No. 124285

IN THE
SUPREME COURT OF THE STATE OF ILLINOIS

Kimberly Accettura, Adam Wozniak,	) Appeal from the Circuit Court
	) of Kane County
Plaintiffs,	)
	)
v.	) Trial Court No. 14 CH 1467
	) Appellate Court No. 2-17-0972
Vacationland, Inc.,	) The Honorable David Akemann,
	) Presiding
Defendant.	)

BRIEF OF PLAINTIFFS-APPELLANTS

Oral Argument Requested

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II. NATURE OF THE CASE

This case involves an RV that Plaintiffs bought in April for a summer vacation. When the RV turned out to be defective (massive water leaks), and when, by August, the Defendant-warrantor would not give an estimate as to when it would repair the RV, and refused to "cure," Plaintiffs revoked acceptance and canceled their contract.

Defendant moved for summary judgment, which the trial court granted on multiple grounds. Plaintiffs appealed, and the Appellate Court affirmed on every issue. One of these issues involved the interpretation of Section 2-608 of the Commercial Code (810 ILCS 5/2-608), specifically, whether the "right to cure" can be read into subsection (1)(b) of Section 2-608, even though it is not referenced there.

The Appellate Court, acknowledging that this was an issue of the first impression in Illinois, read the right to cure into the statute, in a published opinion.

Plaintiffs filed a petition for leave to appeal with this Court, arguing that this Court should adopt the majority position, according to which, under the plain reading of the text, there is no right to cure for subsection (1)(b), where "cure" is not mentioned, as opposed to subsection (1)(a), where the right to cure is specifically set forth. Plaintiffs argued that, given the express intent of the UCC to establish uniformity of commercial law throughout the country, this Court should adopt the majority position.

III. ISSUES PRESENTED FOR REVIEW

Whether the opportunity to cure should be read into the statute as an unwritten element for revoking acceptance under subsection 5/2-608(1)(b), even though the Code's underlying purposes and policies include simplifying commercial transactions.

IV. STATEMENT OF JURISDICTION

Jurisdiction exists under Supreme Court Rule 315, because, on January 31, 2019, this Court granted Plaintiffs' petition for leave to appeal.

V. APPLICABLE STATUTES

810 ILCS 5/2-608(1):

(1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it

(a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or

(b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

(Emphasis added.)

VI. STATEMENT OF FACTS

As mentioned above, this case involves an RV bought for a summer vacation. When the RV turned out to be defective (massive water leaks), and when the Defendant-warrantor would not give an estimate as to when it would repair the RV, and refused to "cure"—i.e., when the time for performance had come and passed—Plaintiffs revoked acceptance and cancelled their contract.

The trial court granted summary judgment to Defendant in a written order, the gist of which was that Plaintiffs did not give Defendant reasonable time to "cure" the defects. Plaintiffs argued that Defendant in fact refused to "cure." Plaintiffs brought a Motion to Reconsider, and the trial court issued another order, reversing itself with respect to half of Plaintiffs' claims. Then Defendant brought its own Motion to Reconsider, and the trial

court went back to its original ruling and granted summary judgment to Defendant on all four claims.

Plaintiffs timely appealed. The Appellate Court, by a published opinion, affirmed. 2018 IL App (2d) 170972 (2018). Relevant to this proceeding, the Appellate Court, after acknowledging that the issue of the right to cure, as applicable to subsection (1)(b) of Section 2-608, was one of the first impression, adopted the minority position, according to which the right to cure is read into subsection (1)(b) as an unwritten element.

Plaintiffs timely filed a motion to reconsider, which the Appellate Court denied.

Then Plaintiffs filed a petition for leave to appeal, which, after full briefing, was granted by this Court on January 31, 2019. On February 1, 2019, Plaintiffs filed their Notice of Intention to File Additional Brief, as provided by Supreme Court Rule 315(h). The instant brief is being filed under that authority.

The issue before this Court is one of statutory construction. Nevertheless, in order to provide some context for this dispute, Plaintiffs recite the facts underlying this litigation.

Plaintiffs bought the subject RV on April 19, 2014. Complaint, ¶4, C-212, A-12; purchase contract, C-219, A-19. In June Plaintiffs noticed the water leakage problem. Plaintiffs brought the June problem to Defendant's attention, and Defendant attempted to repair it. Wozniak dep., 8:6-9:9, C-235; Accettura dep., 30:17-32:11, C-264.

In July, during a trip to Michigan, the RV continued having a significant leakage problem. Again, Plaintiffs brought this problem to Defendant's attention. Wozniak Amended Affidavit, C-310, A-37, ¶2. Apparently, the problem was so severe that, this

time, on or sometime after July 14, 2015, Defendant-warrantor effectively confessed to Plaintiffs that it was not able to repair the RV under its warranty,[1] gave up on any supposed right to cure, and told Plaintiffs that it would send the RV for repairs to a third party out of state. Wozniak Amended Affidavit, C-310, A-37, ¶¶2-3. When Plaintiffs asked for a time estimate for the repairs, Defendant-warrantor was unable to provide one. Wozniak Amended Affidavit, C-310, A-37, ¶4.

Having been refused an estimate, on the same day Plaintiffs asked Defendant for a new RV instead of the defective one, and were again refused. Wozniak Amended Affidavit, C-310, A-37, ¶5.

Having been refused an estimate for repairs, having been refused a replacement RV, and with the summer nearly gone, Plaintiff revoked their acceptance on August 2, 2015. Wozniak Amended Affidavit, C-310, A-37, ¶6.

Plaintiffs sued, asserting the following claims: (1) revocation of acceptance under the Magnuson-Moss Warranty Act, (2) breach of the implied warranty of merchantability under the Magnuson-Moss Warranty Act, (3) revocation of acceptance under the Commercial Code, and (4) action to recover the purchase price under the Commercial Code. Complaint, pp. 2-7, C-213-18, A-13-18.

[1] At the beginning of the case, Defendant, as an affirmative defense, claimed it properly disclaimed the implied warranty of merchantability. Only after several motions to dismiss did the trial court finally recognize that Defendant did not properly disclaim implied warranties, by failing to make its disclaimers conspicuous. Accordingly, the trial court dismissed this affirmative defense. Order of June 7, 2015, C-182-84. The Appellate Court failed to recognize or otherwise acknowledge that the warranty in question was the implied warranty of merchantability given by ***Defendant*** (810 ILCS 5/2-314), not a written warranty of a third-party manufacturer.

On February 10, 2017, the trial court granted summary judgment on all four counts. Order of February 10, 2017, C-312, A-47.

Plaintiffs filed their Motion to Reconsider, and, after Defendant filed its Response, and Plaintiffs replied, the trial court partially granted the motion, reinstating Plaintiffs' Counts III and IV. Order of July 5, 2017, C-418, A-83.

Then Defendant filed its Motion to Reconsider, and, after further briefing, the trial court went back to its original position and granted summary judgment on all four counts of Plaintiffs' Complaint. Order of November 27, 2017, C-487, A-112.

In their appeal to the Appellate Court, Plaintiffs raised the following issues, some of which overlap different legal theories: (1) whether "cure" is an element in 810 ILCS 5/2-608(1)(b), even though the statute does not say so; (2) whether "cure" and "repair" are necessarily the same, where both the statutory and case law provide that "cure" sometimes means tendering conforming goods, not merely repairing non-conforming goods; (3) whether the trial court failed to apply the proper standard of review when it found that Plaintiffs refused a reasonable opportunity to cure, where the record demonstrate that the cure was in fact refused ***to them***, and where the issue of reasonableness of time was a question of fact; (4) whether the trial court applied wrong legal standards of reasonableness, including applying the standards from the Illinois Lemon Law, which was not at issue in this case; and (5) whether the trial court erred in striking Plaintiffs' Cross-Motion to Reconsider under 735 ILCS 5/2-1203, even though there was no final order entered in the case.

As mentioned before, the Appellate Court affirmed on every issue. One of those issues is now before this Court: whether Illinois should adopt the majority position that

"cure" should not be read into subsection (1)(b) of the revocation statute (810 ILCS 5/2-608), given that it is not mentioned there, and given that simplicity and uniformity of commercial law would be best promoted by adoption of the majority view.

VII. STANDARD OF REVIEW

The standard of review for pure questions of law is de novo. Reliable Fire Equipment Co. v. Arredondo, 965 N.E.2d 393, 396 (2012).

VIII. SUMMARY OF THE ARGUMENT

As an issue of the first impression, both the trial court and the Appellate Court found that "cure" was an unspoken element of the revocation statute, 810 ILCS 5/2-608. However, the plain language of the relevant subsection, (1)(b), does not even mention "cure," and the majority view is that "cure" is not an element in subsection (1)(b) (as opposed to subsection (1)(a)). Moreover, public policy reasons (which include simplification of commercial transactions), the UCC stated goal of uniformity, and this Court's precedent, mandate adoption of the majority view.

Related to the foregoing is the meaning of the term "cure" under the UCC. Both of the courts below, in essence, equated the terms "repair" and "cure." However, the pertinent law is more nuanced than merely equating "cure" with "repair." Sometimes it does, and sometimes is does not, depending on the severity of the defect. Moreover, even assuming that "cure" = "repair," the uncontradicted record in this case is that the "cure" was in fact refused. Not by Plaintiffs, but by Defendant.

Nevertheless, even assuming that "cure" equals "repair," subsection (1)(b) of the revocation statute sets forth no right to cure, and this Court should adopt the majority position so holding.

IX. ARGUMENT

A. UCC "cure" is not necessarily the same as "repair"

The sole issue in this case is whether subsection (1)(b) of Section 2-608 includes a seller's right to "cure" a defective condition. In its most basic form, Plaintiffs argument is this:

- Subsection (1)(a) references "cure";
- Subsection (1)(b) does not;
- Therefore, "cure" is an element of subsection (1)(a), but not an element of subsection (1)(b).

This reading comports with logic, common sense, and the plain language rule this Court has embraced:

> The familiar maxim *expressio unius est exclusio alterius* is an aid of statutory interpretation meaning "the expression of one thing is the exclusion of another." Black's Law Dictionary 581 (6th ed. 1990). "Where a statute lists the things to which it refers, there is an inference that all omissions should be understood as exclusions * * *." *Burke v. 12 Rothschild's Liquor Mart, Inc.*, 148 Ill.2d 429, 442, 170 Ill.Dec. 633, 593 N.E.2d 522 (1992). This rule of statutory construction is based on logic and common sense. It expresses the learning of common experience that when people say one thing they do not mean something else. The maxim is closely related to the plain language rule in that it emphasizes the statutory language as it is written. 2A N. Singer, Sutherland on Statutory Construction § 47.24, at 228, § 47.25, at 234 (5th ed.1992).

Metzger v. DaRosa, 805 N.E.2d 1165, 1172 (2004).

As Plaintiffs demonstrate below, this reading also comports with UCC principles of simplicity, clarity, and uniformity.

One would think the issue of cure would hardly ever arise, because, as commentators have noted, "[a] reading of the cases indicates that most buyers allow, or even desire, an opportunity to cure by the seller before resorting to the more drastic

action of revocation."[2] Just as the Plaintiffs herein, who revoked only after their summer vacation was ruined, and after the warrantor confessed its own inability to repair their RV and refused to tell them when it would be repaired.

As a preliminary matter in this "right to cure case," it is important to discuss the legal meaning of the term "cure."

According to Defendant, "cure" always means "repair." Defendant fails to acknowledge that—at least sometimes!—"cure" means "replacement." At least sometimes. But Defendant subscribes to argumentum ad absurdum, where "cure" ***always*** means "repair."

This argument is easily rebutted: if "cure" always means "repair," why not call it "repair"?

Plaintiffs believe that the Commercial Code, if read with care, provides an answer. The applicable section of the UCC is 5/2-508 (which may or may not apply to revocations of acceptance[3]) references "cure." But it does not define it.

What is "cure," then? The UCC provides a strong hint. The term "cure" is referenced in Section 508, the very title of which includes the word "replacement." Apparently, "cure" is a responsibility of a "seller," and moreover, in order to properly

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[2] White, Summers, Hillman, Uniform Commercial Code (6th ed. 2012), §9:23, p. 828.

[3] "According to White and Summers [] § 8-5, pp. 466-67, until recent years most courts held the right to cure in § 400.2-508 did not apply in 'revocation cases.' Proponents of this approach argue this was intended by the Code's drafters and that the act of acceptance draws the line where the right to cure ends. Id. Newer case law and commentary show an increased willingness to allow the seller to cure after acceptance and before allowing the buyer to exercise the right to revoke. Id. However, according to 4 U.L.A. 63, Uniform Commercial Code (Cum.Supp.1995), the rule that a seller has no right to cure when a buyer justifiably revokes his acceptance remains the majority view." Bowen v. Foust, 925 S.W2d 211, 215, n.6 (Mo.App. 1996).

"cure," the seller must either "substitute a conforming tender," or "make a conforming delivery." Thus, under Section 508 "cure" is not a "repair."

The Second District, in a case that involved a major defect (for major v. minor defects see infra) plainly stated: "Tendering another substantially similar vehicle is a proper cure because that is what the law requires." Belfour v. Schaumburg Auto, 306 Ill.App.3d 234, 242, 713 N.E.2d 1233, 1238, 239 Ill.Dec. 383, 388 (2d Dist. 1999). Other courts reached the same conclusion. Gorman v. Saf-T-Mate, Inc., 513 F.Supp. 1028, 1034, n.7 (N.D. Ind. 1981) ("UCC 'cure' means 'replacement' and is illustrative of the limited remedial significance of the term").

Moreover, ***real*** cure sometimes means conforming goods ***and*** compensation for nonconforming tender. (What ***is*** the appropriate compensation for a vacation ruined by a leaky RV?) See Moulden & Sons, Inc. v. Osaka Landscaping & Nursery, Inc., 21 Wash.App. 194, 199, 584 F.2d 986, 971 (Wash.App. 1978).

Thus, it appears that "cure" is a broad term, encompassing such concepts such as "tendering conforming goods," along with "tendering conforming goods with appropriate compensation."

In fairness, sometimes "cure" also encompasses "repair." Courts do treat "cure" as synonymous with "repair," ***but only*** with respect to minor defects. Wilson v. Scampoli, 228 A.2d 848, 850 (D.C. 1967) (tint in color TV set curable by repair, no entitlement to cure by replacement: "minor repairs or reasonable adjustments are frequently the means by which an imperfect tender may be cured"; choice between repair and replacement should not be "subjecting the buyer to any great inconvenience"; citing Section 2-508).

Or sometimes the term "cure" means a simple price reduction—but only in cases of insubstantial nonconformities. Oral-X Corp. v. Farnam Companies, Inc., 931 F.2d 667, 760 (10th Cir. 1991) (credit against purchase price is the appropriate cure where the defect affected only one quarter of one percent of the product).

However, in cases of major defects, courts do not allow the seller to cure by repair, but instead mandate cure by replacement. Bowen v. Foust, 925 S.W.2d 211, 216 (Mo.App. 1996) (no cure by repair of substandard heating/cooling equipment; "even if Defendant had a right to cure under § 400.2-508, the only acceptable cure would have been to replace the equipment he installed with equipment conforming to the contract. *** Defendant never notified Plaintiffs *** that he intended to do so.").

As mentioned above, this "major versus minor defect" dichotomy is consistent with the Second District's language in Belfour, where the Court read "cure" as synonymous with "replacement," because the car there was alleged to be a "total loss." Belfour, 306 Ill.App.3d at 236, 713 N.E.2d at 1235, 239 Ill.Dec. at 385. This language is consistent with the "major versus minor defect" theory.

A defect is considered minor when the repair would neither leave evidence of the defect's prior existence, nor threaten the value or quality of the product as a whole. Jonathan Sheldon & Carolyn L. Carter, National Consumer Law Center, Consumer Warranty Law, at 360 (4th ed. 1997). On the other hand, a defect is major if it does the opposite. Seller's Right to Cure Nonconforming Goods, 6 Rutgers-Camden L.J. 384, 413 (1974). Another consideration is whether the repair attempt would inconvenience the buyer (ruining a summer vacation, for example). Sales of Personal Property—Breach of

Warranty—Repair As a Means of Cure under §2-508 of the Uniform Commercial Code, 53 Iowa L.Rev. 780, 783 (1967).

Accordingly, the term "cure" is susceptible to multiple meanings. It means "repair" when defects are minor. But it means "replacement" (tendering conforming goods) when defects are major. This is a logical construction, protecting the rights of both sellers and buyers. As aptly explained by the New Jersey Supreme Court:

> In general, economic considerations would induce sellers to cure minor defects. *See generally* Priest, *supra,* 91 *Harv.L.Rev.* 973-974. Assuming the seller does not cure, however, the buyer should be permitted to exercise his remedies under *N.J.S.A.* 12A:2-711. The Code remedies for consumers are to be liberally construed, and the buyer should have the option of cancelling if the seller does not provide conforming goods.

Ramirez v. Autosport, 88 N.J. 277, 290, 440 A.2d 1345, 1352 (N.J. S.Ct. 1982).

With this definition in mind, we now turn to the main issue in this case.

B. Right to cure is* not *an element of 810 ILCS 5/2-608(1)(b) (as opposed to 5/2-608(1)(a)) because the UCC says so

Count III of Plaintiffs' Complaint (C-216, A-16) involved an issue of "cure" under the UCC. The trial court declared that "section 2-608 of the Uniform Commercial Code anticipate[s] a reasonable opportunity to cure." Order of July 5, 2017, ¶13, C-423, A-88. The court reiterated its ruling in the Order of November 27, 2017, C-487-88, A-112-13 (referencing a "threshold requirement" of opportunity to cure for all attempts to revoke, C-488, A-113).

Similarly, the Appellate Court stated, on page 11 of its Opinion (A-124), that "the record clearly establishes that on July 14, 2014, plaintiffs asked defendant to cure the defects discovered during their trip to Michigan and defendant offered plaintiffs a proper cure." The Appellate Court further stated immediately thereafter that "Plaintiffs revoked

acceptance about two weeks later, knowing that the RV was going to the manufacturer to be repaired under the warranty. Thus, the material facts are undisputed and all reasonable minds would agree that plaintiffs failed to allow defendant a reasonable time to cure before their purported revocation, as a matter of law" and hence, "the trial court properly determined that revocation was improper" and "properly granted summary judgment in defendant's favor as to count III." A-124.

(1) Summary of the argument

The relevant portion of the revocation of acceptance section of the Illinois Commercial Code (810 ILCS 5/2-608) states:

> (1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it
>
> (a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or
>
> (b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

There is no dispute that this case should be analyzed under subsection (1)(b), given that the leaks manifested themselves after Plaintiffs' acceptance and were not known to them before they bought the RV.

As evident from the plain statutory language, subsection (1)(a) presupposes a right to cure. Subsection (1)(b) does not.

This is an issue of first impression in Illinois.

Below, Plaintiffs argued that Illinois should adopt the majority interpretation of section (1)(b), consistent with its plain language, according to which there is no right to cure under subsection (1)(b), as opposed to subsection (1)(a).

The Appellate Court disagreed, and adopted the minority interpretation, reading the right to cure into subsection (1)(b).

As the discussion below will show, most jurisdictions adopt the reading according to which there is no right to cure under subsection (1)(b). Thus, there is now a split between Illinois and most of the country.

Plaintiffs maintain that, given this Court's teaching that lower courts should adopt majority interpretations of the UCC, and given that the public policy of Illinois promotes simplicity and uniformity in interpretations of the Uniform Commercial Code, the Appellate Court should have adopted the majority interpretation of subsection (1)(b).

This Court, in several opinions, stated that the Uniform Commercial Code is an area of the law "in which uniformity and certainty are highly valued." Razor v. Hyundai Motor America, 222 Ill.2d 75, 92, 854 N.E.2d 607, 618, 305 Ill.Dec. 15, 26 (2006). This Court directed that, as a general proposition, lower courts should follow majority interpretations of the UCC, because one of the underlying purposes of the ***Uniform*** Commercial Code is "to make uniform the law among the various jurisdictions." Connick v. Suzuki Motor Co., 174 Ill.2d 482, 491, 675 N.E.2d 584, 589, 221 Ill.Dec. 389, 394 (1996) (courts are to follow "the majority interpretation of the UCC"; following Pennsylvania cases).

The same logic applies to the majority interpretation of the UCC with respect to Section 2-608 of Article Two. Courts in most jurisdictions take the position that a seller

has no right to cure nonconformities prior to revocation under subsection 2-608(1)(b) (as opposed to subsection 2-608(1)(a)). A quick Westlaw search yields cases so holding from Alabama,[4] Arizona,[5] California,[6] Idaho,[7] Kansas,[8] Michigan,[9] Missouri,[10] New Hampshire,[11] New Jersey,[12] Texas,[13] and West Virginia.[14]

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[4] American Honda Motor Co., Inc. v. Boyd, 475 So.2d 835, 839–40 (Ala. S.Ct. 1985) (where buyer purchased a car believing it to be new, and in fact the car was previously damaged and repaired, and buyer did not discover this until after accepting car, the case fell under UCC §2–608(1)(b), and therefore, there was no right to cure).

[5] Preston Motor Co. v. Palomares, 133 Ariz. 245, 249, 650 P.2d 1227, 1231 (Az.App. 1982) (acceptance of a leased car without discovery of a non-conformity—excessive oil consumption—allowed for revocation "without waiting for a cure, seasonable or otherwise ***.").

[6] U.S. Roofing, Inc. v. Credit Alliance Corp., 228 Cal.App.3d 1431, 1444, 279 Cal.Rptr. 533, 540 (Cal.App. 1991) (categorically stating that "[we] believe that the right to cure under [UCC § 2–508] does not apply to situations where the buyer seeks to revoke his acceptance under [UCC § 2–608]").

[7] Jensen v. Seigel Mobile Homes Group, 105 Idaho 189, 668 P.2d 65, 69–70 (Idaho S.Ct. 1983) (holding that right to cure is relevant only when there has been a rejection of goods; citing authorities for the proposition that cure is not available following the buyer's acceptance of goods).

[8] CB Aviation LLC v. Hawker Beechcraft Corp., 2011 WL 5386365, at *10 (E.D. Pa. 2011) ("No right to cure where Plaintiff properly revokes acceptance; *** on its face [UCC 2-508] applies only where the buyer rejected the goods, not where the buyer revoked a prior acceptance"; interpreting Kansas law).

[9] Head v. Phillips Camper Sales & Rental, Inc., 234 Mich.App. 94, 593 N.W.2d 595, 600 (Mich.App., 1999) (adopting "majority view" that "a seller has no right to cure a defect that was not discoverable when the buyer accepted the goods").

[10] Bowen v. Foust, 925 S.W.2d 211, 215 n. 6 (Mo.App. 1996) (noting that this remains the majority view, although the more recent cases more willingly allow opportunity to cure following an acceptance).

[11] Werner v. Montana, 117 N.H. 721, 378 A.2d 1130, 1136–37 (N.H.S.Ct. 1977) (defective boat; recognizing that cure is not available under 608(1)(b)).

[12] Pavesi v. Ford Motor Co., 155 N.J. Super. 373, 378 (N.J. App.Div. 1978) (right to cure after acceptance limited to trivial defects).

[13] Gappelberg v. Landrum, 666 S.W.2d 88, 89-91 (Tx. S.Ct. 1984) (plain reading of Section 608(1)(b) means no right to cure).

[14] City Nat'l Bank of Charleston v. Wells, 181 W.Va. 763, 769-770, 384 S.E.2d 374, 380 (W.V.S.Ct. 1989) (plain reading of Section 608(1)(b) means no right to cure).

The majority view is supported by the plain reading of the statutory text. The courts have recognized that "the drafters of the U.C.C. [] pored over the code for years," and so when they meant something to be included, they expressly included it. Seekings v. Jimmy GMAC of Tuscon, Inc., 130 Ariz. 596, 602, 638 P.2d 210, 216 (Az. S.Ct. 1981).

"Cure" is referenced in subsection (1)(a), not in subsection (1)(b). There is a reason for this. Section 2-608 as a whole is concerned with the issue of what would excuse the buyer's performance under the contract. Subsection (1)(a) addresses the situation where the buyer ***knows*** that the tendered goods are non-conforming, and has agreed that buyer will accept the non-conforming goods on the reasonable assumption (usually on the basis of assurances from the seller) that the goods will be brought into conformity with the contract (cured) "seasonably." This subsection, then, sets a time limit for cure. It does not give the seller a "reasonable" right to cure. Rather, it mandates that a cure be "seasonable." Is est, seller sells buyer a camper that is known to leak, and the leak is disclosed to buyer with a promise to cure seasonably. ("Buy this leaky camper because I will give you a discount and fix the camper so you can use it without worry of it leaking this year.") That does not give the seller the unlimited right to cure, because part of the contract for sale is the promise to cure within a certain time. The seller has a deadline for effecting cure—"seasonably." If the seller fails to cure the non-conformity seasonably, the buyer can avoid the buyer's obligations under the contract by revoking acceptance of the non-conforming goods.

Subsection (1)(b), on the other hand, addresses the issue of a non-conformity that is difficult or impossible to detect by the buyer (or even the seller) at the time of

acceptance, or when a seller gives the buyer assurances about the goods. Under this circumstance, it is irrelevant whether the goods can be made conforming by cure, because "cure" ***was not part of the contract for the goods*** (i.e., there was no "Buy this leaky camper because I will give you a discount and fix the camper so you can use it without worry of it leaking this year."). Rather, the contract had certain requirements for the goods to conform. If, after acceptance, those requirements are discovered not to have been met, and the non-conformity substantially impairs the value to the buyer, then the buyer may avoid the buyer's obligations under the contract by revoking acceptance of the non-conforming goods.

In any event, it appears undisputed that, where a buyer's acceptance is as described in subsection (1)(b), the majority rule is that the buyer may revoke the acceptance without waiting for a cure, seasonable or otherwise, by the seller.

In the instant case, the Appellate Court, by a published opinion, adopted a minority position. The Appellate Court referenced Belfour, 306 Ill.App.3d 234, 713 N.E.2d 1233, 239 Ill.Dec. 383, and Mydlach v. DaimlerChrysler Corp., 226 Ill.2d 307, 875 N.E.2d 1047, 1059, 314 Ill.Dec. 760 (2007) in support of its interpretation. But neither Belfour nor Mydlach mandate this result, because neither addressed the instant issue of the first impression—the interplay between subsections (1)(a) and (1)(b).

Plaintiffs respectfully suggest that, in light of the teachings of this Court, which strongly encourage Illinois courts to follow the majority interpretations of the UCC, this Court should reverse the Appellate Court and adopt the majority reading of the plain language of the statute as the law in Illinois.

(2) Public policy grounds for keeping the UCC "uniform"

As mentioned before, this Court, in several opinions, has stated that the Uniform Commercial Code is an area of the law "in which uniformity and certainty are highly valued." Razor v. Hyundai Motor America, 222 Ill.2d 75, 92, 854 N.E.2d 607, 618, 305 Ill.Dec. 15, 26 (2006). This Court directed that, as a general proposition, lower courts should follow majority interpretations of the UCC, because one of the underlying purposes of the Code is "to make uniform the law among the various jurisdictions." Connick v. Suzuki Motor Co., 174 Ill.2d 482, 491, 675 N.E.2d 584, 589, 221 Ill.Dec. 389, 394 (1996) (courts to follow "the majority interpretation of the UCC"; following Pennsylvania cases). Consistent with these principles, this Court, in First Galesburg Nat'l Bank & Trust Co. v. Joannides, 103 Ill.2d 294, 301 (1984), listed all the decisions from other states interpreting a specific provision of the UCC and justified its interpretation on the ground that it "is consistent with the conclusion reached in most jurisdictions where the question has been examined."

In reliance on this precedent, federal courts, when obligated to anticipate how this Court would rule on issues of the first impression under the UCC, expect Illinois to adopt majority views. Northrop Corp. v. Litronic Indus., 29 F.3d 1173, 1178 (7th Cir. 1994). To depart from this principle would have substantial stare decisis consequences.

The "presumption in favor of majority view" is justified by the UCC itself, which describes its "purposes and polices" (and public policy of Illinois) as including "to make uniform the law among the various jurisdictions." 810 ILCS 5/1-103(a)(3). See also Kelsay v. Motorola, Inc., 74 Ill.2d 172, 187 (1978) (public policy of Illinois is announced in its statutes).

(3) Statutory language is the best evidence of legislative intent

When courts interpret statutes, they begin their analysis with the plain text of the statute:

> When interpreting a statute, we strive to ascertain the legislature's intent. The best evidence of that intent is the language the legislature used in the statute, and we should give the language its plain and ordinary meaning. If the statutory language is clear and unambiguous, we should discern the legislative intent from that language alone, without resorting to other tools of statutory construction, such as legislative history.

In re Estate of Snodgrass, 337 Ill.App.3d 619, 784 N.E.2d 431, 433, 271 Ill.Dec. 213 (4th Dist. 2003) (citations omitted).

Moreover, the UCC establishes the principles of simplicity and clarity as the guideposts of interpretation. 810 ILCS 5/1-103(a)(1).[15] "The UCC counsels against hypertechnical rules of construction that undermine the UCC's underlying purposes and policies." Bank of Waunakee v. Rochester Cheese Sales, Inc., 906 F.2d 1181, 1191 (7th Cir. 1990). As courts observed, clarity in interpretation of the UCC reduces transaction costs. E.g., Dayka & Hackett, LLC v. Del Monte Fresh Produce N.A., Inc., 269 P.3d 709, 714 (Az. App. 2012).

This Court has consistently referred to the principles of simplicity and clarity as providing guidance for interpreting the UCC. See, e.g. Gillespie v. Riley Management Corp., 50 Ill.2d 211, 216 (1974) (citing predecessor section). The Appellate Court follows this Court's lead. Mitchell Buick & Oldsmobile Sales, Inc. v. McHenry Sav. Bank, 235 Ill.App.3d 978, 982, 601 N.E.2d 1360, 1364, 176 Ill.Dec. 662, 666 (2d Dist.

[15] "(a) The Uniform Commercial Code must be liberally construed and applied to promote its underlying purposes and policies, which are:
(1) to simplify, clarify, and modernize the law governing commercial transactions ***."

