

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2005-011568

07/23/2009

HONORABLE J. KENNETH MANGUM

CLERK OF THE COURT  
D. Glab  
Deputy

JOHN POWERS III

MARK J DEPASQUALE

v.

COUNTRY COACH INC, et al.

ERICK S DURLACH

RULING

This matter having come on regularly for trial to the Court on June 9, 10, 11, 12 and 17, 2009, and the Court having considered the testimony received, the exhibits admitted into evidence, and the arguments of counsel, and being fully advised in the premises, hereby makes the following findings of fact and conclusions of law, such having been requested prior to trial by Plaintiff, pursuant to Rule 52(a), Ariz.R.Civ.P. If any FINDING OF FACT is more properly a CONCLUSION OF LAW or vice versa, it shall be so considered.

**FINDINGS OF FACT**

1. The testimony of the witnesses is generally summarized under that person's name. For convenience the witnesses are generally referred by their surname. Information gleaned directly from deposition transcripts submitted to the court but not presented during the hearing is so indicated.

**Summary of the Dispute**

2. This case arises out of Powers' purchase from Guaranty of a 2004 Intrigue model motor home manufactured by Country Coach Inc. ("CCI") through Damon Rapozo at Guaranty

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RV, Inc. ("Guaranty"). This motor home ("Coach") was equipped with a Caterpillar C-13 525 horse power diesel engine. In his Amended Complaint, Powers seeks rescission of the purchase agreement based on allegations of misrepresentations involving the C-13 that induced Powers to purchase the Coach. (Amended Complaint at ¶¶ 25-39) In the alternative, Powers seeks damages based upon allegations of a violation of the Arizona Consumer Fraud Act. A.R.S. § 44-1522. (Amended Complaint at ¶¶ 24-46)

**Uncontested Facts Deemed Material by the Parties.**

3. The jurisdiction and venue in this Court are appropriate and not in dispute.
4. Plaintiff John Powers III ("Powers") was at all times relevant hereto a resident of the State of Arizona, County of Maricopa.
5. Defendant Guaranty RV, Inc. ("Guaranty") is now and was at all times relevant hereto an Oregon corporation.
6. Damon Rapozo ("Rapozo") is and at relevant times was an employee of Guaranty.
7. Guaranty owns and operates automobile and recreational vehicle dealerships, including a motor home dealership located in Junction City, Oregon.
8. Defendant Country Coach, Inc. ("Country Coach") was at all relevant times an Oregon corporation that manufactured motor homes. Country Coach has filed for bankruptcy protection.
9. In late 2002 or early 2003, Powers purchased a 2002 Country Coach Intrigue from a private party with Damon Rapozo's assistance.
10. In or around November 2003, Powers contacted Rapozo for the purpose of shopping for a new coach. He did not shop for a replacement vehicle other than through Rapozo. The 2002 Country Coach Intrigue, which Powers traded in for the subject Coach, and the subject Coach are the only two motor homes he has ever owned.
11. Initially, Rapozo recommended a coach with a Caterpillar C-12 505 HP engine to Powers, which was in stock at Guaranty.
12. Powers purchased from Guaranty a 2004 Intrigue model motor home manufactured by Country Coach.

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13. Powers' Coach had a Caterpillar model C-13 525 HP diesel engine installed.
14. The C-13 was a new engine which replaced the C-12.
15. In January 2004, Country Coach and Caterpillar tested the C-13 cooling system.
16. Powers expressed concern to Rapozo over whether the engine would overheat.
17. Pursuant to Powers' request, Rapozo emailed Jeff Howe at Country Coach asking whether Country Coach could provide Powers with a letter stating that "the C-13 will not overheat in the Intrigue."
18. By email dated February 9, 2004, Country Coach's chassis engineering manager, Bently Buchanan, wrote:

The cooling system for each power train installation is required to be tested by the engine manufacturer. The cooling system consists of a radiator, charge air cooler, transmission cooler, hydraulic oil cooler" air conditioning condenser, hydraulic pump, hydraulic motor and the cooling fan. Recently we successfully completed this testing for our C-13 installation on our Magna and Affinity chassis. This same cooling system will be used on your Intrigue with the C-13. The only difference between our Magna! Affinity installation and the Intrigue is the engine access door. On our Magnas and Affinities the doors have "hidden horizontal louvers" cut into them. On Intrigues we install a door which has a perforated aluminum panel on it. These louvers and perforations aid in engine compartment heat dissipation. Whereas I have faith that our cooling package installation on the C-13 Intrigue will be successful, the effect that the different door has on cooling is unknown at this time. Because our cooling system equipment is the same on all chassis with the C-13, we are not required to test our Intrigue installation.

19. Pursuant to Powers' request, Rapozo forwarded Mr. Buchanan's 2/9/04 email to Powers.
20. Powers signed the "Purchase Order" dated July 19, 2004, for the Powers' Coach.

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21. On or about July 21, 2004, Terry Cass (an employee of Powers' company) dropped off Powers' 2002 Country Coach Intrigue and picked up Powers' 2004 Country Coach Intrigue in Junction City, Oregon. Mr. Cass then proceeded to drive Powers' new Coach to Arizona.

**John Allen Powers, III**

22. John Allen Powers, III, is employed by and is an owner of Powers Steel in Phoenix, Arizona. He did not finish high school nor attend college because of ADD.

23. Racing is Powers' hobby and was his profession in the 1970's and had a world championship in 1978. In 2002-03, racing brought back a nostalgic circuit so he spends a weekend each month to six weeks at races. He sells T-shirts, hats, jackets, and other memorabilia.

24. He first purchased in 2003 a used 2002 Intrigue model made by Country Coach. He wanted a motor home so he could tow a trailer to the races. However, wind can cause his first coach (32 or 33 feet in length) to wander on the road as it was a single, rear axle coach. He learned that tandem axle coaches hold the road better.

