

2000

Joseph R. Boud v. SDNCO, Inc. : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT FOR THE STATE OF UTAH

JOSEPH R. BOUD, Trustee of the :
Diane Mansell Boud Revocable Trust, :

Plaintiff and Appellant, :

vs. :

SDNCO, INC., dba Wasatch Marine; :

Defendant, :

and KCS INTERNATIONAL INC., :
dba CRUISERS YACHTS; :

Defendant and Appellee. :

Supreme Court Case No. 20001020

Priority Number: 15

BRIEF OF APPELLANT

APPEAL

From The Third Judicial District Court, Salt Lake Department
Judge J. Dennis Frederick, Trial Court Case No. 990910029

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JURISDICTIONAL STATEMENT

The Supreme Court has jurisdiction in this matter pursuant to Section 78-2-2(3)(j), Utah Code Annotated 1953, as amended.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Issue No. 1: Whether the trial court correctly ruled that the pertinent portions of the sales brochure relating to the subject yacht cannot form enforceable express warranties under the Utah Commercial Code or the Utah Consumer Sales Practices Act where Plaintiff had demanded a trial by jury and where the ruling was based upon a motion to dismiss by Defendant KCS International, Inc., which was converted to a motion for summary judgment by the trial court.

Record Citation Showing Issue Was Preserved: Record Pages 445-449.

Issue No. 2: Whether the trial court correctly ruled that the pertinent portions of the sales brochure relating to the subject yacht lack specificity to become material to Plaintiff's purchase of the yacht and therefore cannot constitute material facts which could be negligently misrepresented in the brochure where Plaintiff had demanded a trial by jury and where the ruling was based upon a motion to dismiss by Defendant KCS International, Inc., which was converted to a motion for summary judgment by the trial court.

Record Citation Showing Issue Was Preserved: Record Pages 445-449.

Issue No. 3: Whether the trial court correctly dismissed with prejudice all of Plaintiff's claims against Defendant KCS International, Inc.

Record Citation Showing Issue Was Preserved: Record Pages 445-449.

Standard of Review for Issues Presented (Same for All Issues Presented):

In reviewing a grant of summary judgment, the Supreme Court views facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party (Plaintiff). Glover v. Boy Scouts of America, 923 P.2d 1383, 1384 (Utah 1996). Rule 56(c), U.R.C.P.

Summary Judgment is appropriate only when no genuine issues of material fact exist and the moving party (Defendant KCS International, Inc) is entitled to judgment as a matter of law. Glover v. Boy Scouts of America, 923 P.2d 1383, 1385 (Utah 1996). Rule 56(c), U.R.C.P.

Because entitlement to summary judgment is a question of law, the Supreme Court accords no deference to the trial court's resolution of the legal issues presented. Glover v. Boy Scouts of America, 923 P.2d 1383, 1385 (Utah 1996). Rule 56(c), U.R.C.P.

The Supreme Court determines only whether the trial court erred in applying the governing law and whether the trial court correctly held that there were no disputed issues of material fact. Glover v. Boy Scouts of America, 923 P.2d 1383, 1385 (Utah 1996). Rule 56(c), U.R.C.P.

CONTROLLING LEGAL PROVISIONS

Utah Code § 70A-2-313. Express warranties by affirmation, promise, description, sample

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

Uniform Commercial Code § 2-313. Express warranties by affirmation, promise, description, sample

Utah Code § 70A-2-313 has enacted this relevant, model section verbatim.

The text of the Official Comment to Uniform Commercial Code § 2-313 is included as "Appendix D" to the present brief.

[Utah Consumer Sales Practices Act]

Utah Code § 13-11-2. Construction and purposes of act

This act shall be construed liberally to promote the following policies:

- (1) to simplify, clarify, and modernize the law governing consumer sales practices;
 - (2) to protect consumers from suppliers who commit deceptive and unconscionable sales practices;
 - (3) to encourage the development of fair consumer sales practices;
 - (4) to make state regulation of consumer sales practices not inconsistent with the policies of the Federal Trade Commission Act relating to consumer protection;
 - (5) to make uniform the law, including the administrative rules, with respect to the subject of this act among those states which enact similar laws; and
 - (6) to recognize and protect suppliers who in good faith comply with the provisions of this act.
-

[Utah Consumer Sales Practices Act]

Utah Code § 13-11-4. Deceptive act or practice by supplier

- (1) A deceptive act or practice by a supplier in connection with a consumer transaction violates this chapter whether it occurs before, during, or after the transaction.
- (2) Without limiting the scope of Subsection (1), a supplier commits a deceptive act or practice if the supplier knowingly or intentionally:
 - (a) indicates that the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, uses, or benefits, if it has not;
 - (b) indicates that the subject of a consumer transaction is of a particular standard, quality, grade, style, or model, if it is not;

. . . .

[Utah Consumer Sales Practices Act]

Utah Code § 13-11-5. Unconscionable act or practice by supplier

(1) An unconscionable act or practice by a supplier in connection with a consumer transaction violates this act whether it occurs before, during, or after the transaction.

(2) The unconscionability of an act or practice is a question of law for the court. If it is claimed or appears to the court that an act or practice may be unconscionable, the parties shall be given a reasonable opportunity to present evidence as to its setting, purpose, and effect to aid the court in making its determination.

(3) In determining whether an act or practice is unconscionable, the court shall consider circumstances which the supplier knew or had reason to know.

STATEMENT OF THE CASE

This appeal originates from consumer claims against a retailer (SDNCO, Inc, dba Wasatch Marine) and manufacturer (KCS International, Inc., dba Cruisers Yachts) relating to the purchase of yacht costing the consumer over \$150,000.00.

This an appeal from a multiple-party and multiple claim case in the Third Judicial District Court, Salt Lake Department, where the order appealed from (Summary Judgment for KCS International, Inc., dba Cruisers Yachts on all of Plaintiff's claims) has been certified as a final order by the trial court pursuant to Rule 54(b) of the Utah Rules of Civil Procedure. The two parties remaining in front of the trial court, after entry of the trial court's order which is the subject of this appeal, are the Plaintiff and Defendant SDNCO, Inc., doing business as Wasatch Marine. The claims remaining in front of the trial court are those of the Plaintiff against Defendant SDNCO, Inc. (including asserted violations of the Utah Consumer Sales Practices Act, breach of contract and the duty of good faith and fair dealing, various U.C.C. claims such as rejection/revocation of acceptance and unconscionability and breach of warranties, claims for negligent misrepresentation, punitive damages, and equitable relief).

Purchase of the Yacht

Plaintiff was shopping for a yacht in or about December, 1998. 2nd Amended Complaint ¶ 9 (Record Pages 273-274). During that time period, while at the dealership location of SDNCO, Inc. dba Wasatch Marine, a retailer for boats manufactured by KCS

International, Inc., dba Cruisers Yachts (hereinafter identified as “Cruisers Yachts”), Wasatch Marine provided Plaintiff with a 1999 sales brochure produced by Cruisers Yachts relating to its line of model year 1999 yachts. 2nd Amended Complaint ¶ 19 and 82 (Record Pages 275-276). Prior to entering into any agreement to purchase a 1999 model 3375 Esprit Cruisers Yacht, Plaintiff read and reviewed page thirty of the 1999 Cruisers Yacht sales brochure. Final Order, Findings of Fact, ¶ 2 (Record Page 446 and Page 2 of “**Appendix A**”). Page thirty of the 1999 Cruisers Yacht sales brochure specifically pertained to the 1999 model 3375 Esprit Cruisers Yacht. Final Order, Findings of Fact, ¶ 1 (Record Page 446, Page 2 of “**Appendix A**”, and Page 30 of “**Appendix C**”). Page thirty of the 1999 Cruisers Yacht sales brochure specifically shows a photograph of a yacht moving through the water under its own influence at, what appears to be, a good clip (Page 30 of “**Appendix C**”). Above the photograph is the designation "3375 ESPRIT." Below the photograph is language which states the following:

"Offering the best performance and cruising accommodations in its class, the 3375 Esprit offers a choice of either stern-drive or inboard power, superb handling and sleeping accommodations for six."

Final Order, Findings of Fact, ¶ 1 (Record Page 446, Page 2 of “**Appendix A**”, and Page 30 of “**Appendix C**”).

Based in part on page thirty of the 1999 Cruisers Yacht sales brochure pertaining to the 1999 model 3375 Esprit Cruisers Yacht, Plaintiff, on or about December 23, 1998, agreed to

purchase a 1999 model 3375 Esprit Cruisers Yacht from Wasatch Marine for a sum exceeding \$150,000.00. 2nd Amended Complaint ¶ 19, 20, 22, and 23 (Record Pages 275-276). The yacht purchased by the Plaintiff was not present at Wasatch Marine and, at the time of the transaction, it was agreed that the yacht would be provided by Wasatch Marine to Plaintiff by May 1, 1999. 2nd Amended Complaint ¶ 24 (Record Page 276). As part of the terms of the transaction, Plaintiff gave a \$15,000.00 check deposit to Wasatch Marine on or shortly after December 23, 1998. 2nd Amended Complaint ¶ 26 and 27 (Record Pages 276-277).

Problems with the Yacht

The subject yacht, when it did arrive at Wasatch Marine, was missing a power windlass order by Plaintiff. 2nd Amended Complaint ¶ 31 (Record Pages 277). Plaintiff was required to pay the balance of the purchase price to Wasatch Marine prior to the initial test drive of the subject yacht on Utah Lake despite an earlier promise to the contrary. 2nd Amended Complaint ¶ 35 and 36 (Record Page 278). During the initial test drive on Utah Lake on or about May 20, 1999, the mechanism for raising the yacht's engines malfunctioned. Specifically, the outdrives could not be raised remotely as they were designed to do. 2nd Amended Complaint ¶ 45 (Record Page 279). Plaintiff was subsequently informed by Wasatch Marine that the mechanical problem experienced was not minor and that all of the gears and wiring had to be replaced. 2nd Amended Complaint ¶ 55 (Record Page 281).

During a subsequent test of the yacht at Lake Powell at the end of May of 1999, the yacht experienced several other problems. These problems included the fact that the engines' gears

would not mesh smoothly and were very difficult to shift. Additionally, the yacht's engines became unusually hot while traveling slowly on the water and, thereafter, would overheat at a speed above an idle. Finally, the system alarm would sound and light without any apparent cause. The breakdown of the yacht, due to no fault of Plaintiff or its agents, was only thirty (30) minutes outside of Bullfrog bay and required a slow return at idle to the marina. 2nd Amended Complaint ¶ 62-64 (Record Page 282). Although mechanics dispatched by Wasatch Marine did appear to remedy the problem with the yacht's engines overheating, the difficulty with the gears was not fixed. 2nd Amended Complaint ¶ 66 (Record Page 283).

During the next test of the yacht at Lake Powell on or about June 11th and 12th of 1999, the yacht experienced several problems: 1) the gears remained difficult to shift and would not mesh smoothly; 2) the system alarm would sound at idling speed but would go silent at cruising speed; 3) the yacht's air conditioning system operated erratically and inconsistently, sometimes failing to function at all; 4) the yacht's carbon monoxide (CO) detector would sound without apparent cause; 5) the generator malfunctioned and issued a burning electrical smell followed by smoke filling the cabin; 6) the upper level dashboard screw were not screwed into any moorings and hung unconnected in their holes in the faceplate; and 7) the rear door of the yacht was misaligned and would not latch creating a hazard for the Boud family. 2nd Amended Complaint ¶ 70 (Record Pages 283-284). Following another repair attempt by the mechanics of Wasatch Marine at Lake Powell, Wasatch Marine called Plaintiff and represented the defects to be serious, apologized for the defects, and indicated that the defects required the return of the

yacht to Salt Lake City for repairs by Wasatch Marine. 2nd Amended Complaint ¶ 72-73 (Record Pages 284-285).

Legal Proceedings

Shortly after the return of the yacht to Wasatch Marine Plaintiff rejected the yacht (alternatively revoking acceptance of the yacht). 2nd Amended Complaint ¶ 86, 89, and 94 (Record Pages 286-288). Plaintiff has alleged that Wasatch Marine requested a rescission or replacement product from Cruisers Yachts but that the Cruisers Yachts has refused to comply with Wasatch Marine's request. 2nd Amended Complaint ¶ 134 (Record Page 297). Plaintiff filed suit thereafter when Wasatch Marine also refused to void the purchase agreement of the yacht, return monies paid, and release Plaintiff from any further obligation relating to the yacht and transaction. 2nd Amended Complaint ¶ 90 (Record Page 287). Plaintiff's claims in its lawsuit included claims against the Cruisers Yachts for breach of contract/express warranty, violation of the Utah Consumer Sales Practices Act, negligent misrepresentations, equitable relief, and punitive damages. A trial by jury was demanded. See 2nd Amended Complaint (Record Pages 271 and 303).

On or about June 22, 2000, after having been served with a copy of Plaintiff's 2nd Amended Complaint, Cruisers Yachts filed a Rule 12(b)(6) Motion to Dismiss (Record Pages 334-335) and supporting Memorandum (Record Pages 336-345) asserting that 1) the promotional literature (1999 Cruisers Yachts sales brochure -- particularly page 30), as a matter of law, cannot form the basis of an express warranty or negligent misrepresentation; and 2)

Plaintiff failed to allege all of the necessary elements of its claims. Plaintiff filed a timely Opposition Memorandum (Record Pages 380-397), Cruisers Yachts filed a timely Reply Memorandum (Record Pages 403-413), and the trial court heard oral argument on the Motion on September 11, 2000.