1992) (purposes of the UCC are to simplify, clarify, and unify law governing commercial transactions and to make law among various states uniform); Your Style Publications, Inc. v. Mid Town Bank & Trust Co., 150 Ill.App.3d 421, 426, 501 N.E.2d 805, 809, 103 Ill.Dec. 488, 492 (1st Dist. 1986) (same).

Reading "cure" into subsection (1)(b) was error, not only because of effecting a departure from the majority reading, but also because the plain language of the statute does not support it, and therefore such a reading does not comport with the legislative intent. The Appellate Court's reading violated UCC principles of simplicity and clarity.

While subsection 2-608(1)(a) of Article 2 does envision a "seasonable" cure, subsection 2-608(1)(b) does not. It says nothing about cure.

The UCC mentions cure on several occasions; in fact, it mentions it in the subsection just above subsection (1)(b). It follows, then, that the omission in subsection (1)(b) is intentional and meaningful. Expressio unius est exclusio alterius. Metzger v. DaRosa, 805 N.E.2d at 1172.

(4) Case law does not support reading "cure" into the statute

Cases from numerous jurisdictions confirm that the right to cure should not be read into subsection (1)(b). For example, the Michigan Court of Appeals held:

> A majority of courts considering this question have concluded that a seller has no right to cure after a buyer revokes his acceptance under § 2-608(1)(b) of the UCC. ***
>
> We adopt the majority approach to the construction of § 2-608(1)(b). Under the plain language of M.C.L. § 440.2608(1)(b); MSA 19.2608(1)(b), a seller has no right to cure a defect that was not discoverable when the buyer accepted the goods. The Legislature explicitly granted the seller a right to cure in M.C.L. § 440.2508; MSA 19.2508, and implicitly granted a similar right in M.C.L. § 440.2608(1)(a); MSA 19.2608(1)(a) (acceptance with knowledge of a nonconformity that

> the seller will seasonably cure). The Legislature granted no such right in M.C.L. § 440.2608(1)(b); MSA 19.2608(1)(b). We will not read a right to cure into § 2-608(1)(b) where the Legislature granted that very right in other sections, but did not do so here.

Head v. Phillips Camper Sales & Rental, 593 N.W.2d 595, 600-01 (Mich.App. 1999).

Of particular note is Economy Folding Box Corp. v. Anchor Frozen Foods Corp., 515 F.3d 718 (7th Cir. 2008), given that it discusses Illinois law:

> Economy also argues that it had a right to cure any defects before Anchor could lawfully reject the first installment of boxes or cancel the contract. In the decision below, the district court did not make a finding whether the defect in the outer box was curable or whether Economy had an opportunity to cure. The court applied 810 ILCS 5/2-608, which provides that a buyer can revoke acceptance of a delivery of non-conforming goods if he "accepted it (a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or (b) without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances." A small number of courts have found that a seller who accepts goods without knowing they are non-conforming and later discovers the defect must give the seller a chance to cure before revoking acceptance. *See* 18 Richard A. Lord, Williston on Contracts, § 52:25 (4th ed.2004). ***However, most courts "have concluded that the seller's right to cure does not apply to situations in which the buyer revokes acceptance based on a subsequently discovered defect." Id. (citation omitted). Noting that there is no dispositive Illinois case on the issue, the district court found that since 810 ILCS 5/2-608 does not expressly provide a seller a right to cure prior to a buyer's revocation of acceptance, Economy had no right to cure under that section***.
>
> Economy Folding Box Corp. v. Anchor Frozen Foods Corp., 515 F.3d at 721

(emphasis added).

To the extent that Illinois cases mentioned above (Belfour[16] and Sorce[17]) appear to state otherwise, in fact they do not. (This has been recognized by the Seventh Circuit,

[16] Belfour, 306 Ill.App.3d 234, 713 N.E.2d 1233, 239 Ill.Dec. 383.
[17] Sorce v. Naperville Jeep Eagle, Inc., 309 Ill.App.3d 313, 722 N.E.2d 227, 242 Ill.Dec. 738 (2d Dist. 1999).

when, in 2008, it observed that there is no dispositive Illinois case on the issue. Both Belfour and Sorce are 1999 cases.) The reason they could appear to state otherwise is that they discuss revocation generally, without distinguishing between subsections (1)(a) and (1)(b) of Section 2-608. But proper analysis must take into account the fundamental textual difference between the two subsections. It appears that none of the Illinois cases do that. This Court should confirm that Illinois follows the majority view.

(5) Defendant's position

In its submission to this Court, Defendant argued that the plain reading of the text is not the majority view. However, various courts recognize it as such. In addition to the already cited Bowen v. Foust, 925 S.W2d at 215, n.6 ("remains the majority view"), Head v. Phillips Camper Sales & Rental, Inc., 593 N.W.2d at 600 (adopting "majority view") and Economy Folding Box Corp. v. Anchor Frozen Foods Corp., 515 F.3d at 721 (same), see Car Transportation Brokerage Co., Inc., v. Blue Bird Body Co., 322 Fed.Appx. 891, 895, 2009 WL 962669, *3 (11th Cir. 2009, per curiam), which provides the following survey of the majority view:

> On its face, the plain language of O.C.G.A. § 11-2-608 requires a pre-revocation opportunity to cure only where a buyer knew about the nonconformity prior to acceptance and reasonably assumed that the nonconformity would be cured. Courts in a majority of jurisdictions, therefore, take the position that a seller has no right to cure nonconformities prior to revocation under UCC § 2-608(1)(b), that is, where the goods are accepted by the buyer without knowledge that it fails to conform to the sales contract. See, e.g., Preston Motor Co v Palomares, 650 P.2d 1227, 1231 (Ariz. 1982); Werner v. Montana, 378 A.2d 1130, 1136-37 (N.H. 1977); American Honda Motor Co., Inc. v. Boyd, 475 So. 2d 835, 839-40 (Ala. 1985) (holding that where buyer purchased a car, believing it to be new, and in fact the car was previously damaged and repaired, and buyer did not discover this until after it had accepted car, the case fell under UCC § 2-608(1)(b), and therefore, there was no right to cure); U.S. Roofing, Inc. v. Credit Alliance Corp., 279 Cal. Rptr. 533, 540

> (Cal. App. 3d Dist. 1991) (categorically stating that "[we] believe that the right to cure under [UCC § 2-508] does not apply to situations where the buyer seeks to revoke his acceptance under [UCC § 2-608]"); Jensen v. Seigel Mobile Homes Group, 668 P.2d 65, 69-70 (Idaho 1983) (holding that right to cure is relevant only when there has been a rejection of goods; following acceptance there is no right to cure, citing authorities for the proposition that cure is not available following the buyer's acceptance of goods); Head v. Phillips Camper Sales & Rental, Inc., 593 N.W.2d 595, 600 (Mich. App. 1999) (adopting majority view that "a seller has no right to cure a defect that was not discoverable when the buyer accepted the goods"); Bowen v. Foust, 925 S.W.2d 211, 215 n.6 (Mo. Ct. App. S.D. 1996) (noting that this remains the majority view, although the more recent cases allow opportunity to cure more willingly following an acceptance). Accordingly, where a buyer's acceptance is as described in UCC § 2-608(1)(b), the majority rule is that he may revoke the acceptance without waiting for a cure, seasonable or otherwise, by the seller.

In its submissions below (and before this Court), Defendant also referenced Comment 4 of Section 2-608.[18] Comment 4 states that revocation will "generally" be resorted to after attempts at adjustment have failed.

From this language Defendant deduces the right to cure in subsection (1)(b).

There are two problems with Defendant's argument. First, the quoted language from Comment 4 is merely an observation, not a legal rule. It does not say that the right to cure must be read into subsection (1)(b), nor can it be reasonably interpreted that way.

And second, "generally" means there are exceptions. See, e.g., case that turned on the meaning of the word "generally," Redlark v. Commissioner of Internal Revenue, 106 T.C. 31, 45 (1996) ("generally" does not mean "always"). See also Emergency Services Billing Corp. v. Allstate Ins. Co., 668 F.3d 459, 469 (7th Cir. 2012) (dropping the word

[18] Indeed, Official Comments are a valuable interpretive source for the UCC. They are written with great care, and are to be relied upon by the courts. "Courts may assume that the legislature adopted the legislation with the same intent evidenced by the official comments ***." Tompkins State Park v. Niles, 127 Ill.2d 209, 229, 537 N.E.2d 274, 283, 130 Ill.Dec. 207, 216 (1989).

"generally" from the final text of a rule indicates that the final text of the rule allows for no exclusions); In re 7H Land & Cattle Co., 6 B.R. 29, 34 (D. Nev. Bankr. 1980) (use of the term "generally" means there are exceptions to the rule); American Farm Bureau Federation v. United States EPA, 792 F.3d 281, 307, n.8 (3d Cir. 2015) (explaining that, when Congress drafts statutes and regulations, "[t]he use of the word `generally' is intended to provide the Administrator with some discretion ***."); Lake Bluff Housing Partners v. City of South Milwaukee, 540 N.W.2d 189, 195 (Wis. S.Ct. 1995) (the use of the word "generally" implies there are exceptions to an absolute rule); Monte v. State of Florida, 51 So.3d 1196, 1203, n.5 (Fl.App. 2011) ("The use of the word 'generally' by the supreme court in *Tingle* implies that there are exceptions.").

One of these exceptions is subsection (1)(b), which does not contemplate cure, but rather establishes a completely different regime, in which the operative factors are either "difficulty of discovery" of defects, or "seller's assurances" that a conforming delivery would be made. In any event, a comment cannot be used to override the plain meaning of the statute, and subsection (1)(b) says nothing about cure.

Knowing that the plain language of the statute is against it, Defendant conjured up an inventive theory that, somehow, the parties came to an "agreement" to use subsection (1)(a) but not (1)(b). Defendant does not explain what consideration supported this mythical agreement, and, even more fundamentally, misreads the language of the statute, because both subsections refer to the time at or near acceptance (which, in this case, was in April), not to events taking place months after the acceptance, when time for performance had come and gone.

Defendant also argued below that the buyer who revokes has the same duties as the buyer who rejects. See 810 ILCS 5/2-608(3). Maybe.[19] This brings us back to the above-referenced subsection 2-508(2) ("Cure by Seller of Improper Tender or Delivery; Replacement") of the Code. Subsection 2-508(2), as broken into separate elements for convenience of reading, states:

> (1) Where the buyer rejects a non-conforming tender
> (2) which the seller had reasonable grounds to believe would be acceptable
> (3) with or without money allowance
> (4) the seller may if he seasonably notifies the buyer
> (5) have a further reasonable time to
> (6) substitute a conforming tender.

The record in this case contains no evidence submitted by Defendant that it had "reasonable grounds to believe" that a late repair of a summer product would be acceptable to Plaintiffs; the record contains no evidence submitted by Defendant that it addressed the "money allowance" issue; the record contains no evidence submitted by Defendant that it "seasonably notified" the Plaintiffs of its intended "cure" (but the record does contain evidence that the time for repair was ***un***reasonable), and the record contains no evidence submitted by Defendant as to whether the defects were minor, which would

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[19] This point is far from settled:

> Sections 2-508(1) & (2) also suggest that cure may only be made after rejection. Thus § 2-508(2) begins: "Where the buyer rejects a non-conforming tender ... the seller may . . ." However, § 2-608(3) provides that buyers who revoke have "the same ... duties with regard to the goods involved as if .. . [they] had rejected them." This probably refers to §2-603, which specifies the duties, such as following reasonable seller instructions, imposed on rejecting merchant buyers; but it is at least arguable that one of the § 2-608(3) duties is to accept cure, if it can be made in conformity with the requirements of § 2-508.

Schwartz, Alan, Cure and Revocation for Quality Defects: The Utility of Bargains, Boston College Indust. & Comm. L. Rev. 543, 568, n. 65 (1975).

have allowed it to repair, or major, which would have imposed on Defendant a duty to "substitute" a conforming tender, i.e., a new RV. Instead the record contains ***contrary*** evidence, submitted by Plaintiffs, that the defect was major (C-223-24, A-23-24), in that it ruined their summer vacation (C-310, A-37, ¶7) and diminished the value of the RV by 90% (C-225, A-25). Defendant's hypertechnical and convoluted interpretation (described as "at least arguable" by commentators—hardly a ringing endorsement[20]) runs counter to UCC's stated principles of simplicity and clarity. 810 ILCS 5/1-103(a)(1).

Going back to the main issue of this section, i.e., whether "cure" should be read into subsection (1)(b) of the revocation statute, Plaintiffs respectfully urge this Court to apply the principles of simplicity and clarity, as set forth by the UCC, 810 ILCS 5/1-103(a)(1), and to follow the majority position (and the plain reading of the statute)—that is, cure is referenced in subsection (1)(a) and therefore ***is*** a statutory element, but cure is not referenced in subsection (1)(b), and therefore is ***not*** a statutory element. 810 ILCS 5/2-608(1)(a) and (1)(b).

[20] Schwartz, Alan, Cure and Revocation for Quality Defects: The Utility of Bargains, Boston College Indust. & Comm. L. Rev. 543, 568, n. 65 (1975).

X. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Honorable Court reverse the Appellate Court on Count III of Plaintiffs' Complaint and remand this case to the trial court for trial on the merits.

KIMBERLY ACCETTURA
ADAM WOZNIAK

By: ____/s/ Dmitry N. Feofanov____
One of their attorneys

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XI. CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rule 341(a) and (b). The length of this brief, excluding the appendix, is 30 pages.

____/s/ Dmitry N. Feofanov____

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XII. PROOF OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct: I, Dmitry Feofanov, certify that I served a copy of this document to the person(s) listed in the Service List by e-mail transmission to email address(es) listed in the Service List, at or before the hour of 11:59 p.m. on or before March 1, 2019.

___/s/ Dmitry N. Feofanov_____
Dmitry Feofanov

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XIII. APPENDIX

Kane County Circuit Court THOMAS M. HARTWELL ACCEPTED: 11/30/2017 8:58 AM By: CA Env #241481

APPEAL TO THE ILLINOIS APPELLATE COURT, SECOND DISTRICT
FROM THE CIRCUIT COURT OF KANE COUNTY, ILLINOIS

Kimberly Accettura, and Adam Wozniak, Plaintiffs, v. Vacationland, Inc. Defendant.	Thomas M. Hartwell Clerk of the Circuit Court Kane County, Illinois 11/29/2017 12:08 PM FILED/IMAGED	No. 14 CH 1467 **JURY OF 12 DEMAND**

NOTICE OF APPEAL

Plaintiffs appeal the decisions of the Honorable David R. Akemann of the Circuit Court of Kane County, Illinois, with respect to Defendant Vacationland, Inc., rendered on February 10, 2017 (granting summary judgment), July 5, 2017 (denying Plaintiff's motion to reconsider grant of summary judgment for two out of four counts), and November 27, 2017 (granting Defendant's motion to reconsider, granting Defendant summary judgment on the two remaining counts, and striking Plaintiff's cross-motion to reconsider). Final and appealable order in this case was entered on November 27, 2017.

KIMBERLY ACCETTURA
ADAM WOZNIAK

By: /s/ Dmitry N. Feofanov
One of their attorneys

Dmitry N. Feofanov
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PROOF OF SERVICE

I, Dmitry Feofanov, under penalties of perjury, certify that I served a copy of the above-referenced document(s) to the person(s) listed in the Service List, either by email or through e-filing, or by enclosing the above-referenced document(s) in an envelope plainly addressed to such person(s) at the address(es) listed in the Service List, by sealing the envelope containing the above-described document(s), and affixing to the envelope the proper amount of U.S. postage for regular mail, and then by depositing the envelope with its contents in the United States mail at the United States Post Office in Lyndon, Illinois, at or before the hour of 5:00 p.m. on or before November 29, 2017.

/s/ Dmitry N. Feofanov
Dmitry Feofanov

SERVICE LIST

Clerk of the Circuit Court of Kane County 540 S. Randall Road St. Charles, IL 60174 (e-filed)	James F. McCluskey Momkus McCluskey, LLC 1001 Warrenville Road, Suite 500 Lisle, IL 60532
File	

IN THE CIRCUIT COURT FOR THE SIXTEENTH JUDICIAL CIRCUIT
KANE COUNTY, ILLINOIS

KIMBERLY ACCETTURA and ADAM WOZNIAK,	)	
	)	
Plaintiffs,	)	
	)	
vs	)	14 CH 1467
	)	
VACATIONLAND, INC ,	)	
	)	
Defendant	)	

DEFENDANT'S VACATIONLAND, INC.'S MOTION FOR SUMMARY JUDGMENT

NOW COMES Defendant, VACATIONLAND, INC (hereinafter, "Vacationland"), by and through its attorneys, MOMKUS McCLUSKEY ROBERTS LLC and moves for entry of an order granting summary judgment in its favor and against Plaintiffs pursuant to 735 ILCS 5/2-1005 For the reasons set forth below, summary judgment should be entered in favor of Defendant Vacationland

EXECUTIVE SUMMARY

Plaintiffs Kimberly Accettura and Adam Wozniak's four-count Complaint alleges breaches of the implied warranty of merchantability and revocation of acceptance under the Magnuson-Moss Warranty Act ("MMWA") 15 U S C 2301 et seq , and revocation of acceptance and return of purchase price under Sections 2-608 and 2-711(1) the Illinois Commercial Code (810 ILCS 5/2-608, 810 ILCS 5/2-711(1)) for a new 2014 Palomino RV purchased from Vacationland on April 19, 2014 See Plaintiffs' Complaint, attached as Exhibit 1 However, Plaintiffs purported revocation of acceptance and implied warranty claims fail as a matter of law First, as a threshold matter, Plaintiffs did not allow Vacationland or the

manufacturer a reasonable time to cure the alleged defects, which bars their alleged revocation of acceptance Second, Plaintiffs admit they refused to view the RV after the manufacturer completed repairs, which is unreasonable as a matter of law and fatal to their claimed revocation of acceptance as a matter of law Indeed, Plaintiffs directly contradicted their own allegations when they gave sworn testimony that it was possible to repair the defects, but that they refused to view the RV after repairs in order to verify that the purported defect(s) had been remedied Therefore, summary judgment should be entered in favor of Vacationland because Plaintiffs cannot sustain their claims as a matter of law

STATEMENT OF UNDISPUTED MATERIAL FACTS

1 On April 19, 2014, Plaintiffs, Kimberly Accettura and Adam Wozniak, purchased a new 2014 Palomino RV trailer from Defendant, Vacationland, Inc for $26,000 25 See Exhibit A to Exhibit 1 A walkthrough was performed on April 25, 2014 and the Plaintiffs took possession and control of the RV on May 3, 2014 *Id*

2 Plaintiff Wozniak testified to observing water or leaking issues related to the emergency exit window in June 2014, which caused pooling of water on one of the bunk beds Wozniak Dep pgs 8 6-9 6, Exhibit 2 Plaintiff Wozniak contacted Vacationland, which diagnosed the leak as an issue with the emergency exit release and conducted testing Wozniak Dep pgs 10 10-10 22 Exhibit 2 Vacationland did not bill Plaintiffs for its work *Id* Plaintiff Accetura testified that Vacationland satisfactorily repaired the problems with the emergency exit window of the RV Accetura Dep pgs 30 17-32 11, Exhibit 3

3 On July 3, 2014, Plaintiffs took the RV on a trip to Traverse City, Michigan Wozniak Dep pgs 11 3-10, 26 3-8, Exhibit 2 Plaintiff Wozniak testified that, during a rainstorm on the trip, the RV experienced significant leakage in the dinette, visible water on the

windowsill, and warping of the banquette *Id* at 11 14-15 3 Importantly, Plaintiff Wozniak admitted this was a new and different problem from the emergency exit release leak that was previously repaired by Vacationland While towing the RV home from that trip, the electrical system went out *Id* at 15 10-24 Plaintiffs brought the RV back to Vacationland on or about July 14, 2014 *Id* at 16 7-11, see also Exhibit B to Exhibit 1 at 2

4 Vacationland inspected the vehicle and advised Plaintiff Wozniak that it could not perform the required repairs and the RV needed to be sent to the manufacturer for repair Wozniak Dep pgs 17 19-20 7, Exhibit 2 The manufacturer picked up the RV from Vacationland for repair on or about August 4, 2014 according to Plaintiff's property appraiser See Exhibit B to Exhibit 1 Vacationland advised Plaintiff Wozniak it could not give a specific timeline for how long the manufacturer would take to repair the RV *Id*

5 Plaintiffs testified that, after they dropped off the RV, on or about July 14, 2014, they never again personally saw, viewed, or inspected the RV Wozniak Dep pg 20, Exhibit 2, Accetura Dep pgs 36 19-37 2, Exhibit 3 They also admit that they have no knowledge as to whether the repairs were satisfactorily made Wozniak Dep pgs 32 14-33 12, Exhibit 2, Accetura Dep pgs 35 16-36 12, Exhibit 3

6 While the RV was at the manufacturer for repair, Plaintiff Wozniak testified he verbally revoked the contract due to the amount of damage to the RV, the timing of the matter and the ability to service the RV Wozniak Dep pg 21, Exhibit 2

7 On September 28, 2014, attorney Dmitry Feofanov sent a letter on behalf of Plaintiffs to Vacationland revoking acceptance of the RV See Exhibit C to Exhibit 1

LEGAL STANDARD

8 Summary judgment is warranted "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law" 735 ILCS 5/2–1005(c) (West 2006) These documents and exhibits are viewed in the light most favorable to the nonmoving party *Home Insurance Co v Cincinnati Insurance Co*, 213 Ill 2d 307, 315, 290 Ill Dec 218, 821 N E 2d 269 (2004) A defendant is entitled to summary judgment if the plaintiff fails to establish factual basis for one of the required elements of the cause of action *Smith v Tri-R Vending*, 249 Ill App 3d 654, 657 (2nd Dist 1993) As discussed below, the unrebuttable evidence clearly shows that the Plaintiffs did not act reasonably as a matter of law and failed to give Vacationland a reasonable opportunity to cure the alleged defect(s) Therefore, summary judgment in Defendant's favor is warranted

ARGUMENT

9 Under the Magnuson-Moss Warranty Act ("MMWA"), consumers may bring claims premised on written and implied warranties for consumer products, but only after they meet the threshold requirements as defined by the MMWA and state law on implied warranties See 15 U S C §§ 2310(d), 2301(7) Specifically, in order to establish a claim for a breach of warranty under the MMWA and Illinois law, Plaintiff must show that (i) Plaintiff gave Defendant a reasonable opportunity to cure the alleged defect(s) and (ii) Defendant failed or refused to cure the defect(s) *Pearson v Daimler Chrysler Corp*, 349 Ill App 3d 688, 696 (1st Dist 2004) Indeed, to bring an action under section 2310(d)(1) of the MMWA, the consumer must give the warrantor "a reasonable opportunity to cure" its failure to comply with 'an obligation under any written or implied warranty" § 2310(e) ("No action may be brought

under subsection (d) under any written or implied warranty or service contract unless the [warrantor] is afforded a reasonable opportunity to cure such failure to comply ") Plaintiffs here cannot establish this key element of their warranty claims

10 Moreover, under Illinois common law and the Uniform Commercial Code, nonconforming goods do not constitute a warranty breach if the seller has not been given a reasonable opportunity to cure the defect 810 ILCS 5/2-508(1) (West 2014), 15 Williston on Contracts sec 45 23 (4th ed) The right to attempt a cure corresponds with the duty to mitigate damages *Id* , *Magnum Press Automation, Inc v Thomas & Betts Corp* , 325 Ill App 3d 613, 622 (4th Dist 2001) Illinois law defines "a reasonable opportunity to cure" as it relates to a new vehicle Notably, section 380/3(b) of the New Vehicle Buyer Protection Act ("Act") provides that **four (4) or more** repair attempts is a reasonable number of attempts, or if the vehicle is out of service by reason of repair for **thirty (30) or more business days**, only then is the manufacturer is required to provide additional remedies, such as a new vehicle or full refund of the purchase price See 815 ILCS 380/3(a), (b)(1) and (2) (emphasis added)

11 Here, it is undisputed that Plaintiffs did not allow Vacationland or the manufacturer a reasonable opportunity to cure the alleged defects when they purportedly revoked their acceptance while the RV was in repair Instead, Plaintiffs revoked their acceptance while Vacationland was making efforts to repair the new alleged defects that arose in July, 2014 Plaintiffs' failure to give Vacationland a reasonable opportunity to cure as defined by the MMWA and Illinois law is fatal to their claims as a matter of law

12 Plaintiffs' deposition testimony here establishes that they had two separate issues with the RV First was the emergency exit leak in June of 2014 Plaintiff Accetura testified that Vacationland addressed and repaired this issue to her satisfaction in-house Accetura Dep pgs

30 17-32 11. Exhibit 3 Second, the following month, new issues arose unrelated to the emergency exit leak By Plaintiffs' own testimony, problems with the dinette, windowsill, banquette and electrical system arose for the first time during Plaintiffs trip to Traverse City on July 3, 2014 Plaintiffs brought the RV back to Vacationland for inspection on July 14 2014 After inspection, Vacationland determined it could not make the required repairs in-house and advised Plaintiff Wozniak it needed to send the RV to the manufacturer for repair Vacationland promptly made arrangements for the RV to be picked up by the manufacturer, which occurred on August 4, 2014 Plaintiff Wozniak testified he verbally revoked his acceptance of the RV weeks before the RV came back from the manufacturer Wozniak Dep pgs 21 6-22 15. Exhibit 2 Plaintiff Wozniak has no knowledge of whether the alleged defects were remedied because as the summer camping season was ending, he chose to simply abandon the vehicle while it was in repair with the manufacturer

13 Illinois courts have upheld summary judgment under similar circumstances In *Belfour v Schaumberg Auto*, 306 Ill App 3d 234 (2d Dist 1999), the plaintiff purchased a new car that was destroyed due to an engine fire The manufacturer made various attempts to cure, including an offer to replace the car and pay associated costs See *Belfour*, 306 Ill App 3d at 236-37 Plaintiffs refused to respond to this offer and instead brought suit under the Magnuson-Moss Warranty Act and breach of express and implied warranties *Belfour* 306 Ill App 3d at 238 The Second District held that no action for damages can be brought under the Acts unless the warrantor is afforded a reasonable opportunity to cure the failure, and that plaintiffs did not allow the warrantor/manufacturer an opportunity to cure before revoking acceptance and suing

Belfour, 306 Ill App 3d at 241-42 [1] Under Illinois law, courts will resort to revocation of acceptance only after attempts of adjustment have failed See 810 ILCS Ann 5/2-608(1)(a), Committee Comments-1992, at 380 (Smith-Hurd 1993)

14 This Court should find, as the court did in *Belfour* that summary judgment is appropriate as a matter of law in favor of Defendant because Plaintiffs did not allow a reasonable opportunity to cure prior to revoking acceptance Here, Plaintiffs did not even give Vacationland or the manufacturer one attempt at curing the complained-of issues with the RV The dinette, windowsill, banquette, and electrical system issues were separate and distinct from the original emergency exit leak When Vacationland sent the RV to the manufacturer on August 4, 2014, this was the first attempt at curing the nonconformity which arose in July, 2014 Plaintiffs' revocation of acceptance should be barred because it was unreasonable as a matter of law to revoke acceptance while they knew the manufacturer was attempting to make its first warranty repairs to the vehicle

15 Moreover, Plaintiffs claims fail to meet the reasonable cure requirement under Illinois law Section 380/3(b) of the Illinois New Vehicle Buyer Protection Act ("Act") clearly provides that **four (4) or more** repair attempts is a reasonable number of attempts, or if the vehicle is out of service by reason of repair for **thirty (30) or more business days**, only then is the manufacturer is required to provide additional remedies, such as a new vehicle or full refund of the purchase price See 815 ILCS 380/3(a), (b)(1) and (2) (emphasis added) Here, when

[1] Notably, in *Belfour*, the court went a step beyond simply granting summary judgment when it also awarded sanctions against plaintiffs See 306 Ill App 3d at 242-43 The court held that under Supreme Court Rule 137, litigants and attorneys have an affirmative duty to conduct an inquiry of the facts and law prior to filing an action, pleading, or other paper Although plaintiffs had received letters from the manufacturer demonstrating its efforts to cure, plaintiffs still filed a complaint stating that the defendant failed to replace the car as provided in the written warranty and under Magnuson-Moss *Belfour*, 306 Ill App 3d at 243

Plaintiffs attempted to revoke acceptance, repairs to the RV were in process at the manufacturer It is undisputed that this was the first repair attempt to the alleged issues with the dinette, windowsill, banquette, and electrical system Plaintiffs admit that Vacationland repaired the emergency exit leak Accetura Dep pgs 30 17-32 11, Exhibit 3 Under the Act, one (1) repair does not presume Vacationland or the manufacturer were required to refund the purchase price or provide Plaintiffs with a new RV The undisputed facts in the record demonstrate that, at the point Plaintiffs revoked acceptance, Vacationland and the manufacturer were in the midst of reasonable efforts to cure any defects

16 Additionally, the RV was only out for repair with Vacationland from July 14, 2014 through August 4, 2014, at which time the vehicle was sent to the manufacturer The manufacturer had the RV in repair from approximately August 4, 2014 through September 23, 2014 Wozniak Dep pg 45 21-46 1, Exhibit 2 Plaintiffs' Interrogatory Answers state that Plaintiffs first revoked their acceptance on or after July 15, 2014, and further states they revoked their acceptance sometime before August 2, 2014 Exhibit 4, Plaintiffs' Responses to Interrogatories and Requests to Produce of Defendant Vacationland, Responses in ¶¶14-16 In other words, Plaintiffs failed to give Vacationland the required 30 business days to attempt to cure Indeed, it is undisputed that Vacationland assessed the issues and arranged for manufacturer pickup and repair within 15 business days At the time Plaintiffs revoked their acceptance before August 2, 2014, the vehicle was in repair for the first time for the identified issues and out of service for repair for less than 30 business days Therefore, not only were Defendants not obligated to offer Plaintiffs a full refund or replacement vehicle, but Plaintiffs' alleged revocation of acceptance should be barred as a matter of law because it was unreasonable under the MMWA, the Illinois Commercial Code, and the Illinois New Vehicle Buyer Protection

Act to attempt such revocation without giving Vacationland and the manufacturer a reasonable attempt to cure the alleged defects

17 Moreover, Plaintiffs were unreasonable as a matter of law and breached their duty to mitigate damages when they refused to view, inspect, or take possession of the RV after it was fully repaired by the manufacturer Wozniak Dep pgs 20 11-23, Exhibit 2, Accetura Dep pgs 33 20-34 5, Exhibit 3 Plaintiffs admit they do not even know what repairs were made Wozniak Dep pgs 28 10-13, Exhibit 2, Accetura Dep pgs 36 19-37 2, Exhibit 3 Plaintiffs admitted the RV could be repaired, or at the very least, they did not know whether the RV could be repaired Wozniak Dep pgs 32 14-33 12, Exhibit 2, Accetura Dep pgs 35 16-36 12, Exhibit 3 Plaintiffs' sworn testimony directly contradicts the allegations in their Complaint See Exhibit 1 at ¶8 Paragraph 8 of Plaintiffs' Complaint states that, "[t]hese defects cannot be repaired The unit was in repair for almost the entire summer of 2014, and still was not repaired properly " Complaint at ¶8 Plaintiffs testified they have no idea whether the defects could be repaired, that Vacationland or the manufacturer could possibly do something to remedy the problem(s), and that they have no idea what Vacationland and the manufacturer did to repair the RV Wozniak Dep pgs 32 14-33 12, Exhibit 2, Accetura Dep pgs 35 16-36 12, Exhibit 3

18 Nonconforming goods do not constitute a breach where the seller has not been given a reasonable opportunity to cure the defect 810 ILCS 5/2-508(1) (West 2014) Here, Plaintiffs prematurely revoked their acceptance of the RV while it was in repair for the first time and for less than 30 business days, unreasonably demanding a full refund or replacement vehicle

19 Moreover, a breach of the promise to repair or replace cannot occur until a refusal or failure to repair the defect See *Cosman v Ford Motor Co* . 285 Ill App 3d 250, 260, 220 Ill Dec 790, 674 N E 2d 61 (1996), *Collum v Fred Tuch Buick*. 6 Ill App 3d 317, 322, 285 N E 2d

532 (1972), see also 15 U S C A § 2310(e) (West 1982) (no action for damages may be brought for failure to comply with any obligation unless the warrantor is afforded a reasonable opportunity to cure such failure to comply) Here no breach of warranty could have occurred as a matter of law because Vacationland and the manufacturer had not refused or failed to repair the defects Plaintiffs admitted they revoked acceptance prior to any failure Plaintiffs should not now benefit from their unreasonable behavior at the time Vacationland was engaging in reasonable repair efforts to cure any defects at no cost to Plaintiffs Viewing all of the evidence of this case in a light most favorable to Plaintiffs the undisputed facts in the record demonstrate Plaintiffs acted unreasonably as a matter of law and their revocation of acceptance must be barred

CONCLUSION

Plaintiffs cannot demonstrate an essential element of their warranty claims, and thus, summary judgment should be granted in favor of Defendant Vacationland as to Plaintiffs' warranty claims

WHEREFORE, Defendant, VACATIONLAND, INC , requests that this Honorable Court grant summary judgment in its favor and against Plaintiffs and for any other or further relief that this Court deems just and equitable

Respectfully Submitted.