25. He called Damon Rapozo, a salesman for Guaranty before Christmas 2003. They talked daily and Rapozo sent faxes of various models. Powers understood that the C-13 was the only engine for the Intrigue because of EPA requirements even though Exhibit 12 shows it was special for Powers and even though he paid \$44,250.00 extra for the engine.

26. Powers was aware from racing fans (Bud Rice, whose son won the Indy 500 in 2004, Jerry Webb, who drives for Bobby Raynal and Brett Anderson) that high horsepower engines overheat. He also wanted a bigger generator but Rapozo said that only an 8000 would fit. Powers spoke many times of his concerns about overheating after he first heard of the problem starting in the November-December 2003 time frame. Rapozo said that the C-13 model Caterpillar diesel engine wouldn't overheat. Nevertheless, Powers asked for a letter that the diesel wouldn't overheat. Powers believed Rapozo but still was worried enough to ask for a letter.

27. Exhibit 30 is the letter reporting that the C-13 passed the test to show it wouldn't overheat. Powers says that he bought the letter from Rapozo and Guaranty, not CC. Rapozo and Powers read the letter together and Rapozo said the Coach wouldn't overheat. Rapozo didn't say not to rely on Exhibit 30 or that it was inaccurate. Powers didn't have any concerns over the slight difference between the engine door opening on the model tested by CC and the model Powers was looking to buy.

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28. CC advertized a Tucson Show in March 2004 and Powers attended per Rapozo's request. So the two spent three to five hours visiting together. Thus, Powers selected the shortest tandem axle because it would be easier to handle and would not wander in wind. Exhibit 32 is the original purchase order (on 3/11/04) in Tucson: the purchase price was \$340,202.00 before the credit of \$160,000.00 for his trade-in.

29. Exhibit 67 is the final purchase order signed on 7/19/04. The final net price was \$184,382.00 with the \$160,000.00 trade-in.

30. Exhibit 69 is the Guaranty disclaimer form showing the Coach is sold "as is."

31. Powers was never told of overheating by C-13's and if he'd learned of overheating, he'd not have bought one.

32. From six to eight hours after Cass left Country Coach, he called and said it got hot, so he stopped to let it cool off. Powers called Rapozo who said that wires had crossed and not to worry. Rapozo called the next day to say that the thermostat had been set incorrectly.

33. For the next overheat, Powers took the Coach to Caterpillar which said the wiring and thermostat were fine. In August, Powers was in Tucson with his girlfriend and her three year old child. The Coach overheated on the freeway in the middle of traffic and the engine just "stopped", slowing to 15 mph and taking a mile to get to the shoulder. It was 115 degrees outside. Rapozo said nothing was wrong.

34. Within days, Powers took the Coach to Caterpillar where it sat for a month and nothing was done to fix anything. Rapozo said that Country Coach was working on a solution.

35. Exhibit 127 is the 9/9/04 letter to Rapozo. Powers was also talking to Country Coach who said no one else had problems and Powers was crazy and there was no fix.

36. It turns out that CCI put in a 1/3 bigger radiator and moved the a/c condenser and the air cooler but CCI didn't offer this to Powers. CCI did make a bigger airflow. Powers was told that CCI created a fix by January 2005.

37. Exhibit 158 is Powers' letter of 9/20/04 demanding rescission. He decided that CCI didn't know what they were doing. At that time, when Powers picked up his Coach from Caterpillar at 43<sup>rd</sup> and the I-10 and drove the freeway at 85 degree ambient temperature, the Coach overheated before he got to his business near the airport. This was also the time frame that Jack Fagan was saying that Powers was the only one with a problem and "You can sue us. That's what you'll have to do."

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38. Powers paid \$184,383 and turned in his old coach for a \$160,000 trade in credit.

39. The RV has 11,800+ miles on it but it's not moved an inch in two years. After the "fix" in March 2005, Powers took it to Bakersfield and the turbo blew up.

40. An expert told Powers that a coach like his would rent for \$150/day with 500 miles of use and he'll consider it to have 12,000 miles on it for the credit to be given to Guaranty. As parts the Coach is worth \$25 to \$50,000.

41. Powers wanted a written assurance from CCI and from Rapozo for clarity and proof that it wouldn't overheat. Exhibit 309 is the CCI application for rescission and the second page says he relies on Ben Buchanan's statements. Exhibit 310 is the Non-Uniform Interrogatories which doesn't say the Guaranty was to provide the assurance, but the process started with Powers telling Rapozo that he wanted a letter saying it wouldn't overheat. Powers was relying on Rapozo to tell him the motor was OK so Rapozo came back with Exhibit 30. Powers didn't specify he wanted a letter from CCI. Powers never would have bought the Coach if he'd known of the overheating. He didn't know the problem engine but knew Rayhal and others were having problems (even though his deposition said he knew it was the C-13, but that was because he understood it was the bigger engines that were overheating). He says that he knew that Anderson had a problem with his C-13. Then again, Rapozo told him that they fixed the problem.

42. He doesn't know if the original purchase order was titled in his company's name, but his company has not depreciated the Coach, but he personally did so based on the business of selling memorabilia. He doesn't know if it's been fully depreciated.

43. Exhibit 306 with the Silverleaf computer engine history shows the one overheat on 9/14/04 with 1754 miles (and current mileage is almost 12,000). This is about when he asked for rescission.

44. Caterpillar put in fins for the radiator and rubber around the body in December 2004 and put in the new turbo between January and March 2005. The Coach hasn't been back to the factory since its purchase. Jake Smith for Guaranty inspected the Coach and said that it could be fixed for \$13,600 (or \$16,000), but that was three years late and Powers thought that this was an appraisal only of the FMV of the Coach. Powers thought that a bigger radiator would fix the problem but he was told early on that that would invalidate the warranty. Regardless, fixing the Coach is not an option now.

