TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 17-0081401

HOLLY KOILE and ROSS KOILE, **Complainants**	§	**BEFORE THE OFFICE**
v.	§	**OF**
WINNEBAGO INDUSTRIES, INC., **Respondents**	§	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Holly Koile and Ross Koile (Complainants) filed a complaint with the Texas Department of Motor Vehicles (Department) seeking relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged warrantable defects in their vehicle manufactured by Winnebago Industries, Inc. (Respondent). A preponderance of the evidence shows that the subject vehicle has warrantable defects subject to warranty repair relief.

I. Procedural History, Notice and Jurisdiction

Matters of notice of hearing[1] and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law. The hearing in this case convened, and the record closed, on June 21, 2017, in Houston, Texas, before Hearings Examiner Andrew Kang. Terry Vanderpool, attorney, represented the Complainants. The Complainants testified for themselves. Christopher Lowman, attorney, represented the Respondent. Steve Mary, Product Compliance Manager, testified for the Respondent.

[1] TEX. GOV'T CODE § 2001.051.

II. Discussion

A. Applicable Law

1. Repurchase/Replacement Relief

A vehicle qualifies for repurchase or replacement if the manufacturer cannot "conform a motor vehicle to an applicable express warranty by repairing or correcting a defect or condition that creates a serious safety hazard or substantially impairs the use or market value of the motor vehicle after a reasonable number of attempts."[2] In other words, (1) the vehicle must have a defect covered by an applicable warranty (warrantable defect); (2) the defect must either (a) create a serious safety hazard or (b) substantially impair the use or market value of the vehicle; and (3) the defect must continue to exist after a "reasonable number of attempts" at repair.[3] In addition, the Lemon Law imposes other requirements for repurchase/replacement relief, including (1) a mailed written notice of the defect to the manufacturer, (2) an opportunity to repair by the manufacturer, and (3) a deadline for filing a Lemon Law complaint.

a. Serious Safety Hazard

The Lemon Law defines "serious safety hazard" as a life threatening malfunction or nonconformity that: (1) substantially impedes a person's ability to control or operate a vehicle for ordinary use or intended purposes, or (2) creates a substantial risk of fire or explosion.[4]

b. Substantial Impairment of Use or Value

i. Impairment of Use

In determining substantial impairment of use, the Department considers "whether a defect or nonconformity hampers the intended normal operation of the vehicle." For instance, "while a vehicle with a non-functioning air conditioner would be available for use and transporting passengers, its intended normal use would be substantially impaired."[5]

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[2] TEX. OCC. CODE § 2301.604(a).

[3] TEX. OCC. CODE § 2301.604(a).

[4] TEX. OCC. CODE § 2301.601(4).

[5] *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012).

ii. Impairment of Value

The Department applies a reasonable purchaser standard for determining whether a defect substantially impairs the value of a vehicle. The reasonable purchaser standard "does not require an owner to present an expert witness or any technical or market-based evidence to show decreased value." Instead, under this standard, "factfinders should put themselves in the position of a reasonable prospective purchaser of the subject vehicle and determine (based on the evidence presented) if the current condition of the vehicle would deter them from buying the vehicle or substantially negatively affect how much they would be willing to pay for the vehicle."[6]

c. Reasonable Number of Repair Attempts

Generally, a rebuttable presumption is established that the vehicle had a reasonable number of repair attempts if:

> [T]he same nonconformity continues to exist after being subject to repair four or more times by the manufacturer, converter, or distributor or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and: (A) two of the repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, following the date of original delivery to the owner; and (B) the other two repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the second repair attempt.[7]

Alternatively, for serious safety hazards, a rebuttable presumption is established that the vehicle had a reasonable number of repair attempts if:

> [T]he same nonconformity creates a serious safety hazard and continues to exist after causing the vehicle to have been subject to repair two or more times by the manufacturer, converter, or distributor or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and: (A) at least one attempt to repair the nonconformity was made in the 12 months or 12,000 miles, whichever occurs first, following the date of original delivery to the owner; and (B) at least one other attempt to repair the nonconformity was made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the first repair attempt.[8]

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[6] *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012) ("[T]he Division's interpretation that expert testimony or technical or market-based evidence is not required to show diminished value or use is consistent with the statute's goal of mitigating manufacturers' economic advantages in warranty-related disputes.").