MOMKUS McCLUSKEY ROBERTS LLC

By _____
One of its Attorneys

James F McCluskey
(jfmccluskey@momolaw com)
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Attorneys for Defendant
Attorney No 03124754

IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT
KANE COUNTY, ILLINOIS

Kimberly Accettura, and	)	
Adam Wozniak,	)	
Plaintiffs,	)	
v	)	No
Vacationland, Inc	)	
Defendant	)	**JURY OF 12 DEMAND!**

COMPLAINT

Now come the Plaintiffs, by their attorneys, ChicagoLemonLaw com, P C , and state as follows by way of Complaint against Defendant Vacationland, Inc

PRELIMINARY STATEMENT

This is an action for breach of the implied warranty of merchantability and revocation of acceptance of an RV under the Magnuson-Moss Warranty Act, 15 U S C §2301 et seq , and additional Commercial Code claims, such as revocation of acceptance and cancellation of contract under the Sections 2-608 and 2-711(1) of the Commercial Code (810 ILCS 5/2-608, 810 ILCS 5/2-711(1)) and return of the purchase price under Section 2-711(1) of the Commercial Code (810 ILCS 5/2-711(1)).

I. BACKGROUND

THOMAS MUELLER

A. The Parties

1 Plaintiffs, Kimberly Accettura and Adam Wozniak, are natural persons

2 The subject RV was bought for personal use

3 Defendant Vacationland, Inc , is an Illinois corporation Its agent for service of process is Michael D Shrader, 47W529 U S Route 30, Big Rock, Illinois, 60511

B. The Facts

4 On April 19, 2014, Plaintiffs bought a 2014 Palomino RV trailer from Defendant, for $26,000 25 **Exhibit A**, the parties' contract

5 Since the time of the purchase the RV experienced numerous mechanical problems

EXHIBIT
1

6 Those included

(a) water leakage through a defective emergency escape window,
(b) defective dinette window that allowed water leaks,
(c) leaking slide out unit,, water leaks into the paneled wall,
(d) inoperative electrical system,
(e) and generally, massive water leaks

Exhibit B, Expert's Report

7 Such water leakage has the potential of causing mold and serious health issues.

8 These defects cannot be repaired The unit was in repair for almost the entire summer of 2014, and still was not repaired properly

Allegations regarding revocation of acceptance.

9 Prior to filing this suit, Plaintiffs revoked their acceptance of the RV and canceled their contract **Exhibit C**, letter confirming revocation

10 Defendant refused to return Plaintiffs' money

II. CAUSES OF ACTION

Count I— Magnuson-Moss Warranty Act: Revocation of Acceptance

11 Plaintiffs re-allege all the factual allegations contained in all other paragraphs of this Complaint, and incorporate them herein by reference

12 As detailed above, Defendant was a seller in this transaction, and the tender made by Defendant was substantially impaired In addition, Defendant breached its implied warranty of merchantability

13 Section 2310(d) of the Magnuson-Moss Warranty Act provides, in relevant part

> a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief—
>
> (A) in any court of competent jurisdiction ***

14 The defects enumerated above substantially impaired the RV's value to Plaintiffs These defects had not been cured prior to Plaintiffs' notice of justifiable revocation

15 Plaintiffs notified Defendant that Plaintiffs were revoking the acceptance of the RV within reasonable time after Plaintiffs discovered or should have discovered the grounds for it, and before any substantial change in the condition of the RV, which was not caused by its own defects

16 Defendant has refused to cancel the sale or to acknowledge Plaintiffs' revocation of acceptance

17 Plaintiffs are entitled to revoke their acceptance of the RV and cancel the sales contract on the following grounds

(a) Defendant's breach of the implied warranty of merchantability, and/or

(b) substantial impairment of the RV's value to Plaintiffs, based on non-conformities described above, where Plaintiffs accepted the RV without discovery of such non-conformities, and where Plaintiffs' acceptance was reasonably induced by the difficulty of discovery of the non-conformities before acceptance, and where Plaintiffs' faith in the RV is completely shaken.

WHEREFORE, Plaintiffs request that the Court

A Award Plaintiffs damages to which they are entitled,

B Award Plaintiffs expenses of litigation and costs,

C Enter an order confirming Plaintiffs' rightful revocation of acceptance and cancellation of contract under Section 2310(d) of the Magnuson-Moss Warranty Act and Sections 2-608 and 2-711(1) of the Commercial Code,

D Enter an order requiring Defendant return the purchase price of the RV,

E Award Plaintiffs' attorneys their fees, and

F Grant Plaintiffs other relief the Court deems appropriate and just

Count II—Magnuson-Moss Warranty Act: Breach of Implied Warranty of Merchantability

18 Plaintiffs re-allege all the factual allegations contained in all other paragraphs of this Complaint, and incorporate them herein by reference

19 Defendant is a merchant with respect to RVs, such as the RV sold to Plaintiffs

20 An implied warranty that the RV was merchantable arose by operation of law as part of the sale

21 Section 2310(d) of the Magnuson-Moss Warranty Act provides, in relevant part

> a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief—
>
> (A) in any court of competent jurisdiction ***

22 As described above, the RV is defective Such defects existed when the RV left Defendant's control

23 Because the RV was not in a merchantable condition when sold, in that, among others, it was not fit for the ordinary purposes for which such goods are used and/or would not pass without objection in the trade under its contract description, Defendant breached the implied warranty of merchantability

24 Plaintiffs notified Defendant of the defects in the RV within a reasonable time after Plaintiffs discovered the breach

25 As a result of Defendant's breach of the implied warranty of merchantability, Plaintiffs suffered damages

26 Because Defendant failed to repair or replace the vehicle within a reasonable time, Plaintiffs did not receive the benefit of the bargain—a non-defective RV—and the limited remedy of replacement or repair of defective parts of the vehicle failed its essential purpose, allowing Plaintiffs to recover incidental and consequential damages under Section 2-719 of the Commercial Code, because the exclusion was unconscionable (printed on the back of a yellow contract with light gray print, in dot-matrix font!) Accordingly, Plaintiff claim their loss of use damages of not less than $595 00 per week for the entire summer of 2014 **Exhibit D**, rental rates for a 23' trailer

27 Defendant's breach of the implied warranty of merchantability constitutes a violation of 15 U S C §2310(d)

WHEREFORE, Plaintiffs request that the Court

A Award Plaintiffs damages to which they are entitled,

B Award Plaintiffs expenses of litigation and costs,

C Award Plaintiffs' attorneys their fees, and

D Grant Plaintiffs other relief the Court deems appropriate and just

Count III—Commercial Code. Revocation of Acceptance and Cancellation of Contract Under Sections 2-608 and 2-711(1) of the Commercial Code

28 Plaintiffs re-allege all the factual allegations contained in all other paragraphs of this Complaint, and incorporate them herein by reference

29 As detailed above, Defendant was a seller in this transaction, and the tender made by Defendant was substantially impaired In addition, Defendant breached its implied warranty of merchantability

30 Section 2-608 of the Commercial Code provides, in relevant part·

(1) The buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it

(a) on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured, or

(b) without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects It is not effective until the buyer notifies the seller of it

(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them

31 The defects enumerated above substantially impaired the RV's value to Plaintiffs These defects had not been cured prior to Plaintiffs' notice of justifiable revocation

32 Plaintiffs notified Defendant that Plaintiffs were revoking the acceptance of the RV within reasonable time after Plaintiffs discovered or should have discovered the grounds for it,

and before any substantial change in the condition of the RV, which was not caused by its own defects

33 Defendant has refused to cancel the sale or to acknowledge Plaintiffs' revocation of acceptance

34 Plaintiffs are entitled to revoke their acceptance of the RV and cancel the sales contract on the following grounds

(a) Defendant's breach of the implied warranty of merchantability, and/or

(b) substantial impairment of the RV's value to Plaintiffs, based on non-conformities described above, where Plaintiffs accepted the RV without discovery of such non-conformities, and where Plaintiffs' acceptance was reasonably induced by the difficulty of discovery of the non-conformities before acceptance and where Plaintiffs' faith in the RV is completely shaken

WHEREFORE, Plaintiffs request that the Court·

A Award Plaintiffs damages to which they are entitled,

B. Award Plaintiffs expenses of litigation and costs,

C Enter an order confirming Plaintiffs' rightful revocation of acceptance and cancellation of contract under Sections 2-608 and 2-711(1) of the Commercial Code,

D Enter an order requiring Defendant return the purchase price of the RV,

E. Grant Plaintiffs other relief the Court deems appropriate and just.

Count IV—Commercial Code: Action To Recover The Price Under 2-711(1)

35 Plaintiffs re-allege all the factual allegations contained in all other paragraphs of this Complaint. and incorporate them herein by reference

36 Section 1-106(2) of the Code provides

Any right or obligation declared by this Act is enforceable by action unless the provision declaring it specifies a different and limited effect

37 Section 1-201(2)(a) states that the term "action,"

in the sense of a judicial proceeding includes recoupment, counterclaim, set-off, suit in equity and any other proceedings in which rights are determined

38 Section 2-711(1) provides that, in a case of a breach, "the buyer may cancel." and may recover "so much of the price as has been paid "

39 Under 2-711(1), Plaintiffs cancelled their contract with Defendant

40. Plaintiffs demanded that Defendant returned the money, but Defendant wrongfully, and without justification, refused

41. Plaintiffs are entitled to "so much of the price as has been paid" from Defendant

42 Plaintiffs have the right to immediate, absolute, and unconditional return and possession of the money

43 Accordingly, Plaintiffs bring this claim for monetary damages under Section 2-711(1) of the Code, to recover "so much of the price as has been paid "

WHEREFORE, Plaintiffs request that the Court

A Award Plaintiffs actual damages to which Plaintiffs are entitled;

B Award Plaintiffs expenses of litigation and costs; and

C Grant other relief the Court deems appropriate and just

KIMBERLY ACCETTURA
ADAM WOZNIAK

By _____
One of their attorneys

Dmitry N Feofanov
CHICAGOLEMONLAW.COM, P.C.
404 Fourth Avenue West
Lyndon, IL 61261
815/986-7303
Service via email or facsimile is NOT accepted

Vacationland, Inc.

47W529 US Route 30 Big Rock, IL 60511 Phone (630) 556-3211 Fax (630) 556-3215

DATE 4/19/14 DEAL #

SALESPERSON Tania

REFERRAL Open House

RETAIL PURCHASE AGREEMENT

PURCHASER KIMBERLY ACCETTURA DOB 8/16/71 DL A 236-5007-1833

PURCHASER ADAM WOZNIAK DOB 2/10/77 DL W252-0107-7041

ADDRESS 3406 Greenwood Ln CITY St. Charles STATE IL ZIP CODE 60175 COUNTY Kane

HOME PHONE 630.444.1794 CELL PHONE EMAIL kaccettura@hotmail.com

VEHICLE

YEAR MAKE MODEL

VIN COLOR

[X] NEW [ ] USED [X] STOCK [ ] ORDERED

TRADE-IN

YEAR 2014 MAKE Palomino MODEL 267 BHSK

VIN 4X4TPAC27EN017295 CONDITION (Subject to physical appraisal)

LIENHOLDER (Name, Phone, Account Num, Approx Payoff)

TOW OR DELIVER

TOW VEHICLE			
TO BE DETERMINED.	$	PRICE OF VEHICLE	$ 24,050 00
	$	FREIGHT	$ —
	$	ADDITIONS	$ —
	$	DEALER PREP	$ —
	$	DOC FEE	$ 120 00

ADDITIONS & OPTIONS

	$	LESS TRADE VALUE	($ —)
	$	TAXABLE SUBTOTAL	$ 24,175 00
	$	SALES TAX	$ 1,692 25
	$	TITLE & LICENSE	$ 133 00
	$	MISC NON-TAXABLE	$ —
	$	TOTAL PRICE	$ 26,000 25
Free 84 month	$	DEPOSIT ✓ #1372	$ 26,000 00
	$	BALANCE * Must be a cashiers check	$ 2
Free LP	$	*This balance does not include any trade-in payoff due	
Free Battery	$		
	$		
Free Husky Installed.	$		
TOTAL ADDITIONS	$		

MISC

EXT WARRANTY		FINANCING ESTIMATES
	$	
	$	$ _____ X _____ MONTHS @ _____ %

NOTE

DELIVERY DATE WALK THROUGH 4/25 @ 5:00pm MEMO/USER

I have read the terms and conditions of this Agreement including the terms and conditions that appear on the reverse side and in any documents which are part of this transaction, and I hereby acknowledge that they accurately reflect the agreements between the Dealership and myself. I further acknowledge receipt of a copy of this Agreement. This Agreement shall not become binding until accepted by an Authorized Representative of the Dealership. Used vehicles are sold AS-IS with no warranty. Any warranties by a manufacturer or supplier other than our Dealership are theirs not ours, and only such manufacturer or supplier shall be liable for performance under such warranties.

Purchaser

Purchaser

Accepted by Authorized Dealership Representative

Ex. A

2012 10 28

P.J.G.
Consulting and Appraisal

"Have camera will travel"

EXPERT TRANSPORTATION AND MARINE
APPRAISAL CONSULTATION AND ADJUSTING

Phillip J. Grismer

Experience since 1970

A.S.E. Master Automobile Technician

Illinois State Board of Education Certified Automotive Instructor.

Past President Chicago land VW Service Managers Organization.

Certified Member International Automobile Appraisers Association Member # 1003180004

807 E. Main Street

Genoa, Illinois 60135

E-mail

amertek1@gmail.com

CAGA Certified

Certified Personal Property Appraiser

Certified Appraisers Guild of America

U.S A.A.P. Certified

Certified Heavy Equipment, Ag. Equipment & Heavy Commercial Truck Inspector

Certified Inspections Association

APPRAISAL REPORT SECTION 1.
VEHICLE AND CONDITION DETAILS

File No.: 083014-1	***Client Name*** Kimberly Accettura/Adam Wozniak
Date of Appraisal 083014-1	***Time of Appraisal***: NA
Weather Conditions: NA	***Documents Reviewed***: I have reviewed supplied purchase documents repair order history and all documents attached as support documents for this subject matter.

Ex. B

P.J.G. Consulting and Appraisal

Appraisal Report Section 1 File # 083014-1 Page 2.

VEHICLE SPECIFICATIONS

Year of Vehicle 2014	***Make/Model*** Palomino 267 BHSK
VIN 4X4TPAC27EN017295	***Mileage:*** NA
Engine Specifications NA	***Other Specifications:*** slide out unit, full travel trailer equipment.
Condition of Vehicle/Comparison Category based on sale price : NEW	***Fluid Levels:*** NA

The Travel Trailer was not physically inspected. Documents and photographs were reviewed

P J.G. Consulting and Appraisal and/or Phil Grismer attest to having no financial interest in this vehicle beyond the Appraisal fee.

Complaint Issues : Vehicle unmerchantable at time of retail sale. Vehicle owner unable to use unit due to defects. Water leakage ingress into living quarters of unit. Electrical defects.

P.J.G Consulting and Appraisal Section 2.
File # 073114-1 VIN 4X4TPAC27EN017295

Inspection Report Prepared for Kimberly Accettura Adam Wozniak 3406 Greenwood Lane. Saint Charles, Illinois 60175.

The vehicle was not physically inspected. Documents and supplied photographs were reviewed.

The vehicle is diminished in value from the comparison category due to the following historic and ongoing conditions.

The provenance and history supplied, consists of purchase documents, e mail documents, trailer owners statement of the chain of events, US Plus service contract, correspondence and photographs.

Provenance: The Recreational Travel Trailer was sold on 4-19-2014. The vehicle was sold by Vacationland Inc. for $26,000.25 placing it in the New Vehicle category for valuation purposes. The sale price included an 84 month service contract warranty from U.S. Plus warranty.

History Reviewed:

The reviewed bill of sale from Vacationland Inc. does not show anywhere on the document that the trailer was substandard in any way of unmerchantability as a new recreational trailer

A walk through was performed on 4-25-2014 the owner's took possession of the travel trailer on 5-3-2014.
The trailer was however stored at Vacationland until 6-20-2014 while the owners obtained a suitable tow vehicle. With the full belief and expectation that they could use the trailer for vacationing as delivered, they picked up the trailer and took it home to practice set up and take down as well as prepare the unit for personal usage.

The trailer was towed to the owner's home on 6-20-2014 A heavy rain fall over

that weekend caused water leakage into the trailer through a defective emergency escape window/screen assembly that had allowed water into the lower bed bunk area. The window latch assembly was diagnosed as defective and the owner's requested the bedding be replaced, it has not been replaced to date The bunk support material absorbed water.

The trailer was again retrieved after servicing on 7-1-2014 from Vacationland and was taken to Traverse City for a vacation. On 7-3-2014 the trailer was exposed to rain again and the carpeting under the dinette was wet A water dripping sound was noticed but the source could not be identified. The outside dinette window was found to not be sealed to the wall. Water had entered the wall and saturated the dinette bench, carpeting and flooring.

The reviewed e mail documents show that the vehicle owner had contacted the dealer service department and on July 14, 2014 returned the trailer to Vacationland. After using the trailer, the owner's found that the slide out unit leaked water during a rain storm. The water leakage was severe and the resulting water damage due to water ingress past the slide out seals caused significant interior water damage.

The water ingress was found to be leaking into the paneled wall and running out the floor. The paneling in the forward section of the trailer is warped and secured poorly to the wall of the unit.

The electrical system was inoperative. Out of 10 electrical circuit breaker protected circuits, 9 were inoperative. In order to close the slide out unit and retract the leveling jack system the battery backup system had to be hooked up, to energize the jacks and slide out unit and retract them for travel.

The trailer was returned to Vacationland for service. The dealer has now decided that they are not equipped to service the slide out unit and the vehicle will need to be returned to the manufacturer to be rebuilt and repaired. Palomino arranged to pick up the trailer for repairs on 8-4-2014 and it has not been returned as of this writing.

Conclusion Opinion of reviewed history:

The reviewed history for this travel trailer shows a Recreational Travel Trailer that

has required excessive repair attempts and excessive repair visits. To the point that the authorized selling dealer is not equipped to handle the repairs and the trailer must be returned to the manufacture for repairs. Water ingress damage causes wall distortion, electrical system shorts, flooring material separation and mold and mildew growth, premature disintegration and failure of materials, as well as saturating the interior cloth materials. The dealer and manufacturer have had possession of the unit longer than the vehicle owners There is no guarantee that the manufacturer will do the repair work and ensure that the damage is also torn out and replaced. This travel trailer is a rebuilt, refurbished unit that was completely unmerchantable at the time of retail sale as a new travel trailer.

Photographic Review Observations.

While the trailer is unavailable and sitting idle at the manufacturer's facility it was not physically inspected. The vehicle owners supplied several high quality digital photographs electronically.

These photographs were reviewed and they disclose the defects complained of by the vehicle owners. It is clear that the unprotected raw wooden floor under layment and lower wooden support frame work is saturated with water. Water leakage of this type is highly detrimental to the interior walls, supports, flooring, interior and frame work.

These are all damaged by water ingress, similar to flooding. Water ingress into any vehicle is highly detrimental. The formation of mold and mildew aggravated by the closed up interior while in storage, as well as the accumulation of water inside the walls and floor will be subjected to ambient temperature changes from highs of 90 degrees Fahrenheit to sub zero degrees Fahrenheit The result is a constant bacterial growth cycle during warm weather, as well as freezing and expansion causing seam splitting and breakage during winter It is my opinion that this recreational trailer would not pass without objection in the industry and that it was unfit for the purpose it was intended at the time of retail sale due to uncorrected and potentially uncorrectable manufacturing defects and shortcomings.

Safety Recall Involvement Review.

Additionally this vehicle year, make and model, is not listed as involved in Safety Recall Campaigns per the National Highway Transportation Safety Agency

Author's Opinion of Merchantability of Vehicle.

This travel trailer is unfit for the purpose it was intended and as a result of the defects is highly undesirable and has provided a very poor ownership experience. It is my opinion that under full disclosure few if any consumers would be willing to purchase this unit. This fact drastically diminishes the value of the trailer.

Required Further Diagnostics and/or Service

All of the abnormal conditions complained of require extensive invasive diagnostic and service repair operations that are beyond the scope of this inspection

Author's Opinion of Value.

It is my opinion that the value of this vehicle is that of a rebuilt refurbished trailer with serious ongoing defects that may not be correctable.

Having inspected this vehicle and reviewed its service history, it is my opinion that the value of this vehicle was below ***The Original Purchase Price at time of Retail Sale***, by 90 percent. Sale Price $26,000.25. ***Actual Value at time of Retail Sale/Purchase,*** due to diminished value appraisal $2,600 02.

Current Good Condition Comparison Vehicles Market Value.

The Current good valuation category per RV trader.com . Comparison Vehicle # 1 $22,997 00 Exhibit "A" Comparison vehicle # 2 $25,685 00 Exhibit "B" Average current valuation between both guides, $24,341.00. Diminished value of **subject** vehicle in **its** current condition, $2,434.10.

Methodology

I arrived at this number first by determining the vehicle's condition through my review of the purchase documents, then by determining the average values between high and low retail from the above-referenced standard valuation guides for a vehicle in the similar condition category, then determining the average between the guide values, then by determining the vehicle's true condition through my inspection and my review of the service history and other relevant documentation,

then by expressing this condition by a percentage by which the vehicle's value was diminished due to its condition, then expressing this percentage as an actual dollar value, and then deducting it from the claimed value at the time of sale, thus arriving at the Diminished Value figure.

Appraisal Margin of Error.

This appraisal allows for a margin of error of 5 percent either way due to market fluctuations. Therefore, 85 Percent DV of $26,000.25 equals $3,900.37. 95 percent DV of $26,000.25 equals $1,300.12.

Availability of Comparison Replacement Vehicles and Effect on Value.

This make and model of vehicle is readily available in the automotive market place, without the serious defects present in this specific vehicle, and can be acquired without defects and meeting the Good condition criteria as defined by all published major valuation guides. This fact has the effect of drastically devaluing this vehicle.

USAAP Certification.

I hereby certify that I have no bias with respect to the vehicle that is the subject of this appraisal report, or to the parties involved with this assignment. My compensation for completing this assignment is not contingent upon the development or reporting of a predetermined value, or direction in value that favors the cause of the client, the amount of the value opinion, the attainment of a stipulated result, or the occurrence of a subsequent event directly related to the intended use of the appraisal report My analysis, opinions and conclusions were developed and this appraisal report has been prepared, in conformity with the Uniform Standards for Automobile Appraisal Procedure

Perjury Statement.

Under penalties as provided by law pursuant to section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this affidavit are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes to be true

Phillip J. Grismer B.B.A.
A.S.E. Certified Master Automobile Technician
Certified Member International Automobile Appraisers Association
Member # 1003180004.
CAGA Certified Personal Property Appraiser
Certified Appraisers Guild of America.
Uniform Standards for Automobile Appraisal Procedure Certified.

Sent via E-Mail, USPS, Fed EX, UPS,
Fax, hand delivery, or any combination of same.

RV Trader

2014 Palomino Solaire 267BHSK
Jonesboro, GA 30236
New 30 ft., 1 a/c, 1 slideouts sleeps 9 Stock # PS268H7804

$22,997

SOUTHERN RV

9672 Tara Blvd
Jonesboro, GA 30236
(855) 816-1666

About this RV

2014 Palomino Solaire 267BHSK,

Not on ? Check out our site for more information and pictures!

The all new SolAires are hitting the lot and they are loaded with features! This 267BHSK can sleep up to 9 people! This unit is tricked out with it's outside kitchen, alloy wheels, and LED lights inside and out. All of this at a dry weight of only 5360 lbs.

Features.

