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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JERRY BRENISER and GALE)
THURBER,)
)
 Plaintiffs,)
)
 v.)
)
 WESTERN RECREATIONAL VEHICLES,)
 INC., a foreign corporation,)
)
 Defendant.)
_____)

No. CV-07-1418-HU

OPINION & ORDER

Justin M. Baxter
BAXTER & BAXTER LLP
8835 S.W. Canyon Lane, Suite 130
Portland, Oregon 97225

Attorney for Plaintiffs

HUBEL, Magistrate Judge:

Plaintiffs Jerry Breniser and Gale Thurber bring this action against defendant Western Recreational Vehicles, Inc., regarding an allegedly defective fifth-wheel trailer plaintiffs purchased in August 2005. Plaintiffs bring a single breach of warranty claim under the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301 - 2312 (MMWA).

Both parties have consented to entry of final judgment by a

1 Magistrate Judge in accordance with Federal Rule of Civil Procedure
2 73 and 28 U.S.C. § 636(c). Plaintiffs move for summary judgment.
3 I deny the motion.

4 BACKGROUND

5 The background is fully set forth in my December 12, 2008
6 Opinion & Order. There, I denied plaintiffs' initial motion for
7 summary judgment because, although the motion was unopposed,
8 plaintiffs had failed to establish that they were entitled to
9 judgment as a matter of law on the summary judgment record they had
10 created.

11 I allowed plaintiffs to file a supplemental motion¹ addressing
12 three deficiencies: (1) evidence showing that defendant Western
13 Recreational Vehicle in Delaware ("WRV-Delaware") had assumed the
14 obligations of plaintiffs' warranty from Western Recreational
15 Vehicle in Washington ("WRV-Washington") in a December 2006 Asset
16 Purchase Agreement between WRV-Delaware and WRV-Washington; (2)
17 citation to appropriate state law establishing that plaintiffs are
18 entitled to the remedies they seek; and (3) documentation and more
19 detailed explanation of the amounts of damages claimed by
20 plaintiffs. I address these areas in turn.

21 I rely on the summary judgment standards and law regarding the
22 MMWA recited in the December 12, 2008 Opinion.

23 DISCUSSION

24 I. Asset Purchase Agreement

25 As seen from reviewing the December 12, 2008 Opinion and
26

27 ¹ Although instructed to file a supplemental motion,
28 plaintiffs filed a supplemental memorandum (dkt #33), which I
construe as a motion.

1 Order, under the Asset Purchase Agreement, WRV-Delaware assumed
2 liability for the warranty at issue in this case if the liability
3 arises from product defects to products sold on or prior to the
4 closing date of the Asset Purchase Agreement, unless the liability
5 was the subject of a "'claim, action, suit, charge, complaint,
6 material grievance, hearing, investigation or other proceeding
7 (including any arbitration proceedings) . . . and is threatened or
8 pending against the Shareholders or the Company as of the Closing
9 date[.]'" Dec. 12, 2008 Op. at p. 12 (quoting Exh. 1 to Baxter
10 Declr. at Art. VII). Finally, even if the liability was subject to
11 such a claim, action, complaint, etc., the liability was still
12 assumed by WRV-Delaware if it was set forth on Schedule 4.10 of the
13 Asset Purchase Agreement. Id.

14 As stated in the December 12, 2008 Opinion, the record
15 establishes that the fifth-wheel trailer was sold before the
16 closing date of the agreement. My review of the record also shows
17 that given the broad recitation in the agreement of words such as
18 "claim, action, suit, charge, complaint," and the like, plaintiffs'
19 repeated complaints, requests to obtain a refund, contact of the
20 Oregon Attorney General for assistance, and threats to "follow
21 other avenues," including contacting a lawyer, are actions
22 qualifying under the agreement as being an excluded liability.
23 Thus, to be an assumed liability, the liability under the warranty
24 at issue here must have been listed on Schedule 4.10.