At the time of the hearing, the Court converted the Motion to Dismiss to a Motion for Summary Judgment based upon the court's review of matters outside the pleadings, specifically the entire sales brochure. Final Order, Page 2 (Record Page 446 and Page 2 of "Appendix A"). The trial court held that the portions of the sales brochure relevant to the yacht at issue were "merely sales talk" and lacked "the specificity necessary to form the basis of an enforceable express warranty under either Utah UCC provisions or the Utah Consumer Sales Practices Act." Final Order, Conclusions of Law, ¶ 2 (Record Page 447 and Page 3 of "Appendix A"). The trial court also held that since the portions of the sales brochure relevant to the yacht at issue lacked the "specificity to create an express warranty," it also lacked the "specificity to become material to the Plaintiff's purchase" and could not therefore "constitute a material fact that could be negligently misrepresented in the brochure." Final Order, Conclusions of Law, ¶ 3 (Record Page 447 and Page 3 of "Appendix A"). As a result of its findings of fact and conclusions of law, the trial court ordered all of Plaintiff's claims against Cruisers Yachts to be dismissed with prejudice. Final Order, Order of Dismissal, ¶ 1 (Record Page 447 and Page 3 of "Appendix A"). Upon the oral request of Plaintiff's counsel made at the time of the hearing and with the concurrence of counsel for Cruisers Yachts, the Court certified the dismissal of Plaintiff's

claims against Cruisers Yachts as a final judgment pursuant to Rule 53(b), U.R.C.P. on October 17, 2000 (Record Page 447-448 and Pages 3-4 of “**Appendix A**”). A true and correct copy of the final Order entitled "FINDINGS, CONCLUSIONS, ORDER OF DISMISSAL and RULE 54(b) CERTIFICATION" entered on October 17, 2000 (Record Pages 445-449), is attached as "**Appendix A**" (hereinafter identified as "Final Order"). A timely “Notice of Appeal” was filed on November 16, 2000 (Record Pages 453-454), followed by the timely filing of a “Docketing Statement” with this Court.

SUMMARY OF ARGUMENT

A. Express Warranties

Express Warranties by sellers are statutory creatures under the Uniform Commercial Code as it has been adopted in Utah. *See Utah Code § 70A-2-313*. A reasonable person standard is used to determine whether the language of a seller results in an express warranty by affirmation, promise, or description as opposed to seller's talk, opinion, or "puffery." In general, if the finder of fact determines that a reasonable person would have entered into a transaction based upon an affirmation, promise, or description, an express warranty be found.

A determination of whether a warranty exists and whether any warranty has been breached is ordinarily one for the trier of fact. Pacific Marine Schwabacher, Inc. v. Hydroswift Corp., 525 P.2d 615, 619 (Utah 1974). Plaintiff has requested a jury trial. In this matter, a jury would normally have made the decision as to whether or not Cruisers Yachts made any express warranties to Plaintiff but for the trial court's summary judgment ruling dismissing Plaintiff's claims against Cruiser's Yachts.

Because entitlement to summary judgment is a question of law, the Supreme Court accords no deference to the trial court's resolution of the legal issues presented. See Rule 56(c), U.R.C.P. and Glover v. Boy Scouts of America, 923 P.2d 1383, 1385 (Utah 1996). This Court should views the facts presented and all reasonable inferences drawn therefrom in the light most favorable to Plaintiff. Id. at 1384. It is Plaintiff's assertion that, under this standard of review and the undisputed facts, a "reasonable" jury could find that Cruisers Yachts made express

warranties to Plaintiff in its promotional materials, as Plaintiff has alleged.

Plaintiff claims and has previously asserted that Cruisers Yachts, through its promotional literature, represented and described the yacht Plaintiff ultimately purchased as:

1. “*offering the best performance and cruising accommodations in its class*” and
2. providing “*superb handling*,” among other included statements.

See Cruisers Yachts Promotional Material, Page 30, attached to the present Brief as “**Appendix C.**” Additionally, these claims were positioned immediately below a photograph of the identified model of yacht Plaintiff purchased, the 3375 ESPRIT, which photograph shows the identified yacht moving at an apparently good rate of speed, as evidenced by the displaced water, spray, and the levitated prow (forepart) of the yacht. (Page 30 of “**Appendix C**”).

Express Warranty Analysis

1. “*Affirmation of Fact or Promise*” or “*Description of the Goods*” versus “*Puffing*”

In State By and Through Div. of Consumer Protection v. GAF Corp., 760 P.2d 310, 315 (Utah 1988), this Court (quoting in part 3 R. Anderson, *Anderson on the Uniform Commercial Code*, § 2-313:50, at 44 (3d ed. 1983)) stated,

“An affirmation of fact, a promise, or a description of the goods must be judged objectively against the meaning that a reasonable person would have taken from the statement . . . In determining reasonableness, a court should consider such factors, among others, as ‘(1) the ability of the buyer to see and understand for himself, (2) the vagueness of the statement, and (3) the incredibility of the statement.’”

(Underline Emphasis Added)

The determination of whether or not statements and the Photo in Cruisers Yachts

promotional materials potentially qualify as enforceable warranties is the issue upon which the present appeal is primarily based. The trial court, under its Final Order, Conclusions of Law, ¶ 2-3 (Record Page 447 and Page 3 of “**Appendix A**”), stated that:

“ 2. The Court concludes that the referenced portion of the sales brochure is merely sales talk and lacks the specificity necessary to form the basis of an enforceable express warranty under either the Utah UCC provisions or the Utah Consumer Sales Practices Act.

3. The Court concludes that since the referenced portion of the sales brochure lacks specificity to create an express warranty, it also lacks specificity to become material to the Plaintiff’s purchase and cannot therefore constitute a material fact that could be negligently misrepresented in the brochure.”

(Record Page 447). While the focus of the claims for express warranty in Cruisers Yachts promotional brochure is directed to Page 30 of the brochure (which brochure is attached as “**Appendix C**”), it should be clear that the trial court specifically considered “*the entire sales brochure*” in making its ruling. (Record Page 446; Final Order, Page 2 of “**Appendix A**”).

Plaintiff does not dispute the position that “[t]he line between puffing and warranting is often difficult to draw, but the more specific the statement the more likely it constitutes a warranty.” Downie v. Abex Corp., 741 F.2d 1235, 1240 (10th Cir. 1984), 39 U.C.C. Rep. Serv. 427. Nevertheless, Plaintiff, on appeal, makes essentially two responsive arguments to the review and decision of the trial court. First, Plaintiff asserts that, contrary to the opinion of the trial court, the identified statements and Photograph, individually and/or collectively, are specific enough to be “susceptible” to the creation of a warranty. Second, Plaintiff asserts that the trial court failed to properly consider factors provided for in GAF other than the “vagueness

of the statement,” despite the fact that several additional factors were addressed by Plaintiff, through counsel, in briefing and at oral argument.

First Responsive Argument

Statements such as “*offering the best performance and cruising accommodations in its class*” and providing “*superb handling*,” while not stated in a technical fashion which the average, reasonable person might not understand anyway, are sufficiently clear in and of themselves, particularly when combined with the photograph, to provide a clear understanding of some specific qualities of the product are being represented. Similarly, the Supreme Court of the State of Washington, in Federal Signal Corp. v. Safety Factors, Inc., 886 P.2d 172, 179 (Wash. 1994), 125 Wn.2d 413, 25 U.C.C. Rep. Serv.2d 765, advised the trial court in the case through its decision that, “*affirmations of fact or promises will generally relate to the quality of a good.*” See also Keith, 220 Cal. Rptr. at 395, which states that, “*A warranty relates to the title, character, quality, identity, or condition of the goods.*” Plaintiff asserts that the representations made go straight to the quality, character, and condition of the product purchased. It is Plaintiff’s position that the average, reasonable person could clearly envision and comprehend that some identifiable characteristics are being promised.

A resort to case law on the subject also provides sufficient decisions to support the assertion that the representations made are “susceptible” of being determined to be express warranties and not overly vague. In briefing for the trial court and at oral argument, Plaintiff directed the trial court’s attention to Summers v. Provo Foundry & Machine Co., 178 P. 916

(Utah 1919). In Summers, a case which considered alleged express warranties relating to an automobile, this Court stated,

“While the warranties are denied in the answer, the evidence is undisputed that before the trade was consummated plaintiff asked defendant's salesman what guarantee would be given on the Hudson car, and plaintiff was told that "it is a good car; the company is behind it, and it is guaranteed against all defects in workmanship and material"; that at the time the car was shown plaintiff he was informed by defendant's sales agent that it would do anything that any other Hudson Super-Six would do, and that it was the same type of car that had made the Pike's Peak climb which had been extensively advertised. The car referred to was pointed out and after more talk of the same kind the trade was made. There was a warranty as to the car being free from defects as to material and workmanship, **but we regard the statement that the car would do whatever any other Super-Six would do as also amounting to an express warranty, and not mere "seller's talk," or an expression of opinion.** The statements made come within the following definition of warranty as given in Comp. Laws Utah 1917, § 5121:

‘Any affirmation of fact and any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only, shall be considered as a warranty.’

[Underline and Bold Emphasis Added]

Id. at 917. Although Summers was decided under the relevant provision of Utah's enactment of the Uniform Sales Act, the predecessor to the Uniform Commercial Code, it is substantially similar to the Commercial Code provision at issue. Numerous decisions from other jurisdictions are cited to give this Court a feel for the dividing line between “puff” and “warranty.”

Utah case law is clear that sales literature and other promotion materials may form the

basis of an express warranty or warranties. State By and Through Div. Of Consumer Protection v. GAF Corp., 760 P.2d 310, 315 (Utah 1988). Furthermore, a consumer may still recover for breach of express warranties from a manufacturer (such as Cruisers Yachts) or other party even if the consumer did not purchase directly from such a party. See GAF at 315.

Second Responsive Argument

Pursuant to GAF, the trial court, in considering whether express warranties were made by Cruisers Yachts was supposed to have “considered” factors other than just the “vagueness of the statement” but gave no real evidence of this consideration. There is no indication in the record (both the Final Order and Transcript of oral argument) that the trial court specifically considered the other enumerated GAF factors such as “the ability of the buyer to see and understand for himself” or “the incredibility of the statement.” Plaintiff, through counsel, specifically addressed both of these factors in the briefing and at oral argument and explained why Plaintiff successfully met these factors.

In addition to these two factors, the GAF opinion expressly acknowledged that other appropriate factors not enumerated in the opinion may be considered to determine the reasonableness of finding an express warranty. These additional factors play an important role in analyzing the totality of the circumstances in which a buyer might expect a representation to be an enforceable warranty. The following items, though not an exhaustive list, are appropriate factors for this Court to consider:

1) *Money Expended*; 2) *Hedging*; 3) *Vendor Assumption of Fact Upon Which Buyer is*

Ignorant; 4) *Determinable Representations*; 5) *Surrounding Brochure Information*; and 6) *Seller Bears the Risk*. Each of these factors was discussed in connection with the facts in Plaintiff's case and their importance in this Court's consideration.

2. *"Part of the Basis of the Bargain" Test*

this Court stated in GAF that,

"Actual reliance on the statement need not be shown, however; the statement need only form a 'part of the basis of the bargain.' Utah Code Ann. § 70A-2-313; *Jensen*, 105 Idaho at 194-95, 668 P.2d at 71; *Autzen v. John C. Taylor Lumber Sales*, 280 Or. 783, 788-89, 572 P.2d 1322, 1324-25 (1977)."

GAF, 760 P.2d at 315. While Utah appellate courts frequently cite to the Official Comments to the Uniform Commercial Code, ". . . comments by the drafters of uniform acts are not written into the statute when Utah adopts a version of a uniform act but are nevertheless considered relevant when seeking legislative intent." Carlie v. Morgan, 922 P.2d 1, 7 (Utah 1996)(from concurring opinion by Justice Howe).

For purposes of the present appeal only (and based upon the appropriate standard of review -- where all facts and reasonable inferences are drawn in Plaintiff's favor), it should not be disputed that the statements and Photograph, which Plaintiff asserts to be express warranties, were made part of the basis of the bargain. Evidence of this claim is first found in the Final Order, Findings of Fact, ¶ 2 (Record Page 446 and Page 2 of "Appendix A"), which states that,

"The Court finds, for purposes of Cruiser's motion, that the Plaintiff read the referenced portion of the sales brochure prior to his purchase of the subject model 3375 boat."

Additional evidence is provided in the Transcript of oral argument where the trial court states,

THE COURT: “. . . and one might say that overall clearly the plaintiff, and there’s no dispute that he relied upon the language presumably because it’s in the brochure.”

(Record Page 466 and Page 21 of “**Appendix B**”). Finally, further evidence that the statements and Photograph from the promotional literature were made part of the “basis of the bargain” is specifically set forth in the 2nd Amended Complaint ¶ 19, 20, and 22 (Record Pages 275-276).

3. Test for Breach of Warranty

For the limited purposes of this appeal (and based upon the appropriate standard of review -- where all facts and reasonable inferences are drawn in Plaintiff’s favor), it is must be conceded that Cruisers Yachts is in breach of warranty if this Court agrees with Plaintiff and holds that the previously identified statements and Photograph constitute express warranties (either individually or collectively). Plaintiff’s 2nd Amended Complaint contains numerous assertions that the yacht failed to perform properly according to the asserted express warranties at issue in this appeal. These asserted failures include those items set forth in the “Statement of the Case.”

B. The Utah Consumer Sales Practices Act

The "Deception" prong of the UCSPA, 13-11-4 and its components, initially required no intent to deceive prior to 1985, which lack of intent was in accordance with the provisions of the Uniform Act. See GAF at 313. From 1985 until the 1995 amendment to effect, the "Deception" prong required an "*intent to deceive*." The 1995 amendment changed the "*with*

intent to deceive" requirement to "*knowingly or intentionally*." The "Unconscionability" prong of the UCSPA was interpreted by the Utah Supreme Court in Wade v. Jobe, 818 P.2d 1006, 1016 (Utah 1991) as follows:

" . . . Under the statute [13-11-5 and 13-11-5(3)], unconscionability does not require proof of specific intent but can be found by considering circumstances which the supplier 'knew or had reason to know.'"