Fully Walkable Barreled Ceiling LED Interior Lights AL-KO Independent Suspension Axles Carefree® Awning w/ LED Lights Tinted Safety Glass Windows Fully Welded Aluminum Super Structure

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Black Tank Flush

Solid Surface Counters on Exterior Kitchen

Toylok

Tri Fold Hide-A Bed

Aluminum Wheels

RVQ Bumper Mount Grill

Spare Tire, Carrier & Cover

Power Front Jack

Exterior Propane Quick Connect

ACCEPTANCE
EXHIBIT "A"

Fleetwood, Keystone, Gulfstream, Forest River Heartland, Coachmen K2, Jayco Palomino, Cardinal Cedar Creek, Wildwood Rockwood Flagstaff Sabre, Columbus, Open Range, Dutchmen Cougar Montana, Mountaineer Pinnacle, Springdale, Laredo Passport, Newmar, Carriage, Cameo Crossroads, Holiday Rambler

Details

Year	2014	**Air Conditioners**	1
Make	Palomino	**Slide Outs**	1
Model	Solaire 267BHSK	**Length**	30
Location	Jonesboro GA	**Water**	
Class	Travel Trailer		

Sleeping Capacity	9	**Interior Color**	Indigo w/ True Cherry

Notes

ACCETURA / WORMAK
EXHIBIT "A"

Dmitry N Feofanov
Attorney at Law
(815) 986-7303

CHICAGOLEMONLAW.COM, P.C.
404 Fourth Avenue West
Lyndon, IL 61261

September 28, 2014

David Shrader, President
Vacationland, Inc
47W529 U S Route 30
P O Box 246
Big Rock, IL 60511

Re: Wozniak v. Vacationland

VIA FACSIMILE to 1-630-556-3215 and via regular mail

Dear Mr Shrader

This office represents Adam Wozniak and Kimberly Accettura, who hereby confirm their revocation of acceptance of the 2014 Palomina Solaire they bought from you, cancel their contract with you, and further confirm their notification of your breaches of warranties As you already know, the camper is unmerchantable, having been in repair for the whole summer

Please contact me ***in writing*** to make arrangements to return the purchase price for the camper to my clients Do the right thing! If you do the right thing, my clients at this point would not expect to be compensated for the entire summer they could not use the camper The camper has already been returned to you I am instructing my clients to cancel their insurance for the RV, as it is now your responsibility We would be happy to sign whatever papers are necessary to officially transfer the certificate of title back to you

Very truly yours,

CHICAGOLEMONLAW.COM

Dmitry N Feofanov

Ex. C

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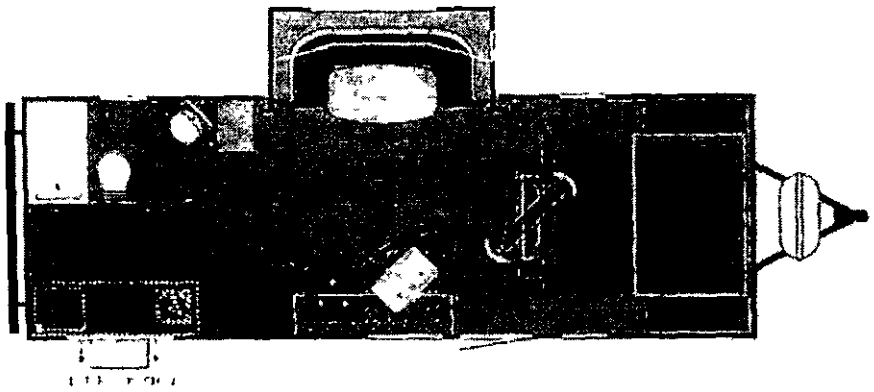

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Ex. D

IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT
KANE COUNTY, ILLINOIS

Kimberly Accettura, and	)	
Adam Wozniak,	)	
Plaintiffs	)	
v	)	No 14 CH 1467
Vacationland, Inc	)	
Defendant	)	**JURY OF 12 DEMAND**

RESPONSE TO MOTION FOR SUMMARY JUDGMENT

1 Defendant's Motion is infirm both procedurally and substantively It is fatally infirm procedurally because Defendant failed to comply with the filing requirements for deposition transcripts But, even if Defendant complied with the procedural requirements for summary judgment motions, its Motion is still fatally infirm, because reasonableness of time is a question of fact, and when a summer product, like an RV, spends the whole summer in the shop, there is a genuine issue of material fact as to whether it was repaired within a reasonable time, as required by the law Accordingly, Defendant's Motion fails in every respect

I. FATAL PROCEDURAL FLAWS OF DEFENDANT'S MOTION—

Supreme Court rules require formal filing of deposition transcripts

2 The Court of Civil Procedure contemplates that depositions must be "on file" before they can be considered in support of summary judgment 735 ILCS 5/2-1005(c) The procedure for filing deposition is established by Supreme Court Rule 207(b), which requires the filing of depositions used in support of dispositive motions in the Court's file Thus, depositions used in support of summary judgment must be properly made "a part of the court record." Bezin v Ginsburg, 59 Ill App 3d 429, 435, 375 N E 2d 468, 474, 16 Ill.Dec 595, 601 (1st Dist 1978) Merely slapping it as an exhibit to a motion is not sufficient As the Appellate Court explained

> Supreme Court Rule 207 prescribes the procedure for signing and filing depositions [Citation] The deposition must either be signed by the deponent or contain a waiver of signature It is further required that the deposition be certified, sealed and filed with the clerk of the court When no attempt is made to comply with the above rules the deposition is clearly informal and insufficient
>
> ***
>
> ***In the instant case Bezin did not file the deposition with the court as required by rule, but merely made the deposition a part of his motion for summary***

> ***judgment. We cannot accept Bezin's suggestion that a totally improper deposition can be transformed into an acceptable affidavit in complete disregard of the rules prescribing the form and manner in which depositions are to be obtained.***
>
> ***
>
> Objections to the use of a deposition filed in support of a motion for summary judgment may be raised in the trial court either by motion to strike or otherwise [Citations] An objection to the consideration of the Leadingham deposition was properly preserved in the trial court in the Ginsburgs' response to Bezin's partial motion for summary judgment

Id (emphasis added) See also Lippold v Beanblossom, 23 Ill App 3d 595, 319 N E 2d 548 (4th Dist 1974)

> Plaintiffs in their legal memorandum opposing defendants' motion to dismiss did cite excerpts from what purported to be the discovery depositions of defendants and alleged that defendants therein admitted the existence of said contract However, these discovery depositions were not properly before the court for they were never filed with the clerk of the Court See Supreme Court Rule 207(b), Ill Rev Stat 1973, ch 110A, part 207(b), for the certification and filing requirements for depositions

Lest the Court things these cases are a fluke, later cases are in complete agreement with this settled issue of Illinois law

> [T]he rule allowing the use of deposition testimony in support of a motion for summary judgment contemplates that the deposition relied upon is one which has properly been made a part of the court record [citations], e g , filed with the court pursuant to Rule 207(b) [Citations] If a deposition is not on file, the trial court may, on motion of a party, suppress the deposition and prohibit use of it in support of or in opposition to a motion for summary judgment [Citations]

Ideal Tool & Manufacturing Co v One Three Six, Inc , 289 Ill App 3d 773, 776, 682 N E 2d 437, 439, 224 Ill Dec 876, 878 (1st Dist 1997), see also Urban v. Village of Inverness, 176 Ill App 3d 1, 6, 530 N E 2d 976, 979, 125 Ill Dec. 567, 570 (1st Dist 1988).

3 As the Supreme Court has repeatedly noted, "the rules of court we have promulgated are not aspirational. They are not suggestions They have the force of law, and the presumption must be that they will be obeyed and enforced as written " Roth v Illinois Farmers Ins Co , 202 Ill 2d 490, 494, 782 N E 2d 212, 215, 270 Ill Dec 18, 21 (2002), Robidoux v Oliphant, 201 Ill 2d 324, 340, 775 N E 2d 987, 996, 266 Ill Dec 915, 924 (2002) The appellate court also has repeatedly noted that the Supreme Court rules require strict compliance Kim v Mercedes-Benz,

U S A , 353 Ill App 3d 444, 453, 818 N E 2d 713, 721, 288 Ill Dec 778, 786 (1st Dist 2004) (Supreme Court rules are "mandatory rules of procedure subject to strict compliance by the parties") Because Defendants failed to comply with a simple rule, Defendants' motion fails on this procedural ground alone

II. FATAL SUBSTANTIVE FLAWS OF DEFENDANT'S MOTION--

Reasonableness is a question of fact

4 The standard for breach of the implied warranty of merchantability is "reasonable time or reasonable number of attempts " See seminal case is Pearson v DaimlerChrysler Corp , 349 Ill App 3d 688, 813 N E 2d 230, 237, 286 Ill Dec 173 (1st Dist 2004) and cases cited therein (emphasis added)

> [To prove a breach of a warranty plaintiff must prove] (1) the existence of a defect in the automobile covered by the warranty, (2) compliance with the terms of the warranty by plaintiff, (3) plaintiff afforded defendant a reasonable opportunity to repair the defect, and (4) defendant was unable to repair the defect ***after a reasonable time*** or a reasonable number of attempts

Even though Defendant cited this case in its Motion, it (1) did not even get the case name right, and (2) deceptively, did not quote, or even address, the "reasonable time" prong

5 Federal law is in agreement The leading federal case cited multiple times for the same proposition is Temple v Fleetwood Enterprises, Inc , 133 Fed Appx 254, 268 (6th Cir 2005) (emphasis added)

> In order to state an actionable claim of breach of warranty and/or violation of the Magnuson–Moss Act, a plaintiff must demonstrate that (i) the item at issue was subject to a warranty, (ii) the item did not conform to the warranty, (iii) the seller was given reasonable opportunity to cure any defects, and (iv) the seller failed to cure the defects ***within a reasonable time*** or a reasonable number of attempts

6 This standard is stated in practically the same language in Illinois Magnuson-Moss IPI

> Fourth, that Defendant or its authorized dealer did not repair the vehicle after being given a reasonable number of attempts ***or did not offer to refund, replace or take other remedial action within a reasonable amount of time.***

IPI 185 05 (emphasis added)

7 This standard comes from Section 1-205(b) of the Commercial Code, that establishes the "rule of reasonableness" under the UCC

(b) An action is taken seasonably if it is taken at or within the time agreed or, if no time is agreed, at or within a reasonable time 810 ILCS 5/1-205(b)

8 Defendant's Motion is fatally flawed because it—deceptively—concentrates on the "reasonable number of attempts" prong of the test and moreover references absolutely unrelated Illinois statute, while ignoring the "reasonable time" prong

9 Reasonableness is a question of fact Brame v City of North Chicago, 2011 IL App (2d) 100760, 955 N E 2d 1269, 1273, 353 Ill Dec 458, 462 (2d Dist 2011) ("reasonableness is a question of fact"), Basselen v General Motors Corp , 341 Ill.App 3d 278, 283, 792 N E 2d 498, 503, 275 Ill Dec 267, 272 (2d Dist 2003) (same)

10 Defendant, in its own Motion, states "the RV was only out for repair with Vacationland from July 14, 2014 through August 4, 2014, at which time the vehicle was sent to the manufacturer The manufacturer had the RV in repair from approximately August 4, 2014 through September 23, 2014 " Motion, para 16

11 Well, then By Defendant's own ***admission***, the RV was in repair from July 14 through September 23 That's 71 days Plaintiffs do not care whether the RV was being repaired by Defendant or the manufacturer—under the implied warranty of merchantability, as alleged in Plaintiff's Complaint, it was ***Defendant***'s responsibility to repair it, and if Defendant was unable to do so itself (impliedly demonstrating the ***severity*** of the problem), this means it breached its warranty Whatever issues Defendant has with the manufacturer is between them

12 Further, Defendant misrepresents the record before the Court Nowhere in their Responses to Interrogatories did Plaintiffs state that their revoked their acceptance only July 15, 2014, as falsely claimed in Defendant's Motion, in para. 16 (This, in any event, would be a legal conclusion, which ultimately would be determined at trial) Regardless, Defendant mixes and matches two distinct legal theories—revocation of acceptance and damages for breach of the implied warranty of merchantability The timing of revocation is important only for the revocation count, but the only relevant inquiry with respect to the implied warranty is whether the defect was repaired within a reasonable time Defendant's own ***admission*** states that, for the final repair. the RV was in repair for 71 days This is manifestly unreasonable, and, by Defendant's own admission, makes the RV unmerchantable

13 Indeed, there was only one or two attempts to repair the RV The problem is, these attempts lasted practically the entire summer—and that's for a summer product, such as an RV (Unlike Defendant, Plaintiff support this Response with proper evidence—an affidavit—and it demonstrates that the RV was being repaired for an unreasonable time—from July 14, 2015 to September 23, 2014 **Exhibit A**, Affidavit of Adam Wozniak)

14 Because the repair took too long (nearly the entire summer), the warranty was breached Defendant's Motion fails

15 Defendant's attempt to graft the Illinois Lemon Law standards to the instant case are invalid Plaintiffs did not sue under the Lemon Law It does not apply to the transaction It has standards different from the Magnuson-Moss Warranty Act Defendant mixes apples and elephants

17 As demonstrated above, the Magnuson-Moss case law developed its own standards, directly applicable here, and under these standards if a repair takes an unreasonable time, a warranty is breached Because reasonableness is a question of fact, a jury will have to decide whether a summer-long repair of a summer product was reasonable or not

18 Finally, the case most relied upon by Defendant (Belfour) is inapplicable In Belfour, the manufacturer cured its breach by offering to give the Plaintiff a new car Indeed, this is what Plaintiffs asked for in the instant case **Exhibit A**, para 5 As opposed to Belfour, Defendant refused If either the manufacturer or dealer offered a timely replacement, Plaintiffs would not be in court today

III. DEFENDANT MAY NOT CURE ITS FAILES IN A REPLY BRIEF

19 Plaintiff pointed out a fatal procedural deficiency in Defendant's Motion This issue is waived, and Defendant may not cure this deficiency in its reply brief Griffin v Bell, 694 F 3d 817, 822 (7th Cir 2012) ("More precisely, Griffin did not raise this argument until his reply brief, and arguments raised for the first time in a reply brief are deemed waived ")

WHEREFORE, Plaintiffs request that the Court

A Deny Defendant's Motion, and,

B Grant other relief the Court deems appropriate and just

KIMBERLY ACCETTURA
ADAM WOZNIAK

By /s/ Dmitry N Feofanov
One of their attorneys

Dmitry N Feofanov
CHICAGOLEMONLAW.COM, P.C.
404 Fourth Avenue West
Lyndon, IL 61261
815/986-7303

Amended Affidavit of Adam Wozniak

I, Adam Wozniak, state that, if called to testify, I can competently testify as follows:

1. I am one of the former owners of the RV subject to this litigation.

2. When, on or about July 14, 2015, after being told that the leakage problem in the RV was fixed, we brought it back to Vacationland for another leakage problem, Vacationland told me that the problem was such that they could not repair it themselves. I spoke to Mark in the service department. This conversation was in person, on Vacationland's lot.

3. Defendant told me that the RV will have to be sent to the manufacturer for repairs. I spoke to Mark in the service department, on or about July 14, 2015. This conversation was in person, on Vacationland's lot.

4. When I asked for an estimate of time for the repairs, Vacationland could not give me an estimate. I spoke to Mark in the service department, on or about July 14, 2015. This conversation was in person, on Vacationland's lot.

5. I also spoke to the manufacturer by phone, asking them for a timeline for repairs. However, the manufacturer referred me to the dealer. In my conversations with the manufacturer, I asked for a new RV, and the manufacturer referred me to Vacationland. When I asked Vacationland for a new RV, they refused. My conversation with the manufacturer was by phone, some time after July 14, 2015. I dialed the manufacturer's phone number and spoke to an unknown to me person who was a person in a repair and technical department, after being transferred there. When I asked Vacationland for a new RV. To the best of my recollection I spoke to Joel, our salesman. This conversation was by phone, and it took place sometime after July 14, 2015.

6. When neither the dealer nor the manufacturer would give me an estimate for a repair time, on or about August 2, 2015, I told Defendant I no longer wanted the RV. I spoke to Joel, our salesman, by phone. I dialed Vacationland's phone number, and asked for Joel specifically, and I recognized Joel's voice.

7. As I found out later, it took the manufacturer until September 23 to "repair" and return the RV. By that time the summer was gone, and so was our reason for having an RV. I found that out after receiving an email from Mark sometime on or about September 23, 2015.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, I certify that the statements set forth in this Affidavit are true and correct.

Adam Wozniak

January 3, 2017

Ex. A

A-37

IN THE CIRCUIT COURT FOR THE SIXTEENTH JUDICIAL CIRCUIT
KANE COUNTY, ILLINOIS

KIMBERLY ACCETTURA and ADAM WOZNIAK,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	14 CH 1467
	)	
VACATIONLAND, INC.,	)	
	)	
Defendant.	)	

DEFENDANT'S VACATIONLAND, INC.'S
REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

NOW COMES Defendant, VACATIONLAND, INC. (hereinafter, "Vacationland"), by and through its attorneys, MOMKUS McCLUSKEY ROBERTS LLC, and replies to Plaintiffs' Response to its motion for entry of an order granting summary judgment in its favor and against Plaintiffs pursuant to 735 ILCS 5/2-1005. For the reasons set forth below, summary judgment should be entered in favor of Defendant Vacationland.[1]

INTRODUCTION

In their Response, Plaintiffs makes various arguments, which they claim prevent the entry of summary judgment. Specifically, in their Response, Plaintiffs claim that Vacationland's Motion for Summary Judgment should be denied because the deposition transcripts provided in support of the motion are procedurally "flawed". However, Plaintiff cite to an outdate Supreme Court Rule and its interpreting case law, and Vacationland's reliance upon certified deposition transcripts in support of summary judgment is entirely proper under Illinois Supreme Court Rule 207. Additionally, Plaintiffs' Response fails to rebut the Material Facts set forth in Vacationland's motion for summary judgment. Indeed, a

[1] Vacationland filed its Motion to Strike Adam Wozniak's Affidavit contemporaneously with this Reply and incorporates the arguments set forth therein as if fully set forth here.

cursory review of Plaintiffs' Response reveals they fail to present any admissible evidence whatsoever in opposition which would raise a genuine issue of material fact. Plaintiffs present only an improper affidavit by Adam Wozniak, which does not comply with Illinois Supreme Court Rule 191(a) and is the subject of Vacationland's Motion to Strike, filed contemporaneously herewith. Notwithstanding, Plaintiffs do not dispute that they did not allow Vacationland or the manufacturer a reasonable time to cure the alleged defects, which bars their alleged revocation of acceptance and claims under the Magnuson Moss Warranty Act ("MMWA"). Moreover, Plaintiffs do not dispute that they refused to view the RV after repairs were completed, which is unreasonable as a matter of law and fatal to their claims. Therefore, Plaintiffs cannot sustain their claims as a matter of law and summary judgment is warranted.

ARGUMENT

1. Plaintiffs' Deposition Transcripts are Properly Before the Court.

Contrary to Plaintiffs' contention, Vacationland's reliance upon Plaintiffs' sworn deposition testimony complies with Illinois Supreme Court Rule 207. Rule 207 provides, in relevant part:

> **Rule 207. Signing and Filing Depositions**
>
> **(b) Certification, Filing, and Notice of Filing.**
>
> (1) If the testimony is transcribed, the officer shall certify on the deposition that the deponent was duly sworn by him and that the deposition is a true record of the testimony given by the deponent. ***A deposition so certified requires no further proof of authenticity.*** . . .

Ill. Sup. Ct., R 207 (2016). (Emphasis provided).

Here, Plaintiffs' deposition transcripts reflect that both witnesses waived the signature requirement and the officer transcribing the depositions duly certified each transcript. (Wozniak Dep. pgs 46:17 and 47:1-24, Exhibit 2; Accetura Dep. pgs 49:10-11 and 50:1-24, Exhibit 3.)[2]

Plaintiffs contend that the deposition transcripts must be on file *prior* to filing a motion for summary judgment. However, the case law that Plaintiffs cite to in support of this proposition *rely upon a prior and substantially different version of Illinois Supreme Court Rule 207* and, accordingly, have no precedential value.

In June, 1995, Illinois Supreme Court Rule 207 was revised to do "away with the requirement of former Rule 19-6(5)(a) that all evidence depositions be transcribed and filed. . . . Certification, rather than certification and filing, establishes authenticity under the new provision . . ." Ill. S. Ct. R. 207(b), Committee Comments (rev. June 1, 1995). Under the current version of Rule 207(b), a certified deposition is considered authentic and can be relied upon, and a separate filing is not necessary. *Payne v. City of Chicago*, 2014 IL App (1st) 123010 at ¶24, 16 N.E.3d 110, 117.[3]

Plaintiffs' argument relies upon case law which interpreted the prior version of Rule 207. *See Id.* at ¶25, 118. Accordingly, these cases, and their holdings, are inapplicable here.

Further, Plaintiffs' reliance upon *Bezin v. Ginsburg*, 59 Ill.App.3d 429 (1st Dist. 1978), is misplaced in the instant case. In *Bezin*, the plaintiff, Walter Bezin, was a beneficial owner of a

---

[2] Citations are made to the exhibits attached to Vacationland's Motion for Summary Judgment.
[3] The *Payne* court noted that, even prior to the amendment of Rule 207, courts allowed unfiled deposition transcripts to be considered where the plaintiff's counsel was present at the depositions, the transcripts were available to counsel, the transcripts were presented to the court, and the court considered them in its ruling. *Id.* at ¶25, 117-18. Here, Plaintiffs' counsel was present for his clients' respective depositions and copies of the deposition transcripts were made available to him. Full and complete copies of the transcripts were also attached to Vacationland's Motion for Summary Judgment. Accordingly, even under the prior version of Rule 207, it is permissible for this Court to consider these deposition transcripts.

land trust that sought summary judgment against former beneficial owners. *Id.* Bezin supported his motion with an unsigned deposition taken in a related lawsuit to which he was never a party. The trial court denied Bezin's motion for summary judgment because the deposition relied upon was never signed nor was it made part of the court record in the related lawsuit where Bezin was not a party. The deposition relied upon in Bezin is quite different than Plaintiffs' depositions in this case.

Here, Vacationland filed Plaintiffs' deposition transcripts with the court, which contain both certification and waiver of signature. These depositions are considered to be authentic and can be relied in support of Vacationland's Motion for Summary Judgment.

2. **Plaintiffs' Response Fails to Present Evidence of a Material Fact in Dispute.**

Plaintiffs' response to Vacationland's motion for summary judgment does not challenge or respond whatsoever to Vacationland's statement of undisputed material facts. Rather, Plaintiffs present an affidavit by Adam Wozniak, which contains inadmissible hearsay and lacks foundation and should be stricken under Rule 191(a) for the reasons set forth in Vacationland's motion to strike. Notwithstanding, Plaintiffs' Response fails to offer any admissible evidence to rebut the evidence that demonstrates Plaintiffs did not act reasonably as a matter of law and failed to give Vacationland a reasonable opportunity to cure the alleged defect to their RV. As a result, Plaintiffs cannot sustain the essential elements of their claims and summary judgment is warranted. The opponent of a motion for summary judgment is not required to prove his case. *Glenview v. Northfield Woods Water & Utility Co.*, 216 Ill.App.3d 40, 46-47 (1st Dist. 1991). However, the nonmovant has a duty to present a factual basis which would arguably entitle him to a judgment. *Id.*

Plaintiffs here did not file any proper counter-affidavits pursuant to Rule 191(a) disputing the fact that they did not give Vacationland a reasonable opportunity to cure the alleged RV defect as defined under the Magnuson Moss Warranty Act ("MMWA") and the Illinois Uniform Commercial Code ("UCC"). As set forth in *Helfers-Beitz v. Degelman*, 406 Ill. App. 3d 264, 267-68 (3rd Dist. 2010):

> While the movant always has the burden of persuasion on a motion for summary judgment, the burden of production can shift to the nonmovant. *Pecora v. County of Cook*, 323 Ill. App. 3d 917, 933, 752 N.E.2d 532, 545, 256 Ill. Dec. 652 (2001).
>
> "A defendant who moves for summary judgment may meet its initial burden of production in at least two ways: (1) by affirmatively disproving the plaintiff's case by introducing evidence that, if uncontroverted, would entitle the movant to judgment as a matter of law (traditional test) [citation], or (2) by establishing that the nonmovant lacks sufficient evidence to prove an essential element of the cause of action (*Celotex* test) (see *Rice v. AAA Aerostar, Inc.*, 294 Ill. App. 3d 801, 805, 690 N.E.2d 1067, 1070, 229 Ill. Dec. 20 (1998), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 273, 106 S. Ct. 2548, 2552 (1986); [citation])." *Williams v. Covenant Medical Center*, 316 Ill. App. 3d 682, 688-89, 737 N.E.2d 662, 668, 250 Ill. Dec. 40 (2000).
>
> In either instance, once the defendant-movant has met its initial burden of production, the burden shifts to the nonmovant. *Hutchcraft v. Independent Mechanical Industries, Inc.*, 312 Ill. App. 3d 351, 355, 726 N.E.2d 1171, 1175, 244 Ill. Dec. 860 (2000).

At this point, Plaintiffs cannot rest on their pleadings to raise genuine issues of material fact, and Plaintiffs must produce facts that would arguably entitle them to a favorable judgment. *Id.*, citing *Kleiss v. Bozdech*, 349 Ill. App. 3d 336, 350 (4th Dist. 2004).

Here, Plaintiffs' response fails to present admissible evidence which would establish that they met the threshold elements of the MMWA or UCC, which require them to show they gave Vacationland a reasonable opportunity to cure the RV's alleged defect. Instead, Plaintiffs rely on an improper affidavit of Adam Wozniak that fails to comply with Rule 191(a), which, even if considered by the Court, fails to show Plaintiffs met the statutory requirements to establish their

warranty claims. Plaintiffs cannot establish that they provided Vacationland a reasonable opportunity to cure as defined by the statutes on which they base their claims.

Under both the MMWA and the UCC, a buyer can only seek damages and/or revoke the contract after providing the seller with a reasonable opportunity to cure an alleged defect. 15 U.S.C. §2310(3); *Pearson v. DaimlerChrysler Corp.*, 349 Ill.App.3d 688, 696 (1st Dist. 2004); 810 ILCS 5/2-608.

Here, it is undisputed that Plaintiffs presented the RV to Vacationland for repairs on July 14, 2014. *See* Wozniak Dep., pg. 20, Exhibit 2; Accetura Dep. pgs. 35:19-37:12, Exhibit 3. Without viewing the vehicle or otherwise verifying if repairs had been done, Plaintiffs revoked the contract on or before August 2, 2014. Exhibit 4. Plaintiffs admittedly gave Vacationland only seventeen (17) days, or fourteen (14) business days, in which to attempt to cure the purported defect. This is insufficient as a matter of law and, accordingly, Plaintiffs' claims under the MMWA and UCC must fail.

In their Response brief, Plaintiffs attempt to excuse their untimely revocation by arguing that the timing of their revocation is irrelevant to their count for breach of implied warranty. This argument, however, ignores clear case law to the contrary.

In *Belfour v. Schaumberg Auto*, the buyers sought remedies under the MMWA for breaches of express and implied warranties. *Belfour v. Schaumberg Auto*, 306 Ill.App.3d 234, 238, 713 N.E.2d 1233, 1236 (2nd Dist. 1999). The plaintiffs refused to allow the Audi dealer to inspect the vehicle and, instead, revoked the agreement and demanded the immediate return of the purchase price. *Id.* at 237, 1235. The Second District Appellate Court held that the dealer could not have breached its warranty until it "refuses or fails to repair the defect," and no action

for damages can be brought until the defendant is afforded a *reasonable opportunity* to cure. *Id.*, at 241, 1238.[4]

Here, Plaintiffs preemptively revoked the contract before allowing Vacationland a reasonable opportunity to cure and, accordingly, their claims fail.

Furthermore, Plaintiffs do not dispute that they failed to mitigate their damages by failing to view or inspect the RV prior to revocation. When making a claim under the UCC, the claiming party is required to make reasonable attempts to mitigate its damages, and the failure to do so here is fatal to Plaintiffs' claims. *American Nat'l Bank & Trust Co. v. Weyerhaeuser Co.*, 692 F.2d 455, 468 (7th Cir. 1982).

Plaintiffs also rely upon case law which is inapplicable to the facts and claims at issue in this case. Plaintiffs' cite *Brame v. City of North Chicago*, 2011 IL App (2d) 100760 (2nd Dist. 2011), which is not a breach of warranty case. Rather, *Brame* involves a retaliation claim under the Whistleblower Act. *Id.* at ***4-8. Moreover, the plaintiff in *Brame* opposed summary judgment by presenting facts demonstrating that he complied with the reasonableness requirement of the Whistleblower Act. Thus, in that case, the court found that a question of fact existed as to reasonableness of the plaintiff's actions. Id. at ***13. In contrast, here, Plaintiffs' response fails to present admissible evidence that could create a question of fact as to whether they provided Vacationland a reasonable opportunity to cure. With regard to the warranty statutes at issue in this case, the meaning of reasonable opportunity to cure is a defined term under Illinois law, but Plaintiffs here do not (and cannot) present admissible evidence which would create a fact in dispute as to whether they complied with that essential element of the

[4] It should be noted that, in *Belflour*, almost four months passed from the date that plaintiffs first observed a problem with the vehicle (May 2, 1992) and the date on which plaintiffs' counsel revoked the agreement (August 31, 1992). *Id.* at 236-37, 1235. This is a substantially longer gap in time than that which occurred in the instant case.

MMWA and the UCC. See, e.g., *Belfour v. Schaumberg Auto*, 306 Ill. App. 3d 234 (2d Dist. 1999).

In that regard, Plaintiffs' reliance upon *Basselen v. General Motors Corp.*, 341 Ill.App.3d 278 (2nd Dist. 2003) is also misplaced. Although *Basselen* involves breach of warranty claims, a review of the court's decision supports Vacationland's arguments in favor of summary judgment here because the plaintiffs in *Basselen* also failed to act reasonably as a matter of law. The *Basselen* plaintiffs purchased a van from defendants with which they experienced several problems and complained to the dealer. *Id.* at 281-82. The year after the purchase, the plaintiffs attempted to revoke their acceptance and demanded a new vehicle from the dealer, which refused. *Id.* at 283-84. The plaintiffs continued driving the van for several thousand miles. *Id.* The court entered summary judgment in favor of the dealer because the plaintiffs presented no evidence that they could not have purchased another van or used alternate means of transportation. The *Basselen* court found that the plaintiffs' revocation was ineffective, since their continued and extensive use of the vehicle was unreasonable as a matter of law. *Id.* at 285-86. The *Basselen* court stated:

> Plaintiffs assert that reasonableness is a question of fact. This proposition is generally true. See *Magnum Press Automation, Inc. v. Thomas & Betts Corp.*, 325 Ill. App. 3d 613, 618-19, 758 N.E.2d 507, 259 Ill. Dec. 384 (2001). However, beyond this bare assertion, plaintiffs point to no facts that would support the proposition that their use was reasonable. Obviously, for an issue of fact to exist, there must be some facts in the record that would allow plaintiffs to prevail. Absent some explanation for their continued use of the van, we hold that it bars revocation as a matter of law.

Id. at 283-84.

In the instant case, Plaintiffs' response fails to point to any admissible evidence that they gave Vacationland a reasonable opportunity to cure or that they acted reasonably in their revocation of acceptance of the RV. In short, they fail to rebut Vacationland's factual evidence

regarding their failure to meet the threshold requirements of their warranty claims. As discussed in Vacationland's motion for summary judgment, the undisputed facts in this matter demonstrate that Plaintiffs' cannot sustain a key element of their warranty claims, which must fail as a matter of law.

CONCLUSION

Plaintiffs cannot demonstrate an essential element of their warranty claims, and thus, summary judgment should be granted in favor of Defendant Vacationland as to Plaintiffs' warranty claims.

WHEREFORE, Defendant, VACATIONLAND, INC., requests that this Honorable Court grant summary judgment in its favor and against Plaintiffs and for any other or further relief that this Court deems just and equitable.

Respectfully Submitted,

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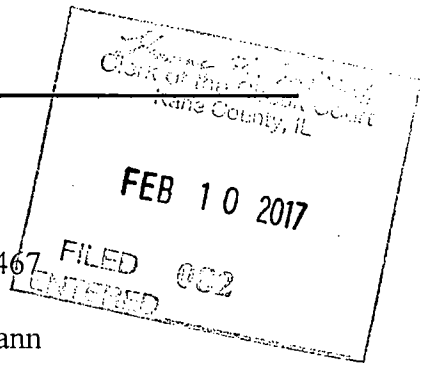
IN THE CIRCUIT COURT FOR THE SIXTEENTH JUDICIAL CIRCUIT
KANE COUNTY ILLINOIS
IN CHANCERY



Kimberly Accettura and Adam Wozniak	)	
	)	
Plaintiffs,	)	
	)	Case No. 2014-CH-1467
v.	)	
	)	Hon. David R. Akemann
Vacationland, Inc.,	)	Circuit Judge Presiding.
	)	
Defendant.	)	

ORDER

THIS CAUSE coming to be heard upon Defendant's Motion for Summary Judgment, Plaintiff's Response to Defendant's Motion for Summary Judgment, Defendant's Reply in Support of its Motion for Summary Judgment, Defendant's Motion to Strike Adam Wozniak's Affidavit, and this court, having considered the pleadings, affidavits, exhibits, and oral arguments of counsel, and being otherwise fully advised in the premises, finds:

BACKGROUND

1. In short summary, Plaintiffs Kimberly Accettura and Adam Wozniak (hereinafter "Plaintiffs") filed their four-count Complaint alleging Defendant breached its implied warranty of merchantability, and as a result, Plaintiffs are entitled to revoke their acceptance of the RV.
2. On November 14, 2016, Defendant Vacationland, Inc. (hereinafter "Defendant") filed their Motion for Summary Judgment alleging summary judgment should be granted because Plaintiffs failed to establish an essential element of their breach of warranty claims.

