

No. 41265-9 II

COURT OF APPEALS
DIVISION II

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

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

Appellant,

v.

REGAL MARINE INDUSTRIES INC., doing business as REGAL
BOATS, a Florida State Corporation,

Respondent.

**BRIEF OF RESPONDENT AND CROSS-APPELLANT
REGAL MARINE INDUSTRIES INC. - CORRECTED**

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I. INTRODUCTION

This case occurred within the context of the rapidly-growing economy and the subsequent Great Recession the United States has experienced from 2004 through the present. From 2004 through 2006, Petitioner Malich Motors, Inc. (“PBNW”) aggressively gambled by expanding its highly-leveraged retail boat sales business. By 2007 and 2008, with the nearly complete melt-down of the recreational boat industry, PBNW was unable to sustain itself and went out of business.

In 2006, before PBNW started to feel the consequences of its leveraged-growth choices, Respondent Regal Marine Industries, Inc. (“Regal”), the manufacturer of one of the many boat lines PBNW sold, exercised its uncontested and unilateral contractual right to revise PBNW’s primary marketing area so that it could improve Regal’s sales in northwest Washington. By 2006, PBNW had sold only one Regal boat in Whatcom County (and no Regal boats in Whatcom County during the term of the 2005 Agreement that is at issue in this case). Unlike PBNW, another boat dealer, Sunchaser Yachts, Inc. (“Sunchaser”), had demonstrated a commitment to selling Regal boats throughout northwest Washington and southwest British Columbia through a dedicated sales and service facility in Whatcom County. After revising PBNW’s territory to

exclude Whatcom County, Regal entered into a sales and service agreement with Sunchaser that included Whatcom County.

This case also involves PBNW's effort, after the convergence of its growth strategy and the recession destroyed its business, to cover at least some portion of its losses by pursuing a tortured interpretation of the parties' agreement and blaming Regal, in some large but still undefined part, for its failure.

Regal did not breach its agreement with PBNW by exercising its uncontested and unilateral right to revise PBNW's territory. The trial court should have granted Regal's first motion for summary judgment. But the trial court's ultimate dismissal of PBNW's claims was justified. The trial court properly found that PBNW cannot prove that its demise was caused in any way by Regal, and even if it was, PBNW has yet to show that it can prove its claimed damages with any degree of reasonable certainty and with competent evidence.

II. ASSIGNMENT OF ERROR

1. The trial court erred by denying Regal's first motion for summary judgment because PBNW admitted that Regal had a unilateral contractual right to annually revise PBNW's sales territory and Regal

properly did so.¹ The trial court, however, properly dismissed PBNW's claims in response to Regal's second summary judgment because PBNW failed to prove damages.

Issues Pertaining to Assignment of Error

Did Regal have a unilateral right to revise PBNW's territory when the parties' contract confirmed that right, PBNW admitted that Regal had a contractual right to do so, and Regal properly revised PBNW's territory?
[Assignment of Error No. 1]

III. STATEMENT OF THE CASE

A. The Parties' Sales and Service Agreements.

PBNW began selling Regal boats in the spring of 2004, and Regal and PBNW signed a one year Sales and Service Agreement on June 14, 2004 (the "2004 Agreement"). (CP 74–83) PBNW's "Primary Marketing Area" under the 2004 Agreement was described simply as "the area local to" PBNW. (CP 74) Under the 2004 Agreement, PBNW sold 24 Regal boats, primarily in the Tacoma-Seattle area, but only one Regal boat in Whatcom County. (CP 306) (red highlighted sale).

In early 2005, Regal's Kyle Mazanti and Joe Malich, the owner of PBNW, discussed the potential terms of a new Sales and Service

¹ Regal's first motion for summary judgment included a motion to dismiss all personal claims against Regal's Regional Sales Manager and then co-defendants Kyle Mazanti and "Jane Doe" Mazanti. PBNW did not contest the Mazantis' motion (CP 249) and all claims against them were dismissed (CP 280-281).

Agreement to take effect when the 2004 Agreement ended. They specifically discussed the scope of PBNW's primary Marketing Area under a new Agreement. (CP 58) Regal proposed that PBNW's Marketing Area be the Seattle business trading area ("BTA"), which included the Seattle-Tacoma area and contiguous counties: Grays Harbor, Thurston, Pierce, Kitsap, Mason, King, and Snohomish Counties. (CP 85) But Mr. Malich stated that PBNW intended to open a satellite location in Whatcom County and requested that Whatcom County be added to PBNW's Marketing Area. Because Mr. Malich committed to open a new facility in Whatcom County, and thus confirmed that PBNW would service Whatcom County customers locally and not from nearly 150 miles away in Pierce County, Regal agreed to add Whatcom County to PBNW's Marketing Area. (CP 87)

1. The Parties Agree that Regal's Grant of Sales Territory Was Limited by Regal's Annual, Unilateral Right to Revise that Sales Territory.

On June 10, 2005, Regal and PBNW entered into a second Sales and Service Agreement (the "2005 Agreement"). (CP 89-109) The 2005 Agreement's first provision, §1.0, establishes its three-year term and June 30, 2008 termination date. The 2005 Agreement's second provision, §1.1, states:

At the end of the first year of the Agreement, [Regal] and [PBNW] shall evaluate [PBNW'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 [Regal] to reflect changes in [PBNW's] territory, standards of performance and effect of termination.

(CP 89) (emphasis added). This provision described the process for entering into a subsequent agreement and confirmed that Regal could change PBNW's Marketing Area once per year, at its own discretion. The 2005 Agreement does not require any condition be met prior to any revision by Regal of PBNW's Marketing Area. PBNW has unequivocally agreed that this "[o]ne provision allows Regal a unilateral right to change the contract." (CP 248)

The 2005 Agreement's next provision then defines PBNW's primary Marketing Area as: "Seattle BTA including Greys [sic] Harbor, King, Kitsap, Mason, Pierce, Snohomish, Thurston, Whatcom Counties." (CP 89-109) Not surprisingly, this §2.0 begins with the unequivocal reminder that it is "subject to the terms and conditions of" the Agreement, including §1.1. Although §2.0 established PBNW's new, primary Marketing Area, the grant of that Marketing Area is expressly "subject to"

and limited by Regal's annual, unilateral, discretionary right to revise that territory described in §1.1.