In light of the change from "*with intent to deceive*" to "*knowingly or intentionally*" under 13-11-4(2) and the Jobe decision relating to the sister prong of "Unconscionability," it is reasonable and appropriate that "*knowingly*" under the "Deception" prong be interpreted as "*knew or had reason to know*." This interpretation is strengthened by the fact that the stated legislative intent of the UCSPA in the Act is that it be construed liberally "*to protect consumers from suppliers who commit deceptive and unconscionable sales practices*" and "*to encourage the development of fair consumer sales practices*." Utah Code §§ 13-11-2(2) and 13-11-2(3).

Under this "*knew or had reason to know*" standard, the Defendant, as the manufacturer, knew or should have known of the defects and non-conformities of the yacht. Even if it did not know it should have known. Likewise, it certainly had knowledge (constructive or actual) of its own promotional literature containing the statements Plaintiff has asserted to be express warranties. These two points, taken together, provide a sufficient basis to show violations of the UCSPA. Given that the Defendant has stated in its promotional literature that the subject yacht was "*offering the best performance and cruising accommodations in its class*" and "*superb handling*," it seems absurd to claim that these representations, the Photograph, and the other alleged express warranties don't fit into this act as violations.

In particular, look at 13-11-4(2)(a) which finds a violation where "**performance**

characteristics" [Bold Emphasis Added] and "uses" are represented which are untrue.

Performance is what Cruisers Yachts represented and the UCSPA specifically enforces untrue representations of performance. Likewise, 13-11-4(2)(b) finds a violation where a "particular standard," "quality," or "grade" is represented which is untrue. This subsection is also directly applicable to Plaintiff's express warranty claims.

C. Negligent Misrepresentation

"The tort of negligent misrepresentation allows a party

'injured by reasonable reliance upon a second party's careless or negligent misrepresentation of a material fact [to] recover damages resulting from that injury when the second party had a pecuniary interest in the transaction, was in a superior position to know the material facts, and should have reasonably foreseen that the injured party was likely to rely upon the fact.'"

Klinger v. Kightly, 889 P.2d 1372 (Utah App. 1995)(quoting Price-Orem Investment Co. v. Rollins, Brown and Gunnell, Inc., 713 P.2d 55 (Utah 1986)).

The trial court, under its Final Order, Conclusions of Law, ¶ 3 (Record Page 447 and Page 3 of "Appendix A"), stated that:

" 3. The Court concludes that since the referenced portion of the sales brochure lacks specificity to create an express warranty, it also lacks specificity to become material to the Plaintiff's purchase and cannot therefore constitute a material fact that could be negligently misrepresented in the brochure."

(Record Page 447). Plaintiff disputes that the referenced portion of the sales brochure does not qualify as an express warranty and thus disputes that it would also lack the specificity to become "material" to Plaintiff's purchase and can, in fact, constitute a material fact that could be negligently misrepresented in the identified brochure. Plaintiff admits that for purpose of

this appeal, a representation's sufficiency or insufficiency to meet the standard for an express warranty will likely have similar success or failure under the tort of negligent misrepresentation.

For the reasons and rationale already presented under the "Express Warranty" and "Utah Consumer Sales Practices Act" provisions, and as specifically plead in Plaintiff's 2nd Amended Complaint ¶ 141-149 (Record Pages 299-301), Plaintiff specifically asserts that the condition of the yacht and the representations as to its condition in the promotional materials were material facts, that Cruisers Yachts had a pecuniary interest in Plaintiff's purchase of the yacht and was the maker of the representations and in a superior position to know of their falsity, that Plaintiff was injured and suffered damages, as previously stated, resulting from the failure of the yacht to comply with the representations in the promotional material, and that Cruisers Yachts should have reasonably foreseen that Plaintiff was likely to rely on the asserted misrepresentations and that Plaintiff would suffer damages of the type and amount claimed.

ARGUMENT

A. Express Warranties

Generally

The Utah Supreme Court, in Rawson v. Conover, 2001 UT 24 §§ 54-55, 20 P.3d 876, recently stated that,

“§ 54 Under the Utah UCC,

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

....

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as ‘warrant’ or ‘guarantee’ or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

Utah Code Ann. § 70A-2-313(1)(a)(b), (2) (1997).

“§ 55 A reasonable-person standard is used to determine whether the language of the seller is an affirmation of fact, promise, or description as opposed to the seller's opinion or commendation. *See* State Div. of Consumer Prot. v. GAF Corp., 760 P.2d 310, 315 (Utah 1988). “If it is reasonable to conclude that a reasonable person would have ventured into the transaction on the basis of a particular statement,” an express warranty was made.” *Id.* (quoting 3 R. Anderson, *Anderson on the Uniform Commercial Code*, § 2-313:50, at 44 (3d ed.1983)).”

"The question of the existence of a warranty and whether the warranty was breached is ordinarily one for the trier of fact." Pacific Marine Schwabacher, Inc. v. Hydroswift Corp., 525 P.2d 615, 619 (Utah 1974). Plaintiff has requested a jury trial. See 2nd Amended Complaint (Record Pages 271 and 303). This is particularly appropriate given that the jury, unlike a lawyer or judge with some specialized knowledge of the law, is probably most capable of representing and determining the "reasonable person" standard. In this matter, a jury would normally have made the decision as to whether or not Cruisers Yachts made any express warranties to Plaintiff but for the trial court's summary judgment ruling dismissing Plaintiff's claims against Cruiser's Yachts.

Because entitlement to summary judgment is a question of law, the Supreme Court accords no deference to the trial court's resolution of the legal issues presented. See Rule 56(c), U.R.C.P. and Glover v. Boy Scouts of America, 923 P.2d 1383, 1385 (Utah 1996).

As a result, this Court's review of this appeal requires no deference to the decision of the trial court. Summary Judgment is appropriate only when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Id. Furthermore, this Court should view the facts presented and all reasonable inferences drawn therefrom in the light most favorable to Plaintiff. Id. at 1384. It is Plaintiff's assertion that, under this standard of review and the undisputed facts, a "reasonable" jury could find that Cruisers Yachts made express warranties to Plaintiff in its promotional materials, as Plaintiff has alleged.

Express Warranties Made by Cruisers Yachts to Plaintiff and the Consuming Public

Plaintiff claims and has previously asserted that Cruisers Yachts, through its promotional literature, represented and described the yacht Plaintiff ultimately purchased as:

1. “*offering the best performance and cruising accommodations in its class*” and
2. providing “*superb handling*,” among other included statements.

See Cruisers Yachts Promotional Material, Page 30, attached to the present Brief as “**Appendix C.**” Additionally, these claims were positioned immediately below a photograph of the identified model of yacht Plaintiff purchased, the 3375 ESPRIT, which photograph shows the identified yacht moving at an apparently good rate of speed, as evidenced by the displaced water, spray, and the levitated prow (forepart) of the yacht. (Page 30 of “**Appendix C**”).

Plaintiff, by and through counsel, specifically referenced the identified statements of the Cruisers Yachts promotional material in both Plaintiff’s 2nd Amended Complaint (Record Pages 271-304), in Plaintiff’s Opposition Memorandum to the Motion to Dismiss by Cruisers Yachts (Record Pages 380-397), and in oral argument before the trial court (Record Page 466 and Pages 9, 12-13, and 17 of “**Appendix B**”). Likewise, although the identified photograph was not specifically referenced in either Plaintiff’s 2nd Amended Complaint (Record Pages 271-304) or Plaintiff’s Opposition Memorandum to the Motion to Dismiss by Cruisers Yachts (Record Pages 380-397), the photograph was specifically identified in oral argument before the trial court (Record Page 466 and Pages 9, 11, 15 of “**Appendix**

B”).

Express Warranty Analysis

California, like Utah, has adopted Uniform Commercial Code § 2-313 verbatim. In Keith v. Buchanan, 220 Cal. Rptr. 392, 395 (1985), 173 Cal. App.3d 13, 42 U.C.C. Rep. Serv. 386, the California Court of Appeals has identified three fundamental issues a court must deal with in deciding whether an express warranty has been made under §§ 2-313(1)(a) or 2-313(1)(b). These issues are as follows:

“First, the court must determine whether the seller's statement constitutes an ‘affirmation of fact or promise’ or ‘description of the goods’ under California Uniform Commercial Code section 2313, subdivision (1)(a) or (b), or whether it is rather ‘merely the seller's opinion or commendation of the goods’ under section 2313, subdivision (2). Second, assuming the court finds the language used susceptible to creation of a warranty, it must then be determined whether the statement was ‘part of the basis of the bargain.’ Third, the court must determine whether the warranty was breached.”

1. “Affirmation of Fact or Promise” or “Description of the Goods” versus “Puffing” *Keith Issue Number One*

In State By and Through Div. of Consumer Protection v. GAF Corp., 760 P.2d 310, 315 (Utah 1988), this Court (quoting in part 3 R. Anderson, *Anderson on the Uniform Commercial Code*, § 2-313:50, at 44 (3d ed. 1983)) stated,

“An affirmation of fact, a promise, or a description of the goods must be judged objectively against the meaning that a reasonable person would have taken from the statement . . . In determining reasonableness, a court should consider such factors, among others, as ‘(1) the ability of the buyer to see and understand for himself, (2) the vagueness of the statement, and (3) the incredibility of the statement.’”

(Underline Emphasis Added)

This is the Keith issue upon which the present appeal is primarily based. The trial court, under its Final Order, Conclusions of Law, ¶ 2-3 (Record Page 447 and Page 3 of “**Appendix A**”), stated that:

“ 2. The Court concludes that the referenced portion of the sales brochure is merely sales talk and lacks the specificity necessary to form the basis of an enforceable express warranty under either the Utah UCC provisions or the Utah Consumer Sales Practices Act.

3. The Court concludes that since the referenced portion of the sales brochure lacks specificity to create an express warranty, it also lacks specificity to become material to the Plaintiff’s purchase and cannot therefore constitute a material fact that could be negligently misrepresented in the brochure.”

(Record Page 447). While the focus of the claims for express warranty in Cruisers Yachts promotional brochure is directed to Page 30 of the brochure (which brochure is attached as “**Appendix C**”), it should be clear that the trial court specifically considered “*the entire sales brochure*” in making its ruling. (Record Page 446; Final Order, Page 2 of “**Appendix A**”).

Plaintiff does not dispute the position that “[t]he line between puffing and warranting is often difficult to draw, but the more specific the statement the more likely it constitutes a warranty.” Downie v. Abex Corp., 741 F.2d 1235, 1240 (10th Cir. 1984), 39 U.C.C. Rep. Serv. 427. Nevertheless, Plaintiff, on appeal, makes essentially two responsive arguments to the review and decision of the trial court. First, Plaintiff asserts that, contrary to the opinion of the trial court, the identified statements and Photograph, individually and/or

collectively, are specific enough to be “susceptible” to the creation of a warranty. Second, Plaintiff asserts that the trial court failed to properly consider factors provided for in GAF other than the “vagueness of the statement,” despite the fact that several additional factors were addressed by Plaintiff, through counsel, in briefing and at oral argument.

Statements and the Photograph in Cruiser’s Brochure can form express warranties

In supporting the first assertion that the statements and Photograph are “susceptible” to the creation of an express warranty, Plaintiff would first direct this Court to the rationale espoused by Plaintiff’s counsel during oral argument before the trial court in which he is responding to the argument of counsel for Cruisers Yachts that the assertions are not specific enough. Plaintiff’s counsel stated,

“Opposing counsel said there have to be specifics. What would specifics in a yacht case do if they were to say, well, this has such and such horse power, such and such. Sure that might be an express warranty ~~which~~ [but] to the average lay person who buys a boat they just want to know, yeah, this has great performance. It’s the best in its class.”

[Transcript modified to strike out “which” and add “but” to clarify the point]

(Transcript of Oral Argument: Record Page 466 and Page 17 of “**Appendix B**”).

Statements such as “*offering the best performance and cruising accommodations in its class*” and providing “*superb handling*,” while not stated in a technical fashion which the average, reasonable person might not understand anyway, are sufficiently clear in and of themselves, particularly when combined with the photograph, to provide a clear understanding of some specific qualities of the product are being represented. Similarly, the

Supreme Court of the State of Washington, in Federal Signal Corp. v. Safety Factors, Inc., 886 P.2d 172, 179 (Wash. 1994), 125 Wn.2d 413, 25 U.C.C. Rep. Serv.2d 765, advised the trial court in the case through its decision that, “*affirmations of fact or promises will generally relate to the quality of a good.*” See also Keith, 220 Cal. Rptr at 395, which states that, “*A warranty relates to the title, character, quality, identity, or condition of the goods.*” Plaintiff asserts that the representations made go straight to the quality, character, and condition of the product purchased. It is Plaintiff’s position that the average, reasonable person could clearly envision and comprehend that some identifiable characteristics are being promised.

