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STATE OF WASHINGTON
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NO. 41265-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON AT TACOMA

Pierce County Superior Court Cause No. 08-2-15302-4

MALICH MOTORS, INC., a Washington State Corporation, doing
business as POWERBOATS NORTHWEST,

Plaintiff/Appellant,

v.

REGAL MARINE INDUSTRIES INC., doing business as REGAL
BOATS, a Florida State Corporation, KYLE MAZANTI and "JANE
DOE" MAZANTI, and the marital community comprised thereof,

Defendants/Respondents

REPLY BRIEF OF
APPELLANT/CROSS-RESPONDENT
MALICH MOTORS, INC.

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TREATISES

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I. REBUTTAL TO REGAL'S STATEMENT OF THE CASE

Regal argues that prior to PBNW's ultimate failure in 2008, PBNW *never* complained about the loss of Whatcom County. *Brief of Respondent/Cross-Appellant*, p. 14. This was clearly refuted by Joe Malich in his declaration testimony, which shows that he repeatedly complained:

9. At some point after that, I learned that Regal had supposedly entered into an exclusive agreement with Sunchaser Marine, allowing them to market Regal products in Whatcom County. I repeatedly spoke with Mr. Mazanti to object to this agreement and to point out that PBNW had exclusive marketing rights in Whatcom County. However, Mr. Mazanti never corrected the situation. Of note, though, Mr. Mazanti never made any argument at that time that he or Regal had somehow revised PBNW's territory under the terms of the 2005 Agreement so that Whatcom County was no longer PBNW's exclusive territory.

10. Regal allowed Sunchaser to market Regal products at the 2007 and 2008 Seattle Boat Shows in King County, Washington. I also repeatedly complained about Sunchaser's presence at the Seattle Boat Shows to Mr. Mazanti, but Sunchaser was allowed to remain.

11. At a dealer meeting at Regal's headquarters in Florida in November, 2007, I and Jerry Bauer of PBNW confronted Regal leadership regarding the breach and violation of the terms of the 2005 Agreement by allowing Sunchaser to sell Regal products in Whatcom County. Duane Kuck, president of Regal Marine, specifically apologized to us for Regal's "mistake" in allowing Sunchaser to contract for Whatcom County. He conceded that Whatcom County should have been PBNW's exclusive territory. However, he took no steps to void Regal's

contract with Sunchaser, and Sunchaser was allowed to continue marketing Regal products.

12. I am aware that Kyle Mazanti has testified in his declaration that one of the main reasons that Regal allowed PBNW to have the exclusive marketing rights in Whatcom County was that PBNW planned on opening a satellite facility there. This is not true. At no time did PBNW ever consider opening any facility in or near Whatcom County, nor did I ever discuss this with Mr. Mazanti or indicate in any manner that PBNW was considering such action. . . .

(CP 173-174).

There is nothing in this declaration that is inconsistent with any other testimony of Joe Malich. Additionally, it was confirmed by the declaration of Jerry Bauer, a former PBNW employee. (CP 254-256) Bob Brooks of Sunchaser's testimony to the contrary does not refute this but rather creates an issue a fact.

II. ARGUMENT

a. THE TRIAL COURT CORRECTLY RULED THAT THERE WERE GENUINE ISSUES OF MATERIAL FACT REGARDING WHETHER REGAL BREACHED THE 2005 AGREEMENT.

i. Standard of Review:

Appellate review of summary judgment is *de novo*; the reviewing court engages in the same inquiry as the trial court and views the facts and the reasonable inferences from those facts in the light most favorable to the nonmoving party. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d

1030 (1982). The initial burden is on the moving party to show there is no issue of material fact. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). A genuine issue of material fact exists when reasonable minds could reach different conclusions. *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 601, 200 P.3d 695 (2009).