3. On November 18, 2016, Plaintiffs filed their Response to Defendant's Motion for Summary Judgment alleging Defendant's failed to comply with the procedural requirements for summary judgment motions and there is a genuine issue of material fact as whether the RV was repaired within a reasonable time.
4. On December 28, 2016, Defendant filed their Reply in Support of their Motion for Summary Judgment arguing their motion is proper under Illinois Supreme Court Rule 207 and Plaintiffs fail to rebut the material facts set forth in Defendant's motion.
5. On December 28, 2016, Defendant filed their Motion to Strike Adam Wozniak's Affidavit alleging the affidavit, attached in support of Plaintiff's Response should be stricken because it fails to comply with Illinois Supreme Court Rule 191(a).

STANDARD

6. Summary judgment is only appropriate where the pleadings, depositions, affidavits, admissions, and other matters on file, viewed in the light most favorable to the non-moving party, demonstrate that there exists no genuine issue of material fact such that the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c); *Gillespie Cmty. Unit Sch. Dist. No. 7 v. Wright & Co.*, 4 N.E. 3d 37, 43 (Ill. 2014). Though summary judgment can be an expeditious method of disposing of a lawsuit, it is a drastic measure, and therefore, should be allowed only when the right of the movant is clear and free from any doubt. *Pyne v. Witmer*, 129 Ill. 2d 351, 358 (Ill. 1989).

ANALYSIS

Defendant's Motion for Summary Judgment

7. "The term 'implied warranty' means an implied warranty arising under State law..." 15 U.S.C.S. § 2301(7). A plaintiff must show that (1) they gave the defendant a reasonable opportunity to cure the alleged defect(s) and (2) the defendant failed or refused to cure

the defect(s). *Pearson v. DaimlerChrysler Corp.*, 349 Ill. App. 3d 688, 696 (1st Dist. 2004). Similarly, to bring an action under Section 2310(d)(1) of the Magnuson-Moss Warranty Act (hereinafter "the Act"), the consumer must give the warrantor "a reasonable opportunity to cure" its failure to comply with "an obligation under any written or implied warranty." 15 U.S.C.S. § 2310(e). A breach of the promise to repair or replace cannot occur until the defendant seller refuses or fails to repair the defect. *Belfour v. Schaumberg Auto*, 306 Ill. App. 3d 234, 241 (2nd Dist. 1999). If the product is not "fit for the ordinary purposes for which such goods are used" then the product breached the implied warranty of merchantability. *Id.* at 698. Regarding automobiles, "fitness for the ordinary purpose of driving implies that the vehicle should be in a safe condition and substantially free of defects." *Id.* at 698-99.

8. "Where any tender or delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery." 810 ILCS 5/2-508(1). The buyer must allow the seller time to cure before revoking acceptance under the UCC. *Belfour*, 306 Ill. App. 3d at 241. "Thus, courts will resort to revocation of acceptance only after attempts at adjustment have failed." *Id.* at 242. The buyer's duty to mitigate damages is "pertinent" where the buyer accepts the goods and must make repairs to the goods. See *Magnum Press Automation, Inc. v. Thomas & Betts Corp.*, 325 Ill. App. 3d 613, 622 (4th Dist. 2001). A presumption that a reasonable number of attempts have been undertaken to conform a new vehicle to its express warranties shall arise where, within the statutory period:

> (1) the same nonconformity has been subject to repair by the seller, its agents or authorized dealers during the statutory warranty period, 4 or more times, and such nonconformity continues to exist; or (2) the vehicle has been out of service by

> reason of repair of nonconformities for a total of 30 or more business days during the statutory warranty period.

815 ILCS 380/3(b). An action is "seasonable" if it is taken at or within the time agreed, but if no time is agreed upon between the parties, then within a reasonable time. 810 ILCS 5/1-205(b). Reasonableness is a question of fact. *Basselen v. GMC*, 341 Ill. App. 3d 278, 283 (2nd Dist.2003) (citing *Magnum*, at 618-19).

9. In this case, Defendant argues Plaintiffs failed to give Vacationland a reasonable amount of time to cure the defects of the RV. Defendant's argument is convincing. Plaintiffs incorrectly argue the New Vehicle Protection Act, or Lemon Law, has different standards than the Magnuson-Moss Warranty Act. However, as stated above, both acts apply a standard of reasonableness. Additionally, Plaintiffs argue Defendant solely concentrates on the reasonable number of attempts prong of Section 5/1-205 of the UCC and ignores its language regarding reasonable time. However, while, reasonableness is a factual question, the record is clear that Plaintiffs revoked "sometime before August 2, 2014", which, under the Magnuson-Moss Act and New Vehicle Buyer Protection Act, is not a reasonable amount of time for Defendant to cure the defect. *Plaintiffs' Responses to Defendant's Interrogatories*, ¶ 14-15; Wozniak Dep. pg. 21: 20-24; Adam Wozniak Affidavit.

10. Plaintiff further argues Defendants incorrectly filed the depositions used as exhibits in their motion, which they allege is a fatal flaw. However, Plaintiffs' interpretation is under a prior version of Rule 207(b), and as the court held in *Payne v. City of Chicago*, Illinois Supreme Court Rule 207(b) now does away with the requirement that all depositions be transcribed and filed before they are used in a motion for summary judgment. *Payne v. City of Chicago*, 2014 IL App (1st) 123010, ¶ 24. Therefore, Defendant's Motion for Summary Judgment is granted.

Defendant's Motion to Strike Adam Wozniak's Affidavit

11. Illinois Supreme Court Rule 191(a) requires that an affidavit used to support a motion for summary judgment "shall be made on personal knowledge, shall set forth particularity the facts upon which the claim is based, shall not consist of conclusions, but facts admissible in evidence." Ill. Sup. Ct. R. 191(a). Affidavits that contain inadmissible hearsay evidence cannot be used as opposition to a motion for summary judgment. *Kellman v. Twin Orchard Country Club*, 202, Ill. App. 3d 968, 973 (1st Dist. 1990). In addition, conclusions within an affidavit are not admissible into evidence. *Cole Taylor Bank v. Corrigan*, 230 Ill. App. 3d 122, 130 (2nd Dist. 1992).

12. Here, Defendant's argue Plaintiff Adam Wozniak's affidavit should be stricken because the affidavit fails to comply with Illinois Supreme Court Rule 191(a), it includes inadmissible hearsay, inadmissible conclusions, and lacks foundation. While, the first affidavit filed lacks proper foundation, the amended affidavit is proper under Rule 191(a).

IT IS THEREFORE ORDERED AND ADJUDGED:

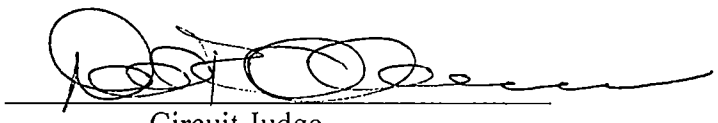
A. Plaintiff's Motion to Amend Adam Wozniak's Affidavit is granted.

B. Defendant's Motion to Strike the amended affidavit is denied.

C. Defendant's Motion for Summary Judgment is Granted.

D. All future dates are hereby stricken

Entered this 10th day of February, 2017



Circuit Judge

IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT
KANE COUNTY, ILLINOIS

Kimberly Accettura, and Adam Wozniak, Plaintiffs, v. Vacationland, Inc. Defendant.	Thomas M. Hartwig Clerk of the Circuit Court Kane County, IL FEB 27 2017 FILED 041 ENTERED	No. 14 CH 1467 **JURY OF 12 DEMAND**

MOTION TO RECONSIDER

Plaintiffs move to reconsider the Court's grant of summary judgment on Counts I-IV of their Complaint.

I. NATURE OF THE CASE

This case involves an RV bought to spend a summer vacation. When the RV turned out to be defective (massive water leaks), and when the Defendant-warrantor would not give an estimate as to when the RV would be repaired and refused to "cure," Plaintiffs revoked acceptance and cancelled their contract.

II. ISSUES PRESENTED FOR REVIEW

A. Count I—Revocation of Acceptance under the Magnuson-Moss Warranty Act.

1. The trial court erred in equating "cure" with "repair," where, under the Act, Plaintiffs had to give the Defendant a "reasonable opportunity to cure," and where both the statutory and case law provide that "cure" means tendering conforming goods, not merely repairing non-conforming goods;
2. The trial court erred in relying on the Code section that applied only in cases where the time for performance has not yet expired;
3. The trial court erred in failing to apply the proper standard of review when it found that Plaintiffs refused a reasonable opportunity to cure, where the uncontroverted record demonstrates that the cure was in fact refused by the Defendant;
4. The trial court erred in raising the issue of mitigation, where the theory of mitigation of damages as a matter of law does not apply to the return of the purchase price contemplated by revocation of acceptance;

5. Even assuming that "cure" was the same as "repair," the trial court erred in granting summary judgment to Defendant, where the reasonableness of time is a question of fact, where the Magnuson-Moss Warranty Act does not establish a bright-line time limit, and where the 30 days limit from Illinois Lemon Law does not apply as a matter of law;
6. Even assuming that "cure was the same as "repair," the Act provides for "a" reasonable "opportunity" (singular) to cure. The Act does not require multiple opportunities. In this case the leakage problem was addressed by Defendant in June of 2014; the second leakage problem in July falls outside of "a reasonable opportunity to cure" and therefore Plaintiffs' revocation was proper.

B. Count II—Breach of the Implied Warranty of Merchantability under the Magnuson-Moss Warranty Act.

1. The trial court erred in equating "cure" with "repair";
2. The trial court erred in applying the wrong legal standard to a breach of the implied warranty claim;
3. The trial court erred in commingling the standards of "repair" found in Illinois Lemon Law (an exclusive remedy that was not asked by Plaintiff, which provides for a buy-back, not warranty damages) with the standards applicable to breaches of implied warranties;
4. The trial court erred in raising the issue of mitigation, where the theory of mitigation of damages does not apply to actual damages for breaches of warranty as a matter of law.
5. The trial court erred in making a factual determination of the reasonableness of time, where the reasonableness of time is a question of fact, where the Magnuson-Moss Warranty Act does not establish a bright-line time limit, and where the 30 days limit from Illinois Lemon Law does not apply as a matter of law.

C. Count III—Revocation of Acceptance and Cancellation of Contract under Sections 2-608 and 2-711 of the Commercial Code.

1. The trial court erred in discussing "cure" in the 2-608 revocation context, because the applicable sub-section of 2-608 does not provide for cure and therefore "cure" is not applicable as a matter of law;
2. The trial court erred in commingling the standards applicable to revocation under the Magnuson-Moss Warranty Act and under the Code.

D. Count IV—Action to Recover the Price under Section 2-711(1) of the

Commercial Code.

1. The trial court erred in even ruling on Count IV, as Count IV was not addressed in Defendant's summary judgment motion;
2. The trial court erred in ruling on Count IV sua sponte, as such ruling violated the adversarial principle of litigation, which provides that no relief should be granted absent a corresponding pleading.

III. STATEMENT OF FACTS

As mentioned above, this case involves an RV bought to spend a summer vacation. When the RV turned out to be defective (massive water leaks), and when the Defendant-warrantor would not give an estimate as to when the RV would be repaired and refused to "cure," Plaintiffs revoked acceptance and cancelled their contract.

The trial court granted summary judgment to Defendant in a written order, the gist of which is that Plaintiffs did not give Defendant a reasonable time to "cure" the defects. Plaintiffs argued that Defendant in fact refused to "cure."

Plaintiffs bought the RV on April 19, 2014. Complaint, ¶4. In June Plaintiffs noticed the water leakage problem. Plaintiffs brought the June problem to Defendant's attention, and Defendant attempted to repair it. Wozniak dep., 8:6-9:9, Accettura dep., 30:17-32:11.

In July, during a trip to Michigan, the RV again experienced a significant leakage problem. Again, Plaintiffs brought this problem to Defendant's attention. Wozniak Amended Aff. ¶2. Apparently, the problem was so severe that, this time, on or sometime after July 14, 2015, Defendant-warrantor told Plaintiffs that it could not repair the RV, and that Defendant would have to send the RV for repairs out of state. Wozniak Amended Aff. ¶¶2-3. When Plaintiffs asked for an estimate of time for the repairs,

Defendant-warrantor would not give them an estimate. Wozniak Amended Aff. ¶4.

Having been refused an estimate, on the same date Plaintiffs asked Defendant for a new RV instead of the defective one, and were refused. Wozniak Amended Aff. ¶5.

Having been refused an estimate for repairs, and having been refused a replacement RV, Plaintiff revoked their acceptance on August 2, 2015. Wozniak Amended Aff. ¶6.

Plaintiffs sued, alleging the following claims: (1) revocation of acceptance under the Magnuson-Moss Warranty Act, (2) breach of the implied warranty of merchantability under the Magnuson-Moss Warranty Act, (3) revocation of acceptance under the Commercial Code, and (4) action to recover the price under the Commercial Code. Complaint, pp. 2-7.

On February 10, 2017, the trial court granted summary judgment on all four counts. Order of February 10, 2017.

In this appeal Plaintiff raises the following issues, some of which overlap between the different legal theories: (1) whether "cure" and "repair" are the same, where both the statutory and case law provide that "cure" means tendering conforming goods, not merely repairing non-conforming goods; (2) whether the trial court's reliance on the Commercial Code provision that applied to instances where the time for performance has not yet expired was in error, when the time for performance in this case expired at sale, on April 19, 2014; (3) whether the trial court failed to apply the proper standard of review when it found that Plaintiffs refused a reasonable opportunity to cure, where the record demonstrate that the cure was in fact refused to them; (4) whether the trial court erred in

raising the issue of mitigation, which does not apply as a matter of law in revocation and breach of implied warranty contexts; (5) whether the trial court erred in determining the issue of reasonableness of time as a matter of law, where it should have been an issue of fact; (6) whether the trial court applied wrong standards along the board, including applying the standards from Illinois Lemon Law, which was not at issue in this case; (7) whether the trial court's reliance on the "cure" provisions of the Code was in error as it applied to the revocation section of the Code, which does not have a cure requirement; and, (8) whether the trial court's grant of summary judgment as to Count IV violated due process and the adversarial nature of litigation, as Defendant said nothing about Count IV in its Motion or Reply, Plaintiffs said nothing about Count IV in their Response, and the trial court provided no analysis of Count IV in its Order.

At the summary judgment stage, the trial court found that Plaintiffs did not give Defendant a reasonable opportunity to cure, that the length of time before their revocation was unreasonable, and that the "repair" standards of Illinois Lemon Law applied to Plaintiffs' claims brought under the Magnuson-Moss and Commercial Code. Order of February 10, 2017.

IV. SUMMARY OF THE ARGUMENT

In this case the trial court improperly equated the terms "repair" and "cure." Cure, under the Code, means tending conforming goods. Plaintiffs asked for conforming goods, and were, in fact, refused. Thus, the record in this case is that, in fact, the cure was refused.

Even assuming, hypothetically, that "cure" is the same as "repair," the Act

provides for "a reasonable opportunity" (singular) to cure. Defendant repaired the leakage problem in June of 2014; Defendant does not get to repair the same problem multiple times.

Moreover, the trial court also improperly relied on Section 508(1) of the Code, which talks about cure in a context of unexpired time for performance. But the time for performance in this case expired when the RV was bought and delivered to Plaintiffs, i.e., on April 19, 2014. The trial court erred in not applying Section 508(2), which deals with cure when the time for performance has expired, and provides a much more restrictive factual standard under which a seller may cure.

The trial court also erred when, in a summary judgment context, it found the time period before revocation to be unreasonable. Reasonableness is a question of fact, and a fact finder must take all relevant factors into consideration—such as when the warrantor refuses to give an estimate for repairs, or the nature of the goods (in this case, a ***summer*** nature, which made the whole transaction pointless in the absence of a firm estimate).

The trial court also erred when it referenced mitigation, because mitigation is conceptually inapplicable to either breaches of implied warranty of revocation. Implied warranty is breached on tender of delivery, and the damages are fixed then; there is nothing a buyer can do afterwards to mitigate actual damages. (The same obviously is not true with respect to incidental and consequential damage). Similarly, a revocation presupposes a return of a contract price—there is nothing to mitigate here.

The trial court also erred in applying wrong legal standards, apparently across the board. The relevant standards are "cure," "reasonable time or reasonable number of repair

attempts," and "substantial impairment of value." The standards found in Illinois Lemon Law (a 30-day presumption, four repair attempts, etc.) have nothing to do with this case. Plaintiffs did not plead the Lemon Law.

The trial court also erred in not discriminating between revocation under Magnuson-Moss (which does require a reasonable opportunity to cure) and under Section 2-608 of the Code (which does not require a reasonable opportunity to cure).

Finally, the court erred in even addressing Count IV, which was not even addressed in Defendant's Motion or Reply.

V. ARGUMENT

A. Count I—Revocation of Acceptance under the Magnuson-Moss Warranty Act

1. "Cure" is not the same as "repair"

The trial court's ruling is premised on equating "cure" with "repair." But these concepts are not the same.

First, as a matter of English, these terms are obviously not the same. As pointed out below, they are not used interchangeably in statutes or case law.

The term "cure" has a specific legal meaning. It is referenced in Section 508 of the Illinois Commercial Code. Section 508 ("Cure by seller of improper tender of delivery; replacement") makes it clear that "cure" is a responsibility of the "seller," and moreover indicates that, to properly "cure," the seller must either "substitute a conforming tender" or "make a conforming delivery." 810 ILCS 5/2-508. Thus, by definition, "cure" is not a "repair."

The trial court cited to the Belfour case. Defendant also cited to the Belfour case,

even dropping an offensive footnote intimating that Plaintiffs' counsel should be sanctioned.

As it happens, Belfour is "on all four(s)." It unequivocally defines "cure" as a new vehicle. "Tendering another substantially similar vehicle is a proper cure because that is what the law requires." Belfour v. Schaumburg Auto, 713 N.E.2d 1233, 1238 (2d Dist. 1999). Belfour then cites to 810 ILCS 5/2-106(2) of the Commercial Code as standing for the proposition that "goods are conforming when they are in accordance with the obligations under the contract." Plaintiffs' contract provided for a new RV. Complaint, Ex. A. This is what they should have been provided with, to get a proper "cure."

2. Section 508(1) does not apply; Section 508(2) does

The trial court compounded its error by referencing sub-section 508(1) as the statutory support for Defendant's right to cure. 810 ILCS 5/2-508(1). But Section 508(1) by its terms applies only to cures within the contract time.

In this case, however, the time for performance has come and gone (as of April 19, 2014, the sale date), so the trial court erred in referencing sub-section 508(1).

Instead, sub-section 508(2) applies, and it allows cure (after the contract time has expired) only when the seller "had reasonable grounds to believe" that the nonconforming goods would be "acceptable to the buyer."

What is apparent immediately is that, whether a seller in this case had "reasonable grounds to believe" would be a question of fact, and therefore the trial court's grant of summary judgment was improper.

Also immediately apparent is that the record is completely silent on Defendant's

"seasonable notification" to Plaintiffs of its intention to cure under sub-section 2-508(2). In fact, the record contains the exact opposite—Defendant's refusal to cure (see next sub-section). Wozniak Amended Aff. ¶5. The record also contains unrebutted evidence that Defendant ***refused*** to give Plaintiff an estimate for the repair time. Wozniak Amended Aff. ¶4. On this record, one cannot say that there is "no genuine issue as to any material fact," 735 ILCS 5/2-1005(c), and therefore summary judgment was improper.

*3. The record uncontrovertably demonstrates that Plaintiffs were **refused** the cure*

In any event, Plaintiffs here asked for a new RV and were refused by the Defendant. Wozniak Amended Aff. at ¶5. Thus, under Belfour, Defendant refused to provide cure, and so summary judgment on this record should have been granted to Plaintiffs, not to Defendant.

4. Mitigation does not apply to revocation of acceptance

The trial court referenced "mitigation," although not clear in reference to what. The case cited by the trial court, Magnum Press Automation, references mitigation as "pertinent" while discussing incidental damages. But return of the purchase price in revocation of acceptance cases is not incidental damages. Thus, while mitigation may apply to incidental and consequential damages, it has nothing to do with the return of the purchase price.

5. Even assuming "cure" was "repair," the issue is reasonableness of time is a question of fact, and the applicable statutes do not establish a bright-light time limit and Illinois Lemon Law does not apply as a matter of law.

While Plaintiffs agree with the trial court that "reasonableness" is the key concept whether the case is brought under the Magnuson-Moss, UCC, or Illinois Lemon Law,

Plaintiffs disagree that the bright-line tests (four repair attempts, 30-day presumption) under the Lemon Law have anything to do with the instant case, or any claims raised in it.

The proper standard under the Magnuson-Moss is "reasonable time or reasonable number of attempts," Pearson v. DaimlerChrysler Corp., 349 Ill.App.3d 688, 813 N.E.2d 230, 237, 286 Ill.Dec. 173 (1st Dist. 2004), and the trial court has an obligation to construe all evidence against the mover.

The trial court, in its Order, made no indication that it considered the relevant facts, such as the fact that the warrantor refused to give an estimate for repair, or the fact that the goods in question were "summer goods," which would be worthless during the winter, or Plaintiffs' testimony that they felt the whole purpose of the transaction was invalidated by the inability to use the RV during the summer. If the trial court did consider these factors, it certainly did not give any indication of this in the Order.

Given the above factors, however, it is a question of fact as to whether all actions were done within "reasonable time" and therefore the grant of summary judgment was improper.

6. Even assuming "cure" was "repair," the Act requires only "a reasonable opportunity" (singular) to cure, and the June repair qualified; in July Plaintiffs were entitled to revoke.

Even assuming that "cure" is the same as "repair," the Act only provides for "a reasonable opportunity" (not "reasonable opportunities"), to cure, so the June repair was all that Defendant was entitled to in the first place.

B. Count II—Breach of the Implied Warranty of Merchantability under the Magnuson-Moss Warranty Act

1. "Cure" is not the same as "repair"

Plaintiffs refer to their argument above (A(1)), as applicable here as well.

2. The standard for breaches of implied warranties is "reasonable time or reasonable number of attempts"

As mentioned above, the proper standard under the Magnuson-Moss is "reasonable time or reasonable number of attempts," Pearson, 813 N.E.2d at 237. And reasonableness is a question of fact. Brame v. City of North Chicago, 2011 IL App (2d) 100760, 955 N.E.2d 1269, 1273, 353 Ill.Dec. 458, 462 (2d Dist. 2011) ("reasonableness is a question of fact"); Basselen v. General Motors Corp., 341 Ill.App.3d 278, 283, 792 N.E.2d 498, 503, 275 Ill.Dec. 267, 272 (2d Dist. 2003) (same).

Whether one counts the time period as between June 14 and August 2 (Wozniak Amended Aff. at ¶6), or June 14 and September 23 (Wozniak Amended Aff. at ¶7), given the fact that Plaintiffs were not given an estimate (Wozniak Amended Aff. at ¶4) for the repair time of the RV, a summer product, there exists a question of fact as to whether the time period was reasonable.

3. Lemon Law does not apply

The trial court erred in commingling the standards of "repair" found in the Illinois Lemon Law (an exclusive remedy that was not asked by Plaintiff, which provides for a buy-back, not warranty damages) with the standards applicable to breaches of implied warranties. As mentioned above, the standard under the Magnuson-Moss Warranty Act is one of reasonableness, not bright lines. Therefore, it was an error to equate reasonableness with either 30-day period, or a number of repair attempts as established by the Lemon Law.

4. Mitigation does not apply to breaches of implied warranty

Implied warranty damages arise at the time of sale, and therefore cannot be mitigated. Standard warranty damages are expressed as diminished value. 810 ILCS 5/2-714. They accrue at the time of acceptance:

> Under the UCC, "The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount." 810 ILCS 5/2–714 (2) (West 2000).

Razor v. Hyundai Motor America, 222 Ill.2d 75, 106, 854 N.E.2d 607, 626, 305 Ill.Dec. 15, 34 (2006). See aslo, Zwicky v. Freightliner Custom Chassis Corp., 373 Ill.App.3d 135, 145-46, 867 N.E.2d 527, 536, 310 Ill.Dec. 836, 845 (2d Dist. April 25, 2007) (date of acceptance is the relevant date for calculating diminished value damages):

> Moreover, the admission that "there are presently no known defects" in the motor home does not preclude the plaintiffs from showing that defects existed at the time they received the motor home. August 31, 1999 (the date of acceptance, *i.e.*, the date that plaintiffs received the motor home), is the relevant date for calculating damages under the UCC (810 ILCS 5/2-714(2) (West 2004)), and the admission that the motor home had no defects on a later date (in February 2003, when the plaintiffs failed to respond to the requests for admissions) does not bar the plaintiffs from showing that defects existed when they received the motor home. *Pearson*, 349 Ill.App.3d at 696.

Thus, if the relevant date for calculating damages is the date of acceptance, then mitigation these types of damages (diminished value) is a legal impossibility. The damages are what the damages are, and nothing post-acceptance—such as repairing the vehicle, or any kind of cure, ***or even selling it*** (Shoop v. DaimlerChrysler)1 does not affect the amount of damages.

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1 371 Ill.App.3d 1058, 1063, 864 N.E.2d 785, 789, 309 Ill.Dec. 544, 548 (1st Dist. 2007) (a sale of a car for a fair market value does not make the case moot; damages are calculated at the time of acceptance;

Accordingly, to the extent the trial court referenced mitigation of damages one of the grounds for granting summary judgment, this was error. (Naturally, the legal principle analyzed above does not apply to incidental or consequential damages, which can indeed be mitigated.)

5. Even assuming "cure" was "repair," the issue is reasonableness of time is a question of fact, and the applicable statutes do not establish a bright-light time limit and Illinois Lemon Law does not apply as a matter of law

As mentioned above (B(2) and B(3)), reasonableness of time is a question of time, and Illinois Lemon Law simply does not apply.

C. Count III—Revocation of Acceptance and Cancellation of Contract under Sections 2-608 and 2-711 of the Commercial Code

1. There is no requirement of "cure" under 2-608(b)

The trial court improperly commingled different standards as they apply to revocation of acceptance under Magnuson-Moss and under Section 2-608 of the Commercial Code.

While Magnuson-Moss undeniably imposes a requirement of cure, this requirement applies only in one of the two prongs of Section 2-608. This is because the applicable provisions are disjunctive: a buyer may revoke if he accepted non-conforming goods:

> (a) on a reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; ***or***
>
> (b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

---

summary judgment for the manufacturer reversed).

810 ILCS 5/2-608(1)(a) and (b) (emphasis added).

Because of the disjunctive nature of the above statutory provisions, the majority of courts concluded that, when revocation occurs under sub-section (b)—such as in a case of a vehicle with substantial hidden defects, which happens to be the facts of this case—there is no right to cure as a matter of law. Economy Folding Box Corp. v. Anchor Frozen Foods Corp., 515 F.3d 718, 721 (7th Cir. 2008) ("most courts 'have concluded that the seller's right to cure does not apply to situations in which the buyer revokes acceptance based on a subsequently discovered defect'", applying Illinois law).

As explained by a sister court:

> A majority of courts considering this question have concluded that a seller has no right to cure after a buyer revokes his acceptance under § 2-608(1)(b) of the UCC. ***
>
> [5] We adopt the majority approach to the construction of § 2-608(1)(b). Under the plain language of M.C.L. § 440.2608(1)(b); MSA 19.2608(1)(b), a seller has no right to cure a defect that was not discoverable when the buyer accepted the goods. The Legislature explicitly granted the seller a right to cure in M.C.L. § 440.2508; MSA 19.2508, and implicitly granted a similar right in M.C.L. § 440.2608(1)(a); MSA 19.2608(1)(a) (acceptance with knowledge of a nonconformity that the seller will seasonably cure). The Legislature granted no such right in M.C.L. § 440.2608(1)(b); MSA 19.2608(1)(b). We will not read a right to cure into § 2-608(1)(b) where the Legislature granted that very right in other sections, but did not do so here. See *Farrington v. Total Petroleum, Inc.*, 442 Mich. 201, 210, 501 N.W.2d 76 (1993). ***

Head v. Phillips Camper Sales & Rental, 593 N.W.2d 595, 600-01 (Mich.App. 1999).

2. The standards articulated by the trial court do not apply to 2-608

The trial court erred in commingling the standards applicable to revocation under the Magnuson-Moss Warranty Act and under the Code. The best Plaintiff could determine, the trial court concentrated on the right to cure (which does not apply in

608(1)(b) cases) and reasonableness of time (which, in revocation cases, results in an opposite inquiry, i.e., whether the revocation came ***too late***). But, as far as Plaintiffs could determine, the trial court has not addressed the "substantial impairment of value" standard that Section 608 establishes. Therefore, the record is void of proper analysis, and summary judgment was improper.

D. Count IV—Action to Recover the Price under Section 2-711(1) of the Commercial Code

1. The trial court erred in even ruling on Count IV

Defendant's Motion for Summary Judgment, and Defendant's Reply brief as silent as to Count IV. Accordingly, Plaintiff did not respond. Nevertheless, Count IV was dismissed together with the other three counts (Plaintiffs are not entirely sure whether Count III was also properly addressed, either by Defendant or the trial court.)