In opposing Regal's first summary judgment motion, PBNW's counsel attempted to argue that §§1.1 and 2.0 were somehow in conflict. First, however, that position is completely inconsistent with PBNW's admission that §1.1 "allows Regal a unilateral right to change the contract." (CP 248) Second, the record could not be clearer that Mr. Malich never contested these enforceable contract provisions or the fact that §2.0's grant of territory was limited by Regal's §1.1 rights to revise that territory. (CP 540)

B. PBNW's Performance in Whatcom County under the 2005 Agreement.

While PBNW intended to open a satellite facility in Whatcom County and Regal therefore agreed to include Whatcom County in PBNW's 2005 Marketing Area, PBNW never opened a satellite facility in Whatcom County and never sold even a single boat in Whatcom County under the 2005 Agreement. (CP 59–60) In total, PBNW sold 213 Regal boats from 2004 until it went out of business in 2008. (CP 306–311) But PBNW sold exactly one Regal boat in Whatcom County, representing less than .005% of its total sales, and it sold that solitary boat on October 20, 2004, before it had even been assigned a primary marketing area that

included Whatcom County under the 2005 Agreement. (CP 306) (red highlighted sale) Not only was the distance between PBNW's Tacoma base of operations and Whatcom County significant, PBNW never took any steps to directly market Regal boats in Whatcom County. (CP 59-60)

In addition to PBNW's lack of sales in Whatcom County, Regal received multiple customer complaints about PBNW's servicing of Regal boats. (CP 59-60) Mr. Malich acknowledged that he and Mr. Mazanti addressed PBNW's Whatcom County sales results and customer service complaints in multiple discussions with Mr. Malich during 2005 and 2006. (CP 538) It became obvious over the course of 2006 that, without a facility in Whatcom County, PBNW would be unable to adequately sell and service Regal boats in and around Whatcom County.

In August 2006, Mr. Mazanti was contacted by Sunchaser, a boat dealer doing business in Whatcom County. (CP 60) Sunchaser, through its owner Bob Brooks, was interested in selling Regal boats and inquired whether that was possible. Mr. Mazanti met with Mr. Brooks, toured Sunchaser's facility, and determined that Sunchaser met Regal's criteria and could serve Whatcom, Skagit and Island Counties particularly well.

C. Regal's Offer of a New Agreement and Its Decision to Revise PBNW's Marketing Area Under the 2005 Agreement.

On September 19, 2006, as part of Regal's consideration of whether to offer PBNW a new, three year Sales and Service Agreement, and as part of its ongoing discussions with PBNW about its lack of sales in Whatcom County and service complaints from customers generally, Mr. Mazanti met with Mr. Malich and PBNW's sales manager Jerry Bauer. (CP 60) Pursuant to § 1.1 of the 2005 Agreement, Mr. Mazanti offered PBNW a proposed Sales and Service Agreement with a new three year term, to expire in 2009. The proposed Agreement confirmed a revised Marketing Area that did not include Whatcom County. Mr. Mazanti explained the sales and service deficiencies that prompted Regal's revisions to PBNW's Marketing Area.

Mr. Malich was aware before September 19 that Regal was considering exercising its right to revise PBNW's territory to exclude Whatcom County and on September 19, he confirmed with Mr. Mazanti that Regal would imminently sign Sunchaser as a Regal dealer in Whatcom County. (CP 537-539) Mr. Malich refused to sign the proposed September 19, 2006 Sales and Service Agreement. (CP 540-542)

Although Regal exceeded its contractual obligations by seeking a new agreement with PBNW that extended the term of their relationship

and confirmed PBNW's revised Marketing Area, Regal had the absolute right, without any agreement or consent by PBNW, to revise PBNW's Marketing Area once per year. Although Regal wished to continue to work with PBNW to serve its revised Marketing Area and improve its service record, Regal had a right and an obligation to maximize its sales in underserved areas like Whatcom County. (CP 61) At least as of September 19, 2006, PBNW knew that Regal revised its Marketing Area to exclude Whatcom County. (CP 540-542, 528-529) That PBNW chose not to enter into a new and extended agreement that confirmed this Marketing Area revision does not change that fact.

D. Regal Did Not Claim Any Default Under or Attempt to Terminate the 2005 Agreement, and No Conflict Exists Between Regal's Right to Revise PBNW's Territory and Any Other Provision of the 2005 Agreement.

PBNW contended at the trial court that the default provisions of the 2005 Agreement somehow trumped the entirely separate, distinct and uncontested right of Regal to adjust dealer territory to maximize its sales. (CP 246-249) PBNW maintained that if PBNW was in default by failing to sell in Whatcom County, Regal was somehow obligated to give PBNW notice and then an opportunity for PBNW to cure under §8.0 of the 2005 Agreement. (CP 246-249) But §8.0 was never implicated by either party both because PBNW's lack of Whatcom County sales was not a default,

and Regal never gave any notice of default and never attempted to terminate the 2005 Agreement.

Regal removed Whatcom County from PBNW's sales territory under §1.1 because PBNW put no effort into selling and sold no boats there during the term of the 2005 Agreement. PBNW cannot now claim that its failure to sell boats in Whatcom County can in any way be characterized as a default. Section 8.0 only remotely refers to sales: at Section 8.0.4, it states that a default occurs "if DEALER fails to meet established requirements for *market share*." (emphasis added) (CP 104) Section 8.0 certainly does not state that anemic performance in one county is a default, particularly if as here, PBNW continued to fulfill its market share requirements through sales elsewhere.

PBNW also ignores §10.0 of its Agreement:

MANUFACTURER'S or DEALER'S failure to exercise any power reserved to it under this Agreement, or the failure by either party to insist upon strict compliance by the other party with any term, covenant, or condition of the Agreement, shall not be deemed to be a waiver of any such term, covenant or condition.

(CP 109) Even if Regal could have claimed default under §8 (which it did not), the fact that PBNW now baselessly alleges it could have does not mean Regal waived any rights under §1.1 to adjust PBNW's territory to maximize Regal's sales.

E. Regal Appoints Sunchaser as the Regal Dealer for Whatcom County and Other Areas that Were Never Part of PBNW's Marketing Area.

On September 21, 2006, Regal entered into a Sales and Service Agreement with Sunchaser that granted Sunchaser the right to sell Regal boats in its home county of Whatcom County as well as areas that had never been contemplated as PBNW sales territory: Skagit and Island Counties and parts of British Columbia. (CP 61)

F. Regal's, PBNW's, and Sunchaser's Cooperative Participation in the 2007 Seattle International Boat Show.

The Seattle International Boat Show is the Pacific Northwest's premier marketing event for recreational boating industry manufacturers and dealers. (CP 61) PBNW has conceded that the Boat Show draws manufacturers, dealers and potential boat buyers from all over Washington, Oregon, British Columbia, Alaska, Idaho, Montana and beyond. (CP 535-536, 61) In late 2006, the Boat Show organizer offered Regal a space capable of accommodating two large yachts in the main hall of the 2007 Seattle Boat Show. (CP 61) PBNW owned a 40 foot Regal yacht and Sunchaser owned a 44 foot Regal yacht so Regal invited both dealers to display their boats in the Regal booth. This arrangement was made with the full understanding and indeed the blessing of both dealerships; both were excited to participate in the Show.