The appellate court may sustain the trial court's judgment upon any theory established by the pleadings and supported by the proof. *Wendle v. Farrow*, 102 Wn.2d 380, 382, 686 P.2d 480 (1984).

ii. Change in Territory

Regal argues not only that it had an annual, unilateral *right* to revise Exhibits A, B, and C to the 2005 Agreement to reflect changes in PBNW's territory, but also that it did so in September, 2006. But despite its arguments to the contrary, there is no evidence that Regal ever revised the portions of the 2005 Agreement dealing with PBNW's territory, including Whatcom County. Whatcom County remained part of PBNW's territory in September, 2006, when Regal installed another "sole authorized dealer" in the same territory, and therefore, Regal was in breach of the contract. The burden was on Regal to prove that it had revised PBNW's territory before the trial court could grant summary judgment. Regal failed to meet its burden, and the trial court was correct in denying summary judgment.

Regal argues that § 1.1 of the 2005 contract allowed it to unilaterally revise and reduce PBNW's territory with no notice. Regal

never claimed until after this litigation was commenced that it actually *had* amended PBNW's territory, though. There is no evidence to show that Regal ever took any affirmative steps to revise the territory. It cannot ask the court to assume for summary judgment purposes that it did.

Regal relies on the following language to support its argument:

Exhibits A, B, and C may be revised annually by MANUFACTURER to reflect changes in DEALER territory, standards of performance and effect of termination.

2005 Agreement, § 1.1. (CP 209)

Regal argues that this language confirms that Regal “could change Powerboats’ Marketing Area once per year, at its own discretion. The Agreement does not require any condition be met prior to the revision of the Marketing Area by Regal.” (CP 41) Even if this were true, there was been no evidence that Regal ever changed PBNW's territory. All Regal did was submit a proposed new contract to PBNW, which was rejected. Regal concedes that the 2005 Agreement thus remained in effect. (CP 38, 47-48)

The fact that the proposed (and rejected) new contract contained different territory has no effect on the territory identified in the 2005 Agreement. Regal never took any steps to revise PBNW's territory as it was listed in the 2005 Agreement. It never prepared any sort of “revised” Exhibit A to the 2005 Agreement changing the territory. It never gave any notice to PBNW that it was exercising its annual right to revise Exhibit A. It never took any steps to keep PBNW from selling in Whatcom County.

(CP 173) Regal never advised PBNW that Whatcom County was no longer its territory. Regal's self-serving, after-the-fact statement that it revised PBNW's territory via an amended Exhibit A has no basis in fact.

Regal argues that Mr. Malich was aware before September 19, 2006 that Regal was "considering exercising" its right to revise PBNW's territory to exclude Whatcom County. *Brief of Respondent/Cross-Appellant*, p. 8. First off, "considering exercising" a right is *not* the same as affirmatively exercising that right. Regal further seems to argue that because PBNW became aware that Regal and Sunchaser were in discussions about Whatcom County, this somehow served – on its own – as the annual revision of the territory. Regal argues, "At least as of September 19, 2006, PBNW knew that Regal revised its Marketing Area to exclude Whatcom County," and somehow it goes on to conclude, "That PBNW chose not to enter into a new and extended agreement that confirmed this Marketing Area revision does not change that fact." *Brief of Respondent/Cross-Appellant*, p. 9. PBNW knew that Regal *proposed* changing its territory in the new contract. This contract was rejected. This did not somehow magically act as a revision of the 2005 Agreement. It is inconceivable that Regal could offer a change, which was rejected, and then expect PBNW to assume a revision to the original contract was made, especially in light of the fact that nothing was ever then

communicated to PBNW to confirm such a revision. In light of the fact that PBNW formally rejected the territorial change in the new contract, it could not be expected to guess or assume that Regal was revising Exhibit A to the 2005 Agreement.

By footnote, Regal argues that comments by Regal's president Duane Kuck were ambiguous and could not be used to show that PBNW held Whatcom County as its exclusive territory. Mr. Kuck's comments to Joe Malich (CP 174, 256), however, show an acknowledgement that Sunchaser should not have been installed as Regal Dealer in Whatcom County, because it was PBNW's territory. Regal had the opportunity to provide a declaration from Mr. Kuck at the summary judgment hearing disputing his statements, but it did not. Looking at this evidence in the light most favorable to PBNW, it shows that no revision to PBNW's territory was made.