25 In the supplemental materials, plaintiffs state that defendant
26 failed to produce Schedule 4.10 in response to plaintiffs' request.
27 I addressed the issue of defendant's production of documents
28 regarding WRV-Washington's purchase by WRV-Delaware in a May 27,

1 2008 hearing. At that time, I ordered defendant to produce to
2 plaintiff's counsel "a copy of the entire contract for the sale of
3 Western Recreational Vehicles to its current owners from its
4 predecessor," no later than June 3, 2008. Dkt #20.

5 Although plaintiffs had not, before the May 27, 2008 hearing,
6 filed a motion to compel production of the sale documents, I
7 construed their production request at the May 27, 2008 hearing as
8 a motion to compel under Federal Rule of Civil Procedure
9 37(a)(3)(B)(iv). Under Rule 37(b)(2)(A), defendant's failure to
10 obey my May 27, 2008 Order that "a copy of the entire contract for
11 the sale" be produced, allows the court to find as a sanction
12 either (1) that plaintiffs have established that the liability of
13 the warranty at issue was assumed by virtue of its presence on
14 Schedule 4.10, or (2) that defendant is prohibited from denying
15 that the warranty liability is not an assumed liability. Fed. R.
16 Civ. P. 37(b)(2)(A)(I), (ii). Accordingly, I conclude that WRV-
17 Delaware assumed the liability of the warranty at issue under the
18 Asset Purchase Agreement with WRV-Washington.

19 II. State Law Remedies

20 As explained in the December 12, 2008 Opinion, this was a
21 limited warranty, not a full warranty under the MMWA. Dec. 12,
22 2008 Op. at pp. 9, 15. As such, plaintiffs' remedies are provided
23 under state law, not the MMWA. Id. at p. 15; see also Clemens v.
24 DaimlerChrysler Corp., 534 F.3d 1017, 1022 (9th Cir. 2008) (when no
25 allegation that manufacturer otherwise failed to comply with MMWA,
26 federal MMWA warranty claims hinged on state warranty law) (citing
27 Schimmer v. Jaguar Cars, Inc., 384 F.3d 402, 405 (7th Cir. 2004)
28 (MMWA allows consumers to enforce written warranties in federal

1 court, borrowing state law causes of action)), DeShazer v. National
2 RV Holdings, Inc., 391 F. Supp. 2d 791, 794 (D. Ariz. 2005) ("while
3 MMWA creates additional requirements for consumer protection
4 warranties and creates a private cause of action for breach of a
5 warranty, state warranty law lies at the base of all warranty
6 claims under [the MMWA]") (internal quotation omitted).

7 Plaintiffs, however, in their original summary judgment
8 motion, failed to cite to or discuss any Oregon law regarding
9 remedies for breach of warranty. Id. at pp. 15-16. I ordered
10 plaintiffs to address the issue in the supplemental motion.

11 In the supplemental materials, plaintiffs cite to Oregon
12 Revised Statutes §§ (O.R.S.) 72.8010 - 72.8200, governing the sale
13 of consumer goods. I agree with plaintiff that the fifth-wheel
14 trailer is a consumer good. O.R.S. 72.8010(1) (citing O.R.S.
15 79.0102).

16 Plaintiffs then cite to O.R.S. 72.8130, which provides
17 remedies for a manufacturer's breach of express warranty when the
18 manufacturer does not provide a service or repair facility within
19 the state. The record in the case demonstrates that defendant's
20 service and repair facility was in the State of Washington, not
21 Oregon. Thus, plaintiffs correctly cite to O.R.S. 72.8130.

22 However, this statute does not provide a remedy to plaintiffs,
23 because it makes the manufacturer liable only to a retail seller
24 who has incurred obligations in giving effect to the express
25 warranty. O.R.S. 72.8130. There is nothing in O.R.S. 72.8130
26 which gives the buyer of the consumer good a remedy directly as to
27 the manufacturer.