A resort to case law on the subject also provides sufficient decisions to support the assertion that the representations made are “susceptible” of being determined to be express warranties and not overly vague. In briefing for the trial court and at oral argument, Plaintiff directed the trial court’s attention to Summers v. Provo Foundry & Machine Co., 178 P. 916 (Utah 1919). See Page 7 of Plaintiff’s Opposition Memorandum (Record Page 386) and oral argument before the trial court (Record Pages 480-481 and Pages 15-17 of “**Appendix B**”). In Summers, a case which considered alleged express warranties relating to an automobile, this Court stated,

“While the warranties are denied in the answer, the evidence is undisputed that before the trade was consummated plaintiff asked defendant's salesman what guarantee would be given on the Hudson car, and plaintiff was told that "it is a good car; the company is behind it, and it is guaranteed against all defects in workmanship and material"; that at the time the car was shown plaintiff he was informed by defendant's sales agent that it would do

anything that any other Hudson Super-Six would do, and that it was the same type of car that had made the Pike's Peak climb which had been extensively advertised. The car referred to was pointed out and after more talk of the same kind the trade was made. There was a warranty as to the car being free from defects as to material and workmanship, **but we regard the statement that the car would do whatever any other Super-Six would do as also amounting to an express warranty, and not mere "seller's talk," or an expression of opinion.** The statements made come within the following definition of warranty as given in Comp. Laws Utah 1917, § 5121:

‘Any affirmation of fact and any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only, shall be considered as a warranty.’

[Underline and Bold Emphasis Added]

Id. at 917. Although Summers was decided under the relevant provision of Utah's enactment of the Uniform Sales Act, the predecessor to the Uniform Commercial Code, it is substantially similar to the Commercial Code provision at issue.¹ Furthermore, “[i]t *does not matter when a case was decided; as long as it has not been overruled, it is still the law and binding precedent, and constitutes the standard against which any argument for change must be evaluated.*”² In the present appeal, the performance warranty at issue doesn't just

¹ In fact, the Uniform Commercial Code and Utah Commercial Code (identical with respect to the provisions at issue) are more likely to support Plaintiff's position than the Uniform Sales Act since the buyer no longer has to prove “actual reliance” on a statement and the statement only needs to form part of the basis of the bargain. See GAF, 760 P.2d 310, 315 (Utah 1988); see also Lutz Farms v. Asgrow Seed Co., 948 F.2d 638 (10th Cir. 1991), 15 U.C.C. Rep. Serv.2d 1167 (citing numerous jurisdictions which have abandoned the requirement of reliance).

² Lieber v. ITT Hartford Insurance Center, Inc., 2000 UT 90 fn 14.

claim to be as good as one other type of vehicle, it appears to be even better by stating that it is has the “best performance in its class.” “Performance,” should certainly be a subset of the designation “best performance” and thus should be an express warranty that the goods should perform (something Plaintiff has disputed has occurred with regards to the yacht and which will be subsequently addressed under the Breach of Warranty provision).

Other decisions in which representations have been held to establish express warranties include representations in sales brochures that a vessel is “seaworthy,”³ representation in a newspaper that a tractor was in “good condition,”⁴ verbal representation that car was in “good mechanical condition,”⁵ verbal representations that car was “in good condition,” had “no problems,” and was “mechanically sound,”⁶ representations in manufacturer’s literature that mobile home was “highly livable” and “luxurious living,”⁷

³ Keith v. Buchanan, 220 Cal. Rptr. 392, 397 (1985) (court held that the “representations regarding seaworthiness . . . were affirmations of fact relating to the quality or condition of the vessel”).

⁴ Pake v. J.C. Byrd, 286 S.E.2d 588, 589-590 (N.C. Ct. App. 1982), 55 N.C. App. 551, 33 U.C.C. Rep. Serv. 835 (court also held that verbal express warranty was given that the tractor would be free of mechanical defects).

⁵ Felley v. Singleton, 705 N.E.2d 930, 934 (Ill. Ct. App. 1999), 302 Ill. App.3d 248, 235 Ill. Dec. 747, 37 U.C.C. Rep. Serv.2d 586.

⁶ Weng v. Allison, 678 N.E.2d 1254, 1256 (Ill. Ct. App. 1997), 287 Ill. App.3d 535, 223 Ill. Dec. 123, 32 U.C.C. Rep. Serv.2d 755.

⁷ Jensen v. Seigel Mobile Homes Group, 668 P.2d 65, 72 (Idaho 1983), 105 Idaho 189, 35 U.C.C. Rep. Serv. 804 (the court indicated that representations that the mobile home was “practical” and “comfortable” “are perhaps closer questions”).

verbal representation that nothing was wrong with a car's transmission and that only the fluid and filter needed to be changed,⁸ verbal representation that Jimmy [sport utility vehicle] was "very nice,"⁹ catalogue representation that Sylox, a floor coating material, "will absorb considerable flex without cracking,"¹⁰ representation on shipping carton label and cover of instruction booklet that "Golfing Gizmo" is "Completely Safe Ball Will Not Hit Player,"¹¹ representation that a vaccine was superior to the product then being used by the buyer.¹² Additionally, the alleged verbal representation that Night Warrior light towers were comparable to and of higher quality than TPME model, if proved on remand, could be an express warranty.¹³

A review of the cases just cited (other than Federal Signal Corp.) will show that these express warranties were found despite the sellers's contentions that they were simply "sales

⁸ Barksdale v. Van's Auto Sales, Inc., 577 N.E.2d 426, 429 (1989), 62 Ohio App.3d 724.

⁹ Grabinski v. Blue Springs Ford Sales, Inc., 136 F.3d 565, 569 (8th Cir. 1998) (court also found express warranties on representations that the vehicle was "driving fine," "had had one owner," had "never been wrecked," "was in excellent condition," and "only needed a clean-up and standard service").

¹⁰ Interco, Inc. v. Randustrial Corp., 533 S.W.2d 257, 261 (Mo. Ct. App. 1976), 19 U.C.C. Rep. Serv. 464.

¹¹ Hauter v. Zogarts, 534 P.2d 377, 383 (Cal. Sup. Ct. 1975), 120 Cal. Rptr. 681, 14 Cal.3d 104, 16 U.C.C. Rep. Serv.2d 765.

¹² Lovington Cattle Feeders, Inc. v. Abbott Laboratories, 642 P.2d 167, 170 (N.M. 1982), 97 N.M. 564, 33 U.C.C. Rep. Serv. 522.

¹³ Federal Signal Corp. v. Safety Factors, Inc., 886 P.2d 172, 178 (Wash. 1994), 125 Wn.2d 413, 25 U.C.C. Rep. Serv.2d 765

talk,” “puffing,” or a “seller’s opinion.” Utah case law is clear that sales literature and other promotion materials may form the basis of an express warranty or warranties. In State By and Through Div. Of Consumer Protection v. GAF Corp., 760 P.2d 310, 315 (Utah 1988), this Court stated that,

"Statements made about a product in promotional materials fall under subsections (a) or (b) [of Utah Code § 70A-2-313], since advertising materials provided by retailers to consumers can form the basis of an express warranty if the statements made in those media form a ‘part of the basis of the bargain.’"

Furthermore, a consumer may still recover for breach of express warranties from a manufacturer (such as Cruisers Yachts) or other party even if the consumer did not purchase directly from such a party. See GAF at 315 ("*the great weight of authority and the better view is that a consumer can recover for breach of an express warranty despite a lack of privity*"). The Court in GAF, quoting dicta from Baxter v. Ford Motor Co., 12 P.2d 409, 412 (1932), 168 Wash. 456, 562-63, explained this rationale as follows:

"Radio, billboards, and the products of the printing press have become the means of creating a large part of the demand that causes goods to depart from factories to the ultimate consumer. It would be unjust to recognize a rule that would permit manufacturers of goods to create a demand for their products by representing that they possess qualities which they, in fact, do not possess, and then, because there is no privity of contract existing between the consumer and the manufacturer, deny the consumer the right to recover if damages result from the absence of those qualities, when such absence is not readily noticeable."

The GAF Court continued its explanation by recognizing that,

"On this principle, courts have held manufacturers responsible for a variety of express warranties found in sales literature. For example, in *Ford Motor Co. v. Lemieux Lumber Co.*, 418 S.W.2d 909 (Tex.Civ.Ct.App.1967), the court

held that a sales brochure which indicated by pictures that the defendant's truck was capable of crossing streams and ditches and climbing mountains could be construed as an express warranty. *See also Sylvestri v. Warner & Swasey Co.*, 398 F.2d 598, 602 (2d Cir.1968) (a brochure picture constituted an express warranty that a backhoe could be used for lifting a rock as plaintiff used it.)"

Id. Plaintiff's assertion that the Photograph in the promotional literature, showing the yacht moving at an apparently good rate of speed over the water, is an express warranty is completely consistent with these principles set forth in GAF.

A Review of the Other GAF Factors for Determining the Existence of an Express Warranty Provide Sufficient Evidence for This Court to Reverse the Trial Court

Pursuant to GAF, the trial court, in considering whether express warranties were made by Cruisers Yachts was supposed to have "considered" factors other than just the "vagueness of the statement." Other than the trial courts assertion that it had reviewed the pleadings filed by Plaintiff and the fact that it listened to Plaintiff's counsel at oral argument, there is no indication in the record (both the Final Order and Transcript of oral argument) that the trial court specifically considered the other enumerated GAF factors such as "the ability of the buyer to see and understand for himself" or "the incredibility of the statement." Plaintiff, through counsel, specifically addressed both of these factors in the briefing and at oral argument. In the briefing, the Plaintiff's ability to "see and understand" for itself was addressed with the following facts:

"First, the promotional materials where these statements are located were provided prior to any purchase of the yacht at issue and in conjunction with other alleged misrepresentations by Defendant Wasatch Marine. See ¶19-20 of the Complaint. The yacht in question was not present and, in fact, had to be

ordered from the Defendant. A post-dated check for approximately ten (10%) percent deposit of the purchase price of the yacht was provided to Defendant Wasatch Marine prior to the ordering of the yacht. See ¶ 27 of the Complaint. Furthermore, Plaintiff paid in full for the yacht (a very substantial sum exceeding \$150,000) prior to taking delivery or having any opportunity to test drive the yacht. See ¶ 35-37 of the Complaint.”

(Record Page 385). At oral argument, this point was similarly set forth by Plaintiff’s counsel. (Record Pages 478-479 and Pages 13-14 of “**Appendix B**”). Clearly, under these asserted facts, Plaintiff had a limited ability to “see and understand.” Likewise, the previously identified section from the briefing assists with addressing the “incredibility of the statements.” These representations were made by the manufacturer, Cruisers Yachts, in writing and were distributed by one of its Utah retailers, Defendant Wasatch Marine, to the Plaintiff who is not a merchant or expert with respect to the type of goods at issue. Plaintiff asserts that it is not “incredible” for Plaintiff to have believed the representations made, particularly given that Cruisers Yachts, as a manufacturer of the goods purchase by Plaintiff, is likely to be aware of its competitors and the quality, characteristics, and performance of their products.

In addition to these two factors, the GAF opinion expressly acknowledged that other appropriate factors not enumerated in the opinion may be considered to determine the reasonableness of finding an express warranty. These additional factors play an important role in analyzing the totality of the circumstances in which a buyer might expect a representation to be an enforceable warranty. The following items, though not an exhaustive list, are appropriate factors for this Court to consider:

- *Money Expended* -

One factor identified by the Illinois Court of Appeals in Felley v. Singleton, 705 N.E.2d 930 (Ill. Ct. App. 1999) is that of the amount of money paid by the buyer. The court in Felley specifically stated that,

“The court notes that a substantial amount of money was paid by the car, and this is one of the factor[s] which would cause the buyer to reasonably rely on affirmations that the automobile was in good mechanical shape. It makes little sense to pay thousands of dollars, and then expect to immediately sink substantial money into repair.”

Id. at 932. Plaintiff, like the buyer in Felley, spent a large amount of money for the yacht at issue, a sum in excess of \$150,000.00, as previously noted. It is reasonable to accept that Plaintiff was willing to expend such a large sum of money based in whole or in part on the representations made by Cruisers Yachts. Plaintiff was reasonably led to believe that he was getting a yacht which functioned with “*superb handling*” and the “*best performance in its class*.” This was why Plaintiff was willing to expend so much money.

- *Hedging* -

Another factor to be considered in determining whether a representation is an affirmation of fact or promise, as opposed to “puffing” or “sales talk,” is to consider whether any hedging occurred. For instance, had Cruisers Yachts wanted to make the statements at issue more likely to be determined as “puffing,” instead of express warranties, these statements could have stated “*we believe that our yacht offers the best performance and cruising accommodations in its class*” and “*we think that our yacht has superb handling*.”

The unequivocal nature of the claims adds to the legitimacy of their being held to be express warranties. See Federal Signal Corp. at 179. This lack of “hedging” in the representations at issue was addressed in some detail by Plaintiff’s counsel at oral argument. (Record Pages 478-479 and Pages 12-13 and 17 of “**Appendix B**”). In fact, Plaintiff’s counsel proffered to the trial court that Cruisers Yachts, in prior promotion material which Plaintiff’s could produce, had “hedged” more in the earlier literature. (Record Pages 478-479 and Pages 12-13 of “**Appendix B**”). It is interesting to note that (under prior law) the Supreme Court of the Utah Territory in Hirschberg Optical Co. v. Dalton, Nye & Cannon Co., 27 P. 83, 83-84 (1891), stated that,

“ . . . Wherever a party states a matter which might otherwise be only an opinion, and does not state it as the mere expression of his own opinion, but affirms it as an existing fact material to the transaction, so that the other party may reasonably treat it as a fact, and rely and act upon it as such, then the statement clearly becomes an affirmation of fact, within the meaning of the general rule . . . ”

- *Vendor Assumption of Fact Upon Which Buyer is Ignorant* -

Some courts have held that,

“To determine whether or not there is a warranty, the decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment on a matter of which the vendor has no special knowledge, and on which the buyer may be expected to have an opinion and to exercise his judgment. In the former case there is a warranty and in the latter there is not.”