Regal also argues that PBNW's contractual territory was not "exclusive" territory. But this blatantly ignores the language in the marketing e-mail that Regal sent to all its dealers, including PBNW, on May 9, 2005 (which was before PBNW entered into its contract). This memo specifically touted "exclusive" marketing territories as a reason for signing a contract with Regal:

Dear North American Dealers:

Attached please find a copy of the new 2006 sales and service agreement. This agreement was drafted by a joint committee of dealers and boat manufacturers in an effort to create a standardized model for the marine industry. The NMMA is encouraging all of its member companies to adopt this new agreement and Regal, along with many other boat manufacturers, has agreed to do so.

This agreement features some exciting new changes that create added value to your dealership.

- * Three year term
- * **Exclusive marketing territories**
- * Succession plan.

(CP 187).

It is difficult to see how Regal can argue that PBNW was never meant to have any exclusive marketing territory when they used that specific term to induce PBNW to sign with them.

The trial court correctly found that Regal failed to meet its burden of proof. The order denying summary judgment on this issue should be affirmed.

iii. Default Provisions:

As Regal has pointed out, "Summary judgment is appropriate if a contract is unambiguous, even if the parties dispute the legal effect of a provision." *BP Land & Cattle LLC v. Balcom & Moe, Inc.*, 121 Wn. App. 251, 254, 86 P.3d 788 (2004). However, a written contract is ambiguous when its terms are uncertain or capable of being understood in more than

one manner. *Farmers Ins. Co. v U.S.F. & G. Co.*, 12 Wn.App 836, 840-41, 537 P.2d 839 (1975).

“In the contract interpretation context, summary judgment is improper if the parties' written contract, viewed in light of the parties' other objective manifestations, has two or more reasonable but competing meanings.” *Granite Falls Sch. Dist.*, 117 Wn. App. at 161 (citing *Hall v. Custom Craft Fixtures, Inc.*, 87 Wn. App. 1, 10, 937 P.2d 1143 (1997)).

Ledaura, LLC v. Gould, 155 Wn. App. 786, 798, 2010 Wash. App. LEXIS 876 (2010).

Regal argues that the Section 8 default provisions of the 2005 Agreement have no bearing on the Section I provisions regarding revision of territory. But these various provisions are incompatible. One provision allows Regal a unilateral right to change the contract. Other provisions require a particular set of steps to be taken by both parties.

The courts follow two principles of general contract construction:

(1) [W]hen there is an inconsistency between a general and a specific provision, the specific provision ordinarily qualifies the meaning of the general provision, *Washington Local Lodge No. 104 of Int'l Bhd. of Boilermakers v. International Bhd. of Boilermakers*, 28 Wn.2d 536, 541, 183 P.2d 504 (1947) (quoting Restatement of the Law of Contracts 327, § 236(c)); and (2) courts favor the interpretation of a writing which gives effect to all of its provisions over an interpretation which renders some of the language meaningless or ineffective. *Newsom v. Miller*, 42 Wn.2d 727, 731, 258 P.2d 812 (1953).

Mayer v. Pierce County Medical Bureau, 80 Wn. App. 416, 423, 909 P.2d 1323 (1995).

Here, the notice and cure provisions are both specific and mandatory. A dealer in default “shall” be entitled to notice and the opportunity to cure such default. (CP 215-216) The dealer “shall have the right” to cure the default. (CP 215) The manufacturer “shall” provide dealer with the notice of default and “shall” identify the cure period to which the dealer is entitled. (CP 215) The dealer “shall” have a certain number of days to cure the default.(CP 215) The contract turns assume that PBNW will be notified and have a chance to correct any problems.