Like many other boat dealers and manufacturers from Washington, British Columbia and beyond, PBNW, Sunchaser and Regal cooperated and shared space at the 2007 Seattle International Boat Show. (CP 385-386) In fact, Sunchaser loaned one of its sales staff to PBNW, and that sales person secured at least one sale of a Regal boat for PBNW – not Sunchaser. (CP 385-386) Neither Sunchaser nor its sales person was ever compensated by PBNW for that sale. (CP 393-396)

PBNW now claims that Sunchaser's presence at the 2007 and 2008 Seattle International Boat Shows somehow violated the 2005 Agreement. First, however, the Agreement's consideration of "Territory," and "boat shows," is entirely unrelated and distinct. (CP 89-90, 99, 95) The 2005 Agreement states:

Dealer is authorized and agrees to participate and display Regal product at the following boat shows[.]

and it lists the Seattle Boat Show. (CP 95) Nothing in the 2005 Agreement promises that PBNW will be the only Regal dealer at the Seattle Boat Show; it merely authorizes and requires PBNW to be there. Nothing in the Agreement connects consideration of territory with boat show participation.

Second, PBNW has never produced a single piece of evidence that could possibly show that it was damaged by the presence of any other

Regal dealer at any Seattle International Boat Show or that any alleged damage exceeded either the significant financial and other contributions Regal made to ensure PBNW was successful at the Seattle Boat Show or the uncompensated sales support provided by Sunchaser at the 2007 Show.

G. PBNW's Advertising and Sales Practices Inside and Outside of Its Primary Marketing Areas Were Unchanged By Its Addition or "Loss" of Whatcom County.

From 2004 through 2008, PBNW regularly advertised outside of its Territory through the internet, through television commercials which aired in all of Western Washington, and through print publications. (CP 533) PBNW confirmed, that despite changes to its territory in 2005 (through its entry of the new, 2005 Agreement) and 2006 (as the result of Regal's removal of Whatcom County), it sold Regal boats throughout Washington, "all over the country," and into Canada. (CP 555, 306) (red and yellow highlighted sales) There is no dispute that after September 2006, PBNW regularly competed with Sunchaser in Skagit and Island Counties and in British Columbia. (CP 383)

Mr. Malich identified at least 33 Regal boats PBNW sold outside of its Territory, some of which he knowingly sold to customers in other dealers' territories. (CP 543-545, 555, 306) (red and yellow highlighted sales) Other dealers sold into PBNW's Territory as well, reflecting the

fact that “primary” marketing areas are not “exclusive” marketing areas.
(CP 549)

PBNW’s out-of-area advertising and sales practices never changed, from June 2004 through June 2005 (when Whatcom County was not included in its primary marketing area), from June 2005 through September 2006 (when Whatcom County was included in its primary marketing area), and from September 2006 through PBNW’s failure in 2008 (when Whatcom County was again not part of its primary marketing area). PBNW continued to advertise into and over Whatcom County at will. PBNW’s out of market sales were not breaches of the 2005 Agreement, and PBNW produced no evidence that any such sales by other dealers, including Sunchaser, damaged PBNW in any way. The only evidence in the record is that PBNW sold more boats in other dealers’ territory than other dealers sold in PBNW’s territory, and PBNW received only a net benefit. The “loss” of Whatcom County had no impact whatsoever on PBNW’s business practices or its profits.

H. Prior to Its Ultimate Failure in 2008, PBNW Never Complained About the “Loss” of Whatcom County.

In discussions with Sunchaser, PBNW’s Mr. Malich made no claim that PBNW had any exclusive right to sell in any areas north of Seattle, including Whatcom County. (CP 383-385, 396-397) During their

discussions after Sunchaser became a Regal dealer, Mr. Malich told Mr. Brooks of Sunchaser: “No skin off my back, we’re not selling anything up north of Seattle anyways,” and “we haven’t been selling hardly anything north of Seattle anyways.” (CP 383-385, 396-398) In fact, PBNW was “happy to have” Sunchaser as a neighboring Regal dealer. (CP 383-385)

In meetings with Regal management after Regal removed Whatcom County from PBNW’s primary marketing area, PBNW did not object to or complain about Regal’s revision of its territory. Soon after Regal removed Whatcom County from PBNW’s territory, Mr. Malich and his Sales Manager, Jerry Bauer, travelled to Florida to meet with Regal’s President and CEO, Duane Kuck, its Vice President of Sales and Marketing, Duffy Stenger, and Mr. Mazanti to determine how Regal could find more boats to satisfy PBNW’s customers’ demands. (CP 383-385, 362-363) Regal’s factory was working at capacity but could not satisfy PBNW’s demand for boats. Mr. Malich and Mr. Bauer spent several days working with Regal executives to locate as many boats at other dealers as they could, and they successfully satisfied all of PBNW’s demand for new boats. PBNW never complained about nor even discussed Whatcom County or Sunchaser with Regal during those meetings.²

² For the first time in response to Regal’s first summary judgment motion, Mr. Malich asserted that Regal’s President stated at a later meeting that Regal had made a “‘mistake’ in allowing Sunchaser to contract for Whatcom County.” (CP 174) But this assertion has

I. The Record Shows that PBNW Only Profited From the Presence of Sunchaser as a Neighboring Regal Dealer.

PBNW cannot show that it was damaged by the appointment of Sunchaser, and the record proves that PBNW only benefitted. From 2006 through its closing in 2008, PBNW alternately cooperated with, received referrals from, competed with, and ultimately extracted profit from Sunchaser.

In addition to Sunchaser's uncompensated sale of a PBNW boat at the 2007 Seattle International Boat Show, Sunchaser referred customers to PBNW when Sunchaser determined that a potential customer's primary boating area was in PBNW's primary marketing area. (CP 394) PBNW also competed against Sunchaser for sales of Regal boats. PBNW frequently learned the lowest price Sunchaser had quoted to a potential customer and undercut that price to try to secure the sale itself. (CP 383)

no bearing on PBNW's breach and damages claims. First, this purported statement says nothing about PBNW's alleged exclusive right to Whatcom County under the 2005 Agreement. At most it refers to the alleged but completely unexplained "mistake" of signing up Sunchaser as a Regal dealer. Second, PBNW admitted that Regal had the unilateral right to change PBNW's territory. (CP 248) Third, any purported statement by Regal's President, is entirely ambiguous. Even if Regal's President stated that Regal made a "mistake," that purported "mistake" was not defined. Mr. Kuck's purported statement could have meant that the revision of PBNW's territory was not the best business move for Regal, because Whatcom County sales or Sunchaser sales generally did not reach the levels Regal expected. Mr. Kuck's purported statements make no reference to nor acknowledge any of the rights PBNW now claims under the 2005 Agreement. In the alternative, the purported statement could have meant that Regal should not have revised the territory of a dealer who was likely to, and ultimately did, respond by bringing a baseless breach of contract claim. PBNW never sought the testimony of Mr. Kuck or otherwise sought to clarify his purported statement.