2. Trial court's sua sponte ruling violated the adversarial principle of litigation

The dismissal was improper. In dismissing Count IV, the trial court took this case outside of the adversarial issues as framed by the parties. Illinois courts do not approve of going outside of the issues as framed by the parties in an adversary process—

Moreover, in *Greenlaw v. United States*, 554 U.S. 237, 243, 128 S.Ct. 2559, 2564, 171 L.Ed.2d 399, 408 (2008), the United States Supreme Court recently addressed the propriety of a reviewing court ruling upon issues raised *sua sponte.* The Court admonished:

> 'In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present. To the extent courts have approved departures from the party presentation principle in criminal cases, the justification

has usually been to protect a *pro se* litigant's rights. [Citation.] But as a general rule, "[o]ur adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." [Citation.] As cogently explained:

Our appellate court in *People v. Rodriguez*, 336 Ill.App.3d 1, 14 [270 Ill.Dec. 159, 782 N.E.2d 718] (2002), expressed a similar sentiment as follows:

'While a reviewing court has the power to raise unbriefed issues pursuant to Supreme Court Rule 366(a)(5), we must refrain from doing so when it would have the effect of transforming this court's role from that of jurist to advocate. [Citation.] Were we to address these unbriefed issues, we would be forced to speculate as to the arguments that the parties might have presented had these issues been properly raised before this court. To engage in such speculation would only cause further injustice; thus we refrain from addressing these issues *sua sponte*.'" *Givens*, 237 Ill.2d at 323–24, 343 Ill.Dec. 146, 934 N.E.2d 470.

People v. Hernandez, 2012 IL App (1st) 092841, 967 N.E.2d 910, 931, 359 Ill.Dec. 880, 901 (1st Dist. 2012). See also Viewig v. Friedman, 173 Ill.App.3d 471, 474, 526 N.E.2d 364, 366, 122 Ill.Dec. 105, 107 (2d Dist. 1988) ("A party cannot be afforded relief absent a corresponding pleading.").

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Honorable Court reverse grant of summary judgment to Defendant (Counts I through IV).

KIMBERLY ACCETTURA
ADAM WOZNIAK

By: _____
One of their attorneys

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IN THE CIRCUIT COURT FOR THE SIXTEENTH JUDICIAL CIRCUIT
KANE COUNTY, ILLINOIS

KIMBERLY ACCETTURA and ADAM WOZNIAK,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	14 CH 1467
	)	
VACATIONLAND, INC.,	)	
	)	
Defendant.	)	

DEFENDANT'S VACATIONLAND, INC.'S RESPONSE TO PLAINTIFFS' MOTION TO RECONSIDER

NOW COMES Defendant, VACATIONLAND, INC., by and through its attorneys, MOMKUS McCLUSKEY ROBERTS LLC, and for its Response to Plaintiffs' Motion to Reconsider, states as follows:

I. Plaintiffs' Motion to Reconsider Improperly Attempts to Raise New Arguments and, Accordingly, Must Be Denied.

The purpose of a motion to reconsider is to bring to the court's attention (i) newly discovered evidence, (ii) changes in the law, or (iii) errors in the court's previous application of existing law. *River Plaza Homeowner's Ass'n v. Healey*, 389 Ill.App.3d 268, 280, 904 N.E.2d 1102 (1st Dist. 2009). A motion to reconsider is not designed to allow the losing party to have a "second bite at the apple," and the losing party is not entitled to raise new arguments in its motion to reconsider unless it provides a reasonable explanation for its failure to present the argument prior to the original ruling. *Delgatto v. Brandon Assoc., Ltd.*, 131 Ill. 2d 183, 195, 545 N.E.2d 689 (Ill. 1989).

Here, Plaintiffs' Motion to Reconsider relies entirely on new arguments that they could have - but failed to - raise in their Response to Defendant's Motion for Summary Judgment. Indeed, in their Response brief, Plaintiffs only argued that (i) Defendant improperly relied upon

deposition transcripts that were not "filed" with the court and (ii) the issue of whether Defendant cured the vehicle within a reasonable amount of time (as opposed to a reasonable amount of attempts) was a question of fact that precluded summary judgment.

This Court properly ruled that both arguments failed. Now, Plaintiffs seek to raise seventeen (17) pages of new arguments in their Motion to Reconsider, but do not explain why they failed to raise these arguments previously. For this reason alone, Plaintiffs' Motion to Reconsider is fatally flawed and should be denied.

In addition, Plaintiffs filed a seventeen (17) page motion without leave of court. This Motion exceeds this Court's page limit by seven (7) pages, and the final seven (7) pages of the Motion should be stricken and not considered. *See* Local Rule 6.07(c).

II. All Claims Raised by Plaintiffs Require Plaintiffs to Provide Defendant With a Reasonable Opportunity to Cure, Including by Repair, and the Uncontroverted Evidence Establishes that Plaintiffs Did Not Provide Defendant With This Opportunity.

For the first time, Plaintiffs argue that the Uniform Commercial Code's term "cure" does not include attempts at repair and that the only way Defendant could have properly "cured" a nonconforming good was to offer a replacement without making any attempt at repair. *See* Motion to Reconsider, p.7-8. This argument flies in the face of both Illinois case law and statutory law and fails as a matter of law.

Illinois courts have repeatedly stated that repairs to nonconforming goods are sufficient to "cure" any nonconformity under the Uniform Commercial Code. In *Belfour*, the court stated that "courts will resort to revocation of acceptance only after *attempts at adjustment* have failed." *Belfour v. Schaumberg Auto*, 306 Ill.App.3d 234, 242, 713 N.E.2d 1233 (2nd Dist. 1999). (Emphasis provided). Indeed, the only reason that the court in *Belfour* focused on the seller's

attempts to replace the vehicle was because, as the court noted, the vehicle was a total loss and any attempts at repair would be ineffective. *Id.* at 236, 1233.

In *Pearson*, the court held that, in order to prove that the defendant breached its limited warranty, the plaintiff must prove, among other things, that the plaintiff afforded defendant a reasonable opportunity to repair the defect and that the defendant was unable to repair the defect after a reasonable time or reasonable number of attempts. *Pearson v. DaimlerChrysler Corp.*, 349 Ill.App.3d 688, 696, 813 N.E.2d 230 (1st Dist. 2004).

Indeed, the commentary to Section 2-608 of the Illinois Uniform Commercial Code clearly states "cure" anticipates "attempts at adjustment." 810 ILCS 5/2-608 Commentary at (4) and (5). There is no basis for Plaintiffs' argument that a nonconforming product can only be "cured" by offering a replacement.

Furthermore, the Magnuson-Moss Warranty Act explicitly requires that the seller under a warranty or service contract must be provided with a "reasonable opportunity to cure." 15 USC Sect. 2310(e). Indeed, Plaintiffs' argument, if true, would turn all warranty agreements into "replacement" agreements. If a warrantor is not allowed an opportunity to repair a vehicle pursuant to its warranty, it would be put in the position of having to automatically replace all vehicles with nonconformities, regardless of the size or severity of the issue.

For these reasons, Plaintiffs' new argument that they were "refused" a cure also fails. *See* Motion to Reconsider, at p.9. The Illinois Uniform Commercial Code does not require a seller to offer a replacement in order to cure an alleged nonconformity. The Code and its interpreting case law both specify that repairs are sufficient to "cure." Indeed, Plaintiffs only requested a replacement vehicle after they dropped off the vehicle for repair. Plaintiffs elected to repair the

vehicle and cannot unilaterally demand a new type of "cure" before Defendant had a reasonable amount of time to attempt repairs.

Plaintiffs similarly attempt to misconstrue the Magnuson-Moss Warranty Act to allow for one, singular opportunity to cure a nonconformity. *See* Motion to Reconsider, at p.10-11. However, the term "reasonable opportunity to cure" encompasses one or more attempts at repair. 15 U.S.C. Sect. 2310(e). The court in *Pearson* clarified that, under the Magnuson-Moss Warranty Act, a limited warranty is only breached if "successful repairs are not made within a reasonable time or within a reasonable number of attempts." *Pearson*, 349 Ill.App.3d at 695, 236. The court's use of the plural in limiting a warrantor's reasonable attempt to cure clearly indicates that a seller can make more than one attempt at repairing a vehicle and still be within the Act's limits of what constitutes proper cure.

Moreover, even if a seller was allowed only one attempt to fix a nonconformity, Defendant was in the midst of this attempt when Plaintiffs' wrongfully revoked their acceptance. As Defendant argued in its Motion for Summary Judgment, Plaintiff Adam Wozniak stated in his deposition that (i) the vehicle experienced an issue with its emergency exit release in June, 2014, and this issue was satisfactorily repaired, (ii) in July, 2014, the vehicle experienced a new and separate issue with its dinette and electrical system, and (iii) the new issue was being repaired when Plaintiffs revoked their acceptance of the vehicle. *See* Deposition of Adam Wozniak, a true and accurate copy of which is attached hereto as **Exhibit A**, at p. 10, 15-16, 21, 30-32. The July, 2014 issue was a separate and distinct problem which Defendant was in the process of curing for the first time when Plaintiffs revoked their acceptance. Accordingly, even if the statute is construed to allow only one attempt to cure, Defendant was not provided with that opportunity before Plaintiffs' wrongfully revoked the agreement.

III. This Court Did Not Err By Referencing 2-508(1).

Plaintiffs now argue that Section 2-508(1) of the Illinois Uniform Commercial Code is inapplicable to this matter and this Court should not have cited to this section. *See* Motion to Reconsider, at p.8-9

Again, this is a new argument which should have been made in Response to Defendant's Motion for Summary Judgment. Defendant referenced Section 2-508(1) repeatedly in its Motion for Summary Judgment and Plaintiffs never argued that the section was inapplicable. *See* Defendant's Motion for Summary Judgment, at para 10, 18.

Regardless, the differences between Section 2-508(1) and (2) are immaterial for the purposes of this matter. Both Section 2-508(1) and 2-508(2) of the Illinois Uniform Commercial Code stand for the proposition that the seller must be provided with a reasonable opportunity to cure any alleged nonconformity in the goods. Indeed, Section 2-508(2) is unequivocal that the seller must be given a "further reasonable time" to cure. 810 ILCS 5/2-508(2). Here, as this Court has already found, Plaintiffs did not provide Defendant with a reasonable opportunity to correct the non-conformity.

Plaintiffs' argument that Section 2-508(2) requirement of reasonable time creates a question of fact that precludes summary judgment is equally unavailing. Plaintiffs have presented no evidence or facts on the record to support their claim. Indeed, Plaintiffs' sworn testimony in this matter is that they presented the vehicle to Defendant for repairs on July 14, 2014 and then revoked the contract on or before August 2, 2014, without having viewed the vehicle or verifying if the repairs had been done. Plaintiffs' act of submitting the vehicle for repairs clearly demonstrates that curing the nonconformity through repair is acceptable.

Plaintiffs cannot rest on their pleadings in order to raise a genuine issue of material fact sufficient to resist summary judgment. *Hutchcraft v. Independent Mechanical Industries, Inc.*, 312 Ill.App.3d 351, 355, 726 N.E.2d 1171, 1175 (2000).

While reasonableness is generally a question of fact, in order for an issue of fact to exist, there must be some facts in the record that would allow Plaintiffs to prevail. *Basselen v. GMC*, 341 Ill.App.3d 278, 284, 792 N.E.2d 498, 504 (2nd Dist. 2003). Here, Plaintiffs have failed to produce any evidence to demonstrate that they provided Defendant with a reasonable opportunity to cure. Accordingly, it was appropriate for this Court to determine this matter by granting summary judgment.

IV. The Duty to Mitigate Damages Is A Requirement of All Causes of Action Under the Uniform Commercial Code.

Plaintiffs now argue for the first time that this Court should not examine the issue of whether they mitigated their damage. *See* Motion to Reconsider, at p.9. The Uniform Commercial Code imposes duties of good faith, commercial reasonableness, and a duty to mitigate damages on any cause of action that arises pursuant to its provisions. *American Nat'l Bank & Trust Co. v. Weyerhaeuser Co.*, 692 F.2d 455, 468 (7th Cir. 1982). Plaintiffs have failed to cite to any statutory or case which stands for the proposition that actions for revocation are an exception to this rule.

V. The New Vehicle Buyer Protection Act is Relevant and was Properly Considered by this Court.

As stated above, the Uniform Commercial Code imposes duties of good faith and commercial reasonableness on all of its actions. The New Vehicle Buyer Protection Act specifies that, a "reasonable" opportunity to cure in the context of a new vehicle is four (4) or more attempts or thirty (30) or more business days. 815 ILCS 380/3.

When interpreting statutes, it is appropriate and common for courts to refer to another statute by analogy. *McNamee v. Federated Equip. & Supply Co.*, 181 Ill.2d 415, 424, 692 N.E.2d 1157, 1162 (Ill. 1998). Here, this Court's reference to the New Vehicle Buyer Protection Act was particularly appropriate as the statute concerns the same type of goods that are at issue here: new motor vehicles.

Again, Plaintiffs cannot attempt to rescue their case by belatedly arguing that "reasonableness" is a question of fact that cannot be determined on summary judgment. Plaintiffs' failure to set forth evidence in support of their claim has doomed their case and judgment is appropriate as a matter of law. *Basselen*, 341 Ill.App.3d at 284, 504.

Plaintiffs further misconstrue the record by arguing that the Code only entitles parties to one attempt at repair, and that the repair completed in June exhausted Defendant's one and only opportunity.

As an initial matter, Plaintiffs' interpretation of the Code as allowing a seller only one chance at repair is flawed. The Commentary to Section 2-608 specifically anticipates there will be multiple "attempts at adjustment." 810 ILCS 5/2-608, Comments (4) and (5). Furthermore, the New Vehicle Buyer Protection Act, which this Court has properly determined to be analogous and informative on this subject, states that up to four (4) attempts at repair is reasonable when a new motor vehicle is concerned.

Problematically, Plaintiffs' argument is premised on its allegation that the June and July defects were one and the same. This is (i) a new argument that should have been raised in response to Defendant's Motion for Summary Judgment and (ii) is contradicted by Plaintiffs' own testimony! At his deposition, Plaintiff Adam Wozniak affirmatively stated that the problem with the dinette (that was satisfactorily repaired in June, 2014) was separate and distinct from the

problem that occurred in July, 2014. Plaintiffs cannot now belatedly attempt to argue in contradiction to their own testimony.

Plaintiffs have admitted that the June and July issues were separate and, accordingly, even if the Illinois Uniform Commercial Code is held to limit sellers to only one attempt to cure a defect, Defendant was in the midst of attempting the repair the July, 2014 issue when Plaintiffs unreasonably revoked the sales contract.

VII. This Court Properly Dismissed Count IV of Plaintiffs' Complaint for Violations of Section 2-711.

Defendant moved for summary judgment as to all counts. Plaintiffs failed to raise any argument in support of their Count IV for return of the purchase price, and this Court properly ruled that this count failed. Plaintiffs now claim that this was a "sua sponte" ruling, but the record belies this point.

Moreover, the denial of Plaintiffs' Count III under the Uniform Commercial Code necessary dooms Count IV. Section 2-711 provides that a buyer may recover its purchase price where "the buyer rightfully rejects or justifiably revokes . . ." 810 ILCS 5/2-711(1). This Court has already (correctly) determined that Plaintiffs did not rightfully revoke the sales agreement. Accordingly, Count IV fails as a matter of law.

CONCLUSION

For the reasons set forth above, Plaintiffs' Motion to Reconsider is both substantively and procedurally defective and should be denied.

WHEREFORE, Defendant, VACATIONLAND, INC., requests that this Honorable Court deny Plaintiffs' Motion to Reconsider, and for any other or further relief that this Court deems just and equitable.

Respectfully Submitted,

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IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT
KANE COUNTY, ILLINOIS

Kimberly Accettura, and Adam Wozniak, Plaintiffs, v. Vacationland, Inc. Defendant.	))))))	No. 14 CH 1467 **JURY OF 12 DEMAND**

REPLY TO DEFENDANT'S RESPONSE TO MOTION TO RECONSIDER

I. REVIEW OF SUMMARY JUDGMENT IS DE NOVO

Given that the standard of review of summary judgment decisions is de novo, whether or not Plaintiffs raise new arguments is irrelevant. The basic argument of Plaintiffs remain the same—there were genuine issue of material fact that precluded grant of summary judgment, because the attempted repairs took unreasonable time, and because the value of the RV was substantially impaired to Plaintiffs.

As for exceeding the page limit under the Local Rules, Defendant is absolutely correct, counsel missed this Rule. Accordingly, together with this Reply Plaintiffs file a Motion for Leave to exceed the page limit.

II. REASONABLE OPPORTUNITY TO REPAIR VERSUS SUBSTANTIAL IMPAIRMENT OF VALUE

Defendant confuses two legal standards and argues as if they apply to all claims. This is not so. For revocation of acceptance the standard is "substantial impairment of value." 810 ILCS 5/2-608(1). For breaches of warranty under the Magnuson-Moss Warranty act, the standard is "reasonable time or reasonable number of attempts." Pearson

v. DaimlerChrysler Corp., 349 Ill.App.3d 688, 813 N.E.2d 230, 237, 286 Ill.Dec. 173 (1st Dist. 2004). The two standards are not the same.

Defendant quotes the "attempts at adjustment" from the Official Comment to Section 2-608 out of context. The comment describes the extension of time to give notice after "attempts at adjustment," rather than imposes an obligation to submit to such attempts. In any event, the genuine issue of material fact here is that, based on the record (Wozniak Amended Affidavit ¶¶4, 6), because, after Plaintiff given the Defendant-warrantor the opportunity to do an "adjustment," Defendant-warrantor refused to give Plaintiffs a time estimate for repairs. Under these conditions, revocation of acceptance was justified.

Similarly, under the "reasonable time or reasonable number of attempts" standard of the Magnuson-Moss Act, when a warrantor refuses to provide a time estimate for a repair, for a summer product such as an RV, there is a genuine issue of material fact as to whether the time for repairs was unreasonable.

Under either theory, the refusal to give a time estimate for repairs in the death knell of Defendant's request for a summary judgment. This refusal creates a genuine issue of material fact as to whether: (1) Plaintiffs' revocation was justified; and (2) Defendant took an unreasonable time to repair.

III. 815 ILCS 508(2), RATHER THAN 508(1), APPLIED

It was an error of law to apply the wrong law. The time for performance for Defendant was long gone, and therefore summary judgment under Section 508(1) does not lie.

Under the explicit terms of Section 508(2), the seller has to have "reasonable grounds to believe" that the non-conforming tender would be acceptable to seller. The record is devoid of any such evidence. Moreover, to be acceptable, non-conforming tender may be "with or without money allowance." The record is devoid of any such evidence. Finally, the death knell of Defendant's defense is the requirement that the seller has to "seasonably notify[y] the buyer" of its intention to substitute a confirming tender. As demonstrated before, the seller did no such thing; in fact, the seller ***refused*** to give Plaintiffs any time estimate for repairs. This does not qualify as a seasonable notification (which presupposes something along the lines, "on such-and-such date we will give you conforming tender"), and creates a genuine issue of material fact.

Thus, there are at least two grounds here why summary judgment is improper. Defendant's own motion references the time period of July 14 and August 2, during which repairs were supposedly attempted. Response at 5. To that two week period, one has to add the first repair, that took place a mere week after the purchase of the RV. Wozniak dep., 8:6-9:9, Accettura dep., 30:17-32:11. The Court cannot say that this period of time a "reasonable time" as a matter of law. Not for a summer product, while summer is quickly disappearing. But the death knell is Defendant's refusal to provide a time estimate for the completion. (Wozniak Amended Affidavit, ¶¶4, 6.) On this record, no one say that the repair time was reasonable as a matter of law.

Defendant's claim that Plaintiffs "failed to produce any evidence to demonstrate that they provided Defendant with a reasonable opportunity to cure" is simply wrong. First, even if we exclude the first leak repair in June, the two-week period acknowledged

by Defendant cannot be said to be reasonable as a matter of law; and next, Defendant's refusal to provide the completion date makes the repair completely unreasonable. Wozniak Amended Affidavit, ¶¶4, 7. Sellers do not have an unlimited open time to tender conforming goods, or to repair under their warranties.

(As pointed out in Plaintiff's Motion, when a seller revokes under Section 2-608(1)(a), the majority rule is that there is no right to cure at all. Defendant did not address this issue in its Response at all, and not surprising, given that both the statutory language and the case law are squarely against it.)

IV. MITIGATION IS A RED HERRING

Defendant seems to think that buyers are required to subject themselves to an open-ended repair process, and those who refuse fail to mitigate. There is no case that holds this.

Moreover, mitigation simply does not conceptually apply to warranty actual damages (it does to incidental and consequential). Standard warranty damages (diminished value, 810 ILCS 5/2-714) accrue at the time of acceptance. Once they accrue, there is nothing to mitigate.

Similarly, mitigation is conceptually inapplicable to revocation of acceptance cases, where the claim itself contemplates a return of the purchase price. There is nothing to mitigate there.

Accordingly, mitigation has nothing to do with whether summary judgment can be granted to Defendant.

V. NEW VEHICLE BUYER PROTECTION ACT DOES NOT APPLY

There is not a single case in Illinois that allowed the standards from the New Vehicle Buyer Protection Act (which are a presumption, in any event) to override different standards under Section 2-608 (revocation of acceptance, "substantial impairment of value") or Magnuson-Moss ("reasonable time or reasonable number of attempts").

In fact, applying the Act in a warranty context would lead to absurd results. For example, suppose that the defect in a car is a blown engine. Under Defendant's reasoning, a consumer must suffer through four (4) blown engines before he/she can get relieve. This is ridiculous. Obviously the reasonableness depends on the nature of a defect. A broken radio may require more than four repairs to reach the unreasonable state; a blown engine might only need one.

In this case, Defendant-warrantor ***refused to give Plaintiff a time repair estimate***, for a summer product. On these facts, revoking acceptance on August 2 was completely justified.

And to apply the wrong standard was an error of law.

VII. IN ITS MOTION, DEFENDANT DID NOT SAY A WORD ABOUT COUNT IV

There is nothing in Defendant's Motion that even hints at Count IV. Accordingly, it was an error to even address it.

VIII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Honorable Court reverse grant of summary judgment to Defendant (Counts I through IV).

KIMBERLY ACCETTURA
ADAM WOZNIAK

By: /s/ Dmitry N. Feofanov
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IN THE CIRCUIT COURT FOR THE SIXTEENTH JUDICIAL CIRCUIT
KANE COUNTY ILLINOIS
IN CHANCERY

Kimberly Accettura and Adam Wozniak Plaintiffs, v. Vacationland, Inc., Defendant.	)	Case No. 2014-CH-1467 Hon. David R. Akemann Circuit Judge Presiding.

Thomas M. Kartsonis
Clerk of the Circuit Court
Kane County, IL

JUL - 5 2017

FILED 034
ENTERED

ORDER

THIS CAUSE coming to be heard upon Plaintiffs' Motion to Reconsider, Defendant Vacationland, Inc.'s Response to Plaintiffs' Motion to Reconsider, and Plaintiffs' Reply to Defendant's Response to Motion to Reconsider, and this court, having considered the pleadings, affidavits, exhibits, and oral arguments of counsel, and being otherwise fully advised in the premises, finds:

BACKGROUND

1. In short summary, on February 27, 2017, Plaintiffs filed their Motion to Reconsider this Court's February 10, 2017 order granting Defendant's Motion for Summary Judgment claiming this Court "improperly equated the terms repair and cure," this Court improperly relied on Section 508(1) of the Code, this Court erred when it found the time period before revocation to be unreasonable, this Court erred when it referenced mitigation, this Court erred in not discriminating between revocation under Magnuson-Moss and under section 2-608 of the Code, and this Court erred when it addressed Count IV.

2. On March 30, 2017, Defendant filed its Response to Plaintiffs' Motion to Reconsider asserting Plaintiffs' Motion improperly attempts to raise new arguments, uncontroverted evidence establishes that Plaintiffs did not provide Defendant with a reasonable opportunity to cure, this Court did not err by referencing 2-508(1), the duty to mitigate damages is a requirement of all causes of action under the Uniform Commercial Code, the New Vehicle Buyer Protection Act is relevant and properly considered by this Court, and this Court properly dismissed Count IV of Plaintiffs' Complaint for Violations of Section 2-711.
3. On April 12, 2017, Plaintiffs filed their Reply to Defendant's Response to their Motion to Reconsider, asserting Defendant's refusal to provide a time estimate for repairs creates a genuine issue of material fact, this Court applied the wrong law when applying section 508(1) rather than section 508(2) of the Uniform Commercial Code, mitigation is inapplicable to revocation of acceptances cases, the New Vehicle Buyer Protection Act does not apply, and this Court was in error to rule on Count IV.

STANDARD

4. "The purpose of a motion to reconsider is to bring to the court's attention newly discovered evidence which was not available at the time of the hearing, changes in the law or errors in the court's previous application of existing law. *Duresa v. Commonwealth Edison Co.*, 348 Ill. App. 3d 90, 97 (1st Dist. 2004). A motion to reconsider is "addressed to the trial court's sound discretion." *Redelmann v. Claire Sprayway, Inc.*, 375 Ill. App. 3d 912 (1st Dist. 2007). A trial court has discretion to review a motion to reconsider based on new arguments not presented during the motion for summary judgment as long as "there is a reasonable explanation for why the

additional issues were not raised at the original hearing." *Daniels v. Corrigan*, 382 Ill. App. 3d 66, 71 (1st Dist. 2008). A trial court should deny a motion to reconsider where the moving party presents new material that was available prior to the hearing on the motion for summary judgment, but was never presented. *River Vill. I, LLC v. Cent. Ins. Cos.*, 396 Ill. App. 3d 480, 493 (1st Dist. 2009).

ANALYSIS

Count I - Revocation of Acceptance under the Magnuson-Moss Warranty Act

5. Under section 2304(a)(4) of the Magnuson-Moss Warranty Act, "if the product cannot be repaired after a reasonable number of attempts, the consumer may elect either a replacement or a refund." *Pearson v. DaimlerChrysler Corp.*, 349 Ill. App. 3d 688, 695 (1st Dist. 2004).
6. When the seller's tender or delivery is rejected by the buyer as nonconforming and the time for performance under the contract has not yet expired, §2-508(1) permits the seller "to make a conforming delivery within the contract time upon seasonable notification to the buyer." 810 ILCS 5/2-508(1), UCC Comment 1. Further, section 2-508(2) gives a seller reasonable time to cure a tender of nonconforming goods when the seller reasonably believed that the buyer would accept the tender. 810 ILCS 5/2-508(2). Section 508(2) applies even where the contract time has expired. *Id.*
7. Here, Plaintiffs argue that under the Uniform Commercial Code cure is not the same as repair. However, cure contemplated by the Uniform Commercial Code includes "repair or partial substitution." 810 ILCS 5/2-510, Comment 2.
8. Additionally, Plaintiffs argue a proper cure under *Belfour* and the parties' contact would have been for Defendant to provide a new RV. Plaintiffs' argument here is unconvincing.

The contract in *Belfour* provided that the defendant was obligated to repair or replace the product, however, unlike in this case, the defendants were not able to repair the vehicle as it "was a total loss." *Belfour*, at 236. Moreover, in *Pearson*, the court cited *Nowalski v. Ford Motor Company*, where the court there found a consumer may ask for a replacement or refund of a product if it cannot be repaired after a reasonable number of attempts. *Pearson*, at 695. Thus, Plaintiffs' argument that they are entitled to a replacement without giving Defendants a reasonable opportunity to repair is unconvincing.

9. Lastly, Plaintiff argues this Court improperly cited to 810 ILCS 5/2-508(1) rather than section 5/2-508(2). Plaintiff is correct. In error, this Court cited to Section 5/2-508(1) rather than 5/2-508(2). However, as stated above, section 2/5-508(2) gives a seller a reasonable opportunity to cure nonconforming goods and Plaintiffs did not provide Defendant with a reasonable opportunity to cure. Therefore, Plaintiffs' Motion to Reconsider Count I is denied.

Count II - Breach of Implied Warranty of Merchantability under the Magnuson-Moss Warranty Act

10. The Magnuson-Moss Warranty Act requires that the warrantor repair the product at a reasonable time and if the product cannot be repaired after a reasonable number of attempts, the consumer may either elect for either a replacement or refund. 15 USCS § 2304(a)(4); *Pearson*, at 695. "A manufacturer does not have an unlimited time or an unlimited number of attempts to repair and automobile; rather, the limited warranty is breached and/or fails of its essential purpose if successful repairs are not made within a reasonable time or within a reasonable number of attempts." *Pearson*, at 695.

Reasonableness is a question of fact. *Basselen v. GMC*, 341 Ill. App. 3d 278, 283 (2nd Dist. 2003).

11. In this case, Plaintiffs argue there is a question of fact as to whether the period of time for repair was reasonable and that this Court improperly used the New Vehicle Buyer Protection Act. While it's true that reasonableness is a question of fact, Plaintiffs failed to support their claim that they provided Defendant with a reasonable opportunity to cure. Specifically, they failed to show that the June and July issues was a continuing issue with the RV and not separate issues. In addition, a court may refer to another statute by analogy, and thus this Court's reference to the New Vehicle Buyer Protection Act was proper. Therefore, Plaintiff's Motion to Reconsider Count II is denied.

Count III – Revocation of Acceptance and Cancellation of Contract under Sections 2-608 and 2-711 of the Commercial Code

12. "[C]ourts will resort to revocation of acceptance only after attempts at adjustment have failed." *Belfour v. Schaumberg Auto*, 306 Ill. App. 3d 234, 242 (2nd Dist. 1999). Alternatively, when goods have been accepted, a buyer may revoke acceptance when a nonconformity substantially impairs the value of previously accepted goods to the buyer. *Sorce v. Naperville Jeep Eagle*, 309 Ill. App. 3d 313, 319 (2nd Dist. 1999). A buyer may revoke if he or she accepted non-conforming goods: "(a) on a reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or (b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances." 810 ILCS 5/2-608(1). In either case, revocation of acceptance "must be made within a reasonable time after the buyer discovers or should have discovered the ground for revocation." *Sorce*, at 320. The "validity" of a revocation hinges upon material questions of fact, specifically

whether the alleged nonconformities caused substantial impairment to the buyer. *Id.* at 321. Substantial impairment is measured in terms of the particular needs of the buyer. *Id.* (citing *GNP Commodities, Inc. v. Walsh Heffernan Co.*, 95 Ill. App. 3d 966 (1981)). "The buyer must present objective evidence showing that with respect to his own needs, the value of the goods as substantially impaired and not merely that he thought or believed the value was impaired." *GNP Commodities, Inc. v. Walsh Heffernan Co.*, 95 Ill. App. 3d 966, 978 (1981). Additionally, Section 5/2-608 anticipates more than one attempt to cure. *See* section 5/2-608, Comments (4) and (5).

