emphasis added). Thus, the *Newmar* court unambiguously acknowledged that the facts of that case were unique because of the manufacturer's conduct: Newmar assured the buyer "that there was a full, bumper-to-bumper warranty." *Id.* at 1023. Further, Newmar failed to repair the RV's defects "[a]fter numerous repairs at the Newmar factory and other repair shops . . . ." *Id.*

Here, defendant did not represent or assure plaintiff that there was a full, bumper-to-bumper warranty. Plaintiff has not made any showing that defendant interjected itself into the sales process as the manufacturer in *Newmar* did. Finally, plaintiff did not afford defendant an opportunity to attempt repairs on the RV. Instead, as discussed above, plaintiff gave Camping World—who is not defendant's agent—a single attempt to repair the defects that he had noticed. Although Camping World retained the RV for an abnormal period of time, that does not justify plaintiff's decision to circumvent the new-vehicle limited warranty.

In sum, *Newmar* is not controlling in this case. Plaintiff has not shown that the new-vehicle limited warranty precludes a fair quantum of damages. Instead, the court finds that the warranty's express and unambiguous limitation on damages is enforceable. Accordingly, the court grants defendant's motion as to the limitation of damages issue.

G. Whether plaintiff's NDTPA claim fails as a matter of law

An NDTPA claim requires "a victim of consumer fraud to prove that (1) an act of consumer fraud by the defendant (2) caused (3) damage to the plaintiff." *Sattari v. Wash. Mut.*, 475 Fed. App'x. 648, 648 (9th Cir. 2011) (quoting *Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651, 658 (D. Nev. 2009)).

Plaintiff raises two arguments that, in light of the foregoing discussion, do not pass muster. First, plaintiff contends that technical violations of the MMWA are instances of consumer fraud. (ECF No. 38 at 29). This argument is unavailing because the evidence before the court shows that defendant complied with the MMWA, and plaintiff does not present evidence of other violations. Second, plaintiff argues that defendant claiming that it would fix defects in the RV is a misrepresentation because his RV was not adequately repaired by Camping World. *Id.* As discussed above, however, plaintiff did not inform defendant of the inadequacy of Camping World's repairs and did not afford defendant an opportunity to repair the RV. Thus, defendant's "failure" to repair the RV cannot be said to be a misrepresentation.

Regarding his NDTPA claim in particular, plaintiff avers that defendant "knowingly . . . made numerous representations in its sales brochures about the quality of its RVs." (ECF No. 38 at 28). Plaintiff specifically takes issue with two representations in defendant's sales materials: that defendant's RVs undergo a "comprehensive 113-point ship out inspection" and that they "will stand

up to the rigors of the road." *Id.* Plaintiff claims that both of these representations are false because defendant "knowns and does not tell consumers that its new RVs will require repairs both before it is sold and during the first year after it is sold to a consumer." *Id.* The parties refer to this one-year period as a "shakedown" period. *Id.*

Defendant argues that the representations in its sales brochures are "mere puffery" and "sales talk," which cannot support a consumer fraud claim. (ECF Nos. 33 at 22; 40 at 23-24). Under Nevada law, "representations as to the reliability and performance of the system [which] constitute mere commendatory sales talk about the product ('puffing')" are not actionable. *Bulbman, Inc. v. Nevada Bell*, 108 Nev. 105, 825 P.2d 588, 592 (Nev. 1992). Similarly, in the Ninth Circuit, reasonable customers cannot rely on "generalized, vague and unspecific assertions, constituting mere 'puffery.'" *Glen Holly Entm't, Inc. v. Tektronix Inc.*, 343 F.3d 1000, 1015 (9th Cir.), *opinion amended on denial of reh'g*, 352 F.3d 367 (9th Cir. 2003) (citations omitted). Thus, when a claim is not actionable when it is "either vague or highly subjective" because "consumer reliance will be induced by specific rather than general assertions." *Cook, Perkiss & Liehe, Inc. v. N. California Collection Serv. Inc.*, 911 F.2d 242, 246 (9th Cir. 1990) (citations omitted).