[7] TEX. OCC. CODE § 2301.605(a)(1)(A) and (B).

[8] TEX. OCC. CODE § 2301.605(a)(2).

Additionally, for vehicles out of service at least 30 days, a rebuttable presumption may be established that the vehicle had a reasonable number of repair attempts if:

> [A] nonconformity still exists that substantially impairs the vehicle's use or market value and: (A) the vehicle is out of service for repair for a cumulative total of 30 or more days in the 24 months or 24,000 miles, whichever occurs first, following the date of original delivery to the owner; and (B) at least two repair attempts were made in the 12 months or 12,000 miles following the date of original delivery to an owner.[9]

However, a statutory rebuttable presumption does not preclude otherwise finding a reasonable number of attempts to repair the vehicle based on different circumstances and fewer attempts.[10] Furthermore, the Department adopted a decision indicating that if a consumer presents the vehicle to a dealer for repair and the dealer fails to repair the vehicle, then that visit would constitute a repair attempt unless the consumer was at fault for the failure to repair the vehicle.[11]

d. Other Requirements

Even if a vehicle satisfies the preceding requirements for repurchase/replacement relief, the Lemon Law prohibits repurchase or replacement unless: (1) the owner or someone on behalf of the owner mailed written notice of the alleged defect or nonconformity to the manufacturer;[12] (2) the manufacturer was given an opportunity to cure the defect or nonconformity;[13] and (3) the

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[9] TEX. OCC. CODE § 2301.605(a)(3).

[10] *Ford Motor Company v. Texas Department of Transportation*, 936 S.W.2d 427, 432 (Tex. App.—Austin 1996, no writ) ("[T]he existence of statutory presumptions does not forbid the agency from finding that different circumstances or fewer attempts meet the requisite 'reasonable number of attempts.'").

[11] *DaimlerChrysler Corporation v. Williams*, No. 03-99-00822-CV (Tex. App.—Austin, June 22, 2000, no writ) (not designated for publication) (Repair attempts include "those occasions when the fault for failing to repair the vehicle rests with the dealership." Conversely, "those occasions when failure to repair the vehicle was the fault of the consumer would not be considered a repair attempt under the statute.").

[12] TEX. OCC. CODE § 2301.606(c)(1). The Lemon Law does not define the words "mailed" or "mail", so under the Code Construction Act, the common usage of the word applies. TEX. GOV'T CODE § 311.011. Dictionary.com defines "mail" as "to send by mail; place in a post office or mailbox for transmission" or "to transmit by email." *Mail. Dictionary.com Unabridged.* Random House, Inc. http://www.dictionary.com/browse/mail (accessed: April 01, 2016). Also, 43 TEX. ADMIN. CODE § 215.204 provides that "[u]pon receipt of a complaint for lemon law or warranty performance relief, the department will provide notification of the complaint to the appropriate manufacturer, converter, or distributor." The Department's notice of the complaint to the Respondent may satisfy the requirement that someone on behalf of the owner mailed notice of the defect/nonconformity to the Respondent.

[13] TEX. OCC. CODE § 2301.606(c)(2). A repair visit to a dealer can satisfy the "opportunity to cure" requirement if the manufacturer authorized repairs by the dealer after written notice to the manufacturer, i.e., the manufacturer essentially authorized the dealer to attempt the final repair on the manufacturer's behalf. *See Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 226 (Tex. App.—Austin 2012).

Lemon Law complaint was filed within six months after the earliest of: the warranty's expiration date or the dates on which 24 months or 24,000 miles had passed since the date of original delivery of the motor vehicle to an owner.[14]

2. Warranty Repair Relief

Even if repurchase or replacement relief does not apply, a vehicle may still qualify for warranty repair if the vehicle has a "defect . . . that is covered by a manufacturer's, converter's, or distributor's . . . warranty agreement applicable to the vehicle."[15] The manufacturer, converter, or distributor has an obligation to "make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty."[16]

3. Burden of Proof

The law places the burden of proof on the Complainants.[17] The Complainants must prove all facts required for relief by a preponderance, that is, the Complainants must present sufficient evidence to show that each required fact is more likely than not true.[18] If any required fact appears equally likely or unlikely, then the Complainants has not met the burden of proof.