PBNW also sold multiple Regal boats out of its stock to Sunchaser and was able to buy Regal boats in Sunchaser stock to make quicker retail sales (rather than waiting to order those boats from Regal's Florida factory or to buy them from more distant Regal dealers). (CP 376) In at least one case, PBNW demanded a \$5,000 to \$7,000 premium over PBNW's wholesale cost after confirming that Sunchaser had received a retail customer's deposit and had the boat under contract. PBNW knew Sunchaser was contractually obligated to deliver the boat to the retail customer and took that fact as an opportunity to extract a higher price and secure a significant profit. (CP 398-400)

PBNW also has failed to produce any admissible evidence tending to prove that it lost any sale to Sunchaser. The evidence unequivocally demonstrates that that PBNW had no interest and made no investment in generating sales north of Seattle while Sunchaser expended significant effort there. The only admissible, non-speculative evidence in this record demonstrates that PBNW likely benefited from and clearly was not damaged by the presence of Sunchaser.

J. PBNW Failed Not Because of Regal But Primarily Because the Collapse of the Retail Pleasure Boat Market.

PBNW failed because the economic recession decimated demand for pleasure boats. Mr. Malich testified that PBNW's business was "still

strong” through the beginning of 2007 but there was a significant slowdown at the end of 2007. (CP 348) By 2008, PBNW was in “fire sale mode” and its profit margins were the “worst they had ever been.” (CP 348-349)

Without continuing sales, PBNW lost its primary lines of credit, provided by Textron and GE. As sales slowed, PBNW bet the market would bounce back, but it lost that bet. PBNW sold boats it had purchased with Textron’s and GE’s money, and rather than paying them back, PBNW used those retail sales proceeds to pay its other expenses. PBNW hoped it would “get caught back up” with sales at the January 2008 Boat Show, but those sales never materialized. (CP 353) As a result, in or before May 2008, Textron and GE terminated PBNW’s lines of credit and they and other creditors repossessed all of PBNW’s boats. (CP 354) PBNW acknowledges that Regal worked hard in early 2008 with PBNW and Textron to try to save PBNW but, as Mr. Malich testified, “gas was \$5 a gallon and nothing was selling and it was just a well that could never be full.” (CP 361) Mr. Malich went on to testify:

Textron was actually open to agree with something. The issue was, were we going to be able to pay rent and pay employees and put all these boats on a lot without any income. You know, I mean, at one point it didn’t matter how cheap you could sell a boat, it wasn’t going to sell. . . .
Q. Right. So do you think that you weren’t -- do you think Regal could have done more to help you negotiate

with Textron or was it just -- it was a lost cause because of the market?

A. You know, it was a lost cause unless somebody wanted to throw good money after bad, a bad decision. I mean, any decision at that point anybody, any investor, any manufacturer, anybody at that point, nobody was surviving.

Q. So do you blame Regal for you not being able to work something out with Textron?

A. No.

(CP 361)

PBNW failed, like countless other recreational boat dealers in the Washington and throughout the country,³ because no one was buying recreational boats from anyone, anywhere, and PBNW could not satisfy its massive overhead costs. (CP 355-356)

K. PBNW Also Failed Because PBNW Lost Its Gamble to Drastically Expand Its Leased Space.

PBNW's business also failed because it decided to place a series of significant bets with its retail space, and PBNW lost those bets as well. Despite PBNW's subsequent litigation efforts to somehow hold Regal responsible for Mr. Malich's independent leasing decisions, and its submission of contradictory post-deposition declarations by Mr. Malich, Mr. Malich's deposition testimony clearly confirmed that no connection exists between PBNW's own lease gambles and Regal.

³ Olympic Boat Centers, one of the largest recreational boat dealers in the country, which had a sales facility within 5 miles of PBNW's primary sales facility, declared bankruptcy in July 2008. (CP 62) Cope & McPhetres, another large national boat dealer with locations in the Northwest, filed for bankruptcy protection in October 2008.

Mr. Malich testified that PBNW took its first “gamble” in 2006 a year after entering into the 2005 Agreement with Regal. It converted to a month-to-month lease on its existing, D Street location so that it could “refuse to pay waterfront taxes.” (CP 338) Shortly thereafter, PBNW’s landlord chose to sell the D Street property and terminated PBNW’s lease. PBNW was forced to find new space in 30 days in one of the most expensive rental markets in history. (CP 338) PBNW’s response was to take another gamble: it entered into a five-year lease for a much larger facility in Fife, and its monthly lease payment increased from \$2,500 to \$30,000.

In addition to Regal boats, PBNW carried significant inventory of at least five other boat lines. At least half of PBNW’s efforts were dedicated to, and its decision to move to the Fife location was motivated by, the promotion and sale of these other lines. (CP 343-345) The Fife lease made financial sense only if PBNW was able to sell all of its boat lines at sustainable levels and sublease 35 to 40 percent of the Fife property to a third party. (CP 338-339) PBNW secured a subtenant for one year, but then lost and was unable to replace that subtenant. (CP 338-339) PBNW did not stop taking significant risks. It subsequently further over-extended itself by opening locations in Kirkland and Gig Harbor.

(CP 340) PBNW's multiple gambles caused its 2007 and 2008 expenses to skyrocket and its net margins to plummet.

Mr. Malich gave the detailed deposition testimony, set forth immediately above, before he offered either of his two subsequent and contradictory declarations in this matter. Through that deposition testimony, Mr. Malich never mentioned that PBNW's move from D Street to Fife was encouraged by or in any way related to the conduct of Regal. Mr. Malich confirmed that he willingly took the D Street and Fife gambles fully one year after PBNW entered into the 2005 Agreement and 2 years before that Agreement expired and that these failed bets had nothing to do with Regal. Mr. Malich tellingly testified that, even more than location, low overhead was the key to successful boat dealership:

If you have very little overhead and you can sell the boats for cheaper than anybody else, then you have a better chance of making a sale versus where you're located.

(CP 358) He admitted that PBNW simply but dramatically failed because it did not control its overhead. (CP 435)

As a result, by September 2008, PBNW had essentially gone out of business. (CP 62) PBNW filed this lawsuit on December 8, 2008 and Mr. Malich filed for personal bankruptcy on December 18, 2008. (CP 113)

L. Even If PBNW Could Have Purchased the 42 Boats It Claims were Wrongfully Sold to Sunchaser, Those Additional Boats Only Would Have Compounded PBNW's Financial Problems.

PBNW can prove neither breach by Regal nor that any purported breach caused any damages. In addition PBNW has failed to produce anything but speculation to support any damages theory.

PBNW's damages theory hinges on the assumption that PBNW would have been able, despite its ever-tightening and ultimately rescinded credit lines, to purchase the 42 boats that Regal sold to Sunchaser (none of which were sold to Whatcom County residents) and then re-sell those 42 boats at a profit level it had never achieved. In fact, however, if PBNW had purchased 42 additional Regal boats, it would have only compounded its financial problems.