45. Powers denied wanting a lot of horsepower.

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46. Powers believes that Rapozo is honest and is the best salesman. After the 2/9/04 email, Powers was satisfied about the overheating. Powers thinks that the email wasn't accurate and that Rapozo knew that.

47. There's no limit as to the length of a vehicle and trailer (as long as the axles are within 45') though California has a 65' maximum. Powers' trailer is 34' long. He bought it to pull a trailer, not for recreation.

48. Powers had five overheatings although not all involved a derating. The Coach stopped twice: in Tucson and going up a hill leaving Bakersfield.

**David Hoffman**

49. David Hoffman is an attorney who now owns a restaurant and who travels extensively in his CC Magna 2005 purchased in 2004 from Guaranty through Rapozo. Hoffman has the highest opinion of Rapozo as a salesman and they stay in touch.

50. On the shakedown cruise after picking up his coach in Junction City, he had an overheat on July 14, 2004. The engine degraded (i.e., stopped or was in the process of shutting down). The computer records on the coach show it happened twice that same day. Exhibit 289 is a photo of the computer's history of that period.

51. Hoffman called Guaranty and called Rapozo directly. Hoffman soon brought the coach in for the factory to look it over but the factory could find nothing wrong. Thereafter, on a trip to Montana, it overheated again and stopped on a two lane logging truck road.

52. The last overheat was on July 23, 2004. The coach went through a retrofit and after he sued CCI, they totally fixed his engine. He didn't sue Guaranty since he felt the manufacturer was at fault.

53. Hoffman is comfortable that he was at the factory on January 19 or 20, and again on August 2 to 5, 2004.

54. 2005 is when Hoffman and CCI worked out a settlement agreement in which CCI fixed the overheating problems. This was the "clean slate, good faith agreement. He still overheated ten times on his way to Oregon in the summer of 2005. He saw no smoke on any of the 31 overheats. However, he didn't look at the engine the first several times. After the 3<sup>rd</sup> overheat in July 2006, the factory put in a bigger hydraulic system, bigger radiator, new fan and controller and cooling system overall.

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**Terry Cass**

55. Terry Cass has been a driver for Powers Steel for 15 years and drove the old coach to Oregon to trade it in for the new Coach. He left on a Saturday, July 18, 2004, arriving late Sunday night.

56. On Monday, the company tried to switch the trailer hitch. Thursday was the final orientation in the new Coach and Cass left for Phoenix. He spent one night on the roadside and one night in Pahrump, Nevada.

57. Friday night it overheated near Tonapah, Nevada on a hill, the first steep hill he encountered, and the alarm went off. Cass checked the hoses and looked for leaks. He called Powers and Rapozo who said the sensors were set too low. Two other times it overheated without derating so he pulled over and slowed down. The second alarm was probably between Kingman and Phoenix.

**Bently Buchanan**

58. Bently Buchanan appeared by video deposition. He has worked for CCI since 1985. In 1995, CCI started building its own chassis, i.e., the structure that supports the "house" or the frame for the power train and components and the housing area. "Chassis" includes the cooling system and engine and everything that's not inside the living quarters.

59. He drafted the email that was sent to Powers regarding the C-13 not overheating. He did not mean to guarantee overheating when it was out of their control. The email didn't discuss any concerns about the test as described, *infra*. The skirts and fenders were different on the Magna and the Intrigue.

60. CCI had to do design changes when the C-13 replaced the C-12 as announced in 2003 and effective 1/1/04. The reason was for pollution requirements. Caterpillar warned that the engine would run hotter.

61. The dyno test involved the performance of the engine with the tires on a roller. The difficulty with the test was that it was done in Oregon in January when the ambient (i.e., outside air) temperature was way below the required 68 degrees, so they tried to maintain 68 degrees inside the garage with the doors open by using plywood and cardboard baffles. The ambient capability is the air temperature that the engine can overheat at full load without overheating. However, the computer will shut the engine down before damage is done. On a 110 degree day the engine should run without overheating.



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62. Buchanan said that they met the Caterpillar standard but he worried if they really met the ambient temperature requirement and he was worried if the stationary test was as good as a moving test where sunshine and wind can affect performance. He expressed his concerns to four people at CCI and Caterpillar and he continued to have concerns. He received the test results with a raised eyebrow. However, the email doesn't express any of these concerns and he never told Guaranty of concerns.

63. Powers' request for a letter was unusual.

64. Buchanan learned in June that the C-13 was overheating. More testing was done in August with Caterpillar with a towable dyno. There was also an issue of turbo lag, a delay in acceleration till the turbo built up pressure. Caterpillar changed the turbo changer thereafter. The conclusion is that the engine would overheat at 1800 rpm at full load and an ambient temperature of 81.7<, almost 30< lower than Caterpillar wanted.

65. CCI came up with the retrofit to fix the cooling issue.

**Damon Rapozo**

66. Damon Rapozo is the salesman at Guaranty and formerly worked selling coaches in Yuma, Arizona, Indio, California, Minnesota and other cities. He's 38 and started in his grandparents' RV business as a teenager. He was the Guaranty salesman of the year for CCI for five out of the last eight years—Guaranty had 60 salesmen at one time. In 2005 he sold 24 coaches and 29 in 2004. CCI went bankrupt and now only sells directly to customers and not through dealers like Guaranty.

67. He has integrity, knowledge of the product, keeps his word, treats customers as a friend and part of the family, and stays in touch after the sale.

68. Guaranty was selling about eight or more companies' coaches. Their slogans include "We do things right," "Eggs are cheaper in the country, and "We don't just sell fun, we guarantee it."

69. He assisted in the sale of a coach to Powers through another customer of his before he went to work for Guaranty. This was a 2002 model Intrigue with a Cummins ISL with 370 or 400 hp.

