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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

BRIEF OF APPELLANT – SECOND CORRECTED

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I. ASSIGNMENT OF ERROR

1. The trial court erred when it granted defendants' Motion for Summary Judgment of dismissal on September 3, 2010, finding that plaintiff would not be able to demonstrate at trial that it had suffered any actual damages due to defendants' breach of contract.

Issues Pertaining to Assignment of Error

Did the Plaintiff submit sufficient facts and evidence at summary judgment demonstrating that at trial it would be able to prove specific damages proximately related to Defendants' breach of the 2005 Agreement? [Assignment of Error 1]

II. STATEMENT OF THE CASE

Plaintiff Powerboats Northwest ("PBNW") was in the business of selling high performance marine vessels and yachts. PBNW's owner, Joe Malich, was approached by Defendant Kyle Mazanti, agent for Defendant Regal Marine Industries ("Regal"), regarding becoming a Regal boat dealer. (CP 169) On or about June 4, 2004, PBNW and Regal entered into a one-year Sales and Service Agreement ("2004 Agreement"), under which PBNW would be an authorized dealer of Regal boats. (CP 169) No specific marketing area was identified, except "the area local to Dealer". (CP 169) At that time, PBNW conducted business at a relatively small leased premises at 821 E. Dock Street in Tacoma, Washington. (CP 169)

During 2003, only 5 Regal Boats had been sold in the Seattle area. After PBNW began selling Regal products in 2004, 22 boats were sold in the Seattle area. (CP 169)

On May 9, 2005, PBNW received an e-mail that Regal sent to all of its dealers outlining its new standardized Sales and Service Agreement. The e-mail specifically addressed three areas that would "create and add value" to PBNW's dealership: 1) a three-year contract term; 2) exclusive marketing territories; and 3) succession plan. (CP 169).

On or about June 10, 2005, PBNW and Defendant Regal, through Kyle Mazanti, entered into a new Sales and Service Agreement ("2005 Agreement"), using the new standardized contract language. This agreement made PBNW the sole authorized dealer for the sale of Regal boats in the territory defined as the Seattle BTA, specifically including Grays Harbor, King, Kitsap, Mason, Pierce, Snohomish, Thurston, and Whatcom Counties within the State of Washington. (CP 169-170, 209-229)

Because PBNW was going to be the sole authorized dealer for Regal in the listed counties, in August, 2006 it incurred the expense of moving to a much larger facility located in Fife, Washington, with freeway visibility and access and more space for inventory, putting it in a much better position to market and sell Regal boats. This move

significantly increased PBNW's monthly overhead, growing from $2,500 to $30,000. PBNW would not have made the move to this particular location had it not contracted to be the sole Regal dealer in the listed counties. (CP 170)

The term of the 2005 Agreement was for a period of three (3) years to June 30, 2008, and included the following significant provisions:

> SECTION 1. TERM OF THE AGREEMENT
>
> 1.0 Term. The term of this Agreement is for a period of three (3) years from the date of the agreement to 6/30, 2008.
>
> 1.1 New Agreement. At the end of the first year of the Agreement, MANUFACTURER and DEALER shall evaluate DEALER'S progress in meeting the performance standards set forth in Section 3.1. herein to determine whether to enter into a new three (3) year agreement. In the event the parties enter into a new agreement, this Agreement shall be null and void. In the event the parties decide not to enter into a new agreement, the parties shall continue to be bound by the terms and conditions of this Agreement. 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.
>
> SECTION 2. TERRITORY AND MARKETING OF PRODUCTS
>
> 2.0 Territory And Products. Subject to the terms and conditions of this Agreement, MANUFACTURER appoints DEALER as the sole authorized dealer for the sale of MANUFACTURER'S products defined by Exhibit A.1 attached hereto (the "Products") within the territory defined by Exhibit A.2 attached hereto (the "Territory").

MANUFACTURER shall not appoint another authorized dealer in the Territory during the term of this Agreement so long as DEALER remains in compliance with the terms and conditions of this Agreement.

SECTION 8. DEFAULT UNDER THE AGREEMENT

8.0 DEALER shall be in default under this Agreement, and shall be entitled to notice and opportunity to cure such default, if any, as provided herein, under the following events or circumstances:

8.0.4. Failure to Meet Applicable Standards of Market Share, CSI, Certification Program, or CIP. If DEALER fails to meet the established requirements for market share, CSI, Certification Program, or CIP for any one year or three consecutive quarters.