13. In this case, Plaintiffs allege there is not right to cure under 2-608(b) and this Court "commingled" the standards of revocation of acceptance under the Magnuson-Moss Warranty Act and section 2-608 of the Uniform Commercial Code. Plaintiffs' argument regarding the right to cure is unconvincing. Both the Magnuson-Moss Warranty Act and section 2-608 of the Uniform Commercial Code anticipate a reasonable opportunity to cure. However, this Court did not consider the substantial impairment standard. Plaintiffs argue they were entitled to revocation because the defects substantially impaired the value of the RV since Plaintiffs intended use of the RV was for summer. Defendant in its Motion for Summary Judgment or Response to Plaintiffs' Motion to Reconsider does not provide a basis to show under the standard of a summary judgment motion that the defects did not substantially impair the value of the RV to Plaintiffs. Therefore, Plaintiffs Motion to Reconsider Count III is granted.

Count IV – Action to Recover the Price under Section 2-711(1) of the Commercial Code

14. In Plaintiffs' Motion to Reconsider they argue this Court erred in ruling on Count IV because Defendant was silent as to Count IV in their Motion for Summary Judgment and

Reply Brief. Plaintiffs arguments are unconvincing, however, Count IV is derivative of Count III. Therefore, Plaintiff's Motion to Reconsider Count IV is granted.

IT IS THEREFORE ORDERED AND ADJUDGED:

A. Plaintiffs' Motion to Reconsider is granted in part and denied in part.

B. Plaintiffs' Motion to Reconsider Counts I and II are denied.

C. Plaintiffs' Motion to Reconsider Counts III and IV are granted and accordingly, Defendant's motion for summary judgment on Counts III and IV are denied.

Entered this 5th day of July, 2017

Circuit Judge

IN THE CIRCUIT COURT FOR THE SIXTEENTH JUDICIAL CIRCUIT
KANE COUNTY, ILLINOIS

KIMBERLY ACCETTURA and ADAM WOZNIAK,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	14 CH 1467
	)	
VACATIONLAND, INC.,	)	
	)	
Defendant.	)	

DEFENDANT VACATIONLAND, INC.'S MOTION TO RECONSIDER AND/OR CLARIFY THIS COURT'S JULY 5, 2017 ORDER

NOW COMES Defendant, VACATIONLAND, INC., by and through its attorneys, MOMKUS McCLUSKEY ROBERTS LLC, and for its Motion to Reconsider and/or Clarify this Court's July 5, 2017 Court Order pursuant to 735 ILCS 5/2-1203, states as follows:

1. On February 10, 2017, this Court granted Defendant's Motion for Summary Judgment, dismissing Counts I-IV of the Plaintiff's Complaint. *See* this Court's February 10, 2017 Order ("February 10, 2017 Order"), a true and accurate copy of which is attached hereto as Exhibit A. Plaintiffs subsequently moved this Court to reconsider its February 10, 2017 Order.

2. On July 5, 2017, this Court granted in part, and denied in part, Plaintiffs' Motion to Reconsider this Court's February 10, 2017 Order (the "July 5, 2017 Order"). A true and accurate copy of this Court's July 5 Order is attached hereto as Exhibit B.

3. This Court denied the Motion to Reconsider as to Counts I and II, meaning that both counts remained dismissed. However, this Court granted the Motion to Reconsider as to Counts III and IV and, accordingly, denied Defendant's Motion for Summary Judgment as to these counts.

4. In doing so, this Court stated, in part, that:

> "Plaintiff's argument regarding the right to cure is unconvincing. Both the Magnuson-Moss Warranty Act and section 2-608 of the Uniform Commercial Code anticipate a reasonable opportunity to cure. However, this Court did not consider the substantial impairment standard. . . . Defendant in its Motion for Summary Judgment or Response to Plaintiff's Motion to Reconsider does not provide a basis to show under the standard of a summary judgment motion that the defects did not substantially impair the value of the RV to Plaintiffs. Therefore, Plaintiffs Motion to Reconsider Count III is granted."

See Exh. B, at ¶13.

5. This Court's July 5, 2017 ruling appears to hold that Plaintiffs must either establish that (i) Plaintiffs provided Defendant with a reasonable opportunity to cure the defect, or (ii) the nonconformity substantially impairs the goods in question. However, there is no basis for this alternative standard in either the case law or the UCC and, in fact, this holding is contrary to the statutory and case law interpreting the right to revoke under the UCC, as well as this Court's February 10, 2017 ruling.

6. In its February 10, 2017 Order, this Court held that:

> "The buyer **must allow** the seller time to cure **before revoking acceptance** under the UCC. [citing to *Belfour v. Schaumberg Auto*, 306 Ill.App.3d 234, 241 (2nd Dist. 1999)]. 'Thus, courts will resort to revocation of acceptance **only after** attempts at adjustment have failed. *Id.* at 242."

See Exh. A, at ¶8. (Emphasis provided). This Court further ruled on February 10, 2017 that Defendant had proven that Plaintiffs had failed to give Defendant a reasonable opportunity to cure defects in the RV. Exh. A, at ¶9.

7. This Court correctly held on February 10, 2017 that a buyer could not revoke goods unless and until the seller had been provided with a reasonable opportunity to cure, and that, in this case, this reasonable opportunity had not been provided.

8. The reasonable opportunity to cure is a threshold requirement which must be met before a party may revoke under the UCC. The question of whether a nonconformity

substantially impairs the value of the goods need not be considered until it is determined that the seller was provided with a reasonable opportunity to cure.

9. This is affirmed by the Comments to Section 2-608 of the UCC, which states that revocation "will be generally resorted to only after attempts at adjustment have failed." 810 ILCS 5/2-608 at Comment 4.[1]

10. Any attempt to circumvent the requirement that buyers must provide sellers with a reasonable opportunity to cure would directly contradict the holding of *Belfour*, which interpreted Section 608 of the UCC:

> "Plaintiffs argue at length that defendants do not have the right to cure when the buyer rightfully revokes his acceptance. This is not the law. Under the UCC, ***the buyer must allow the seller time to cure before invoking revocation of acceptance***. Thus, courts will resort to revocation of acceptance ***only after attempts at adjustment have failed***."

Belfour v. Schaumberg Auto, 306 Ill. App. 3d 234, 241-42, 713 N.E.2d 1233, 1238 (2nd Dist. 1999). (Emphasis provided; citations omitted). *Belfour* unequivocally states that a reasonable opportunity to cure is a precondition of any rightful revocation of acceptance. The question of whether the nonconformity substantially impaired the value of the goods was never considered by the *Belfour* court because the buyers could not establish that they had provided the seller with a reasonable opportunity to cure.

11. This Court seems to premise its July 5, 2017 Order on an interpretation of Section 2-608 as allowing for revocation if either "attempts at adjustment have failed" or "[a]lternatively, . . . when a nonconformity substantially impairs the value of previously accepted goods." Exh. B,

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[1]Illinois courts have held, consistent with this Comment, that where a seller breaches by tendering nonconforming goods, so long as "the breach has not resulted in personal injury, the UCC prefers the breach to be cured without a lawsuit." *Tudor v. Jewel Foods Stores*, 288 Ill.App.3d 207, 214, 681 N.E.2d 6, 11 (1st Dist. 1997). Indeed, Section 2-607's requirement of notice of nonconformity prior to initiating suit is intended to provide the seller with an opportunity to cure. *Id.*

at ¶12. However, the "alternative" language does not appear in the case cited by this Court for this proposition.

12. Indeed, in case cited by this Court for the proposition that "a buyer may revoke acceptance when a nonconformity substantially impairs the value" of the goods, the case went on to state: "a buyer who chooses to revoke acceptance of goods has the same duties as if the buyer had rejected the goods." *Sorce v. Naperville Jeep Eagle*, 309 Ill.App.3d 313, 321, 722 N.E.2d 227, 232 (2nd Dist. 1999) (citing 810 ILCS 5/2-608(3)).[2]

13. The duties of a buyer when rejecting goods (and therefore, the duties of a buyer when revoking goods), include **providing the seller with a reasonable opportunity to cure or substitute a conforming tender**. 810 ILCS 5/2-508. Thus, it is the duty of a buyer to provide a seller with a reasonable opportunity to cure, and the buyer cannot reject or revoke the goods (regardless of their level of nonconformity) unless it does so.

14. As a result, this Court's July 5, 2017 ruling, to the extent that it attempts to abrogate the requirement of a reasonable opportunity to cure, is at odds with the Second District Appellate Court's *Belfour* ruling, Section 2-608(3) of the UCC, and this Court's own February 10, 2017 ruling.

15. Whether a reasonable opportunity to cure was provided is a threshold question. This Court has already determined that Plaintiffs failed to provide Defendant with a reasonable opportunity to cure and, accordingly, their suit may not go any further, regardless of the level of impairment to the goods.

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[2] *Source* did not discuss the issue of whether the buyer gave the seller a reasonable opportunity to cure, presumably because, as the court noted, the buyer had sought service for problems with his vehicle more than thirty (30) times. *Id.* at 321, 233.

16. Defendant therefore requests that this Court (i) reconsider and modify its July 5, 2017 to uphold summary judgment in favor of Defendant on all counts or (ii) clarify its ruling as to the requirement that a buyer provide a seller with a reasonable opportunity to cure prior to revoking goods.

17. WHEREFORE, Defendant, VACATIONLAND, INC., requests that this Honorable Court (i) reconsider and modify its July 5, 2017 to uphold summary judgment in favor of Defendant on all counts or (ii) clarify its ruling as to the requirement that a buyer provide a seller with a reasonable opportunity to cure prior to revoking goods, and (iii) for any other or further relief that this Court deems just and equitable.

Respectfully Submitted,

MOMKUS McCLUSKEY ROBERTS LLC

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IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT
KANE COUNTY, ILLINOIS

Kimberly Accettura, and Adam Wozniak, Plaintiffs, v. Vacationland, Inc. Defendant.	))))))	No. 14 CH 1467 **JURY OF 12 DEMAND**

RESPONSE TO DEFENDANT'S MOTION TO RECONSIDER
AND A CROSS-MOTION (SECOND) TO RECONSIDER

Prompted by Defendant's Motion to Reconsider, Plaintiffs bring to the Court's attention the following infirmities in the Court's Order of July 5, 2017: (1) use of terms "cure" and "repair" interchangeably, even though they are not the same; (2) application of the wrong legal standard in the implied warranty count; (3) failure to distinguish between two different legal standards of Section 2-608; and, (4) failure to construe the utter absence of evidence against the movant, as required by the summary judgment standard of review.

Count I, Revocation of Acceptance under the Magnuson-Moss Warranty Act

The Act imposes a requirement of a "reasonable opportunity to cure." 15 U.S.C. §2310(c). What is "cure"?

The analysis has to consider the UCC (because the Magnuson-Moss Act is, in essence, a disclosure act, and refers to the state law for most of it substantive provisions).

Previously, Plaintiffs pointed out that the Court's reliance on Section 5/2-508(1) ("Cure by seller of improper tender or delivery"), on which the Court relied in its initial ruling, did not apply.

The Court agreed. Order of July 5, 2017, ¶9.

There is a big issue, though, whether Section 508(2) even applies to revocations of acceptance. By its own terms, it does not: "Where the buyer ***rejects*** ***." 810 ILCS 5/2-508(2).[1] But see below, Count III, Revocation of Acceptance.

Assuming Section 2-508(2) applies, though, the Court's grant of summary judgment is not supported by the record. Section 2-508(2) establishes the following elements (Plaintiffs break down the section, clause by clause, for ease of following):

(1) Where the buyer rejects a non-conforming tender
(2) which the seller had reasonable grounds to believe would be acceptable
(3) with or without money allowance
(4) the seller may if he seasonably notifies the buyer
(5) have a further reasonable time to
(6) substitute a conforming tender.

810 ILCS 5/2-508(2).

There is no dispute that the RV was non-conforming (after all, it required multi-months repair), so Plaintiffs do not address clause (1). But, with respect to "reasonable grounds to believe" (2), money allowance (3), seasonable notification (4), and "substitution" of conforming tender, ***the record contains not a shred of evidence***.

It was Defendant's burden to provide evidence that it had reasonable grounds to believe that a repair after the summer ended would be acceptable to Plaintiffs. Defendant produced nothing.

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[1] "According to White and Summers (footnote 2, supra) § 8-5, pp. 466-67, until recent years most courts held the right to cure in § 400.2-508 did not apply in "revocation cases." Proponents of this approach argue this was intended by the Code's drafters and that the act of acceptance draws the line where the right to cure ends. Id. Newer case law and commentary show an increased willingness to allow the seller to cure after acceptance and before allowing the buyer to exercise the right to revoke. Id. However, according to 4 U.L.A. 63, Uniform Commercial Code (Cum.Supp.1995), the rule that a seller has no right to cure when a buyer justifiably revokes his acceptance remains the majority view." Bowen v. Foust, 925 S.W2d 211, 215, n.6 (Mo.App. 1996).

It was Defendant's burden to address the issue of money allowance. Defendant produced nothing.

It was Defendant's burden to produce evidence of proper notice. Defendant produced nothing, and Plaintiff produced evidence that Defendant ***refused*** to provide them a time estimate for repairs. Wozniak Amended Aff., ¶¶2-4.[2]

Finally, the word "substitute" indicates that the statue contemplates a substitution of non-conforming goods for conforming goods, i.e., a new RV, not a badly repaired old one.

Admittedly, the UCC does not define "cure." The case law indicates that, generally, courts allow repair of minor defects. Wilson v. Scampoli, 228 A.2d 848, 850 (D.C. 1967) (tint in color TV set curable by repair, no entitlement to cure by replacement: "minor repairs or reasonable adjustments are frequently the means by which an imperfect tender may be cured"; no "subjecting the buyer to any great inconvenience"; interpreting section 2-508). However, in cases of major defects, courts do not allow the seller to cure by repair, but instead mandate cure by replacement. Bowen v. Foust, 925 S.W.2d 211, 216 (Mo.App. 1996) (no cure by repair of substandard heating/cooling equipment; "even if Defendant had a right to cure under § 400.2-508, the only acceptable cure would have been to replace the equipment he installed with equipment conforming to the contract. As we have seen, Defendant never notified Plaintiffs, either before or after November 11, 1993, that he intended to do so."). This "minor defect versus major defect" dichotomy is consistent with this Court's observation that the Appellate Court in Belfour insisted on replacement because the car there "was a total loss." Order of July 5, 2017, ¶8. It was improper for the Court to make a factual determination that "cure by replacement" did

[2] Previously filed; attached for the convenience of the Court as **Exhibit A**.

not apply, because, presumably, Plaintiffs' defects were not major. (At least this was the import of the Court's reference to the "total loss" in Belfour.) In any event, the initial question to answer is, what is a major defect, as opposed to a minor defect?

A defect is considered minor when the repair would have no evidence of the defect's prior existence, nor threaten the value or quality of the product as a whole. Jonathan Sheldon, Carolyn L. Carter, National Consumer Law Center, Consumer Warranty Law, at 360 (4th ed. 1997). On the other hand, a defect is major if it does the opposite. Seller's Right to Cure Nonconforming Goods, 6 Rutgers-Camden L.J. 384, 413 (1974). Another fact to consider is whether the repair attempt would inconvenience the buyer (like destroying their summer vacation, for example). Sales of Personal Property—Breach of Warranty—Repair As a Means of Cure under §2-508 of the Uniform Commercial Code, 53 Iowa L.Rev. 780, 783 (1967). Obviously, the nature of the defect (minor v. major) is a question of fact, making the grant of summary judgment improper. To the extent the Court impliedly made this determination, this too was error. Moreover, the record here contains the affidavit of Plaintiffs' Expert. After going through a thorough analysis, which included references to comparables, as well as a page-and-a-half description of all the problems with the RV, the Expert concludes that the RV was diminished in value by 90 percent.[3] Therefore, Plaintiffs produced evidence that the defect was major, while Defendant produced nothing.

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[3] The Expert's Report is part of the record. Plaintiffs' Response to Interrogatories and Requests to Produce was attached to Defendant's Motion for Summary Judgment as Exhibit 4. Defendant did not attach any documents attached to the Response as part of its Exhibit 4, but Exhibit referred to them. Documents 1-11 of the 126-document production was the Expert's Report. Plaintiffs' Response was part of Defendant's Motion; it follows that all the documents attached to the Response are incorporated in the record by reference. Plaintiffs attach the Report to this Response for the Court's convenience. **Exhibit B**, pages 1-11, as originally numbered in Plaintiffs' Response to Interrogatories and Requests to Produce.

Not to belabor the point, but Defendant failed to present ***any*** evidence with respect to the majority of factors of 2-508(2). In the absence of evidence, summary judgment was improper.

For example, with respect to the "reasonable grounds" (clause (2)), T.W. Oil v. Consolidated Edison provides a revealing illustration. In T.W. Oil the issue was sulfur content in oil. The supplier provided oil with a higher sulfur content. The buyer rejected. The issue was whether the seller had "reasonable grounds" under 2-508(2) to believe that the oil would be acceptable. The court held it did, because it provided ***evidence*** on this issue:

> the reasonableness of the seller's belief that the original tender would be acceptable, was supported not only by unimpeached proof that the contract's .5% and the refinery certificate's .52% were trade equivalents, but by testimony that, by the time the contract was made, the plaintiff knew Con Ed burned fuel with a content of up to 1%, so that, with appropriate price adjustment, the Khamsin oil would have suited its needs even if, at delivery, it was, to the plaintiff's surprise, to test out at .92%.

T.W. Oil v. Consolidated Edison, 457 N.Y.S.2d 458, 464 (N.Y.App. 1982). In contrast, Defendant in the instance case produced ***nothing***. No evidence. At all.[4]

With respect to the timeliness (clause (5)), sellers do not have unlimited time to effect a cure under 2-508(2). For example, more than six weeks delay in repair is considered an unreasonable time, and therefore nullifies clause (5) of Section 2-508(2). Conte v. Dwan Lincoln-Mercury, Inc., 374 A.2d 144, 147 (Conn. 1976) (six weeks is ample time to cure); cf. Pratt v. Winnebago Indus., Inc., 463 F.Supp. 709, 713 (W.D. Pa. 1979) (thirty days is reasonable,

[4] The right to cure under Section 2-508(2) protects the seller against "surprise" rejections. Official Comment 2 to Section 2-508. Defendant produced no evidence that it was "surprised." As aptly pointed out by one commentator, "a seller who detected a problem but nevertheless proceeded without any commercial justification for believing that the buyer would accept also should not be surprised. Sellers in these circumstances cannot qualify for the right to cure under section 2- 508(2)." William H. Lawrence, Appropriate Standards for a Buyer's Refusal to Keep Goods Tendered by a Seller, 35 Wm. & Mary L. Rev. 1635, 1674 (1994).

when seller provides a loaner). Likewise, a seller who refuses to say when it could repair does not gain the benefit of section 2-508(2). Davis v. Colonial Mobile Home, 220 S.E.2d 802, 805-06 (N.C.App. 1975) (dealer unable to tell buyer when he could make repairs on defective RV; dealer did not cure within contract time or further reasonable time):

> When the defendant's employee Odell went to see plaintiff after delivery he could not tell plaintiff when he would be able to repair the unit. He explained that '. . . it is quite hard to tell the individual or customer when you can possibly get to doing work.' In fact, Mr. Richard Hensley, defendant's regional service manager, testified that he did not '. . . know how long it would take to make all the repairs necessary to get the mobile home back in good condition . . .' By their own testimony, defendants were not able to and did not make a conforming delivery within a 'reasonable time' or within the 'contract time'. Under these [28 N.C.App. 20] circumstances, the plaintiff buyer has no further obligations to purchase or accept any mobile home from defendant, whether the original unit repaired or a replacement. See G.S. 25--2--602(2)(b), (c); G.S. 25--2--608(3).

Most importantly for this case, Defendant here indeed refused to say when it could repair. Wozniak Amended Aff. ¶¶2-4. This factor alone makes the grant of summary judgment improper.

Count II, Breach of the Implied Warranty of Merchantability under the Magnuson-Moss Warranty Act

The same arguments regarding "cure" apply to Count II.

Moreover, the Court mischaracterized the standard for breach of the implied warranty of merchantability. The Court faulted Plaintiffs for failing "to show that the June and July issues was a continuing issue with the RV and not separate issues." Order of July 5, 2017, ¶11.

This is a misapplication of the law. The standard, by which a fact finder finds a breach of the implied warranty of merchantability is not whether there are "issues," continuous or not, but rather whether the goods "pass without objection in the trade under the contract description." 810 ILCS 5/2-314(2)(a). Or whether the goods "are fit for the ordinary purposes for which such

goods are used." 810 ILCS 5/2-314(2)(c). Moreover, a breach of warranty occurs "when tender of delivery is made," 810 ILCS 5/2-725(2). Therefore, the Court's reference of "June and July issue" was an error of law, because the relevant date for the breach was April 19, 2015, the date of the sale (Complaint, ¶4). Moreover, whether the issue was continuous or separate has nothing to do with whether the implied warranty is breached—even separate issues (if fairly traceable to the date of the sale) support a breach of the implied warranty of merchantability. Alvarez v. American Isizu Motors, 321 Ill.App.3d 696, 703, 749 N.E.2d 16, 24, 255 Ill.Dec. 236, 242 (1st Dist. 2001) ("In order to prove a breach of an implied warranty of merchantability, plaintiff must prove that the Rodeo was defective and that the defect(s) existed when the car left defendant's control. [Citation.] Plaintiff is not required to prove a specific defect.").

Here, though, instead of the implied warranty standard, the Court erroneously applied an express warranty standard ("reasonable number of attempts"). Under the Court's erroneous application of the law, if each succeeding issue (say, they are 20 of them) is "cured," there would be no breach of the implied warranty of merchantability. This is error, because the breach already took place—"when tender of delivery is made."

Count III—Revocation of Acceptance and Cancellation of Contract under Sections 2-608 and 2-711 of the Commercial Code

The Court stated that "section 2-608 of the Uniform Commercial Code anticipate[s] a reasonable opportunity to cure." Order of July 5, 2017, ¶13. Respectfully, this was error.

While Section 2-608(1)(a) does anticipate a "seasonable" cure, Section 2-608(1)(b) does not. It says nothing about cure.

When courts interpret statutes, they must begin their analysis with the plain text of the statute:

> When interpreting a statute, we strive to ascertain the legislature's intent. [Citation.] The best evidence of that intent is the language the legislature used in the statute, and we should give the language its plain and ordinary meaning. [Citation.] If the statutory language is clear and unambiguous, we should discern the legislative intent from that language alone, without resorting to other tools of statutory construction, such as legislative history.

In re Estate of Snodgrass, 337 Ill.App.3d 619, 784 N.E.2d 431, 433, 271 Ill.Dec. 213 (4th Dist. 2003).

The UCC mentions cure on several occasions; in fact, it mentions it in the sub-section just above sub-section (1)(b). It follows, then, that this omission is meaningful and/or intentional. And the cases from numerous jurisdictions, cited in Plaintiffs' initial Motion to Reconsider, confirm this point of law. Of particular note is Economy Folding Box Corp. v. Anchor Frozen Foods Corp., 515 F.3d 718, 721 (7th Cir. 2008):

> Economy also argues that it had a right to cure any defects before Anchor could lawfully reject the first installment of boxes or cancel the contract. In the decision below, the district court did not make a finding whether the defect in the outer box was curable or whether Economy had an opportunity to cure. The court applied 810 ILCS 5/2-608, which provides that a buyer can revoke acceptance of a delivery of non-conforming goods if he "accepted it (a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or (b) without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances." A small number of courts have found that a seller who accepts goods without knowing they are non-conforming and later discovers the defect must give the seller a chance to cure before revoking acceptance. *See* 18 Richard A. Lord, Williston on Contracts, § 52:25 (4th ed.2004). However, most courts "have concluded that the seller's right to cure does not apply to situations in which the buyer revokes acceptance based on a subsequently discovered defect." *Id.* (citation omitted). Noting that there is no dispositive Illinois case on the issue, the district court found that since 810 ILCS 5/2-608 does not expressly provide a seller a right to cure prior to a buyer's revocation of acceptance, Economy had no right to cure under that section.

To the extent Illinois cases appear to state otherwise, in fact they don't. (This has been recognized by the Seventh Circuit, when it observed that there is no dispositive Illinois case on

the issue.) The reason they appear to state otherwise is because they discuss revocation generally, without discriminating between sub-sections (1)(a) and (1)(b) of Section 2-608. But a proper analysis must account for the fundamental textual difference between the two sub-sections. None of the Illinois cases do that. Accordingly, it was error to apply the concept of cure to revocation of acceptance under sub-section 2-608(1)(b).

But, assuming the concept of cure is applicable, it still does not apply here, because Defendants in essence refused to repair the RV. Wozniak Amended Aff. ¶¶2-4. Defendant also references Comment 4 of Section 2-608, but fails to note that the comment says that revocation will "generally" be resorted to after attempts at adjustment have failed. "Generally" means there are exceptions. One of these exceptions is sub-section (1)(b), which does not contemplate cure, but does reference "seller's assurances," which fall under the rubric of "attempts at adjustment."

Defendant also argues that the buyer who revokes has the same duties as the buyer who rejects. 810 ILCS 5-608(3). Fair enough. Maybe.[5] This brings us back to Section 2-508(2)—but not to 2-508(1). And what does Section 2-508(2) say?—

(1) Where the buyer rejects a non-conforming tender
(2) which the seller had reasonable grounds to believe would be acceptable
(3) with or without money allowance
(4) the seller may if he seasonably notifies the buyer
(5) have a further reasonable time to
(6) substitute a conforming tender.

[5] This point is far from settled: "Sections 2-508(1) & (2) also suggest that cure may only be made after rejection. Thus § 2-508(2) begins: "Where the buyer rejects a non-conforming tender ... the seller may . . ." However, § 2-608(3) provides that buyers who revoke have "the same ... duties with regard to the goods involved as if .. . [they] had rejected them." This probably refers to §2-603, which specifies the duties, such as following reasonable seller instructions, imposed on rejecting merchant buyers; but it is at least arguable that one of the § 2-608(3) duties is to accept cure, if it can be made in conformity with the requirements of § 2-508. [Citations]." Schwartz, Alan, Cure and Revocation for Quality Defects: The Utility of Bargains, Boston College Indust. & Comm. L. Rev. 543, 568 n. 65 (1975).

The record contains no evidence submitted by Defendant that it had "reasonable grounds to believe" that a late repair would be acceptable to Plaintiffs; the record contains no evidence submitted by Defendant that it addressed the "money allowance" issue; the record contains no evidence submitted by Defendant that it "seasonably notified" the Plaintiffs (but the record does contain evidence that the time for repair was ***un***reasonable), and the record contains no evidence submitted by Defendant as to whether the defects were minor or major, which would impose on Defendant a duty to "substitute" a conforming tender, i.e., a new RV. Indeed, the record contains contrary evidence, submitted by Plaintiffs, that the defect was major, in that it destroyed their summer vacation and diminished the value of the RV by 90%.

The grant of summary judgment on ***all*** four counts of Plaintiff's Complaint was improper.

For the foregoing reasons, Plaintiffs respectfully request that this Honorable Court reverse grant of summary judgment to Defendant (Counts I through II) and deny Defendant's Motion to Reconsider with respect to Counts III and IV, and grant them other appropriate and just relief.

KIMBERLY ACCETTURA
ADAM WOZNIAK

By: /s/ Dmitry N. Feofanov
One of their attorneys

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IN THE CIRCUIT COURT FOR THE SIXTEENTH JUDICIAL CIRCUIT
KANE COUNTY, ILLINOIS

KIMBERLY ACCETTURA and ADAM WOZNIAK,)
)
Plaintiffs,)
)
vs.) 14 CH 1467
)
VACATIONLAND, INC.,)
)
Defendant.)

DEFENDANT VACATIONLAND, INC.'S REPLY IN SUPPORT OF ITS MOTION TO RECONSIDER AND/OR CLARIFY THIS COURT'S JULY 5, 2017 ORDER

NOW COMES Defendant, VACATIONLAND, INC., by and through its attorneys, MOMKUS McCLUSKEY ROBERTS LLC, and for its Reply in Support of its Motion to Reconsider and/or Clarify this Court's July 5, 2017 Court Order pursuant to 735 ILCS 5/2-1203, states as follows:

INTRODUCTION

On February 10, 2017, this Court granted Defendant's Motion for Summary Judgment, holding that under both the Magnuson-Moss Warranty Act and the Illinois Uniform Commercial Code, the buyer must allow the seller a reasonable opportunity to cure, and that Plaintiffs' claims failed because they did not give Defendant a reasonable opportunity to cure. A true and accurate copy of this Court's February 10, 2017 Order is attached hereto as Exhibit A.

Plaintiffs subsequently filed a Motion to Reconsider and, on July 5, 2017, this Court granted Plaintiff's Motion to Reconsider in part and denied it in part. This Court affirmed its prior dismissal of Counts I and II brought under the Magnusson-Moss Warranty Act because, pursuant to the statue, the buyers were obligated to provide the seller with a reasonable opportunity to cure any nonconformity, including by repair, which Plaintiffs failed to do. This Court reversed its prior

dismissal of Counts III and IV brought under Sections 2-608 and 2-711 of the Illinois Uniform Commercial Code, stating that, while the Uniform Commercial Code anticipated that the seller would be provided with a "reasonable opportunity to cure," the Court "did not consider the substantial impairment standard." A true and accurate copy of this Court's July 5, 2017 Order is attached hereto as Exhibit B.

Defendant filed its Motion to Reconsider this Court's July 5 Order arguing that this Court improperly created a new standard for revocation, pursuant to which, a buyer could revoke *either* if it provided the seller with a reasonable opportunity to cure the defect *or* if the nonconformity substantially impaired the goods.