Defendant's representation regarding the 113-point inspection is too precise to be "mere puffery." Accordingly, if defendant does not conduct a 113-point inspection of its RVs, a representation to the contrary would be fraudulent. But plaintiff does not present any evidence that defendant's RVs did not, in fact, undergo a 113-point

inspection. As defendant notes, plaintiff "apparently *assumes* that such an inspection did not occur based upon his allegations that defects were found at a later time." (ECF No. 40 at 23) (emphasis in original).

The claim that the RV would "stand up to the rigors of the road" is generalized, vague, and unspecific. Indeed, plaintiff complains that his RV did not "stand up to the rigors of the road." But plaintiff nonetheless made it to San Diego, back to Nevada, to British Columbia, and returned to Nevada again despite the defects in the RV. (ECF No. 38 at 7-8). As a result, the RV arguably stood up to the rigors of the road. Because of the ambiguity inherent in this representation, it cannot form the basis for consumer fraud or an NDTPA claim.

Accordingly, the court grants defendant's motion and dismisses plaintiff's NDTPA claim.

IV. Conclusion

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendant's motion for partial summary judgment (ECF No. 33) be, and the same hereby is, GRANTED in full.

DATED March 23, 2020.

/s/ James C. Mahan
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA, FILED NOVEMBER 30, 2020

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Case No. 2:18-CV-1710 JCM (BNW)

GORDON WOOD,

Plaintiff(s),

v.

WINNEBAGO INDUSTRIES, INC.,

Defendant(s).

ORDER

Presently before the court is defendant Winnebago Industries, Inc.'s ("Winnebago") motion for summary judgment. (ECF No. 50). Plaintiff Gordon Wood responded in opposition (ECF No. 55) to which Winnebago replied (ECF No. 56).

I. Background

This dispute arises from Wood's purchase of a new 2016 Winnebago Grand Tour WKR42HL Motorhome (the "RV") and Winnebago's alleged breach of its New-Vehicle Limited Warranty ("NVLW"). (ECF No. 50 at

3). Wood alleged claims under the Nevada Deceptive Trade Practices Act and breach of contract claims under state law and the federal Magnuson-Moss Warranty Act ("MMWA"). (ECF No. 50-5 (Exhibit I)). The court previously granted summary judgment in Winnebago's favor on various issues. (ECF No. 33). Winnebago now moves for summary judgment on what it asserts is Wood's only pending claim, breach of express warranty, and asks the court to close the case. (ECF No. 50).

II. Legal Standard

Summary judgment is proper when the record shows that "there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law."[1] Fed. R. Civ. P. 56(a). The purpose of summary judgment is "to isolate and dispose of factually unsupported claims or defenses," *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986), and to avoid unnecessary trials on undisputed facts. *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994).

When the moving party bears the burden of proof on a claim or defense, it must produce evidence "which

1. Information contained in an inadmissible form may still be considered on summary judgment if the information itself would be admissible at trial. *Fraser v. Goodale*, 342 F.3d 1032, 1036 (9th Cir. 2003) (citing *Block v. City of Los Angeles*, 253 F.3d 410, 418-19 (9th Cir. 2001) ("To survive summary judgment, a party does not necessarily have to produce evidence in a form that would be admissible at trial, as long as the party satisfies the requirements of Federal Rules of Civil Procedure 56.")).

would entitle it to a directed verdict if the evidence went uncontroverted at trial." *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (internal citations omitted). In contrast, when the nonmoving party bears the burden of proof on a claim or defense, the moving party must "either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of [proof] at trial." *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000).

If the moving party satisfies its initial burden, the burden then shifts to the party opposing summary judgment to establish a genuine issue of material fact. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). An issue is "genuine" if there is a sufficient evidentiary basis on which a reasonable factfinder could find for the nonmoving party and a fact is "material" if it could affect the outcome of the case under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

The opposing party does not have to conclusively establish an issue of material fact in its favor. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). But it must go beyond the pleadings and designate "specific facts" in the evidentiary record that show "there is a genuine issue for trial." *Celotex*, 477 U.S. at 324. In other words, the opposing party must show

that a judge or jury is required to resolve the parties' differing versions of the truth. *T.W. Elec. Serv.*, 809 F.2d at 630.