Felley v. Singleton, 705 N.E.2d 930, 935 (Ill. Ct. App. 1999) (quoting Weiss v. Rockwell Manufacturing Co., 293 N.E.2d 375 (Ill. Ct. App. 1973), 9 Ill. App.3d 906, 915. See also

Interco, Inc. v. Randustrial Corp., 533 S.W.2d 257, 263 (Mo. Ct. App. 1976), 19 U.C.C. Rep. Serv. 464. Under such a determination, as previously referenced under the GAF analysis, Plaintiff had no special knowledge with regards to the yacht (although Plaintiff was aware of the assertions by Cruisers Yachts in its promotional material relative to the model of yacht Plaintiff purchased). Plaintiff was unaware prior to purchase of the yacht that such assertions might be inaccurate generally and were in fact inaccurate with regards to the yacht purchased by Plaintiff.

- Determinable Representations -

Representations of fact which are capable of being determined are warranties. Interco, 533 S.W.2d at 263. Plaintiff is of the position that there is one specific member of the yacht's class which should be able to be identified as having the "best performance" in its class. Should the court agree with Plaintiff's position that there is a warranty or that there is a "sufficiency" of evidence to go to a jury, it is also likely that future discovery might provide some additional, underlying information identifying on what basis these statements were made by Cruisers Yachts (no discovery has yet been conducted based upon the early Motion to Dismiss filed by Cruisers Yachts which was converted to a Motion for Summary Judgment and granted by the trial court).

- Surrounding Brochure Information -

In addition to the previously identified statements and Photograph which have been the specific subject of Plaintiff's claims for express warranties, these provisions are

bolstered by other items relating to the specified model yacht located on Pages 30 and 31 of “Appendix C.” These bolstering items include detailed “specifications” on Page 30, detailed “standard features,” “optional features,” and “engine options” on Page 31, and representations of sleeping space and power alternatives on Page 30. Even the reference to “cruising” on Page 30 seems to bolster the claims of “best performance . . . in its class” and “superb handling.”

- *Seller Bears the Risk* -

One final factor should be considered which relies upon common sense but which is very critical to a determination of whether an express warranty is extant or not is as follows: “[T]he seller’s protection lies in the fact that his is the choice of language and action.” Interco, 533 S.W.2d at 262. A seller who makes representations bears a risk of accountability. Even this principle was espoused by Plaintiff’s counsel at oral argument where Plaintiff’s counsel stated,

MR. ROGERS: “. . . [P]erhaps a Biblical quote is appropriate here.

THE COURT: “I doubt it. But go ahead.

MR. ROGERS: “‘As you sow, so shall you reap.’ In this case the manufacturer put it in. The manufacturer should be held accountable.”

(Record Pages 466 and Page 18 of “Appendix B”).

2. “*Part of the Basis of the Bargain*” Test
Keith Issue Number Two

“Under former provisions of law, a purchaser was required to prove

that he or she acted in reliance upon representations made by the seller . . . California Uniform Commercial Code section 2313 indicates only that the seller's statements must become 'part of the basis of the bargain.' According to official comment 3 to this Uniform Commercial Code provision, '*no particular reliance ... need be shown in order to weave [the seller's affirmations of fact] into the fabric of the agreement. Rather, any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof.*'"

Keith, 220 Cal. Rptr. at 397. The interpretive law in Utah reaches the same conclusion. For example, this Court stated in GAF that,

"Actual reliance on the statement need not be shown, however; the statement need only form a 'part of the basis of the bargain.' Utah Code Ann. § 70A-2-313; *Jensen*, 105 Idaho at 194-95, 668 P.2d at 71; *Autzen v. John C. Taylor Lumber Sales*, 280 Or. 783, 788-89, 572 P.2d 1322, 1324-25 (1977)."

GAF, 760 P.2d at 315. While Utah appellate courts frequently cite to the Official Comments to the Uniform Commercial Code, ". . . comments by the drafters of uniform acts are not written into the statute when Utah adopts a version of a uniform act but are nevertheless considered relevant when seeking legislative intent." Carlie v. Morgan, 922 P.2d 1, 7 (Utah 1996)(from concurring opinion by Justice Howe).

For purposes of the present appeal only (and based upon the appropriate standard of review -- where all facts and reasonable inferences are drawn in Plaintiff's favor), it should not be disputed that the statements and Photograph, which Plaintiff asserts to be express warranties, were made part of the basis of the bargain. Evidence of this claim is first found in the Final Order, Findings of Fact, ¶ 2 (Record Page 446 and Page 2 of "Appendix A"), which states that,

“The Court finds, for purposes of Cruiser’s motion, that the Plaintiff read the referenced portion of the sales brochure prior to his purchase of the subject model 3375 boat.”

Additional evidence is provided in the Transcript of oral argument where the trial court states,

THE COURT: “. . . and one might say that overall clearly the plaintiff, and there’s no dispute that he relied upon the language presumably because it’s in the brochure.”

(Record Page 466 and Page 21 of “**Appendix B**”). Finally, further evidence that the statements and Photograph from the promotional literature were made part of the “basis of the bargain” is specifically set forth in the 2nd Amended Complaint ¶ 19, 20, and 22 (Record Pages 275-276).

*3. Test for Breach of Warranty
Keith Issue Number Three*

As with Keith Issue Number Two, for the limited purposes of this appeal (and based upon the appropriate standard of review -- where all facts and reasonable inferences are drawn in Plaintiff’s favor), it must be conceded that Cruisers Yachts is in breach of warranty if this Court agrees with Plaintiff and holds that the previously identified statements and Photograph constitute express warranties (either individually or collectively). Plaintiff’s 2nd Amended Complaint contains numerous assertions that the yacht failed to perform properly according to the asserted express warranties at issue in this appeal. These asserted failures include the following items pulled from the “Statement of the Case”:

During the initial test drive on Utah Lake on or about May 20, 1999,

the mechanism for raising the yacht's engines malfunctioned. Specifically, the outdrives could not be raised remotely as they were designed to do. 2nd Amended Complaint ¶ 45 (Record Page 279). Plaintiff was subsequently informed by Wasatch Marine that the mechanical problem experienced was not minor and that all of the gears and wiring had to be replaced. 2nd Amended Complaint ¶ 55 (Record Page 281).

During a subsequent test of the yacht at Lake Powell at the end of May of 1999, the yacht experienced several other problems. These problems included the fact that the engines' gears would not mesh smoothly and were very difficult to shift. Additionally, the yacht's engines became unusually hot while traveling slowly on the water and, thereafter, would overheat at a speed above an idle. Finally, the system alarm would sound and light without any apparent cause. The breakdown of the yacht, due to no fault of Plaintiff or its agents, was only thirty (30) minutes outside of Bullfrog bay and required a slow return at idle to the marina. 2nd Amended Complaint ¶ 62-64 (Record Page 282). Although mechanics dispatched by Wasatch Marine did appear to remedy the problem with the yacht's engines overheating, the difficulty with the gears was not fixed. 2nd Amended Complaint ¶ 66 (Record Page 283).

During the next test of the yacht at Lake Powell on or about June 11th and 12th of 1999, the yacht experienced several problems: 1) the gears remained difficult to shift and would not mesh smoothly; 2) the system alarm would sound at idling speed but would go silent at cruising speed; 3) the yacht's air conditioning system operated erratically and inconsistently, sometimes failing to function at all; 4) the yacht's carbon monoxide (CO) detector would sound without apparent cause; 5) the generator malfunctioned and issued a burning electrical smell followed by smoke filling the cabin; 6) the upper level dashboard screw were not screwed into any moorings and hung unconnected in their holes in the faceplate; and 7) the rear door of the yacht was misaligned and would not latch creating a hazard for the Boud family. 2nd Amended Complaint ¶ 70 (Record Pages 283-284). Following another repair attempt by the mechanics of Wasatch Marine at Lake Powell, Wasatch Marine called Plaintiff and represented the defects to be serious, apologized for the defects, and indicated that the defects required the return of the yacht to Salt Lake City for repairs by Wasatch Marine. 2nd Amended Complaint ¶ 72-73 (Record Pages 284-285).

In addition to these record citations to Plaintiff's 2nd Amended Complaint, Plaintiff's

counsel, at oral argument, made the following point,

“ . . . well how does a boat handle unless it actually moves? And the client indicated in the complaint as well in prior affidavits that there were problems with just getting the boat to operate properly. And so, clearly that has to relate to that.”

(Record Page 466 and Pages 14-15 of “Appendix B”).

B. The Utah Consumer Sales Practices Act

The "Deception" prong of the UCSPA, 13-11-4 and its components, initially required no intent to deceive prior to 1985, which lack of intent was in accordance with the provisions of the Uniform Act. See GAF at 313. From 1985 until the 1995 amendment to effect, the "Deception" prong required an "*intent to deceive*." The 1995 amendment changed the "*with intent to deceive*" requirement to "*knowingly or intentionally*." The "Unconscionability" prong of the UCSPA was interpreted by the Utah Supreme Court in Wade v. Jobe, 818 P.2d 1006, 1016 (Utah 1991) as follows:

" . . . Under the statute [13-11-5 and 13-11-5(3)], unconscionability does not require proof of specific intent but can be found by considering circumstances which the supplier 'knew or had reason to know.'"

In light of the change from "*with intent to deceive*" to "*knowingly or intentionally*" under 13-11-4(2) and the Jobe decision relating to the sister prong of "Unconscionability," it is reasonable and appropriate that "*knowingly*" under the "Deception" prong be interpreted as "*knew or had reason to know*."¹⁴ This interpretation is strengthened by the fact that the

¹⁴ See relevant, excerpted pages from the Tenth Circuit's June 26, 2000 "ORDER AND JUDGMENT" in Heard v. Bonneville Billing and Collections, Nos. 99-4092 and 99-4100, and of the "FINDINGS OF FACT AND CONCLUSIONS OF LAW" in Salinas v.

stated legislative intent of the UCSPA in the Act is that it be construed liberally "*to protect consumers from suppliers who commit deceptive and unconscionable sales practices*" and "*to encourage the development of fair consumer sales practices.*" Utah Code §§ 13-11-2(2) and 13-11-2(3).

Under this "*knew or had reason to know*" standard, the Defendant, as the manufacturer, knew or should have known of the defects and non-conformities of the yacht. Even if it did not know it should have known. Likewise, it certainly had knowledge (constructive or actual) of its own promotional literature containing the statements Plaintiff has asserted to be express warranties. These two points, taken together, provide a sufficient basis to show violations of the UCSPA. Given that the Defendant has stated in its promotional literature that the subject yacht was "*offering the best performance and cruising accommodations in its class*" and "*superb handling,*" it seems absurd to claim that these representations, the Photograph, and the other alleged express warranties don't fit into this act as violations.

In particular, look at 13-11-4(2)(a) which finds a violation where "**performance characteristics**" [Bold Emphasis Added] and "uses" are represented which are untrue. Performance is what Cruisers Yachts represented and the UCSPA specifically enforces untrue representations of performance. Likewise, 13-11-4(2)(b) finds a violation where a

Michael Wade Neilson d/b/a Salt Lake Pools & Spas, Civil No. 960007363 in which these courts have interpreted this provision similarly. These Excerpts are identified as "Attachment A" (Record Pages 390-394) and "Attachment B" (Record Pages 395-397), respectively, to Plaintiff's Opposition Memorandum (Record Pages 380-397). Plaintiff and Plaintiff's counsel are not aware of any other Courts which have examined this exact issue.

"particular standard," "quality," or "grade" is represented which is untrue. This subsection is also directly applicable to Plaintiff's express warranty claims.

C. Negligent Misrepresentation

"The tort of negligent misrepresentation allows a party

‘injured by reasonable reliance upon a second party's careless or negligent misrepresentation of a material fact [to] recover damages resulting from that injury when the second party had a pecuniary interest in the transaction, was in a superior position to know the material facts, and should have reasonably foreseen that the injured party was likely to rely upon the fact.’”

Klinger v. Kightly, 889 P.2d 1372 (Utah App. 1995)(quoting Price-Orem Investment Co. v. Rollins, Brown and Gunnell, Inc., 713 P.2d 55 (Utah 1986)).

The trial court, under its Final Order, Conclusions of Law, ¶ 3 (Record Page 447 and Page 3 of “**Appendix A**”), stated that:

“ 3. The Court concludes that since the referenced portion of the sales brochure lacks specificity to create an express warranty, it also lacks specificity to become material to the Plaintiff's purchase and cannot therefore constitute a material fact that could be negligently misrepresented in the brochure.”

(Record Page 447). Plaintiff disputes that the referenced portion of the sales brochure does not qualify as an express warranty and thus disputes that it would also lack the specificity to become “material” to Plaintiff's purchase and can, in fact, constitute a material fact that could be negligently misrepresented in the identified brochure. Plaintiff admits that for purpose of this appeal, a representation's sufficiency or insufficiency to meet the standard for an express warranty will likely have similar success or failure under the tort of negligent misrepresentation.

For the reasons and rationale already presented under the “Express Warranty” and “Utah Consumer Sales Practices Act” provisions, and as specifically plead in Plaintiff’s 2nd Amended Complaint ¶ 141-149 (Record Pages 299-301), Plaintiff specifically asserts that the condition of the yacht and the representations as to its condition in the promotional materials were material facts, that Cruisers Yachts had a pecuniary interest in Plaintiff’s purchase of the yacht and was the maker of the representations and in a superior position to know of their falsity, that Plaintiff was injured and suffered damages, as previously stated, resulting from the failure of the yacht to comply with the representations in the promotional material, and that Cruisers Yachts should have reasonably foreseen that Plaintiff was likely to rely on the asserted misrepresentations and that Plaintiff would suffer damages of the type and amount claimed.

CONCLUSION

“The purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell.” Keith, 220 Cal. Rptr. at 395. As stated in ¶ 8 of the Official Comment to § 2-313 of Uniform Commercial Code,

“. . . What statements of the seller have in the circumstances and in the objective judgment become part of the basis of the bargain? As indicated above, all of the statements of the seller do so unless good reason is shown to the contrary.”