PBNW sold no boats after November 2007 and had over 30 Regal boats repossessed by its creditors in 2008. (CP 343, 354, 504-508) If PBNW had somehow obtained additional financing to fund the multi-million purchase of 42 more boats from Regal, there is no doubt that PBNW would have had significantly more unsold inventory when it went out of business. PBNW and Mr. Malich would have owed Textron even more than the \$400,000 they currently owe. (CP 411-415, 359-360) The only admissible evidence shows that if PBNW had made its hypothetical

purchase of 42 additional Regal boats, it would have suffered significant additional losses, and it most definitely would not have earned any profits.

M. PBNW Has Admitted That Its Damages Cannot be Proven by Reference to “Gross Profit Margins” and by Ignoring Its Massive Overhead Costs.

PBNW has made the general claim that at some undefined point in time it made a gross profit of 25% on Regal boats and at some other, undefined point in time after it no longer had Whatcom County in its primary marketing area, its “gross profit” dropped to 20%. Setting aside PBNW’s inability to prove Regal was responsible for any drop in PBNW’s “gross profit,” PBNW admitted that “gross profit” does not represent reality. (CP 344-346) Mr. Malich confirmed that gross profits resulted from its sale of Regal boats to retail customers, without any consideration of PBNW’s other, massive overhead costs including rent, payroll, fuel, taxes and utilities. Mr. Malich confirmed that calculating PBNW’s purported damages using gross profits would result in a “windfall,” that any actual damages suffered by PBNW had to be calculated by calculating net profits, and that he “didn’t know” what PBNW’s net profits on Regal boats ever was. (CP 345-346)

PBNW also has provided no basis for the “gross profit margin” it now claims. Instead, PBNW’s sworn tax returns definitively prove that its gross profit margin was consistently below 10%. (CP 342-343) After Mr.

Malich admitted that PBNW's actual gross profit margin was below 10%, PBNW offered a "Supplemental" Declaration of Mr. Malich that attempted to contradict his prior unambiguous testimony. In that Supplemental Declaration, Mr. Malich asserted that he was "personally aware that PBNW had a 21.5% gross realization on its sale of Regal Boats through 2006." (CP 440) There is no evidence, from PBNW's records or otherwise, to support this assertion or explain why Mr. Malich's prior, extensive sworn testimony and PBNW's detailed, sworn tax returns should be ignored. PBNW had never provided any explanation of how this number was calculated, or even one documented example where this rate was actually realized.

N. PBNW Has Admitted That Its Damages Are "Speculative" and "Almost Impossible to Figure."

Mr. Malich admitted that "gross profits" analysis cannot be used to calculate PBNW's purported damages and that he does not know and has yet to calculate PBNW's net profit margin on Regal boats. More important, Mr. Malich also admitted that, given all the challenges with which PBNW was wrestling in 2007 and 2008 including the recession, the loss of all of its financing lines, and its overexpansion, calculating any damage that theoretically could possibly flow from the "loss" of Whatcom

County or the appointment of another dealer there is “impossible to figure.” As Mr. Malich testified under oath:

Q. With all of those other causes we’ve talked about, historic economic recession, fire sale prices, no more financing from Textron, the fact you were only operating for six months, and ultimately as you, you and your wife as the sole owners of Malich Motors went bankrupt in December of 2008, filed for bankruptcy in December of 2008, you’re saying that your five percent loss in gross margin was attributable to losing Whatcom County as a primary marketing area?

[Mr. Malich] A. A portion of it, yes.

Q. But how do you distinguish between the damage that you said you suffered from losing Whatcom County from the damage that you suffered because the economy went in the tank?

A. It’s almost impossible to figure.

[Id., Exhibit C, Malich Dep. 126:7-21.] Mr. Malich unequivocally confirmed the pure speculation behind PBNW’s damages claim with subsequent testimony:

Q. I’m trying to figure out, really the question was, do you agree that you would have to speculate to come up with what kind of loss you experienced in 2008 that was attributable to not having Whatcom County as one of your primary marketing areas?

A. Yes.

Q. And same for 2007, right?

A. Yes.

(CP 350-351)

PBNW has never provided any basis for its admittedly inadequate “gross profit margin” analysis. PBNW has never shown how the loss of a

county where its sold one Regal boat in 2004, but never sold a boat under the 2005 Agreement, had any impact on its financial condition. Instead, Mr. Malich unequivocally admitted that calculating any claimed damages would require PBNW to “speculate.” Mr. Malich unequivocally confirmed and that “it is almost impossible” to distinguish between any losses PBNW suffered as a result of the “loss” of Whatcom County, the appointment of Sunchaser, and the losses PBNW suffered as a result of its own massive and unsustainable overhead costs and the economic meltdown of 2007 and 2008. (CP 349-352)

IV. ARGUMENT⁴

A. Standard of Review.

This court reviews the trial court’s summary judgment decisions *de novo*, engaging in the same analysis as the trial court. Michak v. Transnation Title Ins. Co., 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003). Summary judgment is appropriate where no genuine issues of material fact

⁴ PBNW presented an entirely new argument on appeal at pages 9 and 18-19 of its Brief of Appellant. This argument, that there is evidence somewhere in the record that Regal sold boats to Sunchaser before September 2006, is entirely inconsistent with Mr. Malich’s testimony and completely contradicts PBNW’s clear acknowledgement to the trial court that Regal’s sales to Sunchaser “began” in September 2006. Regal, obviously, had no opportunity or even any inkling of a need to refute this new argument at the trial court level. Regal has moved to strike this new argument pursuant to RAP 9.12. Regal has also asked for permission, pursuant to RAP 10.3(a)(8), to present this Court with additional materials not contained in the record on review which definitively defeat PBNW’s new argument. In the alternative, Regal has asked that this Court to take evidence necessary to provide full perspective to PBNW’s baseless new argument pursuant to RAP 9.11. Regal’s Motion was filed simultaneously with this Brief.

exist. CR 56 (e). “The purpose of a motion for summary judgment is to examine the sufficiency of evidence supporting the plaintiff’s formal allegations so that an unnecessary trial may be avoided where no genuine issue of material fact exists.” Island Air, Inc. v. LaBar, 18 Wn. App. 129, 136, 566 P.2d 972 (1977) (citations omitted). Material facts are those facts upon which the outcome of the litigation depends. Vacova Co. v. Farrell, 62 Wn. App. 386, 395, 814 P.2d 255 (1991). A court may determine a question of fact as a matter of law “when reasonable minds could reach but one conclusion.” Havens v. C&D Plastics, Inc., 124 Wn.2d 158, 177, 876 P.2d 435 (1994). Moreover, an issue is not genuine unless the non-moving party presents sufficient evidence for a jury to find in its favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 202 (1986).

Once the moving party establishes that no genuine issues of material fact exist and that it is entitled to judgment as a matter of law, the burden shifts to the non-moving party to establish specific facts giving rise to a genuine issue of material fact. Schaaf v. Highfield, 127 Wn.2d 17, 21, 896 P.2d 665 (1995). Conclusory statements and unsupported assertions cannot defeat a motion for summary judgment. Herron v. Tribune Publishing Co., 108 Wn.2d 162, 170, 736 P.2d 249 (1987).