8.1 Cure Period. If DEALER is in default in any of the above-noted defaults, MANUFACTURER shall provide DEALER with written notice of the default and shall identify the cure period, if any, to which DEALER is entitled ("Notice to Cure"). Upon receiving Notice to Cure, DEALER shall promptly provide MANUFACTURER with a written plan on how it intends to cure the defaults within the applicable cure period. DEALER shall have the right to cure the default under the Agreement within the following periods:

c. Ninety Day Cure Period. If DEALER fails to meet CSI levels, then DEALER shall have ninety (90) days upon receipt of the Notice to Cure to cure such a default.

d. One Hundred Eighty Day Cure Period. If DEALER fails to meet applicable Market Share Levels, then DEALER shall have one hundred and eighty (180) days upon receipt of the Notice to Cure to cure such a default.

EXHIBIT A

A2. Territory:

> The following geographic area (typically described by county) will be the primary "Marketing Area" into which Dealer will promote, sell, and service Products (if not described, the Marketing Area is the area local to Dealer):
>
> Seattle BTA/including Grays Harbor, King, Kitsap, Mason, Pierce, Snohomish, Thurston, Whatcom Counties.
>
> EXHIBIT B
>
> B.2 Customer Satisfaction Index. Dealer agrees to maintain a minimum CSI average score as compiled by NMMA approved survey on a twelve (12) month rolling average as follows:

Model Year	Minimum Average Score
2006	75%
2007	77%
2008	79%

(CP 209-229)

After entering into the 2005 Agreement, PBNW became one of the top sellers of Regal Boats. (CP 172) During 2005, 23 Regal boats were sold in the Seattle BTA, and Regal boats sold statewide more than doubled from 20 in 2003 to 55 in 2004, 54 in 2005, 57 in 2006, and 89 in 2007. (CP 172)

Of note, for the model year 2005, PBNW's CSI score was 76%. However, for the model year 2006, PBNW's CSI score went up to 82%, which met its contractual requirement. (CP 172, 230-231)

In August 2006, Regal began negotiations with Sun Chaser Yachts, a boat dealer in Whatcom County, and Mr. Mazanti "determined that Sun Chaser met Regal's criteria and could serve Whatcom, Skagit, and Island Counties particularly well." (CP 60) At the time, however, PBNW was already the "sole authorized dealer" of Regal Products in Whatcom County. (CP 209)

On or about September 19, 2006, Regal through its authorized regional sales agent Kyle Mazanti, presented a new Sales and Service Agreement for execution by PBNW, which would run for a period of three (3) years to September 19, 2009 and would supersede the previous Agreement. The exhibits to the proposed September 19, 2006 Sales and Service Agreement showed that it would have reduced the territory of PBNW as the sole authorized dealer for the sale of Regal boats, eliminating several counties, including Whatcom County, as part of PBNW's territory. At the time that Mr. Mazanti presented the proposed agreement to PBNW, it did not contain the exhibits, and Mr. Mazanti did not tell PBNW that the counties would be eliminated as part of its territory. Joe Malich of PBNW refused to sign the agreement without the exhibits and ultimately rejected all versions of the proposed September 19, 2006 Sales and Service Agreement. This meant that the 2005 Agreement remained in full force and effect. At no time after that did Regal ever

notify PBNW in any manner that it was choosing to revise PBNW's territory pursuant to § 1.1 of the 2005 Agreement, nor did Mr. Mazanti ever discuss with PBNW that it had concerns regarding lack of sales in Whatcom County. The terms of the 2005 Agreement, including the exhibits, thus continued as is. (CP 172-173).

Meanwhile, on September 21, 2006, Defendant Regal entered in a Sales and Service Agreement with Sun Chaser Yachts ("Sun Chaser") of Blaine, Whatcom County, Washington. (CP 61) Sun Chaser's agreement contained the following provision, identical to the provision in PBNW's 2005 Agreement:

> SECTION 2. TERRITORY AND MARKETING OF THE PRODUCT
>
> 2.0 Territory and Products. Subject to the terms and conditions of this Agreement, MANUFACTURER appoints DEALER as the sole authorized dealer for the sale of MANUFACTURER'S products defined by Exhibit A.1 attached hereto (the "Products") within the territory defined by Exhibit A.2 attached hereto (the "Territory").
>
> Manufacturer shall not appoint another authorized dealer in the Territory during the term of this Agreement so long as DEALER remains in compliance with the terms and conditions of this Agreement.