4. The Complaint Identifies the Issues in this Proceeding

The complaint identifies the issues to be addressed in this proceeding.[19] The complaint should state "sufficient facts to enable the department and the party complained against to know the nature of the complaint and the specific problems or circumstances which form the basis of the claim for relief under the lemon law."[20] However, the parties may expressly or impliedly consent

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[14] TEX. OCC. CODE § 2301.606(d)(2).

[15] TEX. OCC. CODE § 2301.204.

[16] TEX. OCC. CODE § 2301.603(a).

[17] 43 TEX. ADMIN. CODE § 215.66(d).

[18] *E.g., Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

[19] "In a contested case, each party is entitled to an opportunity . . . for hearing after reasonable notice of not less than 10 days." TEX. GOV'T CODE §§ 2001.051; "Notice of a hearing in a contested case must include . . . a short, plain statement of the factual matters asserted." TEX. GOV'T CODE § 2001.052. *See* TEX. OCC. CODE § 2301.204(b) ("The complaint must be made in writing to the applicable dealer, manufacturer, converter, or distributor and must specify each defect in the vehicle that is covered by the warranty."); TEX. OCC. CODE § 2301.204(d) ("A hearing may be scheduled on any complaint made under this section that is not privately resolved between the owner and the dealer, manufacturer, converter, or distributor.").

[20] 43 TEX. ADMIN. CODE § 215.202(a)(2).

to trying issues not included in the pleadings.[21] Implied consent occurs when a party introduces evidence on an unpleaded issue without objection.[22]

A. Complainants' Evidence and Arguments

On April 2, 2015, the Complainants, purchased a new 2015 Winnebago Itasca Ellipse from McClain's RV SuperStore, an authorized dealer of the Respondent, in Fort Worth, Texas. The vehicle had 905 miles on the odometer at the time of purchase. The vehicle's limited warranty provides basic coverage for 12 months or 15,000 miles, whichever occurs first, and structural coverage for 36 months or 36,000 miles, whichever occurs first. On November 23, 2016, the Complainants' attorney mailed a written notice of defect to the Respondent. On January 31, 2017, the Complainants filed a Lemon Law complaint with the Department alleging: failure of the slides; "green screen" on TVs when using the DVD player; issues with the satellite system on TVs; outside TV does not work with satellite system; refrigerator doors rusting; refrigerator doors do not close properly; refrigerator is out of level; USB receptacle does not function; and the induction cooktop will not work with cookware smaller than six inches in diameter.

Mr. Koile testified that the subject vehicle had a broken window when purchased. The window subsequently fell out and broke while at the dealership, which replaced the window assembly. Additionally, the windshield washer and bed pump had not been completely installed. On June 26th, on a trip to Tool, Texas, the vehicle's steps broke in extended position and the Complainant's drove home with the steps extended. The dealer did not have the parts to repair the steps, but did repair the windshield washer, bed air pump, and thermostat. The dealer retracted, disconnected, and wired-closed the steps. Because the steps remained nonfunctional, Mr. Koile bought a conductor's step. On July 20th, the Complainants took the vehicle to the dealer again for the steps and also for the outside tank level gauge, Bluetooth microphone, rubber step cover loosening, green screen on the TVs, and the refrigerator surface. The step could not be repaired and required additional parts. The dealer notified Mr. Koile that he had to contact the refrigerator manufacturer for the rusting refrigerator doors. After returning to League City on July 23rd, Mr. Koile contacted Whirlpool, the refrigerator manufacturer, and the manufacturer shipped three

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[21] 43 TEX. ADMIN. CODE § 215.42; TEX. R. CIV. P. 67.