28 O.R.S. 72.8130 should be read in conjunction with O.R.S.

1 72.8110, which states that if the manufacturer expressly warranting
2 a good does not provide service and repair facilities within the
3 state, the buyer may return the good to the retail seller for
4 replacement or for service and repair in conformance with the
5 express terms of the warranty. O.R.S. 72.8110(1). If the retail
6 seller does not effect sufficient service or repair, and does not
7 replace the defective good, the retail seller shall reimburse the
8 buyer in an amount equal to the purchase price paid, less a
9 reasonable charge for beneficial use by the buyer. Id. Read
10 together, the two statutes suggest that when a manufacturer
11 breaches an express warranty on a consumer good, and the
12 manufacturer does not maintain an in-state service and repair
13 facility, the buyer's remedy is against the retailer under O.R.S.
14 72.8110, and the retailer may then pursue its remedies as to the
15 manufacturer under O.R.S. 72.8130.

16 While O.R.S. 72.8190 makes clear that the remedies under the
17 statutes governing the sale of consumer goods are cumulative to any
18 other remedy provided by O.R.S. Chapter 72, plaintiffs fail to
19 identify any other statute under which they may obtain remedies for
20 the breach of an express warranty directly from the manufacturer as
21 opposed to the seller of the good. See, e.g., O.R.S. 72.7140
22 (governing a buyer's remedies for seller's breach); O.R.S. 72.7150
23 (governing buyer's incidental and consequential damages for
24 seller's breach).

25 A seller is defined as a person who sells or contracts to sell
26 goods. O.R.S. 72.1030(1)(e). "A 'sale' consists in the passing of
27 title from the seller to the buyer for a price." O.R.S.
28 72.1060(1). Under these definitions, the retail seller of the

1 fifth-wheel trailer, Highway Trailer Sales in Salem, is, on the
2 present record, the seller and thus, the Oregon commercial code
3 remedy for the buyer of nonconforming goods is unavailable to
4 plaintiffs in this case where they have sued only the manufacturer.
5 E.g., Clark v. Ford Motor Co., 46 Or. App. 521, 526-27, 612 P.2d
6 316, 319 (1980) (plaintiff could not invoke O.R.S. 72.6080
7 governing revocation of acceptance by the buyer, because the
8 statute allows buyer to revoke acceptance only as to his seller and
9 under Oregon commercial code definition of seller as "a person who
10 sells or contracts to sell goods," manufacturer of car did not sell
11 or contract to sell to plaintiff). In sum, the remedies plaintiffs
12 identify as being against the manufacturer do not apply under the
13 specific wording of the Oregon statutes. Plaintiffs have failed to
14 explain what Oregon-based remedy they are entitled to for the MMWA
15 claim of the breach of the limited warranty.

16 III. Evidence of Damages

17 In their original motion, plaintiffs sought damages of
18 \$88,623.68. Pltfs' Mem. at p. 4; Pltfs' Concise Stmt of Fact at ¶
19 5. These damages were itemized in Breniser's September 23, 2008
20 Declaration. There, he provided the following list, but no other
21 information:

22	\$15,000	-Trade
	\$1350	-Down Payment
23	\$1280.18	-Monthly Payments
	\$69,976.82	-Payoff Balance
24	\$269.48	-Tires
	\$618.20	-Storage
25	<u>\$129</u>	-Dehumidifier
	\$88,623.68	-Total

26 Sept. 23, 2008 Breniser Declr. at ¶ 6.

27 In the December 12, 2008 Opinion, I noted that the record
28

1 failed to explain exactly what these damages were and why or how
2 they were recoverable. Dec. 12, 2008 Op. at p. 16.

3 The supplemental materials filed by plaintiffs include a
4 Declaration of Gale Thurber which attaches documentation in the
5 form of letters, canceled checks, and receipts, to support the
6 actual damages claimed. Exhibit 2 is a copy of part of the initial
7 Retail Installment Contract showing plaintiffs as the buyer and
8 Highway Trailer Sales as the creditor/seller, in the purchase of
9 the fifth-wheel by plaintiffs. Exh. 2 to Thurber Declr. It is
10 dated August 26, 2005, and shows the original cash sale price of
11 \$85,333.69. Id. It also reflects a cash down-payment of \$1,350
12 and a credit of \$15,000 for the trade-in of a 1996 camper. Id.
13 Thus, the unpaid balance of the cash price at the time of sale was
14 \$68,983.69. Id.