2006 Sun Chaser Sales and Service Agreement.

It also included the following territory:

EXHIBIT A

A.2 Territory

Whatcom, Skagit, and Island Counties, WA – All products;

Lower mainland B.C.-Greater Vancouver to Hope, B.C. for sport boats & cruisers;

Vancouver Island, B.C.– All products.

(CP 241-242)

The Sun Chaser agreement exclusively granted it the territory of Whatcom County, Washington, which Regal had already exclusively granted to PBNW. Regal thus not only sold boats to another dealer within PBNW's exclusive territory but also allowed Sun Chaser to promote, sell and service Regal boats within PBNW's territory, in violation of Regal's 2005 Agreement with PBNW.

Regal also allowed Sun Chaser to market Regal products at the 2007 and 2008 Seattle Boat Shows in King County, Washington, and it allowed sales of Regal boats within PBNW's exclusive territory. At all of these times, PBNW was the sole authorized dealer of Regal products in King County. By allowing Sun Chaser to market at the Seattle Boat show, Regal directly violated its contract with PBNW. Regal's characterization of the Seattle Boat Show as a "regional" event has nothing to do with allowing Sun Chaser to market in PBNW's exclusive territory.

At a dealer meeting at Regal's headquarters in Florida in November, 2007, Joe Malich and Jerry Bauer of PBNW confronted Regal regarding its breach and violation of the terms of the 2005 Agreement in granting a dealership to Sun Chaser and allowing Sun Chaser to sell Regal products in Whatcom and King Counties. (CP 174, 256) Duane Kuck, president of Regal Marine, specifically apologized to Mr. Malich and Mr. Bauer for Regal's "mistake" in allowing Sun Chaser to contract for Whatcom County. (CP 174, 256) He conceded that Whatcom County should have been PBNW's exclusive territory. (CP 174, 256) However, he took no steps to void Regal's contract with Sun Chaser, and Sun Chaser was allowed to continue marketing Regal products. (CP 174, 256)

Plaintiff sued for breach of contract. On June 24, 2010, Defendants filed a motion for summary judgment seeking, among other things, that Plaintiff's breach of contract claim against Regal Marine be dismissed. (CP 37-52) In a letter ruling dated July 23, 2010, the trial court denied this relief:

> I believe that there are factual issues which preclude summary judgment at this time on the breach of contract claims. Clearly, the plaintiff believed that they would be the sole dealer for Regal boats in the area described in the 2005 agreement. The agreement was for a three year term, but the defendant had the option to alter the marketing area annually.

> Here, there was no notice given to plaintiff, consistent with the written contract, that would have notified plaintiff that they had a new competitor in Whatcom county also selling Regal boats. Interpreting the contract provision as a whole, it appears that there is a factual dispute as to whether the plaintiff knew of the Sunchaser competition and somehow acquiesced or waived the apparent breach by Regal of the exclusive rights in Whatcom county.

(CP 282)

On August 6, 2010, Defendant Regal Marine filed its second motion for summary judgment, claiming that Plaintiff could not prove that it had been damaged by any alleged breach of the 2005 contract. The trial court granted this motion:

> Mr. Malich's [sic] had not demonstrated there are genuine issues of material fact. I think the defendant has demonstrated that there is an absence of genuine issue of material fact on the issue of whether or not Mr. Malich would be able to establish or Powerboats Northwest establish any actual lost profits. I think while there may have been a technical breach of the contract, his claim for lost profits and damages is just pure speculation, given both his financial condition, given the market conditions that existed, given the loss of the ability to get financing and the showing that there was really no real competition for him in that area.

(RP 12)

The issue on this appeal is whether the trial court erred in dismissing Plaintiff's breach of contract claim on the basis that Plaintiff would not be able to prove specific damages from that breach at trial.