[22] *See Gadd v. Lynch*, 258 S.W.2d 168, 169 (Tex. Civ. App.—San Antonio 1953, writ ref'd).

replacement doors but the doors could not be installed before pulling out the refrigerator. The Complainants went back to the dealer to address the step; outside tank level gauges (which did not function because a wire was pulled apart); step cover; outside cable cover on the outside edge of the slides; and wooden endcap between kitchen and living room couch that came off. On August 30th, on a trip to Orlando, the step broke again, swinging freely. Mr. Koile wired the steps closed and had to buy a step. On September 11th, the Complainants took the vehicle to the dealer in Fort Worth. After leaving Gaffney, South Carolina, the heater broke; the dishwasher mount broke; and the bathroom door would not latch because the wall moved. On November 13th, the Complainants dropped off the vehicle at the dealer to repair the heater, dishwasher, and a list of other items, but the step was not broken at this time. A manager of the dealer arranged for service on the vehicle at the factory in Iowa. Mr. Koile inquired about the slides sealing properly and the factory rebuilt the two left slides. Afterwards, the front-left slide would not extend. On February 1st, Mr. Koile returned the vehicle to the dealer for variety of issues. About March 23rd, the right front slide stopped after extending two to six inches. A technician came out to manually crank in the slide. At the dealership, a tech looked at the slide and found what he believed was a bad wire connection and repaired it. Since then, that slide would hesitate. In mid-August, Mr. Koile noticed the slide jumping up and down when retracting. He took the vehicle to the dealer on September 14th for rebuilding the slide with a mechanism from a different company. The Complainants went to Orlando almost immediately after repair and the vehicle seemed fine until October 1st. On the left front slide, the front part tried to move but the back part would not move. He could not retract the slide to move the vehicle. A technician came out to manually retract the slide but could not get it in. Eventually, the technicians got the slides in. Mr. Koile elaborated that the vehicle was not usable as a home because the stove would not work on pans smaller than six inches; the USB port did nothing – it would not charge an iPhone or iPad. The steps continued to have issues.

On cross-examination, Mr. Koile affirmed that the vehicle came with a variety of different warranties, including a warranty for the cooktop. He explained that because he bought the cooktop from the Respondent and not the cooktop manufacturer, he looked to Winnebago for repair. He identified the currently existing problems as including the step, USB port, induction cooktop, loose trim in the bath, but the slide functioned now. Mr. Koile acknowledged that two of the existing issues were on the complaint but the other two (steps and bathroom trim) were not. Additionally, Mr. Koile was not completely sure the video was functioning because he had not had been able to

test it. He noted that the cooktop manufacturer was aware of the issue but offered no solutions. Mr. Koile affirmed that a third party, Riverpark, manufactured the USB port.

Mr. Koile explained that he had the dealer install two satellite receiver boxes because outside of the big city, they could not get any reception without satellite. He confirmed that the green screen issue was solved when a dealer tech found a switch in the wrong position.

In closing, the Complainants argued that the warranty was extended and nothing indicates otherwise. Moreover, the vehicle has been out of service for repair for over 500 days and even if out of service for fewer days as the Respondent contends, it still surpasses the Lemon Law's (30 day) requirement. A number of defects make the vehicle that make the vehicle not usable. The Complainants had never taken the vehicle anywhere without a failure and it has never worked properly.

B. Respondent's Evidence and Arguments

Mr. Mary testified that based on the inspection, the vehicle appeared to be in good shape and for the most part operated as designed, including the slideouts, leveling system, though the stovetop had some discrepancies with the manufacturer's representations. The steps did not come in and out. Mr. Mary pointed out that he did find a loose cable which appeared to cause the lack of power. Otherwise, the vehicle appeared in good shape. The USB port would charge one type of phone but would not charge an iPhone. He did not have much familiarity with the monitor. He confirmed that the USB port was manufactured and warranted by Riverpark. He noted that the USB port previously operated as designed when tested with an iPod at Camping World. Mr. Mary also confirmed that True Induction manufactured and warranted the cooktop.

In sum, the Respondent contended that under the Lemon Law, the relevant issue is whether a defect continues to exist. Of the problems listed in the complaint, only the USB port and cooktop continue to have problems; however, neither substantially impair the vehicle. Moreover, the warranty expired after one year with no effect on the limitations in the warranty.