On the other hand, the revision provision under § 1.1 merely states that Exhibits A, B, and C “may” be revised annually by the manufacturer to reflect changes in dealer territory, standards of performance and effect of termination. (CP 209) It is optional, not mandatory. But it makes no sense that PBNW would be entitled to notice and a chance to cure under the default provisions but not be entitled to any notice whatsoever that its territory had been revised. The annual territory revision provision is much more general than the notice and cure provisions and should be qualified by those notice and cure provisions. Regal had no problem following the notice and cure provisions under the default section. By letter of December 18, 2007, Kyle Mazanti of Regal formally notified PBNW of a default due to its customer service index scores (CSI) and gave it “90 days to cure deficiency.” (CP 232). It sent similar formal letters on February 11, 2008, March 10, 2008, and April 15, 2008. (CP 233-235). Yet Regal

claims it had no duty to even orally advise PBNW that it was revising Exhibit A to the 2005 Agreement. This argument is convenient, but not persuasive.

Of interest, even after PBNW was repeatedly and formally notified of its default and still failed to cure it, Regal still never took the step of revising PBNW's territory or other requirements. At no time other than September 2006 does Regal claim that it exercised its right, and it did not raise this argument or ever address revision until after litigation was filed. Looking at the facts in the light most favorable to PBNW, the trial court was correct in denying Regal's motion for summary judgment. Regal failed to prove that it ever revised PBNW's territory, and the trial court's ruling on this should be affirmed.

- b. **PBNW IS NOT CLAIMING THAT REGAL'S BREACH OF CONTRACT CAUSED ITS BUSINESS TO FAIL; BUT PBNW DID SUFFER DAMAGES DIRECTLY AS A RESULT OF REGAL'S BREACH OF CONTRACT.**

Regal spends a great deal of time arguing about PBNW's ultimate closure. PBNW repeatedly has confirmed that it is not claiming that Regal's contract breach was the cause of any business failure. However, PBNW did suffer damages as a direct result of Regal's breach. PBNW is entitled to compensation for these damages regardless of whether it ultimately went out of business for other reasons.

c. PBNW WILL BE ABLE TO PROVE SPECIFIC DAMAGES AND AMOUNTS OF DAMAGES IF ALLOWED TO GO FORWARD TO TRIAL

Regal cites to Joseph Malich's statement that "it's almost impossible to figure" the damages from the contract breach versus business losses due to the economic decline. But as stated in PBNW's corrected brief, there are calculations that can be performed, based upon the documents exchanged via discovery, to provide specific damage amounts taking into account other overhead issues and portions of sales/losses attributable to other brands of boats being sold. Mr. Malich was not prepared to do these calculations at summary judgment, nor should he have been forced to. But he should have been allowed to testify on this issue in full to the trier of fact in a full trial. As stated in his declaration,

8. After Sun Chaser opened as a Regal dealer in Western Washington, PBNW's Regal profit margin dropped significantly. I was asked during my deposition to calculate PBNW's specific losses due to the nearby Regal dealer, which I could not do at that time off the top of my head. It is possible, however, to take the sales figures that were provided to Defendants and calculate out the percentages of PBNW overhead attributable to each different boat brand we sold, and then to figure the per boat cost versus the overhead. This will show the specific losses attributable to decreased Regal sales.

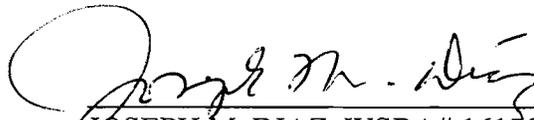
(CP 441).

Any testimony given by Joe Malich at trial will not be speculative, but rather a specific breakdown of the total sales made by Regal to Sunchaser through PBNW's sole authorized territory delineated in the dealer agreement for the period of the contract. Thus, portions of PBNW's losses attributable to these sales will be fully subject to Regal's cross examination and argument at trial. However, a genuine issue of material fact exists that the parties dispute, so the grant of summary judgment in favor of Regal was in error.

III. CONCLUSION

For the reasons set forth above, PBNW respectfully requests that the court affirm the trial court's ruling of July 23, 2010, reverse the trial court's ruling of September 3, 2010, and remand this matter for trial.

RESPECTFULLY SUBMITTED this 20th day of May, 2011.



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Proof of Service of Reply Brief of Appellant/Cross-Respondent
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