Cruisers Yachts’ free-will, written, undisputed statements and photograph in its promotional literature had the reasonable and natural tendency to induce Plaintiff to purchase the yacht at issue and became part of the “basis of the bargain.”

The trial court, though probably very well-intentioned, failed to fully evaluate Plaintiff's claims in light of the governing law, factual circumstances, and standard of review heavily weighted on Summary Judgment to favor all facts and reasonable inferences which benefit Plaintiff. The trial court even seemed to acknowledge the possibility that its ruling might be in error.¹⁵ Furthermore, given that Plaintiff had a "sufficiency" of evidence to present Plaintiff's case to the trier of fact and since Plaintiff had made proper demand for a jury, it was legal error for the trial court remove the decision from the jury and to Dismiss all of Plaintiff's claims against Cruisers Yachts. "'Where it appears doubtful whether or not the statement is one of fact or opinion, and therefore, whether there is a warranty, the question should be left to the trier of facts.'"¹⁶ Park v. Moorman Mfg. Co., 241 P.2d 914, 918 (Utah 1952) (quoting Nielson v. Hermansen, 166 P.2d 536, 537 (Utah 1946)).

This appeal presents an opportunity for the Court to provide a recent decision following up on GAF and providing some additional guidance on what it takes to form express warranties, the boundaries between express warranties and "puffing," and the relationship of express warranties and "puffing" to the Utah Consumer Sales Practices Act.

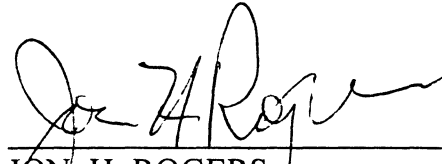
Plaintiff specifically requests that this Court reverse paragraphs two and three under

¹⁵ "THE COURT: Yeah, I may well be wrong. It may be that they ought to have said in their brochure "nearly the best" or "almost superb" but I don't think so." (Record Page 466 and Page 22 of "Appendix B."

¹⁶ Both cited cases were decided under the Utah version of the Uniform Sales Act, which act is substantially similar to its successor, the Uniform Commercial Code as enacted in Utah.

“Conclusions of Law” of the trial court’s Final Order (Record Page 447 and Page 3 of **“Appendix A”**), as well as reversing the “ORDER OF DISMISSAL” contained in the trial court’s Final Order and reinstating Plaintiff’s claims against Cruisers Yachts. Plaintiff also requests any other beneficial relief which this Court might choose to award.

SUBMITTED This 7th day of May, 2001

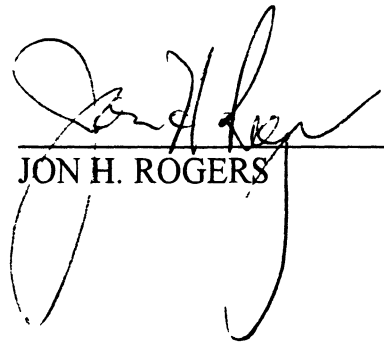


JON. H. ROGERS
Attorney for Appellant

CERTIFICATE OF SERVICE

On the 9th day of May, 2001, I certify that two copies of the foregoing "BRIEF OF APPELLANT" were personally hand-delivered to the office of counsel for the Appellee at the following address:

Mr. John W. Call, Esq.
Nygaard, Coke & Vincent
Attorneys for Defendant/Appellee KCS International, Inc.
333 North 300 West
Salt Lake City, Utah 84103



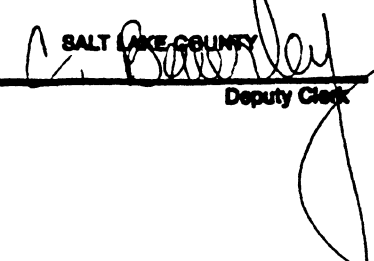
JON H. ROGERS

“APPENDIX A”

**Final Order of the District Court
October 17, 2000**

FILED DISTRICT COURT
Third Judicial District

OCT 17 2000

By 
SALT LAKE COUNTY
Deputy Clerk

JOHN W. CALL, USB #0542
NYGAARD, COKE & VINCENT
Attorneys for Defendant Cruisers Yachts
Division of KCS International Inc.
333 North 300 West
Salt Lake City, Utah 84103
Telephone: (801) 328-2506

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

JOSEPH R. BOUD, Trustee of the)
Diane Mansell Boud Revocable Trust,)
)
Plaintiff,)
)
v.)
)
SDNCO, INC., dba WASATCH MARINE;)
and KCS INTERNATIONAL INC., dba)
CRUISERS YACHTS,)
)
Defendants.)

**FINDINGS, CONCLUSIONS,
ORDER OF DISMISSAL and
RULE 54(b) CERTIFICATION**

Civil No. 990910029

Judge J. Dennis Frederick

Defendant Cruisers Yachts Division of KCS International, Inc.'s ("Cruisers") Motion to Dismiss came on for hearing before the Court on Monday, September 11, 2000, the Honorable J. Dennis Frederick, District Judge, presiding. Plaintiff was represented by his attorney Jon H. Rogers, Defendant Cruisers was represented by its attorney John W. Call and Defendant SDNCO, Inc., was represented by its attorney Robert W. Wilde. The Court

indicated that it was converting the Defendant's Motion to Dismiss to a Rule 56 Motion for Summary Judgment inasmuch as matters outside the pleadings, specifically the entire sales brochure quoted in Plaintiff's Complaint, was considered by the Court. The Court had considered the memoranda previously submitted by the parties in support of and opposing the motion. The Court then heard the arguments of Defendant Cruiser's counsel and Plaintiff's counsel, while Defendant SDNCO's counsel took no position on the motion. Accordingly, the Court makes and enters the following:

FINDINGS OF FACT

1. The Court finds, for purposes of Cruiser's motion, that Defendant Cruisers, manufacturer of the subject boat, published in its 1999 sales brochure, at page 30, a photograph of its model 3375 with a caption containing the following language:

Offering the best performance and cruising accommodations in its class, the 3375 Esprit offers a choice of either stern-drive or inboard power, superb handling and sleeping accommodations for six.

2. The Court finds, for purposes of Cruiser's motion, that the Plaintiff read the referenced portion of the sales brochure prior to his purchase of the subject model 3375 boat.

Having made and entered the foregoing Findings of Fact relevant to the Defendant Cruiser's motion, the Court enters the following:

CONCLUSIONS OF LAW

1. The Court concludes, as plaintiff conceded at the hearing, that Plaintiff's several

claims against the Defendant Cruisers all hinge upon the existence of an express warranty allegedly created by the referenced portion of the sales brochure.

2. The Court concludes that the referenced portion of the sales brochure is merely sales talk and lacks the specificity necessary to form the basis of an enforceable express warranty under either the Utah UCC provisions or the Utah Consumer Sales Practices Act.

3. The Court concludes that since the referenced portion of the sales brochure lacks specificity to create an express warranty, it also lacks specificity to become material to the Plaintiff's purchase and cannot therefore constitute a material fact that could be negligently misrepresented in the brochure.

ORDER OF DISMISSAL

Having made and entered the foregoing Findings of Fact and Conclusions of Law,
IT IS HEREBY ORDERED as follows:

1. All of Plaintiff's claims against the Defendant Cruisers Yachts Division of KCS International, Inc., are hereby dismissed, with prejudice.

CERTIFICATION

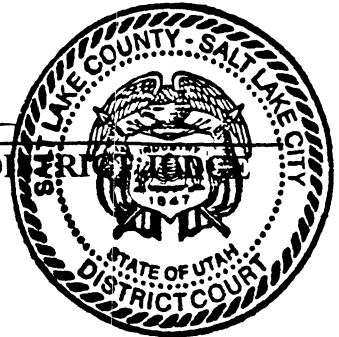
Upon the oral request of Plaintiff's counsel made at the conclusion of the hearing, and with the concurrence of Defendant Cruisers' counsel, the Court hereby determines that there is no just reason for delay of the Plaintiff's right to appeal the foregoing dismissal of Defendant Cruisers from the captioned matter. Accordingly, the Court expressly directs that this Order

of Dismissal be considered a final judgment, pursuant to Rule 54(b), U.R.C.P.

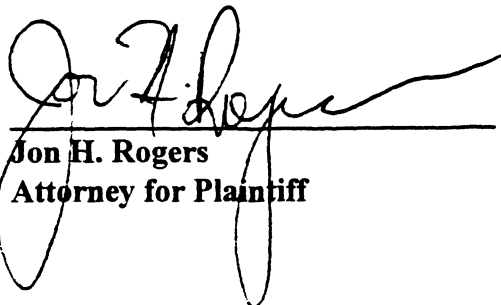
DATED this 17th day of Oct ~~September~~, 2000.

BY THE COURT:

J. DENNIS FREDERICK, DISTRICT JUDGE



The foregoing Findings, Conclusions, Order
of Dismissal and Rule 54(b) Certification
is Approved as to form only:

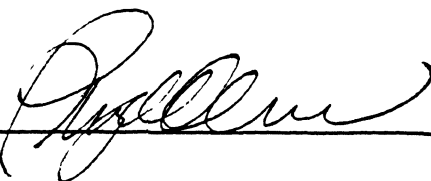

Jon H. Rogers
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I certify that on September 15, 2000, a true and correct copy of the foregoing FINDINGS, CONCLUSIONS, ORDER OF DISMISSAL AND RULE 54(b) CERTIFICATION was mailed, postage prepaid, and addressed as follows:

**Jon H. Rogers
Attorney at Law
803 North 300 West, Suite N144
Northgate Business Center
Salt Lake City, Utah 84103
Attorneys for Plaintiff**

**Robert H. Wilde
Wilde and Associates
935 East South Union Avenue, Ste. #D-102
Midvale, Utah 84047
Attorneys for Defendant Sdnco, Inc. d/b/a
Wasatch Marine**



“APPENDIX B”

**Transcript from Oral Argument in the Trial Court Proceedings
Date of Hearing: September 11, 2000**

COPY

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

JOSEPH R. BOUD, Trustee of the Diane)
Mansell Boud Revocable Trust,)
)
Plaintiff,)
)
vs.)
)
KCS INTERNATIONAL, INC.,)
dba CRUISERS YACHTS,)
)
Defendant.)

Case No. 990910029

BEFORE THE HONORABLE J. DENNIS FREDERICK

Monday, September 11, 2000
9:00 A.M.

Transcript of Video Tape Motions

Transcribed by:
Pamela C. Smith, CSR, RMR
3454 Creek Road
Salt Lake City, Utah 84121
(801) 942-6430
File No. 91100

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APPEARANCE OF COUNSEL:

For the Plaintiff:

JON H. ROGERS
Attorney at Law
803 North 300 West, Suite N144
Northgate Business Center
Salt Lake City, Utah 84103

For the Defendant KCS
International, Inc.:

MR. JOHN W. CALL
Nygaard, Coke & Vincent
333 North 300 West
Salt Lake City, Utah 84103

For the Defendant
SDNCO, Inc.:

MR. ROBERT H. WILDE
Attorney at Law
933 East South Union Avenue,
Suite D-102
Midvale, Utah 84047

1 SEPTEMBER 11, 2000, SALT LAKE CITY, UTAH

2 PROCEEDINGS.

3 THE COURT: Good morning, counsel. This is the
4 time set for hearing on the motion to dismiss in the matter
5 of Boud versus SDNCO, Inc., Case Number C 910029. Counsel
6 state your appearances for the record, please.

7 MR. ROGERS: Jon Rogers for the plaintiff.

8 THE COURT: Very well.

9 MR. CALL: John Call for the defendant, Cruisers
10 Yachts Division of KCS International.

11 MR. WILDE: Robert Wilde for the defendant, KCS
12 International.

13 THE COURT: Very well. This motion essentially
14 seeks examination of matters outside the pleadings and
15 consequently I'm going to convert it to a motion for summary
16 judgment. I believe it's appropriate. I'll entertain your
17 comments in that regard.

18 I believe, therefore, counsel, you may proceed
19 with your argument, Mr. Call.

20 MR. CALL: Thank you, Your Honor. And in respect
21 to treating matters outside the pleadings, I tried to stay
22 within the pleadings. The only thing that I intend to bring
23 up that is somewhat outside the pleadings is the brochure
24 that is referenced in the pleadings.

25 Your Honor, this claim against the manufacturer of

1 the boat that the plaintiff purchased is based primarily upon
2 the language in the sales brochure. And this is the model
3 that the plaintiff purchased. The 3375 Esprit and the
4 paragraph under the picture of the boat reads in its entirety
5 as follows," Offering the best performance and cruising
6 accommodations in its class the 3375 Esprit offers a choice
7 of either stern driver or inboard power, superb handling and
8 sleeping accommodations for six."

9 THE COURT: May I see that --

10 MR. CALL: Certainly, Your Honor.

11 THE COURT: Beautifully packaged brochure. Best
12 performance and superb handling.

13 MR. CALL: That's right. And there's some
14 mention of cruising accommodations. I'm not sure to what
15 extent that figures into the plaintiff's claims. It might.
16 But that is the paragraph that contains the language we're
17 talking about here.

18 Now, I did make reference in my memorandum in the
19 footnote that on the back cover of that brochure is language
20 referencing a limited brochure or, excuse me, a limited
21 warranty that is available either from the manufacturer or
22 the dealer. The plaintiff is not suing on the limited
23 warranty preferring instead to seek a rescission or
24 revocation of the contract of sale, but all of its claims
25 against the manufacturer revolve around that language.

1 There are three claims, the Consumer Protection
2 Act claim, the UCC claim, and a negligent misrepresentation
3 claim. All of them hinge upon the existence of an express
4 warranty created by that language. Now, there is some --
5 there was some mention in the memoranda that the plaintiff
6 may have other express warranty claims not disclosed which
7 maybe there are some but they're known only to the plaintiff.