B. Regal Did Not Breach the 2005 Agreement.

In construing a contract, courts apply the following principles: (1) the intent of the parties controls; (2) the court must ascertain the intent from reading the contract as a whole; and (3) the court will not read an ambiguity into a contract that is otherwise unambiguous. BP Land & Cattle LLC v. Balcom & Moe, Inc., 121 Wn. App. 251, 254, 86 P.3d 788 (Div. 3, 2004). Thus, summary judgment is appropriate if a contract is unambiguous, even if the parties dispute the legal effect of a provision. Id.

Courts must give words in a written agreement their “ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent.” Hearst Communications, Inc. v. Seattle Times Co., 154 Wn.2d 493, 504, 115 P.3d 262, 267 (2005). A court cannot create terms of a contract for parties that the parties did not make for themselves. Dragt v. Dragt/DeTray, LLC, 139 Wn. App. 560, 573, 161 P.3d 473, 481 (2007), citing Wagner v. Wagner, 95 Wn.2d 94, 103, 621 P.2d 1279 (1980).

Washington courts employ the context rule when reviewing written agreements to determine the parties’ intent. McCausland v. McCausland, 129 Wn. App. 390, 118 P.3d 944 (2005), reversed on other grounds, 159 Wn.2d 607, 152 P.3d 1013 (2007). The context rule permits the admission of extrinsic evidence to assist in ascertaining the parties’ intent “where the

evidence gives meaning to words used in the contract.” Id. The context rule was established in Berg v. Hudesman, 115 Wn.2d 657, 801 P.2d 222 (1990). However, the Washington Supreme Court has since explained that Berg was “misunderstood” and applied too broadly. Hearst Communications, Inc. v. Seattle Times Co., 154 Wn.2d 493, 503, 115 P.3d 262 (2005). The Court has strictly narrowed the context rule’s applicability. Id.

Extrinsic evidence is not to be used to show an intention independent of the instrument or to vary, contradict or modify the written word. Id. In fact, Washington continues to follow the objective manifestation theory of contracts. Id. Courts determine the parties’ intent by focusing on the objective manifestations of the agreement rather than on the unexpressed subjective intent of the parties. Id. Thus, when interpreting contracts, the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used. Id. at 503-504.

Here, there is only one reasonable, and fortunately uncontested, meaning that can be ascribed to the 2005 Agreement: Regal may unilaterally revise the Marketing Area. The first page of the 2005 Agreement states the following:

Exhibits A, B and C may be revised annually by [Regal] to reflect changes in [PBNW's] territory, standards of performance and effect of termination.

(CP 89) There were no qualifications or conditions, and no notices or justifications required of Regal for revising PBNW's Marketing Area. Regal was free to revise the Marketing Area without PBNW's permission. Regal did not need a specific reason for doing so, but PBNW's failure to sell a single boat in Whatcom County during the first year of the 2005 Agreement was an obvious and commercially justified reason for removing Whatcom County from PBNW's Marketing Area and later assigning it to a Whatcom County-based dealer who was dedicated to growing Regal's sales in northwest Washington and southwest British Columbia. Regal's decision to revise the Marketing Area and remove Whatcom County from PBNW's Marketing Area did not breach the 2005 Agreement. That decision was expressly anticipated by the 2005 Agreement. The trial court should have dismissed PBNW's breach of contract claim.

C. PBNW Has Failed to Show That Regal Caused Any Damages.

A breach of contract is actionable only if the contract imposes a duty, the duty is breached, *and the breach proximately causes damage to the claimant.* Northwest Independent Forest Mfrs. v. Department of Labor, 78 Wn. App. 707, 712, 899 P.2d 6 (1995), citing Larson v. Union

Investment & Loan Co., 168 Wash. 5, 10 P.2d 557 (1932), and Alpine Industries, Inc. v. Gohl, 30 Wn. App. 750, 637 P.2d 998 (1981), review denied, 97 Wn.2d 1013 (1982).

PBNW admitted it is “almost impossible to figure” what damages, if any, it claims it has suffered as a result of any conduct by Regal and what damages it suffered as a result of the decimation of the recreational boat industry, its failure to maintain financing lines, and its own crushing overhead costs. PBNW’s honest admissions confirm that it cannot prove either proximate cause or damage. All of the admissible evidence before the Court confirms that PBNW went out of business due to the severe economic recession and complete collapse of the recreational boat market beginning in 2007 coupled with PBNW’s own ill-timed expansions. Despite PBNW’s solitary allegation of breach by Regal in 2006, PBNW has confirmed that sales of Regal boats increased overall, and were still “booming” as late as September 2007. (CP 348-349) PBNW confirmed that Regal provided it with all the boats Regal could possibly produce and PBNW could possibly sell. PBNW confirmed, however, that by November 2007 the recession had arrived and had become so severe that it was unable to sell a single boat. By 2008, PBNW went into “fire sale mode” and dramatically reduced its profit margins. (CP 349-350) Even after PBNW stopped reimbursing its flooring financing providers to pay

its daunting rent and other overhead expenses, its hoped-for positive sales bounce never happened. PBNW lost its financing, all of its stock boats were repossessed, and it went out of business.

PBNW's failure has nothing to do with the "loss" of Whatcom County, where it made, at most, less than .005% of all of its Regal sales. PBNW apparently believes that Regal should be paid the profit it speculates Sunchaser made off of all of Sunchaser's sales, including sales in counties and in Canada that were never included in PBNW's primary marketing area. But PBNW admits that it knew when PBNW signed its 2005 Agreement with Regal that more than half of all Western Washington counties were not included in its territory. And PBNW admits that despite the limits of its own primary marketing area, it advertised and made sales throughout Western Washington, "all over the country and Canada," and that PBNW successfully sold to customers of other Regal dealers. PBNW's own out-of-area sales prove that Regal dealers can properly sell into other dealers' primary Marketing Areas. PBNW has no legal right to exclusivity, regardless of whether Whatcom County was included in its primary Marketing Area or not. More important, PBNW cannot possibly prove that any of its speculative profit margin loss theories are in any way related to its "loss" of Whatcom County.

Although PBNW claims that Regal somehow supported PBNW's forced move to a larger location at Fife, PBNW's "supplemental" declarations are completely at odds with its owner's prior sworn, detailed and unambiguous deposition testimony that Regal had nothing to do with PBNW's lease gambles. And there is not a single document that supports PBNW's claims that Regal somehow had something to do with PBNW's move to Fife. Beginning in 2005, PBNW placed multiple, unilateral bets concerning its leased space. PBNW lost those bets, lost the subtenant it needed to finance up to 40% of its new space, and by 2007 was saddled with a monthly lease payment that was more than 10 times higher than its 2005 lease payments.