70. Powers wanted more horsepower in a short coach as he wanted to pull his trailer. But 370-400 hp was the most available in a 32' coach. Rapozo doesn't recall Powers

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wanting tandem axles or a swaying issue though it's possible. Rapozo recalls Powers saying he liked the length and floor plan but just wanted more horsepower. Rapozo told him that the larger engine would have 500 hp or more and a tag axle would be required because of the weight and the coach would have to be longer than 32'.

71. The two talked mostly of 38' coaches (with 2 pullouts) but the 40' coach has four pullouts and it's more popular.

72. Exhibit 12 was his fax to Powers regarding the coach being available in April 2004, that it could come with the C-13, it had two awnings, the colors could be selected by Powers with the design used by CCI, and a large generator was available for the home. The C-13 cost \$44,520 extra as the Cummins ISL 400 hp was the standard engine with the Intrigue. There were no engine options for the 2003 models. Powers was concerned about overheating with the bigger engine and may have spoken about it five times.

73. Powers has testified that he knew of various racers and others who had overheating problems but some of them didn't actually have the C-13's. In fact, CCI was the first manufacturer to install the C-13. Indeed, Rapozo sold CCI's first C-13 coach. None of the three people Powers spoke of had the C-13. Rapozo told him that the C-12's had an excellent history but he didn't know about the C-13's. He would have said that CCI would have to meet certain criteria for the engine not to overheat.

74. January 21, 2004, is the date of the fax, the same week as the heating test in Oregon. Rapozo denies having told Powers that the overheating problems had been fixed. They didn't talk before March about overheating problems. Rapozo says he didn't care what coach Powers ordered. Exhibit 30 is the 2/11/04 fax reporting the overheating test. He probably called Powers to see if the fax was sufficient and Powers probably said it was sufficient. Powers told him, "Damon, I want a letter from Country Coach that the C-13 wouldn't overheat." Rapozo can say "absolutely" that Powers never asked for something in writing other than the letter, and that Powers wanted the letter from CCI and not from Guaranty. If Powers had wanted a letter from Guaranty or from Rapozo, they couldn't have done it because Guaranty is not the manufacturer and they couldn't have fixed the problems.

75. Rapozo couldn't have gotten the test results because they were confidential.

76. He believes that Powers said he wouldn't buy it without a letter: it could be a deal-breaker. Although later, Rapozo said that he thinks Powers would buy even if he knew of the overheating.

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77. Rapozo flew to Tucson and dealt with Powers in looking at the CCI coaches. At that weekend, Powers pretty much centered in on the 40 CCI Coach. Exhibit 32 is the 3/11/04 purchase order. Exhibit 67 is the final purchase order for the sale and is dated 7/19/04. They didn't discuss the terms on the back. Rapozo sold four C-13's before he sold this one to Powers.

78. Rapozo agrees that customers should rely on what he says.

79. The price was:

\$344,302	Cash sale price
<u>-160,000</u>	Trade in
\$184,382	Net cash price with fees included

80. When Cass came up on the 19<sup>th</sup>, Guaranty had to make electrical connections and hitch modifications and give Cass a tutorial about the RV. The 2004 trailer hitch was rated at 10,000 pounds but this was inadequate for Powers' trailer. CCI couldn't modify the hitch so the old one was used on the new Coach.

81. Rapozo was paid a commission of 20% of the net profit of Guaranty, or maybe \$2000 or more likely \$3000 for this Coach. Guaranty would make an average of \$30,000 profit but Powers got a deal because of being a repeat customer and buying it at a show where there's a lot of competition. Rapozo apparently also got a bonus from CCI of \$1000 for the sale.

82. Rapozo got a phone call that Cass had overheated but was continuing on the road. It was a courtesy call. Rapozo believes he got a second, similar call the same or next day. Powers was concerned though not livid. He doesn't remember Powers saying he almost returned the Coach. Rapozo didn't know of other customers with overheating problems at this time, though he wrote an email to CCI on 7/30/04 that two customers (i.e., Powers and Hoffman) had overheating issues. CCI said at one point that sending wires had been switched. Rapozo asked Hoffman but was never told there were fluids on the ground or steam or need for a tech. If it's a real overheat, then it will take an hour for the engine to cool down, but Hoffman's engine started up after a couple of minutes. Rapozo wouldn't call a derate an overheat. Rapozo was familiar with others who had battery cable problems that caused the engine to stop.

83. About 40% of the CCI customers of Rapozo with a C-13 had overheating problems, or four of ten. [However, at his deposition, Rapozo said that *every* purchaser of the C-13 had overheating problems at one point in time after the time of the Tucson show.] CCI had solutions but they didn't work.

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84. Exhibit 147 is the email from Rapozo to CCI to say that Powers wasn't getting help with his problem and he's the type to "go legal" (perhaps gained from a comment from Powers) and asking what CCI would do.

85. Exhibit 158 is Powers' email of 9/20/04 asking for a new coach or a refund. This was addressed to Rapozo and not to CCI. Rapozo's boss said that CCI provided the warranty and would have the resources to assist. Rapozo sympathized with Powers but thought that he'd done all he could for Powers. As late as 9/9/04, Powers was saying how much he liked the Coach.

86. July 30, 2004, is the first that Rapozo knew of Hoffman's problem, but he knew of the overheating claims earlier, just as 7/19/04—he just didn't realize that there was an overheating problem that wasn't being taken care of. This is because the engine started up again fine and drove well back to Oregon and CCI couldn't find a problem. Rapozo thought Hoffman was having an intermittent battery cable problem. Rapozo is sure that no one told him early on that there was a history of high temperatures or Silverleaf history.

87. When Hoffman first called, Rapozo was interested to know if there were fluids on the ground or smoke from the engine. Rapozo asked if help should be sent and was willing to send a tech to Washington if requested. Rapozo doesn't know if Powers' Tucson overheat occurred by the time Rapozo knew of Hoffman's second overheat.