III. ARGUMENT

a. Standard of Review:

The appellate court reviews an order of summary judgment de novo, performing the same inquiry as the trial court. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). It must consider "the facts and the inferences from the facts in a light most favorable to the nonmoving party." *Jones*, 146 Wn.2d at 300. Summary judgment is only appropriate where "the pleadings, affidavits, and depositions establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Jones*, 146 Wn.2d at 300-01; CR 56(c). 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 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). If the moving party meets this initial burden, then "[t]he nonmoving party must set forth specific facts showing a genuine issue and cannot rest on mere allegations." *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989); CR 56(e).

b. Damages from Breach of the 2005 Agreement:

Defendants allege that PBNW cannot prove a specific amount of damages arising from Defendants' breach of the 2005 Agreement. Under their theory, even if PBNW proves a blatant breach of the contract and proves that it suffered some damages as a result of that breach, there can be no recovery at all because PBNW cannot show the specific amount of damages. This would be a completely inequitable outcome. However, PBNW can and has shown specific damages and explained how it calculates those damages. While Defendants may dispute the calculations presented by Plaintiff, the final determination should be left to the trier of fact after hearing all of the testimony. Thus, reversal of the summary judgment and remand for trial is appropriate.

"A party injured by a breach of contract may recover all damages that accrue naturally from the breach, including any incidental or consequential losses the breach caused." *Floor Express, Inc. v. Daly*, 138 Wn. App. 750, 754, 158 P.3d 619 (2007). See also, *Panorama Vill. Homeowners Ass'n v. Golden Rule Roofing, Inc.*, 102 Wn. App. 422, 427, 10 P.3d 417 (2000) (citing *Eastlake Constr. Co. v. Hess*, 102 Wn.2d 30, 46, 686 P.2d 465 (1984)). The plaintiff must prove that the amount of damages claimed is necessary to place the plaintiff in the position it would have occupied had the duty been fulfilled. *Jacob's Meadow Owner's Ass'n v. Plateau 44 II, LLC*, et al, 139 Wn.App. 743, FN 1, 162 P.3d 1153 (2007) citing *Rathke v. Roberts*, 33 Wn.2d 858, 865, 207 P.2d 716 (1949).

Defendants asserted at summary judgment that Plaintiff had to be able to identify its breach of contract damages with absolute certainty. The courts have not held this to be the case:

> If the rule of certainty were literally applied to contract damages, perhaps recovery would be barred in most instances since, in such cases, it is extremely difficult, if not virtually impossible, to determine damages with precise mathematical exactitude. Hence, the rule has come to mean that only **reasonable certainty** as to the fact and amount of damages is necessary:
>
> > "§ 331. Degree of Certainty Required in Establishing the Amount of Profits and Losses; Alternative Methods.
> >
> > (1) Damages are recoverable for losses caused or for profits and other gains prevented by the breach only to the extent that the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty."
> >
> > "§ 26. The certainty rule, in its most important aspect, is a standard requiring a reasonable degree of persuasiveness in the proof of the fact and of the amount of the damage. Through its use, the trial judge is enabled to insist that the jury must have **factual data -- something more than guesswork** -- to guide them in fixing the award."
>
> Furthermore, the doctrine respecting the matter of certainty, properly applied, is concerned more with the fact of damage than with the extent or amount of damage. In the main, the doctrine usually applies to bar recovery for loss of profits in a business which has not been established. We recognized this very distinction in the recent case of

> *Dunseath v. Hallauer*, 41 Wn. (2d) 895, 253 P. (2d) 408, where we stated that the **uncertainty involved went to the amount of damages and not the fact of damage.**

Gaasland Co. v. Hyak Lumber & Millwork, 42 Wn.2d 705, 711-714, 257 P.2d 784 (1953)(Internal citations omitted)(emphasis added).

The *Gaasland* case, above, involved a breach of a contract to furnish lumber millwork products. The defendant alleged that plaintiff could not recover damages because his evidence of loss was based upon speculation and conjecture and therefore did not meet the general requirement that damages must be shown to be ascertainable with reasonable certainty. The Plaintiff, however, provided evidence regarding the difference between the contract prices for the jobs defendant was to do and the price it ultimately had to pay another provider. The Court agreed that, once Plaintiff had shown a difference between the contract price and the price ultimately paid, it had made out a *prima facie* case that should have gone to the finder of fact.