8 In paragraph 109 of the complaint there is
9 reference to paragraph 19 of the complaint which is the one
10 that quotes this language. And then sub paragraph (b) of 109
11 says that the defendant, Cruisers Yachts, violated the
12 Consumer Sales Practices Act by making express warranties as
13 set forth heretofore in the present complaint with its
14 promotional literature.

15 So we're talking at least the way the complaint is
16 framed about that language. It's our position that that
17 language is legally insufficient to form an express warranty
18 because it isn't specific.

19 THE COURT: You mean "best" is not specific?

20 MR. CALL: Correct.

21 MR. ROGERS: We happen to disagree, judge.

22 MR. CALL: And I'm happy to address that. The
23 UCC and the consumer protection statute have been read
24 together by our courts, and I believe it's a fair statement
25 to say in Utah, at least, since they are read together they

1 are intended to compliment each other.

2 The UCC says that an affirmation merely of the
3 value of the goods or a statement purporting to be merely the
4 sellers opinion or a combination of the goods does not create
5 a warranty. Under the Consumer Sales Practices Act that the
6 plaintiff has invoked one of the deceptive acts or practices
7 that is I believe at issue here indicates that the seller
8 indicates the subject of a consumer transaction has
9 sponsorship, approval, performance characteristics,
10 accessories, uses or benefits if it has not.

11 The word performance doesn't imply which
12 performance characteristics are being warranted. The cases
13 that have been cited -- well, first of all let me just give
14 you the dictionary definition of specific. This is
15 Webster's." Precise, definite or explicit. To specify
16 something is to describe or define in detail or to state
17 explicitly as a condition."

18 Here all the cases that I've been able to find
19 that deal with express warranties have some sort of
20 quantifiable set of parameters that can objectively be
21 analyzed. We cited the Auto House case out of Texas where a
22 Mercedes was described by the salesman as being one of the
23 best engineered cars in the world. Maybe it was the best
24 engineered car in the world and better than anything he'd had
25 before. The court rejected that -- the claim that that

1 created an express warranty saying it wasn't specific.

2 One of the cases cited by the court in Auto House
3 was a case out of the Seventh Circuit court of appeals, Royal
4 Business Machines versus Larane Corporation, which dealt with
5 the sale of a bunch of copiers. The copier manufacturer told
6 the broker that he eventually sold them to, the ultimate
7 consumer, that their machines component parts were of high
8 quality and that their experience and testing had shown that
9 the frequency of repair was very low and would remain so.

10 The court said that is not an express warranty and
11 said general statements to the effect that goods are, quote,
12 the best, end quote, or are of good quality or will last a
13 lifetime and be in perfect condition are generally regarded
14 as expressions of the seller's opinion or the puffing of his
15 wares and do not create an express warranty.

16 Well, the cases we have cited in our memoranda I
17 think support that notion. This language is not specific. I'm
18 sure it was designed that way. Maybe it might be sales talk.

19 THE COURT: The term you're looking for is
20 puffery.

21 MR. CALL: Well, I wanted to avoid that, Your
22 Honor, but the alternate expression is sales talk but it is
23 referred to as puffery or puffing. And our courts have been
24 lenient in allowing that.

25 The case that the plaintiff cited from the Utah

1 Territorial Court has language that applies to this
2 situation. It isn't -- it isn't specific enough to determine
3 which performance characteristics are at issue here. We
4 submit, Your Honor, that this language as a matter of law can
5 not support any finding that an express warranty was created
6 by this language. What it is is language that encourages a
7 buyer to examine this particular boat, which the plaintiff
8 did before he paid his money. But it isn't an express
9 warranty, particularly where the brochure that describes or
10 has this language references a limited warranty.

11 We would ask the court to dismiss Cruisers Yachts
12 from this action. Thank you.

13 THE COURT: All right, Mr. Call, thank you.
14 Before we hear from Mr. Rogers I assume, Mr. Wilde, you're
15 taking no position on this motion.

16 MR. WILDE: That's correct.

17 THE COURT: All right. Mr. Rogers, you may
18 respond.

19 MR. ROGERS: Thank you, judge.

20 Evidently plaintiff takes a different position as
21 to this language. The standard of review whether it be with
22 regard to a motion to dismiss or if this court were to
23 convert it to a motion for summary judgment, dismissal is
24 appropriate only, or summary judgment is appropriate only if
25 plaintiff can not have relief under the facts asserted and

1 all inferences in plaintiff's favor.

2 Express warranties are created in a number of
3 different fashions and those are set forth -- the ones
4 pertinent are set forth in the Commercial Code 70(a)2313
5 Subsection 1 and Subsections paragraph (a) and (b) to
6 Subsection 1.

7 THE COURT: But let me, so I'm clear on this,
8 Mr. Rogers, you are -- you are challenging the specific
9 language that's been referred to.

10 MR. ROGERS: Exactly.

11 THE COURT: That's what is actually set forth in
12 paragraph (inaudible).

13 MR. ROGERS: The language and in fact the photo
14 itself, the brochure itself, yes. That's -- that's evidently
15 the focal point. Express warranties under 70(a) 2313
16 Subsection 2 do not require formal words or intent. They must
17 show -- we must show the statements formed part of the basis
18 of the bargain but there's no need to show actual reliance.

19 In this case plaintiff was given the brochure. The
20 boat that's at issue was not present at the dealership
21 location. It was not taken for a test drive before the
22 plaintiff paid approximately ten percent of the purchase
23 price, about \$15,000. You know this is a yacht over 150
24 thousand. The -- it's clear -- that's also -- GAF, the Utah
25 Supreme Court case right on point says that it only need be

1 part of the basis of the bargain. There's no need to prove
2 actual reliance.

3 GAF also said that the promotional materials maybe
4 express warranties under 2313 if it's part of the basis of
5 the bargain. And that a consumer may recover for a breach of
6 warranty despite a lack of privity. And the court went on to
7 give some dicta that I think is helpful and was cited in the
8 memorandum.

9 But it says, if I could just quote that. Radio
10 billboards and the products of the printing press have become
11 the means of creating a large part of the demand that causes
12 goods to depart from factories to the ultimate consumer. It
13 would be unjust to recognize a rule that would permit
14 manufacturers of goods to create a demand for their products
15 by representing that they possess qualities which they in
16 fact do not possess and then because there's no privity of
17 contract existing between the consumer and the manufacturer
18 deny the consumer the right to recover if damages result from
19 the absence of those qualities where such absence is not
20 readily noticeable.

21 The GAF court continues by saying on this
22 principle courts have held manufacturers responsible for a
23 variety of express warranties found in sales literature. For
24 example, in Ford Motor Company versus Lameux Lumber Company
25 the court held," that a sales brochure which indicated by

1 pictures that the defendant's truck was capable of crossing
2 streams and ditches and climbing mountains could be construed
3 as an express warranty."

4 There's no question the yacht pictured here seems
5 to be moving at a pretty good clip. And it goes on to say,
6 " That a brochure picture constitutes an express warranty
7 that a backhoe could be used for lifting a rock as plaintiff
8 used it."

9 There was a point made by opposing counsel that
10 there was a limited warranty on the back of the sales
11 brochure. First of all as we cited in Christopher versus
12 Larson Ford Sales a disclaimer, anything that's buried in the
13 back of literature not brought to the attention of the
14 customer can't be considered part of the basis of the bargain
15 if the court were to so find.

16 And, also, what is quite important is express
17 warranties may not generally be disclaimed. So if the court
18 determines that the language in the photo that what's
19 represented in the brochure is an express warranty a
20 disclaimer on the back or a limited warranty does not affect
21 that. And the GAF specifically supports that proposition as
22 well as the official comment Paragraph 4 of UCC 2313.

23 The question of the existence of a warranty and
24 whether the warranty was breached is ordinarily a question
25 for the trier of fact. In this case plaintiff's requested a

1 jury and so if this court has even the least indication to
2 find, which I think is reasonable under the circumstances,
3 that it could be held as an express warranty then it's
4 appropriate for this to be submitted for the jury to make a
5 decision. That's particularly true because as cited in one of
6 the Supreme Court cases where it appears doubtful whether or
7 not the statement of fact or opinion and therefore whether
8 there is a warranty, the question should be left to the trier
9 of facts.

10 Now, the proposition that it should go to the
11 trier of fact is found in Pacific Marine. That's a Utah
12 Supreme Court case.

13 THE COURT: I assume, Mr. Rogers, that your real
14 argument here has to do with the terminology used, "the best
15 performance." And your argument, I assume, is that indeed it
16 wasn't the best performance.

17 MR. ROGERS: Right.

18 THE COURT: And it wasn't superb handling.

19 MR. ROGERS: And that essentially --

20 THE COURT: Had the language said nearly best
21 and/or most superb you then would acknowledge that that might
22 well be puffery.

23 MR. ROGERS: Absolutely. If they qualified it
24 and if you look -- though it's not -- I didn't intend to
25 address it today because I believe we were pretty much

1 remaining under the motion to dismiss. If you look and we
2 can provide prior literature, sales literature that indicates
3 we feel it has the best -- you know, so and so in its class,
4 prior versions of the literature. In this one there was no
5 qualifying language.

6 Furthermore there's a test -- the GAF court gave
7 the test for whether an express warranty has been made.

8 " An affirmation of fact, a promise or description
9 of the goods must be judged objectively against the meaning
10 that a reasonable person would have taken from the statement.
11 If it is reasonable to conclude that a reasonable person
12 would have ventured into the transaction on the basis of a
13 particular statement an express warranty was made."

14 And they cite Anderson on the Uniform Commercial
15 Code. " In determining reasonableness the court should
16 consider such factors among others as the ability of the
17 buyer to see and understand for himself." In this case the
18 client didn't have the unit in front of them. Nor did he have
19 an opportunity to take a test drive prior to committing
20 himself. The vagueness --

21 THE COURT: Well, he didn't take a test drive.

22 MR. ROGERS: He did not until after he'd paid in
23 full.

24 THE COURT: Right.

25 MR. ROGERS: For it.

1 THE COURT: But my -- I don't have before me,
2 do I, a dispute that he was prohibited before he paid for
3 taking --

4 MR. ROGERS: Well, it wasn't even present. It
5 had to be ordered from the factory.

6 THE COURT: Sure, but his option to pay --

7 MR. ROGERS: If he wanted.

8 THE COURT: Wasn't coerced out of him.

9 MR. ROGERS: If he wanted to buy it, if he
10 wanted to lock in the price he needed to do it at the time
11 with the deposit.

12 The second prong after that, the vagueness of the
13 statement. Well, when you consider that in fact I agree that
14 the Utah Consumer Sales Practices Act and express warranties
15 in general are symbiotic in examining it and the vagueness
16 of the statement, the Utah Consumer Sales Practices Act
17 specifically says performance characteristics, quality. It
18 talks about general terms. In this case not only are they
19 saying that it's the best. If that was all it was, you know,
20 the best. It's the best. That might be a valuation.

21 But where they say it offers the best performance,
22 especially in conjunction with the Utah Consumer Sales
23 Practices Act in its class and it's comparing it to other
24 models in the same class at least in a general sense on that,
25 and then it talks about superb handling, well how does a boat

1 handle unless it actually moves. And the client indicated in
2 the complaint as well in prior affidavits that there were
3 problems with just getting the boat to operate properly. And,
4 so, clearly that has to relate to that.

5 The third is the incredibility of the statement.
6 Well, given the fact that the plaintiff went in there. He
7 relied upon the representations made by the dealer, by the
8 sales brochure that -- is it incredible? Is it something he
9 shouldn't have believed to believe it had the best
10 performance in its class. Sees a picture of it cruising
11 along at apparently a good clip. No, it's not unreasonable
12 and clearly I think the court can find that it was part of
13 the basis of the bargain.

14 Now, opposing counsel has cited cases from Texas,
15 cases from the Seventh Circuit that they feel should give
16 this court guiding influence. Well, much more helpful is
17 something directly from Utah and a controlling case, and
18 plaintiff has cited Summers versus Provo Foundry & Machine
19 Company. And this was a Utah Supreme Court case in 1919.

20 Now, this is for my money pretty much exactly on
21 point. And I'd just like to address first of all that the
22 case has never been overruled specifically in any regard. As
23 a matter of fact it hasn't even been referenced in regard to
24 a distinction.

25 And the -- in Lieber versus ITT Hartford that just

1 came out in August -- well, in May I guess it was, the court
2 referenced that first we reject Hartford's argument that
3 " simply because a case has not been cited recently it has no
4 precedential value. It does not matter when a case was
5 decided as long as it's not been overruled. It is still the
6 law and binding precedent and constitutes the standards
7 against which any argument for change must be evaluated."

8 Now, when we look at Summers versus Provo Foundry
9 and Machine Company basically this was a car that was
10 purchased from a car dealer. Very comparable transaction. And
11 the dicta specifically from that case says," we regard the
12 statement that the car, the car at issue in that case, would
13 do whatever any other super six, that was the model car that
14 was involved, would do as also amounting to an express
15 warranty and not mere sellers talk or expression of an
16 opinion." If you'd like to see it you're welcome.

17 THE COURT: Well, it was addressed in the
18 memorandum.

19 MR. ROGERS: Yes, it was.

20 THE COURT: All right, counsel.

21 MR. ROGERS: So when we look at that that's
22 clearly on point. There's been no case law to overrule that
23 and at a minimum I think that provides the minimum necessary
24 to submit it to a jury to let a jury decide whether or not it
25 is an express warranty. The moving picture just like cited in

1 the GAF case performance characteristics as mentioned in the
2 Utah Consumer Sales Practices Act where here they indicate it
3 has the best performance in its class.