88. Rapozo thinks an overheat is a derail and a stop. But he would have to know the circumstances.

89. July 19<sup>th</sup> is also when Rapozo first met Cass.

90. Rapozo sold about 29 CCI coaches in 2004.

91. Guaranty was willing to refund the deposit and try to resell Powers' Coach off their lot. Guaranty didn't have a meeting about the overheating issue and didn't tell the salesmen not to tell people of the problem.

92. In August and September, Rapozo was communicating with CCI who was saying that the overheating problems were due to:

a. Misconnected wires.

b. Dipstick miscalibration (so one more quart of hydraulic fluid should be added.

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- c. Need for additional venting.
- d. Fan to cool needed to spin in the opposite direction and grill vents needed to be redirected.
- e. Reworking per the Service Bulletin or Warranty Bulletin.

93. A coach manufacturer is told by the engine manufacturer the minimum requirements to cool the engine. Rapozo thinks that Caterpillar didn't provide enough information.

94. Powers is wrong about the rental rates for coaches. The rental rate now is \$650/day and in 2004 it would be \$525/day or \$550/day.

95. There are three areas of disagreement between Powers and Rapozo:

- a. There was no written assurance to come from Guaranty.
- b. Powers wanted higher horsepower.
- c. The tag axle (tandem axle) was not a primary focus.

96. Had Powers not bought the Coach after it was ordered, Guaranty would have sold it off the lot and Rapozo thought that he'd sell Powers a different coach. The 40' Coach would have been sold very easily. The Magna and Intrigue only used the C-13 in 2004. So Rapozo would have sold Powers a different make of coach and it would come with a Cummins engine.

97. Rapozo has lost no customers because of the overheating problem.

**Doug Beaudry** (by deposition)

98. Doug Beaudry is technical support manager for CCI and has worked for them for 16 years. His work includes trouble shooting coach-related problems and issuing warranty authorizations.

99. He has no recollection of dealing with anyone who had complaints about the C-13 overheating after the warranty work was done under the warranty bulletin.

**Bently Ray Buchanan** (by deposition)

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100. Ben Buchanan states there were a few changes over the production run of the C-13 over the C-12.

101. He has never spoken with Rapozo.

102. Differences between the Intrigue and Magna include bodywork—skirts (side bodywork and the rear cap bodywork of the motor homes, the engine access door being part of the rear cap.) It's possible that the differences in the wheel well between the Magna and the Intrigue could make a difference with respect to the way air flows in the two models.

103. He was involved in a test in April 2005, when they were having continuing problems with overheating in the C-13's, even after the warranty bulletins in December 2004. One internal email at the time said not to ship more C-13's until the heating issue got solved. However, as late as June and August 2005, there were still overheating problems reported to CCI and Caterpillar.

**Kevin Patrick Conry** (by deposition)

104. Kevin Patrick Conry did some sales work for Powers Steel selling canopies. He was in the Powers Coach but doesn't remember overheating problems in Phoenix.

**Louis Courtemanche** (by deposition)

105. Louis Courtemanche worked for Country Coach from 1996 through the time of the deposition with one lay-off toward the end. He became the only factory rep for Guaranty since they were such a large customer. CCI had six factory reps in all for the 20 dealerships that sold CCI coaches. Lazy Days also was big enough to have a dedicated factory rep. After CCI went bankrupt, they reorganized and they now sell directly to customers.

106. Guaranty had two locations in California and one in Oregon. They had 40 to 50 sales people.

107. Courtemanche talked with Rapozo numerous times a day, basically answering questions of product and customer needs.

108. Courtemanche reported to Jim Howard and Jim Howard had an assistant by the name of Jeff Howe.

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109. Courtemanche was copied on the email Rapozo sent asking about Powers' inquiry about the C-13 and overheating. At the Tucson show where there were seven or eight dealers and 35 to 40 sales people, he met Powers for maybe five minutes.

110. Courtemanche was aware of the "race" between a Cummins and a C-13, possibly because of concerns of a slow sales take-off for the C-13. Sometime in 2004 he became aware of overheating with the C-13. He helped sell Hoffman his first coach and later dealt with him about the overheating problem before the issues became "legal."

111. Courtemanche got one email from Guaranty on July 26, 2004 saying that there was not an overheating problem but instead involved the annunciator settings being set too low. When Courtemanche drove an Affinity (same chassis as the Magna) to Arizona, he had no overheating problems.

112. It is possible that he got phone calls about overheating on July 23, 2004.

**John Paul Emmanuel** (by deposition)

113. John Paul Emmanuel is a service technician for CCI and works for the chassis team. He worked on Powers' Coach, flying to Phoenix while the Coach was at Caterpillar in December 2004.

114. Because of the C-13 overheating problems, Emmanuel installed a number of "C-13 cooling update[s]".

**Jack Fagan** (by deposition)

115. Jack Fagan has been the manager of consumer affairs for CCI since 2002. CCI heard enough complaints that it seemed not to be a fluke. So the issue went to the engineering department and then to the compliance department.

116. He is not aware of customers who had overheating problems after they had warranty work done. Fagan wrote Powers on September 21, 2004.

117. Jim Howard and Jay Howard would have been involved in the decision regarding Powers' claim for rescission.

**Eugene Graves** (by deposition)

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118. Eugene Graves purchased an Intrigue coach equipped with a C-13 and went to the factory on June 24, 2004, to get the coach; he was told to call the factory if there were any problems. They took it back the next day for some easily correctable cosmetic problems and then drove to Minnesota.

119. There was never any overheating in the coach he bought and none was shown in his review of his SilverLeaf engine computer.

120. Caterpillar installed a warranty update in 2005 and 2006: "C13 Air Intake System" and "C13 Engine Overheating Retrofit Kit".