> **There is a clear distinction between the measure of proof necessary to establish the fact that the plaintiff has sustained some damage and the measure of proof necessary to enable the jury to fix the amount.** Formerly, the tendency was to restrict the recovery to such matters as were susceptible of having attached to them an exact pecuniary value, but **it is now generally held that the uncertainty which prevents a recovery is uncertainty as to the fact of the damage and not as to its amount and that where it is certain that damage has resulted, mere uncertainty as to the amount will not preclude the right of recovery. . . .**
>
> . . .
>
> Since the basic function of the rule of certainty is to assure that one will not recover where it is highly doubtful that he

> has been damaged in the first instance (as where he claims loss of profits in a business which is not shown to have any established record of earnings), the jury does not commit forbidden speculation when, once the fact of damage is established, it is permitted to make reasonable inferences based upon reasonably convincing evidence indicating the amount of damage. Applying this rule to the case at bar (assuming that a jury could find that a contract had been entered into by the parties), clearly, the fact of substantial damage is shown by proof of Hyak's breach and Gaasland's resulting increased costs. Once such a prima facie showing is made, there is **sufficient evidence in the record to permit reasonable inferences to be drawn therefrom as to the extent of damage**.

Id., 42 Wn.2d 705, 713-714,(Internal citations omitted)(emphasis added).

In the present matter, Plaintiff PBNW through its owner Joe Malich, was prepared to provide testimony at trial regarding the losses it sustained as a direct and proximate result of Defendants' repeated breaches of the 2005 Agreement. The trier of fact would have been able to reasonably evaluate this evidence and make a determination of the amount recoverable by Plaintiff. Therefore, summary judgment should have been denied.

i. <u>Calculation of Damages</u>:

Defendants made multiple arguments as to why Plaintiff PBNW could not prove any damages. The main argument relied on Joe Malich's deposition testimony that determining PBNW's damages related to the loss of Whatcom County versus those related to the bad economy in general were "almost impossible to figure." But that line of questioning was not directed to the damages created by Regal's sale of boats to Sun Chaser in Whatcom County during the contract period. Rather, it went to

additional losses that Plaintiff PBNW suffered to its own sales due to Sun Chaser's territorial competition. Losses from Regal's sale of boats to Sun Chaser during the PBNW contract period, however, are clear and specific.

The number and dealer cost of the boats that Defendant Regal sold to Sun Chaser in Whatcom County is not speculative. Through June 30, 2008, the end of the 2005 Agreement between Regal and PBNW, Regal sold $3,370,804 worth of boats to Sun Chaser Yachts, 42 boats in all. (CP 440, 465) None of these boats should have been sold to Sun Chaser in the first place; they each should have gone through PBNW. Joe Malich was prepared to testify at trial that PBNW's standard margin on sales of Regal boats was 21.5%. (CP 440.) Thus, PBNW's damages were **$724,722.86** due to Regal's breach. There is nothing speculative about this number.

As the president of PBNW, Mr. Malich has personal knowledge regarding PBNW's Regal markup; no outside economic expert is needed regarding damages. Experts are only necessary when "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact issue." ER 702. Mr. Malich would have testified how the business operated, how costs and profits were calculated, and what PBNW's dealings with Regal were. None of this was dealt with at the summary judgment level. The trier of fact can weigh the evidence in support of the damage claims. But it has to hear the evidence first. Contrary to Defendants' arguments, there is *prima facie* proof of damages.

Plaintiff's claim for lost profits due to the existence of another Regal dealer in its territory is a separate item of damage from Plaintiff's damages due to Regal's boat sales into Whatcom County and then through Sun Chaser into Western Washington. Defendants have challenged Plaintiff's damages calculations on this issue as "speculative", as that is a word that Joe Malich of PBNW used during his deposition. But the fact that Mr. Malich did not have the hard number calculations available at the time of his deposition does not mean that these numbers cannot be calculated and presented at trial, based upon the documentation that was provided through discovery to Defendants. Mr. Malich testified it can be done:

> Q. So your damages can't be measured in terms of gross profit. They have to be – it's going to take a little more work to try to make sure that you give the right, more than percent percentages of all those sunk costs to the Regal sales, but your actual profits from Regal sales are going to be far less than 25 percent, right?
>
> A. After we accumulate the overhead and divide it by all of the boats that we sold, yes.
>
> Q. Okay. And those are real expenses. That's out-of-pocket money you're paying every month, right?
>
> A. Yes.
>
> Q. So your real profits – what do you think your real profit, call if your net profit, as a percentage of your purchase price of the Regal boat from Regal directly, what do you think your true profit in terms of percentages was on Regal boats?