The court must view all facts and draw all inferences in the light most favorable to the nonmoving party. *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 888, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990); *Kaiser Cement Corp. v. Fishbach & Moore, Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986). The court's role is not to weigh the evidence but to determine whether a genuine dispute exists for trial. *Anderson*, 477 U.S. at 249.

III. Discussion

A. Wood's Pending Claims

As a preliminary matter, the parties dispute what this court's first summary judgment order in favor of Winnebago exactly did. Winnebago asserts that the "singular remaining cause of action" is Wood's breach of express warranty claim and it now moves for summary judgment on this claim. (ECF No. 56 at 5). Wood says Winnebago previously "moved the Court to determine issues and not claims" and that, as a result, he has four pending claims: (1) breach of express warranty under Nevada law, (2) violation of the MMWA based on a breach of express warranty, (3) breach of implied warranty of merchantability under Nevada law, and (4) violation of the MMWA based on a breach of implied warranty of merchantability. (ECF No. 55 at 3).

The court will first address the MMWA claims and then the state law claims. The Magnuson-Moss Warranty Act creates a federal private cause of action for a warrantor's breach of a "written warranty, implied warranty, or service contract" under state law. 15 U.S.C. § 2310(d)(1); *see also Milicevic v. Fletcher Jones Imports, Ltd.*, 402 F.3d 912, 917 (9th Cir. 2005). In the words of Wood, his "MMWA claims for breach of express and implied warranty rise and fall with his state law claims for breach of express and implied warranty." (ECF No. 55 at 11). A consumer can recover attorney's fees and costs under the MMWA. 15 U.S.C. § 2310(d)(2).

The MMWA has what Winnebago calls a "threshold prerequisite."[2] (ECF No. 56 at 24). No action can be brought under 15 U.S.C. § 2310(d)(1) of the MMWA "for failure to comply with any obligation under any written or implied warranty or service contract . . . unless the person obligated under the warranty or service contract is afforded a reasonable opportunity to cure such failure to comply." 15 U.S.C. § 2310(e); *see also Galicia v. Country Coach, Inc.*, 324 F. App'x 687, 689 (9th Cir. 2009) ("To prevail on a breach of warranty claim under . . . federal Lemon Laws, the [consumers] must first establish that they provided [the warrantor] a reasonable number

2. This language is also used by a secondary source on the MMWA: "The consumer must remember that the requirement of 15 U.S.C.A. §§ 2310(d) and (e) for a 'reasonable opportunity to cure such failure to comply' with the obligation imposed under any written or implied warranty or service contract is a prerequisite to bringing a civil action for such failure to comply." Corporate Counsel's Guide to Warranties § 14:18 (October 2020 Update).

of opportunities to repair an engine defect or non-conformity." (citing 15 U.S.C. § 2310(e)).

This court ruled in its first summary judgment order that Wood failed to afford Winnebago an opportunity to repair his RV because Camping World was not an agent of Winnebago and, irregardless of any agency relationship, it had only a single attempt at repairs. (ECF No. 41 at 8-9). And as a result, Winnebago could not be held liable for Camping World's unreasonable delays either. (*Id.*). These findings foreclose any claims Wood may have under the MMWA as he did not meet the Act's threshold prerequisite in subsection 2310(e).

As to Wood's breach of implied warranty of merchantability claim under Nevada state law, this court previously ruled that the NVLW's express and unambiguous limitation on damages is valid and enforceable. (ECF No. 41 at 10-11). The damages provision reads:

> Your sole and exclusive remedy in a proceeding for breach of this NVLW is money damages in an amount equal to the reasonable cost for material and labor necessary to repair or replace parts that should have been done under this NVLW, but were not.
>
> Your sole and exclusive remedy in a proceeding for breach of any applicable implied warranty is money damages in an amount equal to the reasonable cost for material and labor

> necessary to correct the defect or defects upon which the finding of breach of implied warranty is based.