15 Exhibit 2 supports plaintiffs' assertion that they put \$1,350
16 cash down at the time of sale, and were credited \$15,000 for the
17 trade-in. The unpaid balance of \$68,983.69 differs somewhat from
18 Breniser's stated \$69,976.82 as the payoff balance. The basis of
19 the approximate \$993 discrepancy is unclear.

20 Exhibit 1 is a copy of an October 11, 2005 letter to
21 plaintiffs from, according to Thurber, Citizen's Automobile
22 Finance, Inc., informing them that they have paid off the loan for
23 the fifth-wheel trailer in full. Exh. 1 to Thurber's Declr. The
24 exhibit also includes a copy of the check signed by Thurber to
25 Citizen's Bank, dated September 30, 2005, for \$71,135.35. Id.
26 Thurber states that prior to paying off the loan, they made two
27 payments of \$640.09, for a total of \$1,280.18. Thurber Declr. at
28 ¶ 2.

1 Thurber's statement in her declaration supports the assertion
2 that plaintiffs paid \$1,280.18 in monthly payments before paying
3 off the loan. It is unclear how the payoff letter and check in
4 Exhibit 1 relate to an item of claimed damages.

5 Exhibit 3 is a November 29, 2006 receipt from Lowe's for \$129
6 for dehumidifier bags that plaintiffs contend they continually
7 needed to absorb moisture in the fifth-wheel. Id. at ¶ 3; Exh. 3
8 to Thurber Declr. This supports the claim for \$129 in dehumidifier
9 expenses. Exhibit 4 is an October 6, 2006 receipt for \$269.48 from
10 Les Schwab for tires. Exh. 4 to Thurber Declr. Exhibit 4 supports
11 the claim for the amount spent on tires.

12 Thurber also states that plaintiffs incurred \$618.20 in
13 storage costs. Thurber Declr. at ¶ 6. This supports the amount
14 claimed for storage.

15 At this point, although the amounts of these damages are, for
16 the most part, adequately supported by the record, plaintiffs are
17 not entitled to them for the reason explained above - they have
18 failed to cite to an Oregon remedy allowing them to recover from
19 the manufacturer under the facts of this case. I note, however,
20 that even if plaintiffs were successful in showing their
21 entitlement to a remedy under O.R.S. 72.8110 (as to the retailer
22 when the manufacturer does not maintain an in-state service and
23 repair facility), or O.R.S. 72.8100 (if the manufacturer maintains
24 a service and repair facility within the state), the remedy is the
25 service or repair of the good in compliance with the warranty,
26 replacement of the good, or the reimbursement to the buyer of the
27 purchase price less a reasonable charge for beneficial use by the
28 buyer. Additionally, in the event of the replacement of the good

1 or refunding of the purchase price, the buyer must return the
2 defective good to the warrantor.

3 Notably, these statutes do not provide for consequential
4 damages such as storage fees and the dehumidifier. And, inasmuch
5 as the manufacturer is not the seller as explained above, O.R.S.
6 72.7150 does not apply as to the manufacturer. Additionally, there
7 is no evidence in the record of the value of the beneficial use to
8 plaintiffs, if any. Thus, while plaintiffs have submitted
9 documentation of the monetary amounts claimed, they still fail to
10 show that they are entitled to the damages sought.

11 IV. Procedural Posture

12 Currently, this case is set for a three-day jury trial
13 beginning on March 17, 2009. A pretrial conference is set for
14 March 9, 2009, with a pretrial order due on February 9, 2009.

15 Plaintiffs should proceed with the same exhibits they have
16 submitted at summary judgment, and with the supplemental materials
17 they filed, and prepare witness statements based on the
18 declarations they have already submitted. If, at the pretrial
19 conference, plaintiffs are unable to articulate a viable legal
20 theory entitling them to judgment as a matter of law on the facts
21 established, the Court will discuss with plaintiffs why a judgment
22 dismissing the case should not be entered.

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1 CONCLUSION

2 Plaintiffs' supplemental motion for summary judgment (#33), is
3 denied.

4 IT IS SO ORDERED.

5 Dated this 14th day of January, 2009.

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7
8 /s/ Dennis James Hubel
9 Dennis James Hubel
United States Magistrate Judge