PBNW has attempted to distance itself not only from the undisputed facts Mr. Malich confirmed at his deposition, but also from Mr. Malich's unequivocal admissions that he cannot prove damages and can only speculate on the topic. But PBNW cannot create issues of material fact (genuine or otherwise) by submitting declaration testimony that contradicts its prior deposition testimony.

When a party has given clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony.

Overton v. Consolidated Ins. Co., 145 Wn.2d 417, 430, 38 P.3d 322 (2002) (quoting Marshall v. AC&S, Inc., 56 Wn. App. 181, 185, 782 P.2d 1107 (1989), quoting Van T. Junkins & Assoc., Inc. v. U.S. Indus., Inc., 736 F.2d 656, 657 (11th Cir. 1984)) (trial court properly disregarded affidavit contradicting the same person's deposition testimony); "a party cannot create an issue of fact by [a declaration] contradicting his prior deposition testimony," Kennedy v. Allied Mutual Ins. Co., 952 F.2d 262, 266 (9th Cir. 1991) (such contradictory testimony should be disregarded for the purposes of a motion for summary judgment). PBNW's contradictory declarations are inadmissible; but even if they were considered, they cannot overcome PBNW's inability to prove that any breach by Regal damaged PBNW.

D. Even if PBNW Could Prove Breach or Causation, It Fails in Its Final Requirement to Prove Damages with Reasonable Certainty and Competent Evidence.

Under Washington law, it is not enough for a plaintiff to show only breach and causation. See Commercial Inv. Co. v. Nat'l Bank of Commerce, 36 Wash. 287, 293, 78 P. 910 (1904). The plaintiff must also establish the damages resulting from the breach with a *reasonable degree of certainty or supported by competent evidence in the record*. Hyde v. Wellpinit School Dist. No. 49, et al., 32 Wn. App. 465, 470, 648 P.2d 892 (1982) (emphasis added). Evidence of damage is sufficient only if it

affords a reasonable basis for estimating the loss and does not subject the trier of fact to mere speculation or conjecture. Id.; see also, Interlake Porsche & Audi v. Bucholz, 45 Wn. App. 502, 510, 728 P.2d 597 (1986). PBNW's self-contradictory damages analysis is the very definition of speculation and conjecture.

PBNW has previously conceded that it cannot prove any damages relating to the sale of Regal boats to retail customers in Whatcom County, and has produced no new evidence to support any such claim. Instead, PBNW claims damages for the amount of its "gross lost profits" on the sales of all boats Regal supplied to Sunchaser. PBNW has yet to explain how, in the absence of any evidence on the subject, it can prove it could have secured any of Sunchaser's sales for itself. PBNW ignores this glaring gap in its argument and sinks into bald, unsupported conjecture that PBNW could have found a way to purchase millions of dollars in inventory and then re-sell all 42 boats sold by Sunchaser at an astronomical profit in the midst of the worst recreational boating sales market in history. (CP 427-428) None of Mr. Malich's deposition or declaration testimony goes as far as PBNW's latest contentions—he admitted under oath that PBNW did absolutely nothing to develop any of the eventual customers to whom Sunchaser sold those boats and had no presence in northwest Washington or southwest British Columbia to do so.

As a result, PBNW relies solely upon its latest inadmissible and speculative argument that “every one of the boats delivered to and ultimately sold by Sunchaser . . . should have should have been sold through PBNW.” Appellant’s Brief at 20.

PBNW’s hypothetical belies Mr. Malich’s own testimony, PBNW’s uncontested, dismal financial condition, and the uncontested, dismal market for recreational boat sales.

Lost profits are recoverable only when:

- (1) they are within the contemplation of the parties at the time the contract was made,
- (2) they are the proximate result of defendant’s breach, and
- (3) they are proven with reasonable certainty.

Golf Landscaping, Inc. v. Century Constr. Co., 39 Wn. App. 895, 903, 696 P.2d 590 (1984). A lost profits claim “is properly denied if the alleged loss cannot be adequately proved and remains speculative.” Id., quoting United States of America for the Use and Benefit of A.V. DeBlasio Constr., Inc. v. Mountain States Constr. Co., 588 F.2d 259, 263 (9th Cir. 1978) (applying Washington law).

The absence of any admissible evidence that even remotely supports a lost profits claim, and the resulting gaps in PBNW’s logic, are nearly identical to the failed and “attenuated chain of causation” alleged by the plaintiff in U.S., A.V. DeBlasio Constr., Inc. v. Mountain States

Constr. Co. The plaintiff in that case, a subcontractor, unsuccessfully tried to claim that its termination on one landscaping project hampered its ability to obtain bonds required for more public work. Id. It is undisputed that PBNW ran out of financing, sold no boats from 2007 on, and put no effort into the sale of any boat north of Seattle. Consequently, PBNW simply cannot prove either that it was capable of purchasing an additional 42 boats or that it could have re-sold those boats at any profit.

PBNW's failure even to consider any of the other variables that resulted in PBNW's losses in 2007 and 2008 and to jump to the unsupported conclusion that it would have made 42 additional purchases and re-sales in a crumbling and ultimately completely dead recreational boat market is also similar to the plaintiff's failed damages claim in Hyde v. Wellpinit School Dist. No. 49, supra, 32 Wn. App. at 470. In Hyde, the court found for plaintiff on his wrongful termination claim and awarded him lost compensation, but denied his lost rental value claim, calling that claim "speculation and conjecture" because plaintiff offered only conclusory testimony about his alleged net rental loss and failed to produce any evidence of the property's fair rental value on the open market or objective evidence of the benefits he did receive by renting the property.

PBNW cites only to Gaasland Co. v. Hyak Lumber & Millwork, Inc., 42 Wn.2d 705, 257 P.2d 784 (1953), for the proposition that recovery of lost profits should not be barred if there is evidence to establish the fact of damages, even if there is uncertainty as to the extent of damages. Appellant's Brief at 14. However, while Gaasland only states the truism that a fact finder can make reasonable inferences from imprecise evidence, the Gaasland court nevertheless made clear that the plaintiff must still produce "*reasonably convincing evidence indicating the amount of damage.*" Id. at 713 (emphasis added).

More important, Gaasland is factually distinguishable. There, the plaintiff showed what he would have had to pay to defendant for the lumber (via the contract price the defendant agreed to) and what he actually paid to another provider. The plaintiff was able to show a concrete loss had occurred—that is, the actual amount over and above the defendant's price that he had to pay to obtain the same materials. Id. at 711.