121. However, Graves did have a battery cable problem in the summer of 2004 and he called CCI about it.

**David Hoffman** (by deposition)

122. David Hoffman is the person who testified at trial regarding his purchase of a C-13 at about the same time as Powers—a 45 foot Magna model. He bought it off the lot through Rapozo, the best salesman there could be. He picked it up near July 4<sup>th</sup>.

123. He and his wife did a shakedown cruise around the Olympic Peninsula and then another through the Cascade Mountains. There were no overheating problems for the first trip. There were two overheats on the Cascades trip, 78 miles apart, near Yakima, Washington. He brought the coach in for a checkup on about July 14<sup>th</sup> arranged by Rapozo. CCI said there was nothing wrong.

124. The next overheat was scary as it occurred on July 23<sup>rd</sup> when on a two lane mountain road with no shoulder and with logging trucks traversing the road.

125. The coach last overheated in 2006 before the fix in July 2006.

126. He believes the reasonable rental rate for his coach would be \$500/day after it was repaired and less than zero before because of the risk to life and limb.

127. Hoffman sued everyone over the coach, but he felt that the problem belonged to CCI because they designed the coach.

**Jay Howard** (by deposition)



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128. Jay Howard was the CEO of CCI as of his deposition taken on April 5, 2007, having been promoted from Executive Vice President in October 2003 after eight months with the company.

129. The Magna chassis was completely redesigned in 2004 as a 2005 model.

130. As a mechanical engineer, he would be "interested" in a test that barely passed if the ambient temperature for the test was 15 degrees below that specified for the test.

131. Any engine will overheat in the desert with a grade and towing and using the a/c. Engines are made to derate to avoid the \$60,000.00 engine being destroyed. The manufacturers learn to do that because truckers overload their engines.

132. CCI will stand by their customers as long as they own a coach. They will service a coach that is five years out of warranty, for example. They have extended warranties and traded out coaches but never refunded the purchase price.

133. He interprets the Caterpillar test in September 2004, to have failed for overheating (30 degrees short of the standard).

134. CCI would work to fix a coach in a reasonable time or refund the price.

**Gary Obermire** (by deposition)

135. Gary Obermire was formerly Vice President of Engineering for three years before moving to Conversions Operations Manager in September 2006. He first started with CCI in 1990.

136. He participated in a 2003 meeting with several other CCI employees at their factory wherein Caterpillar gave a PowerPoint presentation explaining that the C-13 was their new engine to meet EPA standards for 2004. He remembers that there were fuel and exhaust differences to meet emissions [standards]. Because of increased torque and hp, they knew that the cooling systems had to change.

137. The company only tested the Magna because the same system would also be in the Intrigue and Affinity.

138. On the testing done, he remembers that they had never before used a stationary test dyno. The testing problem included having a door open to exhaust the exhaust fumes, and that

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let in the cold outside air. This meant that keeping the minimum ambient air temperature inside the garage was difficult.

139. Obermire became aware in June/July 2004 that customers had overheating problems. Rutherford was one. He called a meeting with Buchanan in July/August time frame. Several other customers complained and were taking their coaches to Caterpillar, which verified that the engines derated from overheating.

140. The testing done by CCI was high priority. Various changes were tried to solve the problem.

141. One test done with Caterpillar in Las Vegas with a towable dyno quickly found a failed heating failure. However, CCI found an absolute fix for the problem.

142. December 23, 2004, is when the warranty retrofit came out, all as a result of the testing from the summer and fall of 2004.

**John Powers, III** (by deposition)

143. John Powers, III remembers that he was dissatisfied with the smaller coach that he had first purchased, and that he asked Rapozo for the smallest coach with a tag axle. The trailer would cause the single axle coach to move around. This wasn't a problem for owners of a tandem axle coach.

144. He knew the C-13 diesels overheated:

- a. Bobby Rahal had a Monaco (?) coach at Powers' shop for a year and it overheated. It was worth \$1,000,000.00. His driver said it overheated on every hill.
- b. Brad Anderson's Newel coach overheated. Anderson supplies Powers' race car with engines. Powers believes it had a Caterpillar engine in it, maybe a C-13.

145. February 9, 2004, is the email from Buchanan saying the C-13 wouldn't overheat. Even though in December Rapozo had said the overheating problems had been fixed, Powers still wanted a written reassurance as to no overheating.

146. After the Coach overheated, Powers dealt with Rapozo, Obermire, and Fagan.

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147. The trailer pulled by Powers was 36' long, 12' high and whatever is the legal width, perhaps 8' 4". It weighs 10,000 to 15,000 pounds, probably. It has three axles and six tires.

148. He took the Coach to Caterpillar two or three times to correct the overheating.

**Damon Rapozo** (by deposition)

149. Damon Kalani Rapozo, salesman for the Coach in question, stated that there are about 60 salesmen in the motorized division.

150. There is no relationship between CCI and Guaranty other than being in the same town. The sales rep contact at CCI is Louie Courtemanche. There would be others to deal with regarding technical questions, etc. For example, Beaudry would be warranty and technical, Smith for technical, Jake for chassis, and Doug for living quarters.

151. Before Powers ordered the Intrigue, the subject of overheating came up more than five times. The "shopping period" covered some four months. Powers wanted the shortest motor home with the largest engine.

152. Powers had a concern over the C-13 overheating so Powers asked for a letter and Rapozo contacted Buchanan who sent a letter by email which Rapozo forwarded to Powers. Powers was very concerned about the new C-13 engine overheating.

153. Powers and Rapozo spoke about Brad Anderson but he had a Detroit engine. Powers had more conversations about overheating concerns even after he ordered the Coach at the Tucson show. It's unusual for a customer to have specific assurances from a manufacturer. Rapozo never got any phone calls from CCI regarding Powers' request. Rapozo never had any additional information about the CCI testing than what CCI said in it's letter in response to Powers.