However, there is no legal basis for this alternative standard, and this Court's February 10, 2017 Order, the Illinois Uniform Commercial Code, and Illinois case law all stand for the proposition that a reasonable opportunity to cure is a threshold requirement for all attempts to revoke and that a buyer cannot revoke – regardless of the degree of impairment to the goods – unless a reasonable opportunity to cure is provided. Here, this Court has repeatedly held (including in its July 5, 2017 Order) that Plaintiffs' failed to provide a reasonable opportunity to cure. Accordingly, all counts of Plaintiffs' Complaint fail and summary judgment was appropriate as to all counts.

Plaintiffs do not substantively respond to this argument in their Response brief. Instead, Plaintiffs have used their opportunity to respond to instead raise untimely arguments that this Court should reconsider its partial denial of Plaintiffs' Motion to Reconsider. These arguments are impermissible under Section 2-1203 of the Illinois Code of Civil Procedure as they were not brought within 30 days of this Court's July 5, 2017 order and, therefore, must be stricken and disregarded.

DISCUSSION

A. All Matters Raised in Plaintiffs' "Cross-Motion (Second) to Reconsider" Must Be Stricken as Untimely.

As an initial matter, Plaintiffs styled their Response as "Response to Defendant's Motion to Reconsider *and a Cross-Motion (Second) to Reconsider.*" (Emphasis provided). Indeed, Plaintiff's Response brief is not responsive to Defendant's Motion to Reconsider and/or Clarify this Court's July 5, 2017 Order and, instead, is devoted to arguments concerning its newly raised request that this Court reverse its dismissal of Counts I and II of the Complaint. Accordingly, the entire Response brief should be stricken.

Section 2-1203 of the Illinois Code of Civil Procedure states that a party may only move for the court to reconsider an order within 30 days of the entry of the order. 735 ILCS 5/2-1203. That was not done here. Plaintiffs first raised their request that this Court reconsider its July 5th order on September 7, 2017 – more than 30 days after the entry of the order. This request is untimely and any arguments raised which are not responsive to Defendant's Motion to Reconsider must be stricken pursuant to the Illinois Code of Civil Procedure. This provision of the Code does not grant the Court discretion as to whether to entertain late arguments, and such arguments are to be disregarded as a rule.

Out of an abundance of caution, Defendant briefly addresses Plaintiffs' untimely arguments below, but notes that the majority of Plaintiffs' arguments have been previously raised before – and rejected by – this Court in its February 10 and July 5, 2017 Orders. Plaintiffs do not point to any new law or evidence that should cause this Court to reconsider its prior rulings.

B. As This Court Has Repeatedly Held, "Cure" Encompasses a Right to Repair.

Plaintiffs argue that this Court erred because it held that the right to "cure" includes both a right to repair and to replace. As an initial matter, this argument must be disregarded because it is raised more than 30 days after this Court's July 5, 2017 ruling.

Furthermore, Plaintiffs fail to point to a single Illinois case in support of their proposition that "cure" means to "replace" or their argument that Illinois distinguishes between "major" and "minor" defects. These arguments are, in fact, contrary to Illinois law.

In *Belfour*, the court stated that "courts will resort to revocation of acceptance only after *attempts at adjustment* have failed." *Belfour v. Schaumberg Auto*, 306 Ill.App.3d 234, 242, 713 N.E.2d 1233 (2nd Dist. 1999). An adjustment is not a replacement – it is a repair.

In *Pearson*, the court held that, in order to prove that the defendant breached its limited warranty, the plaintiff must prove, among other things, that the plaintiff afforded defendant a reasonable opportunity to repair the defect and that the defendant was unable to repair the defect after a reasonable time or reasonable number of attempts. *Pearson v. DaimlerChrysler Corp.*, 349 Ill.App.3d 688, 696, 813 N.E.2d 230 (1st Dist. 2004). Likewise, the UCC requires that sellers be granted an opportunity to "cure" which means "attempts at adjustment." 810 ILCS 5/2-608 Commentary at (4) and (5). An "adjustment" is a repair – not a replacement.

All applicable Illinois law stands for the principle that a seller is entitled to attempt to repair a nonconformity. A replacement is not automatically required. Plaintiffs repeated attempts to argue otherwise are baseless and should be rejected.

C. Plaintiffs' Argument Misconstrues Section 2-508(2).

Plaintiffs contend that Defendant failed to meet its burden of proof under Section 2-508(2) of the Illinois Uniform Commercial Code. Again, this is a new argument that must be ignored. It

further misrepresents the language of the statue, which does not require a seller to demonstrate that it offered a money allowance or that it had a reasonable basis to believe the substitute tender was acceptable.

The purpose of Section 508(2) is "to avoid injustice to the seller by reason of a surprise rejection by the buyer." 810 ILCS 5/2-508(2) Commentary at 2. Here, Plaintiffs conducted an inspection of the RV prior to its purchase. *See* Defendant's Motion for Summary Judgment, Statement of Facts, at ¶1. Acceptance of goods occurs when a buyer takes the goods after inspecting, or being provided with a reasonable opportunity to inspect. 810 ILCS 5/2-606. As a matter of law, it was reasonable for Defendant to believe the RV was acceptable to Plaintiffs following Plaintiffs' initial inspection.

Pursuant to Section 508(2), Defendant is entitled to a reasonable time to substitute a conforming tender after Plaintiffs rejected the RV that they had previously accepted following an inspection. This Court has already (repeatedly) held that Defendant was not afforded a reasonable opportunity to cure.

D. The Issue of the Date of Origin of the Alleged Defect is Irrelevant.

Plaintiffs raise for the first time – and without support – the argument that Defendant must somehow show that the separate June and July defects did not originate at the time of sale. This question has no bearing on this matter as, regardless of the date that the defect originated, the seller must still be provided with a reasonable opportunity to cure the defect, and this was not done here. *See* Exh. B, at ¶11.

E. "Attempts at Adjustment" are Mandated by Section 2-608.

Plaintiffs argue that some distinction should be read between Section 2-608(1)(a) and (b) such that Subsection (b) purportedly does not allow for an opportunity to cure. Again, this is

contrary to Illinois law, including *Belfour v. Schaumberg Auto*, 306 Ill.App.3d 234, 242, 713 N.E.2d 1233 (2nd Dist. 1999) and *Pearson v. DaimlertChrysler Corp.*, 349 Ill.App.3d 688, 696, 813 N.E.2d 230 (1st Dist. 2004). It is already contrary to this Court's prior orders as this Court already ruled that Section 2-608 anticipates a reasonable opportunity to cure, which was not provided. *See* Exh. B, at ¶13. This ruling is further supported by the Illinois Uniform Commercial Code itself which provides that revocation is permitted "only after attempts at adjustment have failed." 810 ILCS 5/2-608 at Comment 4.

Indeed, the only case law which Plaintiffs cite to the contrary is a Seventh Circuit case in which it was noted that the seller did not argue that it had a right to cure and, therefore, is inapplicable. *Economy Folding Box Corp. v. Anchor Frozen Foods Corp.*, 515 F.3d 718, 721-22 (7th Cir. 2008).

F. Defendant Requests that this Court Reconsider its Ruling to Remand.

As argued in Defendant's Motion to Reconsider, this Court improperly held that Plaintiffs must either establish that (i) Plaintiffs provided Defendant with a reasonable opportunity to cure the defect, **or** (ii) the nonconformity substantially impairs the goods in question There is no basis for this alternative standard in either the case law or the UCC and, in fact, this holding is contrary to the statutory and case law interpreting the right to revoke under the UCC, as well as this Court's February 10, 2017 ruling.

WHEREFORE, Defendant, VACATIONLAND, INC., requests that this Honorable Court (i) reconsider and modify its July 5, 2017 order to uphold summary judgment in favor of Defendant on all counts or (ii) clarify its ruling as to the requirement that a buyer provide a seller with a reasonable opportunity to cure prior to revoking goods, and (iii) for any other or further relief that this Court deems just and equitable.

Respectfully Submitted,

MOMKUS McCLUSKEY ROBERTS LLC

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IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT
KANE COUNTY, ILLINOIS
IN CHANCERY

KIMBERLY ACCETTURA and ADAM WOZNIAK,

Plaintiffs,

v.

VACATIONLAND,

Defendant.

Case No. 14 CH 1467
Hon. David R. Akemann
Circuit Judge Presiding

ORDER

THIS MATTER comes on to be heard on essentially cross motions for reconsideration and the Court having considered the pleadings and arguments of counsel, now finds and orders as follows:

1. On February 10, 2017, this Court granted Defendant's Motion for Summary Judgment, on all Counts (1-4) holding that under both the Magnuson-Moss Warranty Act and the Illinois Uniform Commercial Code, the buyers (Plaintiffs) must allow the seller (Defendant) a reasonable opportunity to cure, and that Plaintiffs' claims failed because they did not give Defendant a reasonable opportunity to cure.

2. Plaintiffs subsequently filed a Motion to Reconsider and, on July 5, 2017, this Court granted Plaintiffs' Motion to Reconsider in part and denied it in part. This Court affirmed its prior order granting Defendant Summary Judgment for Counts I and II brought under the Magnusson—Moss Warranty Act because, pursuant to the statue, the buyers were obligated to provide the seller with a reasonable opportunity to cure any nonconformity, including by repair, which Plaintiffs failed to do. This Court reversed its order granting Defendants Summary Judgment for Counts III and IV brought under Sections 2-608 and 2-711 of the Illinois Uniform Commercial Code, stating that, while the Uniform Commercial Code anticipated that the seller would be provided with a "reasonable opportunity to cure," the Court "did not consider the substantial impairment standard."

3. Defendant filed its Motion to Reconsider this Court's July 5 Order arguing that this Court improperly created a new standard for revocation, pursuant to which, a buyer could revoke either

if it provided the seller with a reasonable opportunity to cure the defect or if the nonconformity substantially impaired the goods.

4. This Court has again carefully considered the Second District's holdings in *Belfour v. Schaumberg Auto*, 306 Ill. App. 234, 241 (2d Dist. 1999) and *Sorce v. Naperville Jeep Eagle*, 309 Ill. App 3d 313, 320 (2d Dist. 1999). These cases and Illinois case law, provide that a reasonable opportunity to cure is a threshold requirement for all attempts to revoke and that a buyer cannot revoke — regardless of the degree of impairment to the goods — unless a reasonable opportunity to cure is provided.

5. In this case, this Court has repeatedly held (including in its July 5, 2017 Order) that Plaintiffs' failed to provide a reasonable opportunity to cure.

6. Accordingly, as this Court found originally in its February 10, 2017 Order, summary judgment was and is appropriate as to all counts and that the portion of its July 5, 2017 which held otherwise as to Counts 3 and 4 was entered in error.

7. Plaintiffs do attempt to raise arguments that this Court should reconsider its partial denial of Plaintiffs' Motion to Reconsider. These arguments are untimely and impermissible under Section 2-1203 of the Illinois Code of Civil Procedure as they were not brought within 30 days of this Court's July 5, 2017 order and, therefore, must be stricken and disregarded.

IT IS THEREFORE ORDERED AND ADJUDGED:

A. Defendants Motion to reconsider the portion of this Court's 7/5/2017 Order which granted the Plaintiffs' Motion to reconsider the portion of its 2/10/2017 Order which had granted Defendants Motion for Summary Judgment as to Count 3 and 4 is GRANTED. Accordingly, Defendant's Motion for Summary Judgment on Counts 3 and 4 is again GRANTED.

B. Plaintiffs' cross motion to reconsider the portion of this Court's 7/5/2017 Order which denied Plaintiffs' Motion to Reconsider the portion of this Court's 2/10/2017 Order which granted Defendant Summary Judgment as to Counts 1 and 2 is STRICKEN.

C. There is no just reason for delaying either enforcement or appeal or both.

D. All future dates are stricken.

Enter this 27th day of November, 2017

Circuit Judge

2018 IL App (2d) 170972
No. 2-17-0972
Opinion filed September 28, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

KIMBERLY ACCETTURA and ADAM WOZNIAK,	)	Appeal from the Circuit Court of Kane County.
Plaintiffs-Appellants,	)	No. 14-CH-1467
v.	)	
VACATIONLAND, INC.,	)	Honorable David R. Akemann,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court, with opinion.
Justices Birkett and Spence concurred in the judgment and opinion.

OPINION

¶ 1 This case involves an allegedly defective recreational vehicle (RV) purchased by plaintiffs, Kimberly Accettura and Adam Wozniak, from defendant, Vacationland, Inc. Plaintiffs' complaint alleged revocation of acceptance and breach of implied warrant of merchantability and sought to recover the purchase price. The trial court granted summary judgment in favor of defendant. Plaintiffs argue that the trial court erred because (1) whether defendant had a reasonable opportunity to cure is a disputed issue of material fact, (2) the standards of the New Vehicle Buyer Protection Act (Act) (815 ILCS 380/1 *et seq.* (West 2016)) do not define "reasonableness" for claims that do not involve the Act, (3) defendant failed to establish its satisfaction of section 2-508(2) of the Uniform Commercial Code (UCC) (810 ILCS

5/2-508(2) (West 2016)), (4) an opportunity to cure is not a prerequisite for a claim under section 2-608(1)(b) of the UCC (810 ILCS 5/2-608(1)(b) (West 2016)), and (5) the trial court relied on section 2-1203 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1203 (West 2016)) in striking their cross-motion to reconsider. For the following reasons, we affirm.

¶ 2 I. BACKGROUND

¶ 3 On April 19, 2014, plaintiffs bought the RV, a new 2014 Palomino trailer, from defendant for $26,000.25. On April 25, 2014, plaintiffs took possession of the RV. In June 2014, plaintiffs discovered water leaking into the RV from the emergency-exit window. Plaintiffs brought the RV to defendant for repair; defendant repaired the RV to plaintiffs' satisfaction, at no charge.

¶ 4 In July 2014, during a trip to Michigan, plaintiffs discovered a different leak in the RV. During a rainstorm, water leaked into the dinette area, damaging the walls and causing electrical failure. Plaintiffs brought the RV to defendant for repair on July 14, 2014. Defendant told plaintiffs that the RV needed to be sent to the manufacturer for repair. Defendant told Wozniak that it could not estimate how long the manufacturer would take to repair the RV. On August 2, 2014, Wozniak verbally revoked acceptance of the RV. The manufacturer had the RV in repair from approximately August 4 through September 23, 2014. On September 28, 2014, plaintiffs' attorney sent defendant a letter revoking acceptance of the RV.

¶ 5 A. Complaint

¶ 6 On October 29, 2014, plaintiffs filed a four-count complaint against defendant, alleging the following. Since they purchased the RV, it had experienced numerous mechanical problems, including (a) water leakage through a defective emergency-exit window, (b) water leakage through a defective dinette window, (c) water leakage into a paneled wall, (d) an inoperative electrical system, (e) and "generally massive water leaks," which "have the potential of causing

mold and serious health issues." Further, these "defects cannot be repaired. The [RV] was in repair for almost the entire summer of 2014, and still has not been repaired properly. *** Prior to filing this suit, Plaintiff's [*sic*] revoked their acceptance of the RV and canceled their contract. *** Defendant refused to return Plaintiffs' money."

¶ 7 Plaintiffs sought damages under the following theories: revocation of acceptance, pursuant to section 2310(d) of the Magnuson-Moss Warranty Act (Magnuson-Moss Act) (15 U.S.C. § 2310(d) (2012)), breach of implied warranty of merchantability, pursuant to section 2310(d) of the Magnuson-Moss Act; and revocation of acceptance and cancellation of contract, under sections 2-608(1)(b) and 2-711(1) of the UCC (810 ILCS 5/2-608(1)(b), 2-711(1) (West 2016)). They also sought to recover the purchase price, under section 2-711(1) of the UCC. Plaintiffs attached the following documents to their complaint: (1) the first page of the parties' contract for the sale of the RV, (2) an alleged expert's report regarding water leakage and mold, (3) the letter to defendant purporting to confirm the revocation of acceptance, and (4) rental rates for a 23-foot trailer.

¶ 8 B. Motion for Summary Judgment

¶ 9 On November 14, 2016, defendant filed a motion for summary judgment pursuant to section 2-1005 of the Code (735 ILCS 5/2-1005 (West 2016)). Defendant argued that plaintiffs' failure to give defendant a reasonable opportunity to cure was fatal to their claims, as a matter of law. Plaintiffs responded that there was a genuine issue of material fact regarding whether the RV was repaired within a reasonable time. Defendant replied that plaintiffs failed to rebut material facts set forth in defendant's motion.

¶ 10 On February 10, 2017, the trial court granted defendant summary judgment on all four counts of plaintiffs' complaint. The trial court stated that reasonableness is a question of fact but

that, in this case, the record clearly showed that plaintiffs revoked acceptance sometime before August 2, 2014, which did not provide a reasonable time for defendant to cure.

¶ 11 C. Postjudgment Motions

¶ 12 On February 27, 2017, plaintiffs filed a motion to reconsider. On July 5, 2017, the trial court denied plaintiffs' motion in part on, counts I and II, and granted it in part, reinstating counts III and IV, brought under sections 2-608(b)(1) and 2-711(1) of the UCC. The court stated that, "while the [UCC] anticipated that the seller would be provided with a 'reasonable opportunity to cure,' the Court did not consider the substantial impairment standard."

¶ 13 On August 1, 2017, defendant filed a motion to reconsider. On September 6, 2017, plaintiffs filed a combined response to defendant's motion and cross-motion to reconsider. On November 27, 2017, the trial court granted defendant's motion and struck plaintiffs' cross-motion. The trial court determined that "a reasonable opportunity to cure is a threshold requirement for all attempts to revoke." The trial court stated, again, that plaintiffs "failed to provide a reasonable opportunity to cure." The trial court also stated: "Accordingly, as this court found originally in its February 10, 2017[,] Order, summary judgment was and is appropriate as to all counts."

¶ 14 Plaintiffs filed their notice of appeal on November 27, 2017.

¶ 15 II. ANALYSIS

¶ 16 A. Standard of Review

¶ 17 Our review of the trial court's grant of summary judgment is *de novo*. *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 315 (2004). "Summary judgment is proper where, when viewed in the light most favorable to the nonmoving party, the pleadings, depositions, admissions, and affidavits on file reveal that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Id.*; see 735

ILCS 5/2-1005(c) (West 2016). A genuine issue of material fact exists when the material facts are disputed or when the material facts are undisputed but reasonable persons might draw different inferences from those undisputed facts. *Carney v. Union Pacific R.R. Co.*, 2016 IL 118984, ¶ 25. "Although summary judgment can aid in the expeditious disposition of a lawsuit, it remains a drastic means of disposing of litigation and, therefore, should be allowed only where the right of the moving party is clear and free from doubt." *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008).

¶ 18 The movant bears the initial burden of production on a motion for summary judgment. *Williams v. Covenant Medical Center*, 316 Ill. App. 3d 682, 689 (2000). A defendant moving for summary judgment can meet its burden of production either by presenting evidence that, left unrebutted, would entitle it to judgment as a matter of law or by demonstrating that the plaintiff will be unable to prove an element of its cause of action. *Id*. at 688. Until the defendant supplies facts that would demonstrate its entitlement to judgment as a matter of law, the plaintiff may rely on the pleadings to create questions of material fact. *Id*. at 689. However, if the defendant presents such facts, the burden then shifts to the plaintiff to present some evidence supporting each element of his cause of action, thereby defining an issue of material fact to be determined at trial. *Id*.

¶ 19 B. Reasonable Opportunity to Cure

¶ 20 Plaintiffs argue that whether defendant had a reasonable opportunity to cure is a disputed issue of material fact. Defendant contends that the trial court correctly determined that plaintiffs did not provide defendant with a reasonable opportunity to cure, as a matter of law.

¶ 21 Plaintiffs fail to inform us which counts of their complaint this argument addresses. Counts I and II alleged revocation of acceptance and breach of implied warranty of merchantability, pursuant to section 2310(d)(1) of the Magnuson-Moss Act. Section 2310(d)(1)

allows a consumer to bring suit where he is "damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this [Act] or under a written warranty, implied warranty, or service contract." 15 U.S.C. § 2310(d)(1) (2012). However, "[n]o action *** may be brought under subsection (d) *** under any written or implied warranty or service contract *** unless the [warrantor] *** is afforded a reasonable opportunity to cure such failure to comply." *Id.* § 2310(e). The Magnuson-Moss Act does not define "reasonable opportunity to cure." Rather, it merely prescribes certain requirements with which a plaintiff must comply in order to recover under section 2310(d).

¶ 22 Accordingly, to determine the meaning of "reasonable opportunity to cure," we look to state law. See *Razor v. Hyundai Motor America*, 222 Ill. 2d 75, 86 (2006). The UCC does not define these terms. However, section 3(b) of the Act provides guidance:

> "A presumption that a reasonable number of attempts have been undertaken to conform a new vehicle to its express warranties shall arise where, within the statutory warranty period,
>
> (1) the same nonconformity has been subject to repair by the seller, its agents or authorized dealers during the statutory warranty period, 4 or more times, and such nonconformity continues to exist; or
>
> (2) the vehicle has been out of service by reason of repair of nonconformities for a total of 30 or more business days during the statutory warranty period." 815 ILCS 380/3(b) (West 2016).

¶ 23 Typically, reasonableness is a question of fact. See *Basselen v. GMC*, 341 Ill. App. 3d 278, 283-84 (2003) (citing *Magnum Press Automation, Inc. v. Thomas & Betts Corp.*, 325 Ill. App. 3d 613, 622 (2001)), *overruled on other grounds by Kinkel v. Cingular Wireless, LLC*, 223 Ill. 2d 1 (2006). When more than one inference could be drawn from undisputed facts, a triable

issue exists and summary judgment may not be granted. *Gordon v. Oak Park School District No. 97*, 24 Ill. App. 3d 131, 134 (1974). However, where, as here, undisputed facts give rise to a single inference, summary judgment should be granted. See *id*. at 135.

¶ 24 Here, on defendant's motion for summary judgment, plaintiffs were obligated to establish facts that would satisfy their burden of showing that they provided defendant with a reasonable opportunity to cure. The undisputed facts establish that plaintiffs brought the RV to defendant in June 2014 because water leaked into the RV from the emergency-exit window. Defendant repaired this problem to plaintiffs' satisfaction. In early July 2014, a separate and distinct problem arose in the RV during a rainstorm; significant water leaked into the dinette area, causing electrical-system and other problems. Plaintiffs brought the RV to defendant for repair on July 14, 2014, and revoked acceptance, "sometime before August 2, 2014."

¶ 25 Although a plaintiff need not prove his case at the summary judgment stage, he must present a factual basis that would arguably entitle him to a judgment at trial. *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 12. Mere speculation, conjecture, or guess is insufficient to survive summary judgment. *O'Gorman v. F.H. Paschen, S.N. Nielsen, Inc.*, 2015 IL App (1st) 133472, ¶ 82.

¶ 26 Here, plaintiffs have failed to point to any authority or facts to support their assertion that their revocation of acceptance, approximately two weeks after asking defendant to repair the RV, was reasonable. Rather, the undisputed facts give rise to only one inference: plaintiffs failed to provide defendant a reasonable opportunity to cure. There is no genuine issue of material fact on this question. Accordingly, the trial court properly entered summary judgment in defendant's favor on counts I and II.

¶ 27 C. The Act

¶ 28 Plaintiffs argue that the Act's standards do not define "reasonableness" for claims that do not involve the Act. Plaintiffs contend that the trial court erred by using the Act's language to determine the meaning of "reasonableness." We disagree with plaintiffs.

¶ 29 When interpreting a statute, it is appropriate and common for courts to refer to another statute by analogy. *McNamee v. Federated Equipment & Supply Co.*, 181 Ill. 2d 415, 424 (1998). The Act is related to the section of the Magnuson-Moss Act at issue here, because both apply to "similar persons, things, or relationships." *Id*. at 424 (quoting 2B Norman J. Singer, Sutherland on Statutory Construction § 53.03, at 233 (5th ed. 1992)). For example, both acts address buyers and sellers of new motor vehicles and the remedies available to buyers when vehicles fail to conform. See, *e.g.*, 815 ILCS 380/3(b) (West 2016). Thus, the trial court's reference to section 3(b) of the Act, by analogy, was appropriate.

¶ 30 D. Section 2-508(2) of the UCC

¶ 31 Plaintiffs argue that the trial court erred by entering summary judgment on counts I and II, because defendant failed to establish its satisfaction of section 2-508(2) of the UCC (810 ILCS 5/2-508(2) (West 2016)).

¶ 32 Defendant argues that plaintiffs forfeited this issue because they failed to raise it until their second motion to reconsider. However, the record indicates that plaintiffs raised this issue in their initial motion to reconsider and that the trial court considered it. Therefore, plaintiffs' argument is not forfeited.

¶ 33 We begin with the language of section 2-508, which provides:

> "Cure by Seller of Improper Tender or Delivery; *Replacement*. (1) Where any tender or delivery by the seller is rejected because non-conforming *and the time for performance has not yet expired*, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.

> (2) Where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to *substitute a conforming tender*." (Emphases added.) *Id.* § 2-508.

¶ 34 Plaintiffs argue that defendant was required to cure by replacing the nonconforming RV with a new RV, pursuant to section 2-508(2) of the UCC. Plaintiffs cite *Belfour v. Schaumburg*, 306 Ill. App. 3d 234 (1999), to support their argument. However, in *Belfour* the defendants were not able to repair the vehicle, as it "was a total loss." *Id.* at 236. In this case, the RV was not a "total loss"; in fact, it had already been repaired before plaintiffs' attorney sent the letter confirming revocation and before plaintiffs filed suit. Therefore, *Belfour* does not support plaintiffs' argument.

¶ 35 E. Opportunity to Cure Under UCC Section 2-608(1)(b)

¶ 36 Next, plaintiffs argue that the trial court erred by entering summary judgment in defendant's favor on counts I and III of their complaint because the trial court improperly determined that an opportunity to cure is a prerequisite for a claim under section 2-608(1)(b) of the UCC. Defendant argues that plaintiffs have forfeited this issue because they failed to raise it in the trial court. However, the record indicates that plaintiffs raised this issue in their initial motion to reconsider, but only as to count III. Because plaintiffs raise this issue as to count I for the first time on appeal, the issue is forfeited as to that count. *Hytel Group, Inc. v. Butler*, 405 Ill. App. 3d 113, 127 (2010) (arguments raised for the first time on appeal are forfeited). Thus, we consider plaintiffs' argument only as to count III.

¶ 37 Count III hinges on whether the trial court erred in finding that plaintiffs were required to provide defendant with an opportunity to cure prior to revoking acceptance. Section 2-608 of the UCC provides:

§ 2-608. Revocation of Acceptance in Whole or in Part.

"(1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it

(a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or

(b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them." 810 ILCS 5/2-608 (West 2016).

¶ 38 Plaintiff contends that, although section 2-608(1)(a) requires an opportunity to cure, section 2-608(1)(b) does not. Plaintiff correctly notes that this is an issue of first impression.

¶ 39 When interpreting a statute, our primary objective is to ascertain and give effect to the legislature's intent. *Valfer v. Evanston Northwestern Healthcare*, 2016 IL 119220, ¶ 22. The best indication of the legislature's intent is the language used in the statute, which must be given its plain and ordinary meaning. *Id*.

¶ 40 Section 2-608(1)(b) does not specify whether the seller has a right to cure prior to a proper revocation of acceptance. However, in *Belfour*, 306 Ill. App. 3d at 241, this court rejected the argument that the seller did not have a right to cure before the buyer revoked acceptance under section 2-608. *Id*. We stated that, "[u]nder the UCC, the buyer must allow the seller time

to cure before invoking revocation of acceptance." *Id.* (citing *Collum v. Fred Tuch Buick*, 6 Ill. App. 3d 317 (1972)). We explained, "courts will resort to revocation of acceptance only after attempts at adjustment have failed." *Id.* at 242 (citing 810 ILCS Ann. 5/2-608(1)(a), Uniform Commercial Code Comment, at 380 (Smith-Hurd 1993)). We concluded that the buyer's revocation of acceptance was improper because the seller had offered a proper cure. *Id.* In addition, our supreme court has stated that "[r]evocation of acceptance is a form of equitable relief." *Mydlach v. DaimlerChrysler Corp.*, 226 Ill. 2d 307, 327 (2007).

¶ 41 In this case, the record clearly establishes that on July 14, 2014, plaintiffs asked defendant to cure the defects discovered during their trip to Michigan and defendant offered plaintiffs a proper cure. Plaintiffs revoked acceptance about two weeks later, knowing that the RV was going to the manufacturer to be repaired under the warranty. Thus, the material facts are undisputed and all reasonable minds would agree that plaintiffs failed to allow defendant a reasonable time to cure before their purported revocation, as a matter of law. See *Carney*, 2016 IL 118984, ¶ 25. Accordingly, the trial court properly determined that plaintiffs' revocation was improper under section 2-608(1)(b) of the UCC. Accordingly, the trial court properly granted summary judgment in defendant's favor as to count III.

¶ 42 F. Plaintiffs' Cross-Motion to Reconsider

¶ 43 Plaintiffs argue that the trial court erred by relying on section 2-1203 of the Code (735 ILCS 2-1203 (West 2016)) in striking their cross-motion to reconsider. We note that we may affirm on any basis appearing in the record, whether or not the trial court relied on that basis and even if the trial court's reasoning was incorrect. *Bank of New York v. Langman*, 2013 IL App (2d) 120609, ¶ 31.

¶ 44 Here, plaintiffs filed a combined "Response to Defendant's Motion to Reconsider and Cross-Motion (Second) to Reconsider." The trial court stated in its written order that it

"considered the pleadings and arguments of counsel." Plaintiffs have failed to provide this court with a transcript of the hearing. Plaintiffs, as the appellants, had the burden to present a sufficiently complete record of the proceedings to support their claim of error. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391 (1984). As such, we presume that "the order entered by the trial court was in conformity with [the] law and had a sufficient factual basis" *Id*. at 391-92.

¶ 45 III. CONCLUSION

¶ 46 For the reasons stated, we affirm the judgment of the circuit court of Kane County.

¶ 47 Affirmed.

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APPEAL TO THE APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT
KANE COUNTY, ILLINOIS

KIMBERLY ACCETTURA
Plaintiff/Petitioner

Appellate Court No: 2-17-0972
Circuit Court No: 2014CH001467
Trial Judge: HONORABLE DAVID AKEMANN

v.

VACATIONLAND, INC.
Defendant/Respondent

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