C. Inspection

Upon inspection at the hearing, the vehicle had 16,987 miles on the odometer. The entry steps stayed retracted whether the door was open or closed. Mr. Mary found a loose power cable on the step motor, which he believed caused the steps to malfunction. An approximately one inch

long section of quarter round trim had come off in the bathroom area. The induction cooktop would not heat a five-inch bottom pan. Specifically, the cooktop would turn itself off with the pan on the cooktop. Mrs. Koile demonstrated that a refrigerator magnet would stick to the pan to show that the pan was induction-capable. The USB port would not charge an iPhone but would charge a Samsung smartphone. With either phone, pressing the USB icon on the infotainment screen did not have any effect. The slides extended and retracted normally.

D. Analysis

The vehicle qualifies for repair relief for the steps and the bathroom trim. However, the record indicates that the other issues are not warrantable defects. As an initial matter, the Complainants identified the following issues in their complaint: failure of the slides; "green screen" on TVs when using the DVD player; issues with the satellite system on TVs; outside TV does not work with satellite system; refrigerator doors rusting, not closing properly, and not level; USB receptacle does not function; and the induction cooktop will not work with cookware smaller than six inches in diameter. Of these listed issues, the slides and refrigerator issues were resolved. Mr. Koile was not certain if the video issues were resolved because he did not have an opportunity to test them after repair. Additionally, the Complainants presented testimony about two new issues (the steps and bathroom trim) not previously identified in the complaint.

1. Repurchase/Replacement Relief Unavailable

Because the complaint was not filed within the time specified in § 2301.606(d) of the Lemon Law, the subject vehicle may qualify for repair relief but cannot qualify for repurchase or replacement. As explained in the discussion of applicable law, the Lemon Law requires a complaint for repurchase or replacement relief to have been filed no later than six months after the earliest of: the express warranty's expiration, or 24 months or 24,000 miles after delivery of the vehicle. Under the terms of the New Vehicle Limited Warranty, the coverage period expired on the earlier of 12 months after delivery, or 15,000 miles on the odometer. The Complainants took delivery of the vehicle on April 2, 2015, so 12 months after delivery falls on April 2, 2016. The odometer read 14,503 miles on September 12, 2016, and 15,102 miles, on January 14, 2017, so the vehicle reached 15,000 miles at some point between these dates. Given these parameters, the warranty expired on **April 2, 2016**. 24 months after delivery falls on April 2, 2017. The vehicle had not reached 24,000 miles as of the date of the hearing. Accordingly, the Complainants must

have filed their complaint by October 2, 2016, six months after April 2, 2016. However, the Complainants filed their complaint on January 31, 2017. Additionally, as explained below, the goodwill policy outlined in the Respondent's December 10, 2015 letter (Goodwill Policy) has no effect on the filing deadline. Also, any issues not identified in the complaint or notice of defect (the steps and the bathroom trim) cannot qualify for repurchase or replacement.

a. Goodwill Policy

As detailed below, the Respondent's Goodwill Policy letter neither creates a new warranty nor extends the existing New Vehicle Limited Warranty.

i. Goodwill Policy Letter Does Not Create a Warranty

Chapter 2 of the Texas Business and Commerce Code governs the sale of goods,[23] which includes the subject vehicle.[24] Section 2.313 of the Code addresses the creation of express warranties. In relevant part, § 2.313(a)(1) states that "[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise."[25] However, the Goodwill Policy letter does not meet the Code's requirements for creating an express warranty.[26] Unlike the New Vehicle Limited Warranty, which the Respondent issued as part of the "basis of the bargain" (i.e., "to induce the sale" of the vehicle),[27] the Respondent gratuitously offered the Goodwill Policy after the vehicle's sale with no consideration from the Complainants.

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[23] TEX. BUS. & COM. CODE § 2.102 specifies that "[u]nless the context otherwise requires, this chapter applies to transactions in goods."

[24] TEX. BUS. & COM. CODE § 2.105 defines "goods" as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Chapter 8) and things in action."

[25] TEX. BUS. & COM. CODE § 2.313(a)(1)(emphasis added).