A. I don't know.

Q. But you would have to do a lot more math to figure it out, right?

A. We'd have to figure out the end of the year statement and then basically subtract all of the other sales or add up the Regal sales and give it a portion, you know, of per boat cost versus the overhead.

(CP 346-347)

PBNW was not permitted to do these full calculations and present them at trial. This was error.

All of the documentation to complete such calculations was provided to Defendants. The math can be done. (CP 441) Specific numbers are available, and would have been presented at trial. That fact that Mr. Malich did not have the calculations at the time of his deposition should not warrant excluding them at trial. Rather, it should have been reserved for trial.

Defendants have argued that PBNW cannot prove damages because there was no evidence that PBNW could have financed the boats that ultimately went to Sunchaser in Whatcom County, because the business was failing. This ignores that during a large portion of the contract period, PBNW was one of the top sellers of Regal boats, and it was not having trouble obtaining financing. (CP 172) There is no evidence that PBNW had any trouble obtaining financing until well after Regal installed a competing dealer in PBNW's exclusive territory.

Additionally, PBNW suffered damages when it moved to a bigger, more expensive facility, in large part to support its increased inventory of

Regal boats due to the provisions of the 2005 exclusive contract. Defendants submitted the new lease agreement as a trial exhibit. Mr. Malich and PBNW's former sales manager Jerry Bauer would have provided first-hand testimony at trial regarding PBNW taking on the new Fife location lease, the increased costs related to the new Fife premises, and the percentage of the new Fife space dedicated to Regal products. It would then have been up to the trier of fact to determine the weight to be given this testimony. Under the *Gaasland Co. v. Hyak Lumber* reasoning, damages will clearly be shown at trial. Thus, the trier of fact should determine the amount of damages that reasonably can be ascertained from the evidence once PBNW has had the chance to fully present it and all examination and cross-examination has been completed.

ii. <u>Number of Boats Sold in Whatcom County</u>:

Defendants argue that because Plaintiff PBNW sold only one boat in Whatcom County, it suffered no losses as a result of Defendants' installation of a competing Regal dealer in Western Washington. This is not correct, as the number of boats sold to consumers in Whatcom County is not the determinative factor. Rather, it is the fact that Regal sold 42 boats to another dealer located within the Plaintiff PBNW's exclusive territory that breached the contract and caused the damages.

Defendant Regal had no right to provide Regal products to any dealer in Whatcom County other than through Plaintiff PBNW. Each time it did so, Regal breached the 2005 Agreement. Every one of the boats delivered to and ultimately sold by Sun Chaser prior to June 30, 2008,

should have been sold through PBNW. To place PBNW back into the position it would have been had Regal not breached the contract, PBNW is entitled to recovery of the profit it would have made on each of these boats. The fact that few or none of the boats were sold in Whatcom County is irrelevant and misses the point that PBNW should not have been facing any competition from Regal sellers in Whatcom County, or within the other counties exclusive to the 2005 PBNW contract, in any manner. That is the whole point of having and "exclusive territory." Sun Chaser should not have been installed in Whatcom County and should not have been selling Regal boats **from** its premises there, no matter where the boats ultimately ended up. Every Regal boat sold to Sun Chaser in Whatcom County was in direct breach of Regal's contract with Plaintiff PBNW.

Representatives of Regal admitted to PBNW that they had breached their contract. Mr. Malich and his employee Jerry Bauer visited Regal headquarters in November, 2007. Mr. Bauer testified via declaration as follows:

> 11. I attended a dealer meeting at Regal's headquarters in Florida in November, 2007, along with Mr. Malich, Kyle Mazanti, and Regal leadership Duane Kuck and Duffy Stenger. Mr. Malich again complained regarding the breach and violation of the terms of the 2005 Agreement and Sun Chaser's presence as a Regal dealer in Whatcom County. Duane Kuck, president of Regal Marine, specifically apologized to us for Regal's "mistake" in allowing Sun Chaser 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 Sun Chaser, and Sun Chaser was allowed to continue marketing Regal products.