(ECF No. 50-1 at 17 (Exhibit F)). Winnebago argues that Wood's "purely state law claims for breach of implied warranties are obviated by this court's ruling" on the enforceability of the NVLW's damages provision. (ECF No. 56 at 24-25). The court is not persuaded. Even though Wood's potential damages are limited by the NVLW, his claim is not entirely foreclosed by this ruling. The plain language of the NVLW reproduced above does not disclaim the implied warranty of merchantability. *See* Nev. Rev. Stat. § 104.2314. And Wood contends that he was not required to give Winnebago an opportunity to cure its breach of an implied warranty, citing Nev. Rev. Stat. § 104.2607(3)(a). (ECF No. 55 at 17-18). Winnebago does not address this contention in its reply.

Furthermore, Winnebago's assertion that Wood's breach of implied warranty claim was "asserted under the auspices of the MMWA" and is "not properly before the court" is likewise unpersuasive. (ECF No. 55 at 24-25; ECF No. 56 at 3 ("Plaintiff now seeks to 'move the goalposts' by asserting stand-alone claims for breach of implied warranties whereas before Plaintiff relied solely upon the [MMWA]."). Wood alleges this claim separate and apart from claims under the MMWA in paragraphs 17 and 33 of his complaint under his first claim for relief. (ECF No. 50-5 at 13, 16 (Exhibit I)).

At bottom, Winnebago does not persuade the court that its first summary judgment order foreclosed Wood's

breach of implied warranty of merchantability claim. This claim can proceed consistent with the foregoing.

B. Wood's Breach of Express Warranty Claim

The court will now turn to Winnebago's request for summary judgment on Wood's breach of express warranty claim.

1. Undisputed Facts

Based on the parties' summary judgment papers, the following material facts are undisputed:

On or about April 22, 2017, Wood purchased a new 2016 Winnebago Grand Tour RV from non-party Giant RV for a total cost of $ 462,876. (ECF No. 50 at 5). He arranged to have the RV transported to Nevada on April 23, 2017. (*Id.*). The RV came with a New-Vehicle Limited Warranty ("NVLW"). (ECF No. 50-1 at 17 (Exhibit F)). The NVLW was for three years from the date the RV is first placed into service or for the first 100,000 miles, whichever came first. (*Id.*). The NVLW required Wood to bring his RV into an authorized Winnebago service center for any and all warranty repairs. (*Id.*). If Wood felt that any repairs failed or were otherwise inadequate, he was required to "contact Winnebago Owners Relations in writing and advise them of the failure or inadequacy, including a list of the defects, and provide Winnebago an opportunity to repair the motorhome prior to claiming a breach of [the] warranty." (*Id.*).

Appendix C

Wood took trips in the RV from Nevada to San Diego and British Columbia and began experiencing problems. (ECF No. 50 at 6). Wood first brought his RV to Camping World Las Vegas ("Camping World") for repairs on October 31, 2017. (*Id.*). Camping World is an authorized Winnebago service center and the NVLW was in full force and effect at the time. (*Id.*). Wood also gave Camping World a list of twenty issues to repair. (*Id.*). Camping World had possession of Wood's RV from October 31, 2017 to July 10, 2018. (*Id.*).

On February 13, 2018, while the RV was still in Camping World's possession for repairs, Wood sent Winnebago a letter to the address in the NVLW. (ECF No. 55 at 7). Wood stated that he was not satisfied with how long the repairs were taking, provided a list of problems which were present at delivery and arose during his trips, and asked Winnebago for assistance. (*Id.*). On March 31, 2018, Wood's attorney sent Winnebago a certified letter and email stating that Wood "feels the repairs made and/or attempted by an authorized service center failed or are otherwise inadequate." (ECF No. 55-9 (Exhibit 8)).