154. Rapozo thinks that everyone that he sold the C-13 to has had overheating problems, but he doesn't recall knowing of any before July 19<sup>th</sup> when Powers (through Terry Cass) picked up his Coach. In other words, no complaints before July 19<sup>th</sup> and ten complaints afterwards. Rapozo is sure that Powers would have canceled his order had he heard of overheating.

155. CCI offered to use Powers' Coach to test for overheating but Powers refused.

156. There are reports of overheating that CCI had before Powers bought his Coach and CCI should have turned that information over to Powers before his took delivery.

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157. Powers also asked Guaranty through Rapozo to take back the Coach and Rapozo passed on that information to Doug Beaudry at CCI. Their response was for Rapozo to keep them advised and that Jack Fagan was to be involved. Fagan told Rapozo what offers had been made back and forth with Powers regarding the overheating problems.

**Jeremy Joseph “Jake” Smith (by deposition)**

158. Jeremy Joseph “Jake” Smith has been a CCI technician since 2001.

159. Document CCGRV-0179 shows that the Coach overheated nine times.

160. Smith came to Phoenix to work on Powers’ Coach at Caterpillar.

161. Per NADA, Powers’ Coach has a value of \$181,580.00, and the actual cash value is 80% of that or \$145,264.00.

162. Mr. Beaudry and Mr. Cooley confirmed that the retrofit on the C-13 was effective. The warranty bulletins addressed the problems with the installation aspects of the C-13 cabinet.

**CONCLUSIONS OF LAW**

163. The Court found all witnesses to be credible and honest. While there were differences in their testimony, there was no evidence of intentional prevarication. While there was no way to evaluate the testimony of the deposition testimony other than through reading the transcripts, there was nothing inherently unreasonable about any of that testimony.

**The Following Are Stipulated Issues of Law**

164. Misrepresentation—the following are questions raised by the theory of misrepresentation:

- a. Was a representation made to Powers by Guaranty or for which Guaranty is legally responsible?
- b. Was the representation false or misleading?
- c. Was the representation material?
- d. Did Powers rely upon the representation in purchasing the motor home?

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- e. Did Guaranty or its agents omit to provide information they had a duty to provide to Powers?
  - f. Is Powers entitled to rescission? If so, under what terms?
  - g. Powers is required to prove his claim by clear and convincing evidence.
165. Consumer fraud—the following are questions raised by the theory of consumer fraud.
- a. Was there a false promise, deception, deceptive art or practice, fraud, false pretense, false promise, misrepresentation or concealment, suppression or omission of any material fact by Guaranty or for which Guaranty was legally responsible?
  - b. Was the statement made in connection with the sale or advertisement of merchandise?
  - c. Did Powers rely upon the statement?
  - d. Did the statement cause Powers injury?
  - e. What is the amount of damages?
  - f. Powers is required to prove his claim by the preponderance of the evidence.

**Rescission/Revocation**

166. With respect to Rescission/Revocation, a transaction induced by a material though innocent misrepresentation of a party is voidable against that party. *Lehnhart v. City of Phoenix*, 105 Ariz. 142, 460 P.2d 637 (1969). The elements for rescission are:

- a. A representation;
- b. Its falsity;
- c. Its materiality; and
- d. The fact that it was an inducing cause. *Id.*

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167. Under certain circumstances, “nondisclosure may be equated with and given the same legal effect as fraud and misrepresentation.” *Hill v. Jones*, 151 Ariz. 81, 84-85, 725 P.2d 1115, 1118-19 (App. 1986) (“[N]ondisclosure of a fact known to one party may be equivalent to the assertion that the fact does not exist.”).

168. Partial disclosure may also be equivalent to misrepresentation. When a party to a contract misleads another party by disclosing some facts and concealing others, that concealment is equivalent to a false representation that what was disclosed is the “whole truth.” *Hill*, 151 Ariz. 84-85.

169. Among the instances when a seller has an “affirmative duty to disclose material facts” include:

- a. When disclosure is necessary to prevent a previous assertion from being a misrepresentation or from being fraudulent or material;
- b. When disclosure would correct a mistake of the other party as to a basic assumption on which that party is making the contract and if nondisclosure amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing;
- c. When disclosure would correct a mistake of the other party as to the contents or effect of a writing, evidencing or embodying an agreement in whole or in part. *Id.* at 84, 725 P.2d at 1118 (App. 1986) (citing Restatement (Second) of Contracts §161 (1981)).

170. The seller also has a duty to disclose all that it knows once a buyer makes an inquiry about a condition. *Universal Inv. Co. v. Sahara Motor Inn, Inc.*, 127 Ariz. 213, 215, 619 P.2d 485, 487 (App. 1980).

171. A party making a representation believing it to be true but later learning it to be false is liable in fraud for failing to correct his misrepresentation if he knows that the other party is about to enter into the contract under a mistaken belief as to the facts and that the party reasonably expects a disclosure of all the facts. *Mammas v. Oro Valley Townhouses, Inc.*, 131 Ariz. 121, 123-24, 638 P.2d 1367, 1369-70 (App. 1981) (“One who, having made a representation which when made was true or believed to be so, remains silent after he has learned that it is untrue and that the person to whom it is made is relying upon it in a transaction with him, is morally and legally in the same position as if he knew that his statement was false when made.” (quoting Restatement (Second) of Torts § 551(2)(c) cmt. h)).

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172. Section 551(2) of Restatement (Second) of Torts provides that:

One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,

\* \*

(c) subsequently acquired information that he knows will make untrue or misleading a previous representation that when made was true or believed to be so; and

\* \*

(e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

173. There is clear and convincing evidence that Guaranty provided the statement in writing from Buchanan to induce Powers to purchase the Coach from Guaranty. This writing was false and misleading in that it stated the testing was successfully completed when the testing was not performed pursuant to the manufacturer's test protocol. There were also test objectives that remained "inconclusive" at the time Buchanan wrote the e-mail. In addition, the email was misleading in that it did not inform Powers of the concerns the participants in the test had concerning the manner in which the test was conducted.