It is undisputed that:

- PBNW did nothing to develop or secure the retail customers who bought Sun Chaser's 42 boats (CP 286, 397-398);

- Regal worked directly with PBNW in early 2007 to obtain additional inventory from other dealers to satisfy all of PBNW's demand for Regal boats (CP 362-363);
- PBNW's profit margins in 2007 and 2008 were essentially non-existent as it entered "fire sale mode" and bet on the hope that the market for recreational boats would rebound, but it never did (CP 328-349);
- In 2007, PBNW had exceeded its credit limits and violated its credit agreements by "selling out of trust" and not reimbursing its creditors upon the retail sale of each boat, so it had no ability to buy any more boats from Regal than it actually bought (CP 353, 361);
- Because of the recession, PBNW sold far fewer boats after the beginning of 2007 than it did in the prior two years (CP 348); and
- All of PBNW's remaining inventory of Regal and other boats was ultimately repossessed by its creditors (and had PBNW purchased the 42 boats it claims it should have re-sold, rather than Sunchaser, in all probability they also would have been repossessed). (CP 354)

If PBNW had found some way to finance the purchase of millions of dollars in inventory it says it should have purchased (i.e., the 42 boats), the \$400,000 judgment Textron has against Mr. Malich now would be in the millions of dollars.

PBNW can show only how many boats Regal sold to Sunchaser, but it cannot show that PBNW could have purchased and re-sold those boats or that the 42 primarily northwest Washington and southwest British Columbia retail customers who purchased boats from Blaine-based Sunchaser would have bought a boat from Fife-based PBNW as opposed to another, closer boat dealer. By the end of 2007, PBNW began to “fire sale” its inventory at little or no profit and had lost all of the flooring financing necessary for it to purchase any boats (Regal or any of its other at least 5 additional lines of boats). As a result, PBNW cannot possibly prove that it would have been able even to purchase any of the 42 boats, let alone make a profit on the retail re-sale of them. PBNW simply has never fulfilled its obligation to produce “reasonably convincing evidence indicating the amount of any damage.”

E. PBNW’s “Gross” Profit Margin Claim Fails as a Matter of Law.

Despite Mr. Malich’s unequivocal deposition testimony to the contrary, PBNW continues to maintain that it is entitled to what it

contends its “gross profit margin” would have been on 42 boats that it cannot prove it could have bought or sold. Fortunately, this Court need not sort through Mr. Malich’s expressly contradictory deposition and “supplemental” declaration statements because it is axiomatic that plaintiffs claiming lost profits are entitled only to net profits. As stated by the court in Platts v. Arney, 50 Wn.2d 42, 309 P.2d 372 (1957):

The purpose of awarding damages for breach of contract is neither to penalize the defendant nor merely to return to the plaintiff that which he has expended in reliance on the contract. It is, rather, to place the plaintiff, as nearly as possible, in the position he would be in had the contract been performed. He is entitled to the benefit of his bargain, *i.e.*, whatever net gain he would have made under the contract. Munson v. McGregor, 1908, 49 Wash. 276, 94 P. 1085; Herbert v. Hillman, 1908, 50 Wash. 83, 96 P. 837; Herrett v. Wershing, 1932, 170 Wash. 417, 16 P.2d 608; Hardinger v. Till, 1939, 1 Wash.2d 335, 96 P.2d 262; Williston on Contracts, § 1338; McCormick on Damages, § 137.

The plaintiff is not, however, entitled to more than he would have received had the contract been performed. If the defendant, by his breach, relieves the plaintiff of duties under the contract which would have required him to spend money, an amount equal to such expenditures must be deducted from his recovery. Gould v. McCormick, 1913, 75 Wash. 61, 134 P. 676, 47 L.R.A., N.S., 765; Robbins v. Seattle Peerless Motor Co., 1928, 148 Wash. 197, 268 P. 594; Rathke v. Roberts, 1949, 33 Wash.2d 858, 207 P.2d 716; Restatement, Contracts, §§ 329, 333, 335; McCormick on Damages, § 143.

Platts, 50 Wn.2d at 46.

The plaintiff in Platts sought his gross lost profits arising from the breach of a contract for the sale and exchange of several parcels of real estate and personal property. Not surprisingly, the trial and appellate courts both deducted the brokerage fees plaintiff would have paid if there had been no breach as well as the “preparatory expenses” he would have incurred to carry out his own obligations. Similarly, despite PBNW’s completely unsupported argument to the contrary, PBNW cannot recover alleged “gross lost profits.” PBNW must take into account not only the wholesale price of any boats it claims it hypothetically could have bought and then re-sold, but the appropriate percentage of all of its overhead costs related to each such retail sale. PBNW has failed to do so, and its damages claim therefore fails.

V. CONCLUSION

The Parties’ unambiguous 2005 Agreement allowed Regal to unilaterally revise PBNW’s primary Marketing Area once per year. PBNW has admitted this. Regal properly did so and did not breach the Agreement. The trial court’s denial of Regal’s first summary judgment motion should be reversed.

In light of Mr. Malich’s prior, unambiguous testimony and the dearth of any evidence tending to prove Regal was responsible for any of PBNW’s catastrophic losses in 2007 and 2008, PBNW can only rely upon

speculation, conjecture, and unsupported and unsupportable damage theories. Speculation, conjecture and unsupportable legal theories do not fulfill PBNW's obligations, either at the trial or appellate levels, to prove damages with reasonable certainty and competent evidence. PBNW cannot prove that Regal caused any of PBNW's self-inflicted and recessionary losses. If the trial court's denial of Regal's first summary judgment is not reversed, its grant of Regal's second summary judgment motion should be affirmed.

RESPECTFULLY SUBMITTED this 20th day of April, 2011.

Cairncross & Hempelmann



Stephen P. VanDerhoef, WSBA No. 20088
Attorney for Respondent/Cross-Appellant

COURT OF APPEALS
DIVISION II

NO. 41265-9

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STATE OF WASHINGTON

BY _____
DEPUTY

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

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

Plaintiff,

v.

REGAL MARINE INDUSTRIES INC., doing business as REGAL
BOATS, a Florida State Corporation,

Defendants.

PROOF OF SERVICE OF BRIEF OF RESPONDENT -
CORRECTED

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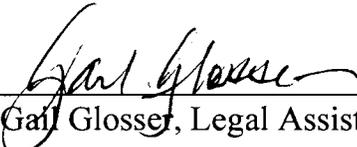
ORIGINAL

STATE OF WASHINGTON)
) ss.
County of King)

GAIL GLOSSER, being first duly sworn on oath, deposes and says:

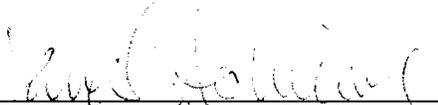
That on the 20th day of April, 2011, I delivered a true and correct copy of the Brief of Respondent and Cross-Appellant Regal Marine Industries, Inc. – CORRECTED by electronic transmission, per agreement, to the following attorneys of record:

Joseph M. Diaz, WSBA No. 16170
Rebecca M. Larson, WSBA No. 20156
Davies Pearson, P.C.
PO Box 1657, 920 Fawcett
Tacoma, WA 98401
253-620-1500



Gail Glosser, Legal Assistant

SIGNED AND SWORN to before me this 20th day of April, 2011 by Gail Glosser.



Print Name: Jana C. Schmeel
NOTARY PUBLIC in and for the
State of Washington, My commission
expires: 2-10-14