Wood retook possession of his Winnebago RV from Camping World on July 10, 2018. (ECF No. 55 at 8). During a trip to British Columbia, he discovered that several of the RV's defects were not fixed. (*Id.*). On July 31, 2018, having received no response from Winnebago to the letters from him and his attorney, Wood filed this suit. (*Id.*). The RV has sat in Wood's shop to this day. (*Id.*).

2. Wood's Obligations under the NVLW

To prevail on a breach of contract claim under Nevada law, the plaintiff must show (1) the existence of a valid contract, (2) a breach by the defendant, and (3) damages as a result of the breach. *Richardson v. Jones*, 1 Nev. 405, 405 (1865). A contract is generally enforceable if there has been an "offer and acceptance, meeting of the minds, and consideration." *May v. Anderson*, 121 Nev. 668, 119 P.3d 1254, 1257 (Nev. 2005).

In the warranty context, "a plaintiff must prove that a warranty existed, the defendant breached the warranty, and the defendant's breach was the proximate cause of the loss sustained." *Nevada Contract Servs., Inc. v. Squirrel Companies, Inc.*, 119 Nev. 157, 68 P.3d 896, 899 (Nev. 2003) (footnote citation omitted). However, "[w]hen parties exchange promises to perform, one party's material breach of its promise discharges the non-breaching party's duty to perform." *Cain v. Price*, 134 Nev. 193, 415 P.3d 25, 29 (Nev. 2018) (citing Restatement (Second) of Contracts § 237 (1981)).

"When a contract is clear, unambiguous, and complete, its terms must be given their plain meaning and the contract must be enforced as written; the court may not admit any other evidence of the parties' intent because the contract expresses their intent." *Ringle v. Bruton*, 120 Nev. 82, 86 P.3d 1032, 1039 (Nev. 2004). This makes issues of contract interpretation pure questions of law often "suitable for determination by summary judgment." *Ellison v. Cal. State Auto. Ass'n*, 106 Nev. 601, 797 P.2d

975, 977 (Nev. 1990) (citing *Phillips v. Parker*, 106 Nev. 415, 794 P.2d 716 (1990)).

The NVLW sets forth Wood's obligations:

> Obtaining Warranty Repairs: Except as otherwise provided herein, to obtain warranty repairs, you must, at your own cost, present your motorhome to an authorized Winnebago service facility during normal business hours and provide a written list of items to be inspected or repaired to the service facility and Winnebago. **In the event you feel the repairs made by an authorized service center failed or are otherwise inadequate, you must contact Winnebago Owner Relations <u>in writing</u> and advise them of the failure or inadequacy, including a list of the defects, and provide Winnebago an opportunity to repair the motorhome prior to claiming a breach of this warranty**. Winnebago may require you to deliver the motorhome to another authorized service center or its facilities in Forest City, Iowa. If Winnebago requests you to bring the motorhome to Forest City, Iowa, Winnebago may cover the reasonable cost of transporting the motorhome to and from Forest City, Iowa. Refusal to allow Winnebago an opportunity to repair the motorhome voids warranty coverage for that repair.

(ECF No. 50-1 at 17 (Exhibit F) (emphasis added)). This court has already ruled that the NVLW is not "ambiguous, confusing, or misleading." (ECF No. 41 at 8, 10).

Appendix C

The crux of the instant summary judgment motion is whether Wood satisfied his obligations under the unambiguous NVLW. This court briefly discussed Wood's obligations under the NVLW in its first summary judgment order:

> It is undisputed that plaintiff took the RV in to Camping World for repairs, Camping World retained the RV for over nine months, and that several of the defects either went unrepaired or resurfaced. (ECF Nos. 33; 38; 40). However, plaintiff did not notify defendant in writing to advise it of Camping World's failure to repair or the inadequacy of its repairs. Thus, the plain language of the new-vehicle limited warranty seems to bar a claim for breach of warranty. But defendant does not request total summary judgment in its motion. Instead, defendant asks the court to hold that a failure to repair within a reasonable number of attempt or a reasonable amount of time cannot sustain plaintiff's [MMWA and breach of warranty] claims.

(*Id.* at 8 (footnote omitted)).