[26] *Medical City Dallas, Ltd. v. Carlisle Corp.*, 251 S.W.3d 55, 60 (Tex. 2008) ("[W]hile an express warranty is a distinct claim, it is nonetheless a part of the basis of a bargain and is contractual in nature."). *Dynegy Midstream Services v. Apache Corp.*, 294 S.W.3d 164, 168 (Tex. 2009) ("'A contract is ambiguous when its meaning is uncertain and doubtful or is reasonably susceptible to more than one interpretation.' We give contract terms their plain and ordinary meaning unless the instrument indicates the parties intended a different meaning. A contract is not ambiguous simply because the parties disagree over its meaning."). *National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. CBI Industries, Inc.*, 907 S.W.2d 517, 520 (Tex. 1995) (per curiam) ("If a written contract is so worded that it can be given a definite or certain legal meaning, then it is not ambiguous."). *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 862 (Tex. 2000) ("When a contract is unambiguous we will enforce it as written.").

[27] *Church v. Ortho Diagnostic Systems, Inc.*, 694 S.W.2d 552, 555 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.) ("'[W]arranty' contemplates that a sale or contract has been made and the seller, to induce the sale, undertakes to vouch for the condition, quality, quantity, or title of the thing sold.").

The Respondent's December 10, 2015, letter reflects the gratuitous nature of the Goodwill Policy: "Due to the length of time associated with previous repairs to date and taking into consideration the days your coach has been out of service; we are prepared to offer you the following goodwill agreement regarding the potential of future service needs." Because the Goodwill Policy letter did not exist at the time of sale, the Goodwill Policy could not have been a part of the basis of the bargain as required to create an express warranty. The Respondent clearly provided the Goodwill Policy after the vehicle's sale so that the Complainants could not have relied on the Goodwill Policy as a basis of the bargain. Rather than being an express warranty, the Goodwill Policy, as the name specifies, is simply a goodwill, customer-relations gesture in response to the Complainants' inconvenience experienced after the vehicle's sale.

ii. Goodwill Policy Letter Does Not Extend the New Vehicle Limited Warranty

The language of the Goodwill Policy letter shows that it does not extend the existing New Vehicle Limited Warranty.[28] The letter indicates that the Goodwill Policy is separate and in addition to the New Vehicle Limited Warranty: "If you continue to experience problems beyond your Winnebago Industries basic warranty, Winnebago will extend a goodwill policy on the repairs . . . for up to one year beyond the expiration of your basic 12 month/15,000 mile warranty." Here, the letter distinguishes between the Goodwill Policy and the New Vehicle Limited Warranty and states that the Respondent will provide goodwill repairs after the New Vehicle Limited Warranty ends at 12 months or 15,000 miles. Moreover, the letter never states that the Goodwill Policy extends the New Vehicle Limited Warranty. Rather, the Goodwill Policy letter explains that it has the practical effect of providing an additional year of repairs as if extending the warranty period: "Under this goodwill policy we will continue to work with you and our dealers as needed for repairs until April 2nd, 2017, effectively extending the period for 1 year." The language in the Goodwill Policy letter affirms that the Respondent provided the Goodwill Policy in addition to the

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[28] *Medical City Dallas, Ltd. v. Carlisle Corp.*, 251 S.W.3d 55, 60 (Tex. 2008) ("[W]hile an express warranty is a distinct claim, it is nonetheless a part of the basis of a bargain and is contractual in nature."). *Dynegy Midstream Services v. Apache Corp.*, 294 S.W.3d 164, 168 (Tex. 2009) ("'A contract is ambiguous when its meaning is uncertain and doubtful or is reasonably susceptible to more than one interpretation.' We give contract terms their plain and ordinary meaning unless the instrument indicates the parties intended a different meaning. A contract is not ambiguous simply because the parties disagree over its meaning."). *National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. CBI Industries, Inc.*, 907 S.W.2d 517, 520 (Tex. 1995) (per curiam) ("If a written contract is so worded that it can be given a definite or certain legal meaning, then it is not ambiguous."). *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 862 (Tex. 2000) ("When a contract is unambiguous we will enforce it as written.").

New Vehicle Limited Warranty, which expired on April 2, 2016, as opposed to extending or modifying the New Vehicle Limited Warranty.