(CP 174, 256)

Regal President Duane Kuck never rebutted this testimony in reply to his company's first or second summary judgment motions. As it stands, the evidence is unrefuted that Regal conceded its breach of contract.

iii. <u>Market Forces</u>:

PBNW is not alleging that the business was forced to close due to Defendants' breach of the 2005 Agreement, but only that it suffered losses due to the contractual breach. (CP 441) Yet Defendants continue to argue about the economic causes of PBNW's business failure, even though this has no bearing on PBNW's losses due to Regal's actions. The fact that PBNW went out of business due to unrelated causes does not reduce any damages that it suffered as a direct result of Defendants' breach of the 2005 Agreement. PBNW is entitled to recover its damages attributable to Regal's breach of contract, no matter what happened to it later as a result of the economy or from poor business practices or from whatever else Defendant Regal wants to attribute the closure to.

iv. <u>Larger Location</u>:

Defendants allege that "PBNW also failed because it lost an ill-timed 'gamble' to expand into space that was over ten times more expensive than its former space and lost a crucial sub-tenant." Again, PBNW is **not** claiming that it failed because of Defendants' breach of the 2005 Agreement. However, PBNW's "gamble" of moving into a much larger space was due in large part to its being courted by Defendant

Mazanti on behalf of Regal to be an "exclusive" dealer. This caused significant increased costs for PBNW. Mr. Mazanti was well aware of PBNW's planned move and was very supportive. Defendants cannot now argue they had nothing to do with PBNW's significantly increased overhead.

Mr. Malich testified that PBNW had to leave its "D" Street location because it lost its lease. It then incurred the increased expense of a significantly larger and more costly facility in Fife. But the reason that PBNW ultimately took the risky Fife location in August of 2006 as opposed to some other, smaller location was due to the increased inventory space and visibility needs it would have after it entered into and relied upon it's sole authorized dealership agreement with Regal. (CP 440-441). Mr. Malich testified, "We considered some other locations but they weren't near the facility that Fife was. The Fife facility could do everything that we needed and have the freeway exposure which would increase our sales." (CP 436) Mr. Malich further explained this as follows:

> 5. Because PBNW was going to be the sole authorized dealer for Regal in the listed counties, in August, 2006 we incurred the expense of moving to a much larger location in Fife, Washington, with freeway visibility and access, putting us in a much better position to market and sell Regal boats. This move significantly increased PBNW's overhead, growing from $2,500 per month to over $30,000 per month. PBNW would not have made this

> move if we had not been given exclusive Regal selling rights in all of the listed counties. This move was done with the full knowledge and approval of Regal.

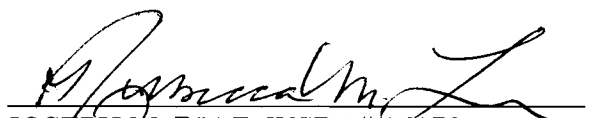
(CP 170)

Defendants argued that this declaration was contradictory with Mr. Malich's deposition testimony. However, this declaration did not contradict Mr. Malich's earlier testimony. Rather, it explained it in more detail. Nothing in Mr. Malich's declaration changed any evidence given in his deposition. The deposition questioning was simply not as complete as it could have been. This was all evidence that should have been presented at trial to determine damages.

IV. CONCLUSION

Plaintiff Malich Motors, Inc., d/b/a Powerboats Northwest clearly suffered damages as a result of Defendant Regal Marine's breach of its 2005 contract. If allowed to present full evidence at trial, Plaintiff will easily be able to calculate its damages with specificity and explain how it calculated these damages. For these reasons, Plaintiff respectfully requests that the court reverse the trial court's ruling of September 3, 2010 and remand this matter for trial.

RESPECTFULLY SUBMITTED this 4TH day of May, 2011.



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NO. 41265-9

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.

Proof of Service of Brief of Appellant – Second Corrected

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STATE OF WASHINGTON)
) ss.
County of Pierce)

SHANNA SWALESON, being first duly sworn on oath, deposes and says:

That on the 4th day of May, 2011, I delivered a true and correct copy of a Brief of Appellant-Corrected to Legal Messengers, Inc. for delivery to the following attorneys of record:

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SHANNA SWALESON

SIGNED AND SWORN to before me this 4th day of May, 2011 by Shanna Swaleson.

Print Name: LISA D. BROWN
NOTARY PUBLIC in and for the State of Washington. My commission expires: 03-07-2012