174. Of course, when Guaranty passed along the letter and information from Buchanan, it was not intending to separately make a representation. As Rapozo stated,

- a. Powers told him, "Damon, I want a letter from Country Coach that the C-13 wouldn't overheat."
- b. Rapozo can say "absolutely" that Powers never asked for something in writing other than the letter, and that
- c. Powers wanted the letter from CCI and not from Guaranty.

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- d. If Powers had wanted a letter from Guaranty or from Rapozo, they couldn't have done it because Guaranty is not the manufacturer and they couldn't have fixed the problems.

This testimony establishes that Powers was not looking to Guaranty for the warranty, but instead was thinking of CCI. It also establishes that Guaranty was not intending to warrant the engine as it was beyond their technical expertise to understand. They didn't independently guarantee the engine/transmission of the Coach.

175. As Rapozo also testified (by deposition),

- a. Rapozo thinks that everyone that he sold the C-13 to has had overheating problems, but he doesn't recall knowing of any before July 19<sup>th</sup> when Powers (through Terry Cass) picked up his Coach.
- b. In other words, no complaints before July 19<sup>th</sup> and ten complaints afterwards.

176. Guaranty, through its salesman, also provided certain oral assurances but they were honest as far as Guaranty knew. Guaranty was also aware, prior to the finalization of the sale of the Coach to Powers, that there was at least one event of the C-13 possibly overheating. But as Rapozo stated,

- a. July 30, 2004, is the first that Rapozo knew of Hoffman's problem, but he knew of the overheating claims earlier, just as 7/19/04—he just didn't realize that there was an overheating problem that wasn't being taken care of.
- b. This is because the engine started up again fine and drove well back to Oregon and CCI couldn't find a problem.
- c. Rapozo thought Hoffman was having an intermittent battery cable problem.
- d. Rapozo is sure that no one told him early on that there was a history of high temperatures or Silverleaf history.

177. Given Powers strong concerns he repeatedly expressed to Rapozo about the C-13 overheating, Rapozo on behalf of Guaranty was obligated to disclose the knowledge they had of the subsequent overheating. But by this time, Guaranty knew of Powers' overheating problems and they were working to try to fix it. Guaranty's failure to disclose all of the problems that other owners were having is *not* equivalent to a misrepresentation.



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178. The evidence does *not* show that Powers materially relied upon the statements provided by Guaranty as these statements were a passing along of the information provided by CCI. If Rapozo had known about and informed Powers of the Hoffman C-13 *overheat* as opposed to the engine shutdown which Hoffman assumed was an overheat, Powers would not have completed the sale; however, Guaranty didn't know there was an overheating problem. The factory didn't conclude that there was an overheat when they checked out the Hoffman coach soon thereafter. The statements and omissions by Guaranty were thus not material and an inducing cause.

179. Powers is *not* entitled to rescission from Guaranty based on misrepresentation. Of course, Powers *has* shown a basis for misrepresentation against CCI, but CCI filed for bankruptcy protection and was dismissed as a party.

**Consumer Fraud**

180. In the alternative, Plaintiff seeks damages under the Arizona Consumer Fraud Act via a private action for Under A.R.S. § 44-1522(A). A.R.S. §44-1522(A) states the following:

The act, use or employment by any person of any deception, deceptive act or practice, fraud, false pretense, false promise, misrepresentation, or concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice.

181. Arizona Revised Statutes § 44-1522 provides a private right of action for consumer fraud. *Sellinger v. Freeway Mobile Homes Sales, Inc.*, 110 Ariz. 573, 521 P.2d 1119 (1974). "The elements of a private cause of action under the act are a false promise or misrepresentation made in connection with the sale or advertisement of merchandise and the hearer's consequent and proximate injury." *Dunlap v. Jimmy GMC of Tucson, Inc.*, 136 Ariz. 338, 32, 666 P.2d 83, 87 (App. 1983). "For the false advertisement to cause the injury, the hearer must actually rely on the advertisement; unlike common law fraud, this reliance need not be reasonable." *Parks v. Macro-Dynamics, Inc.*, 121 Ariz. 517, 520, 591 P.2d 1005, 1008 (App. 1979). "[T]he only showing of intent required . . . is an intent to do the act involved. It is not necessary to show a specific intent to deceive." *State ex rel. Babbitt v. Goodyear Tire & Rubber Co.*, 128 Ariz. 483, 486, 626 P.2d 1115, 1118 (App. 1981).

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182. “A private individual's relief under the Consumer Protection Act is his actual damages suffered as a result of the unlawful act or practice.” *Holeman v. Neils*, 803 F. Supp. 237, 242 (D. Ariz. 1992). *Id.* “These damages include the consideration paid in the contract and out-of-pocket expenses.” *Id.* The plaintiff's burden of proof is by a preponderance of the evidence. *Dunlap*, 136 Ariz. at 343-44, 666 P.2d at 88-89.

183. However, here again as with misrepresentation, Guaranty made no original representation about the reliability of the C-13 engine but instead passed along the statements of CCI. Nor was there any intent by Guaranty to hide the information it was learning. Instead, it was in the process of figuring out what the problems were with the C-13, but knowledge of overheating was not apparent until well after Powers had taken delivery on the Coach. Guaranty made numerous efforts to fix the overheating problem in conjunction with Caterpillar. In fact, technician Jake Smith traveled to Phoenix to work on the Coach in question.

184. The Court concludes that Powers has *not* proved that Guaranty made false or misleading representations to Powers that are covered by Arizona's Consumer Fraud statute.

**Court Ruling**

Accordingly,

IT IS ORDERED entering judgment in favor of Defendant Guaranty RV, Inc., on Plaintiff's complaint.