2. Warrantable Defect

Warranty performance relief does not apply to all problems that may occur with a vehicle. Rather, warranty performance relief only applies to warrantable defects (conditions covered by an applicable express warranty).[29]

In relevant part, the warranty states as follows:

> **Winnebago supplied and installed parts**: Winnebago promises that any part of this motorhome – except those identified in paragraph entitled, "**Excluded from Basic Coverage**" – found to be defective in material or workmanship shall be repaired or replaced at no cost to the owner for parts, material, or labor so long as the motorhome has been used exclusively for recreational purposes and maintained as recommended in the Operator's Manual.
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> **Excluded from Basic Coverage**: Parts, accessories, or equipment installed, or modifications or alterations made after the motorhome leaves the factory, including items installed and modifications or alterations made by a Winnebago dealer or third-party; . . . a part or component covered under a warranty issued by its manufacturer (for example, the chassis, drivetrain, wheels, tires; electronics and appliances) . . . .
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> **Basic Coverage Period:** Basic coverage begins on the date of retail delivery, or the date on which the motorhome is first placed in service as a demonstrator or company vehicle, whichever is earliest. Basic Coverage ends after 12 months or when the vehicle's odometer registers 15,000 miles (24,135 kilometers), whichever is sooner.[30]

a. Items Excluded from Warranty Coverage

The New Vehicle Limited Warranty specifically excludes separately warranted electronics and appliances. In particular, the warranty does not cover the TVs/DVD players, satellite system, refrigerator, USB port, and induction cooktops. Accordingly, these items do not qualify for warranty repair relief.

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[29] TEX. OCC. CODE §§ 2301.204(a) and 2301.603(a).

[30] Complainants' Ex. A, 2015 New Vehicle Limited Warranty (underline added).

b. Warrantable Defects Reported During the Warranty Term

A manufacturer has a continuing obligation to repair nonconformities reported during the term of the warranty.[31] A repair order with a March 2015 promise date includes the step issue and an invoice with a December 7, 2015, appointment date includes the bathroom trim issue. Under the Lemon Law, a Respondent has an obligation to repair beyond the end of the warranty if the defect was reported before the warranty expired. In this case both the steps and bathroom trim issues were reported before the New Vehicle Warranty expired on April 2, 2016.

III. Findings of Fact

1. On April 2, 2015, the Complainants, purchased a new 2015 Winnebago Itasca Ellipse from McClain's RV SuperStore, an authorized dealer of the Respondent, in Fort Worth, Texas. The vehicle had 905 miles on the odometer at the time of purchase.

2. The vehicle's limited warranty provides basic coverage for 12 months or 15,000 miles, whichever occurs first.

3. On November 23, 2016, the Complainants' attorney mailed a written notice of defect to the Respondent.

4. On January 31, 2017, the Complainants filed a Lemon Law complaint with the Department alleging: failure of the slides; "green screen" on TVs when using the DVD player; issues with the satellite system on TVs; outside TV does not work with satellite system; refrigerator doors rusting; refrigerator doors do not close properly; refrigerator is out of level; USB receptacle does not function; and the induction cooktop will not work with cookware smaller than six inches in diameter. The record indicates that the TV/DVD player, satellite, and refrigerator issues were successfully resolved prior to the hearing.

5. On April 4, 2017, the Department's Office of Administrative Hearings issued a notice of hearing directed to the Complainants and the Respondent, giving all parties not less than 10 days' notice of hearing and their rights under the applicable rules and statutes. The notice stated the time, place and nature of the hearing; the legal authority and jurisdiction

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[31] TEX. OCC. CODE §2301.603(b).

under which the hearing was to be held; particular sections of the statutes and rules involved; and the factual matters asserted.

6. The hearing in this case convened, and the record closed, on June 21, 2017, in Houston, Texas, before Hearings Examiner Andrew Kang. Terry Vanderpool, attorney, represented the Complainants. The Complainants testified for themselves. Christopher Lowman, attorney, represented the Respondent. Steve Mary, Product Compliance Manager, testified for the Respondent.

7. The vehicle's odometer displayed 16,987 miles at the time of the hearing.

8. The vehicle's warranty expired on April 2, 2016.

9. During the inspection at the hearing, the entry steps stayed retracted whether the door was open or closed. Mr. Mary found a loose power cable on the step motor, which he believed caused the steps to malfunction. An approximately one inch long section of quarter round trim had come off in the bathroom area. The induction cooktop would not heat a five-inch bottom pan. Specifically, the cooktop would turn itself off with the pan on the cooktop. The USB port would not charge an iPhone but would charge a Samsung smartphone. With either phone, pressing the USB icon on the infotainment screen did not have any effect. The slides extended and retracted normally.