In its instant motion, Winnebago first characterizes this passage as "dicta" but later asserts that "it is an adjudicated fact that [Wood] did not notify Winnebago in writing to advise it of the failure or inadequacy of Camping World's repairs." (ECF No. 50 at 4, 7). In its reply, Winnebago accuses Wood of improperly seeking a do-over on this settled issue and asks the court to apply "rule of the case" principles. (ECF No. 56 at 18-20).

In response, Wood states that "the issue of whether Mr. Wood notified Winnebago in writing of CW's failure to repair the RV's defects or the inadequacy of the repairs has never been raised or briefed by either party." (ECF No. 55 at 13). Wood now offers his February 13, 2018, letter and his attorney's March 31, 2018, letter as proof that "he did everything that was required of him under the NVLW." (*Id.*).

The court will now consider whether Wood satisfied his written notice obligation under the NVLW. The NVLW's warranty repairs provision is formulated in the past tense: "In the event you feel the repairs ***made*** by an authorized service center ***failed*** or are otherwise inadequate. . . ." (ECF No. 50-1 at 17 (Exhibit F) (emphasis added)). It is undisputed that the letters from Wood and his attorney were sent and received while Wood's RV was still in Camping World's possession undergoing repairs. Wood's response in opposition to summary judgment does not squarely address this timing issue. (*See*, *e.g.*, ECF No. 55 at 14 ("Wood provided Winnebago with 2 written notices of CW's failed and inadequate repair attempts prior to filing suit. Winnebago was obligated to repair or replace the RV's defects within a reasonable amount of time if its authorized service center's repair attempts either failed or were inadequate.")). Furthermore, the letters list defects that Wood identified at the time the RV was delivered to him and that he discovered during his trips in 2017. They do not list any failed or inadequate repairs completed by Camping World.

In other words, Wood never notified Winnebago of the failure or inadequacy of Camping World's repairs *after* he

retook possession of his RV on July 10, 2018 and before filing suit. Therefore, he did not satisfy his written notice obligations under the unambiguous NVLW and cannot prevail on his breach of express warranty claim.

IV. Conclusion

In sum, Wood has two pending state law claims: breach of express warranty and breach of implied warranty. Summary judgment is granted in favor of Winnebago on Wood's breach of express warranty claim because Wood did not notify Winnebago in writing of the failure or inadequacy of Camping World's *completed* repairs *after* he retook possession of his RV as required by the plain language of the NVLW.

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that the Winnebago's motion for summary judgment (ECF No. 50) be, and the same hereby is, GRANTED in part and DENIED in part consistent with the foregoing.

DATED November 30, 2020.

/s/ James C. Mahan
UNITED STATES DISTRICT JUDGE

APPENDIX D — STIPULATED DISMISSAL WITH PREJUDICE OF CLAIM FOR BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA, FILED NOVEMBER 2, 2022

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Case No. 2:18-cv-01710-JCM-BNW

GORDON WOOD, an Individual,

Plaintiff,

-vs.-

WINNEBAGO INDUSTRIES, INC.,

Defendant.

STIPULATED DISMISSAL WITH PREJUDICE OF CLAIM FOR BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY

Pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii), the parties hereby stipulate to the dismissal with prejudice as to the only remaining claim before the Court, that being Plaintiff's Claim for Breach of Implied Warranty of Merchantability.

Appendix D

The parties acknowledge that this stipulation does ***not*** hereby dismiss the other claims from the Complaint (Doc. 1-1) filed in Eighth Judicial District Court, Nevada, on July 31, 2018.

The parties note that upon Defendant's Motions (Doc. 33 and 50) the Court previously dismissed (Doc. 41 and 57) all other claims set forth in the Complaint and Plaintiff does not waive his right to appeal the previous dismissal decisions of the Court.

The parties acknowledge that all claims in this case have now been dismissed.

Dated: October 27, 2022.

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The clerk of the court is hereby instructed to close the case.

IT IS SO ORDERED.

/s/ James C. Mahan
UNITED STATES DISTRICT JUDGE

DATED: November 2, 2022