10. The warranty applies to parts supplied and installed by the Respondent and not otherwise excluded from coverage. The warranty excludes "[p]arts, accessories, or equipment installed, or modifications or alterations made after the motorhome leaves the factory, including items installed and modifications or alterations made by a Winnebago dealer or third-party." The warranty also excludes any "part or component covered under a warranty issued by its manufacturer (for example, the chassis, drivetrain, wheels, tires; electronics and appliances) . . . ."

11. The warranty excludes the TVs/DVD players, satellite system, refrigerator, USB port, and induction cooktops.

IV. Conclusions of Law

1. The Texas Department of Motor Vehicles has jurisdiction over this matter. TEX. OCC. CODE §§ 2301.601-2301.613; TEX. OCC. CODE § 2301.204.

2. A hearings examiner of the Department's Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a decision with findings of fact and conclusions of law, and the issuance of a final order. TEX. OCC. CODE § 2301.704.

3. The Complainants filed a sufficient complaint with the Department. 43 TEX. ADMIN. CODE § 215.202.

4. The parties received proper notice of the hearing. TEX. GOV'T CODE §§ 2001.051, 2001.052; 43 TEX. ADMIN. CODE § 215.206(2).

5. The Complainants bears the burden of proof in this matter. 43 TEX. ADMIN. CODE § 206.66(d).

6. The Complainant, a person on behalf of the Complainant, or the Department did not provide written notice of the step and bathroom trim issues to the Respondent. This Order may not require repurchase or replacement of the vehicle without written notice of the defect/nonconformity to the Respondent. TEX. OCC. CODE § 2301.606(c)(1).

7. The Complainants' vehicle does not qualify for replacement or repurchase. The Complainants did not timely file the complaint for repurchase or replacement relief. The proceeding must have been commenced not later than six months after the earliest of: (1) the expiration date of the express warranty term; or (2) the dates on which 24 months or 24,000 miles have passed since the date of original delivery of the motor vehicle to an owner. TEX. OCC. CODE § 2301.606(d).

8. If the Complainants' vehicle does not qualify for replacement or repurchase, this Order may require repair to obtain compliance with the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603; 43 TEX. ADMIN. CODE § 215.208(e).

9. The entry steps and bathroom trim qualify for warranty repair. TEX. OCC. CODE §§ 2301.204 and 2301.603.

10. The Respondent remains responsible to address and repair or correct any defects that are covered by the Respondent's warranty. TEX. OCC. CODE § 2301.603.

11. The Respondent has a continuing obligation after the expiration date of the warranty to address and repair or correct any warrantable nonconformities reported to the Respondent or Respondent's designated agent or franchised dealer before the warranty expired. TEX. OCC. CODE § 2301.603.

V. Order

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that the Complainants' petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is **DISMISSED**. It is **FURTHER ORDERED** that the Respondent shall make any repairs needed to conform the vehicle's entry steps and wood trim in the bathroom to the applicable warranty. The Complainants shall deliver the subject vehicle to the Respondent within 20 days after the date this Order becomes final under Texas Government Code § 2001.144.[32] Within 20 days after receiving the vehicle from the Complainants, the Respondent shall complete repair of the subject vehicle. However, if the Department determines the Complainants' refusal or inability to deliver the vehicle caused the failure to complete the required repair as prescribed, the Department may consider the Complainants to have rejected the granted relief and deem this proceeding concluded and the complaint file closed under 43 Texas Administrative Code § 215.210(2).

SIGNED August 15, 2017

ANDREW KANG
HEARINGS EXAMINER
OFFICE OF ADMINISTRATIVE HEARINGS
TEXAS DEPARTMENT OF MOTOR VEHICLES

[32]: (1) This Order becomes final if a party does not file a motion for rehearing within 20 days after receiving a copy of this Order, or (2) if a party files a motion for rehearing within 20 days after receiving a copy of this Order, this Order becomes final when: (A) the Department renders an order overruling the motion for rehearing, or (B) the Department has not acted on the motion within 45 days after the party receives a copy of this Order.