4 Opposing counsel said there have to be specifics.
5 What would specifics in a yacht case do if they were to say,
6 well, this has such and such horse power, such and such.
7 Sure, that might be an express warranty which to the average
8 lay person who buys a boat they just want to know, yeah, this
9 has great performance. It's the best in its class.

10 THE COURT: Is your client, Mr. Boud, is he an
11 attorney?

12 MR. ROGERS: He's not.

13 THE COURT: Okay.

14 MR. ROGERS: His brother is an attorney.

15 THE COURT: He's the brother of the Boud who's a
16 lawyer?

17 MR. ROGERS: That's correct, judge.

18 THE COURT: All right.

19 MR. ROGERS: Then if you look at the plain
20 language of what was worded there there's no qualifying
21 language, there's nothing that disclaims it. They put it in
22 there. Why did they put it in there? Because they intended
23 that dealers would show it, that consumers would buy it. This
24 isn't the case of two commercial agents involved. This is the
25 case of a manufacturer, a dealer, and a consumer who's not

1 involved in the sale of goods.

2 The yacht wasn't present at the time. The
3 promotional materials were given prior to the -- prior to
4 plaintiff entering into the transaction.

5 And perhaps a Biblical quote is appropriate here.

6 THE COURT: I doubt it. But go ahead.

7 MR. ROGERS: "As you sow, so shall you reap." In
8 this case the manufacturer put it in. The manufacturer
9 should be held accountable.

10 THE COURT: All right, Mr. Rogers, thank you.
11 Before you leave the lectern or the podium.

12 MR. ROGERS: Oh, sorry.

13 THE COURT: Do you have objection to the motion
14 for the appointment of a master that's been filed by Mr.
15 Wilde?

16 MR. ROGERS: We do, judge.

17 THE COURT: All right. And I believe you filed
18 objecting memorandum.

19 MR. ROGERS: Yes, we did. We did, judge.

20 THE COURT: All right. Thank you.

21 MR. ROGERS: Thank you.

22 THE COURT: If there's anything further briefly,
23 Mr. Call, I'll entertain your comments.

24 MR. CALL: Thank you, Your Honor. I would note
25 that the GAF case that plaintiff has invoked was not a sales

1 talk case. We don't quibble with any of the language as far
2 as it goes but it wasn't a sales talk case. There was no
3 claim of puffing, no claim of sales talk, no invocation of
4 that exception in the UCC.

5 The Summers case, 1919, Hudson Super Six case was
6 obviously before the UCC and the Utah Consumers Sales
7 Practices Act were enacted. There isn't anything in that
8 brochure that guarantees that the plaintiff would be able to
9 pull his children at 20 miles an hour, and I think it's a bit
10 of a stretch to say that language is an all encompassing net
11 that allows him to say this boat has to do whatever I want it
12 to do or you've breached your express warranty.

13 There's no claim that there are any other boats in
14 the class that this boat is that are better. That's the
15 problem with language of it being the best. The plaintiff
16 hasn't said a Sea Ray the same size is better or a Bay Liner
17 is better. There isn't any of that language. That's the
18 fallacy of saying best is a warranty.

19 I heard the plaintiff say he doesn't need to rely,
20 but he did rely on this language. That's talking out of both
21 sides of your mouth, and it's important to point out that he
22 didn't sign the contract until after he had had his first
23 test drive of the boat. He paid for it first but he didn't
24 sign the contract until after he had driven it.

25 MR. ROGERS: Just interject there. We believe

1 there was in fact a contract that existed at that point
2 so --.

3 THE COURT: Well, the question of the coercion
4 or the lack thereof upon the buyer plaintiff here is not
5 really an issue before me at this stage. What I'm addressing
6 simply is whether or not the language referred to is mere
7 puffery or, indeed, is specific enough to have created an
8 express warranty. And here's your brochure back.

9 MR. CALL: Oh, thank you, Your Honor.

10 THE COURT: Very nicely done. Is there anything
11 further, Mr. Call?

12 MR. CALL: Your Honor, I would just refer the
13 court to this quote from a Utah case. " The general praise of
14 his own words by a seller commonly called puffing for the
15 purpose of enhancing them in the buyers estimation has always
16 been allowed provided that it is kept within reasonable
17 bounds, that is provided the phrase is general and the
18 language is not a positive affirmation of a specific fact
19 affecting the quality so as to be an express warranty and is
20 not the intentional assertion of a specific and material fact
21 known to the party to be false so as to be a fraudulent
22 representation. That's the Herzberg Optical case from 1891.
23 Still good law.

24 And we believe that this language is not specific
25 so as to allow the plaintiff to say whatever he doesn't like

1 is warranted. Thank you.

2 THE COURT: All right, Mr. Call, thank you.

3 Insofar -- first of all as the motion for the appointment of
4 a master is concerned, I don't purport by this discussion to
5 grant the request for oral argument. I don't consider that to
6 be under 4501 dispositive motion. Ergo I will rule upon it
7 shortly.

8 Insofar as the -- now what I consider to be
9 motion for summary judgment given the fact that matters
10 outside the pleadings have been considered, specifically, the
11 lovely brochure you presented me, I cannot say, Mr. Rogers,
12 that the language you referred to creates an express
13 warranty.

14 The language " best performance and superb
15 handling" in my estimation are simply puffery, sales talk,
16 attempts to sell, and one might say that overall clearly the
17 plaintiff, and there's no dispute that he relied upon the
18 language presumably because it's in the brochure, but
19 nevertheless it is not in my estimation specific enough to
20 have created an express warranty. Therefore the motion for
21 summary judgment now as characterized is granted.

22 You prepare the appropriate order, Mr. Call, and
23 judgment.

24 MR. ROGERS: Just --

25 MR. CALL: I will.

1 MR. ROGERS: Judge, I just had one question.
2 Will you certify the dismissal as a final proceeding?

3 THE COURT: Well, certainly I will because it
4 does now by this ruling allow out the codefendant and it is a
5 final action insofar as that defendant is concerned. So I'll
6 certify it if there's no objection.

7 MR. CALL: There's none, Your Honor. I'd just
8 as soon we get this done with.

9 THE COURT: Yeah, I may well be wrong. It may
10 be that they ought to have said in their brochure " nearly
11 the best" or " almost superb" but I don't think so.

12 All right. Thank you, counsel.

13 MR. CALL: Thank you.

14 (Whereupon, court was held in recess at 9:34.)
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1 STATE OF UTAH)
2 : ss
3 COUNTY OF SALT LAKE)
4

5 I, PAMELA C. SMITH, Certified Shorthand Reporter,
6 Registered Merit Reporter and Notary Public within and for
7 the County of Salt Lake, State of Utah, do hereby certify:

8 That I was NOT present at the foregoing court
9 proceedings;.

10 That the foregoing record was preserved by
11 videotape:

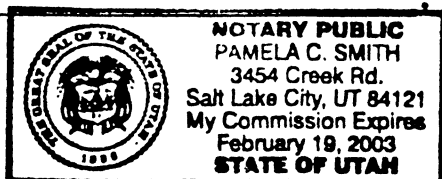
12 That thereafter, I stenographically recorded the
13 requested portion of the video and translated the same using
14 computer-aided transcription, followed by a proofreading
15 against the video.

16 That the foregoing pages contain to the best of my
17 ability a full, true and correct transcript of the same.

18 In witness whereof, I have subscribed my name and
19 affixed my seal this 15th day of December, 2000.

20 Pamela C. Smith
21 PAMELA C. SMITH, C.S.R., R.M.R.
22 Notary Public
23

24 My Commission Expires:
25

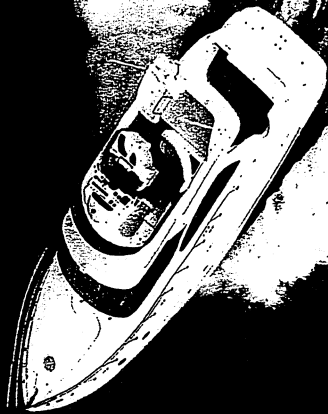


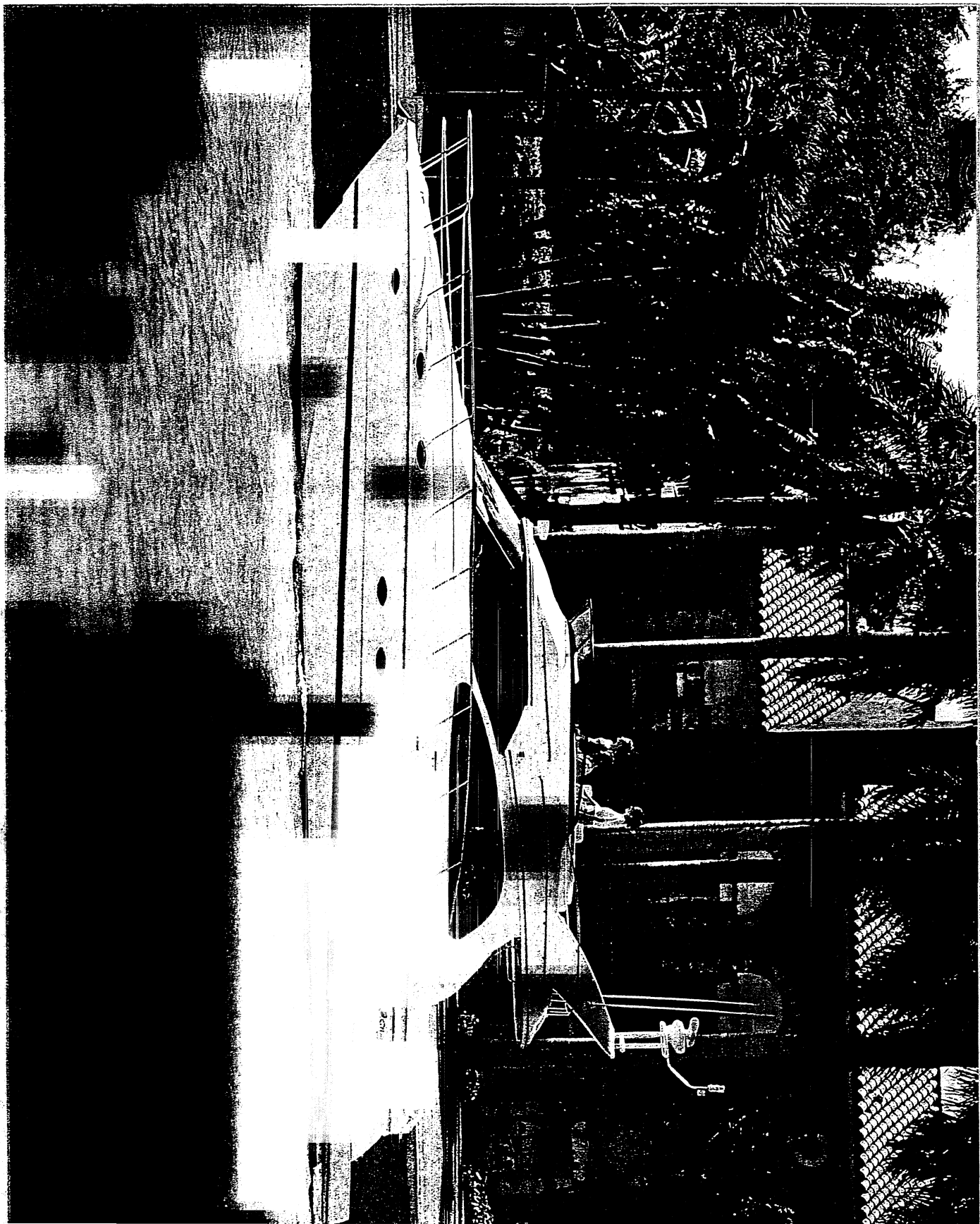
“APPENDIX C”

Cruisers Yachts Brochure

Cruisers
yachts

1999 YACHTS





For more than 45 years, Cruisers Yachts has been committed to the idea that innovation, not imitation, is the path to true excellence in boatbuilding. And now, as the millennium approaches, we are more dedicated to this approach than ever. The proof is in our 1999 product line, from the nimble 2870 to our ultraluxurious flagship, the 5000 Sedan Sport. With a unique blend of craftsmanship, insightful design and space-age technology, every boat that comes out of our Oconto, Wisconsin, facility is a step ahead of the rest. Cruisers Yachts are truly in a league of their own, by any standards.

We work hard to make sure that our yachts meet the exacting demands of our customers, incorporating your ideas into our product. After all, the future of boatbuilding starts here. What is your dream? Smooth, dynamic performance...elegant appointments and detailing, a comfortable live-aboard atmosphere...a yacht that not only meets but actually surpasses your expectations? We invite you to peruse our '99 model lineup. We think you'll like what you see.

THE BEST OF BOTH WORLDS ☞ At Cruisers Yachts we have discovered a successful blend of new and old in the creation of our yachts. The best in boatbuilding technology and cutting-edge design run side by side with the finest of Old World craftsmanship, resulting in a product that shows off its pedigree in every line, every curve, every extra detail. Cruisers Yachts are exciting not only because they stand at the forefront of the industry, but also because each one is a labor of love. The painstaking work that goes into each yacht, from

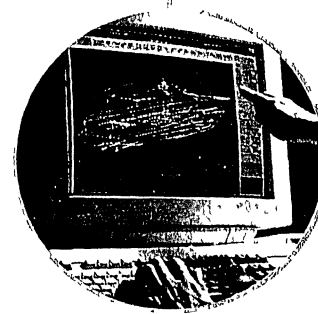
stem to stern, gives it a quality that can't be defined—only appreciated.

The process begins literally at the drawing board. To make our boats even better with every passing year, we consult the most knowledgeable people in the business: our customers. Priceless information about onboard systems, live-aboard amenities and appreciated extra touches come from real boaters, the people behind the names in our database. In other words, we take your feedback and use your ideas to keep Cruisers Yachts forging ahead.

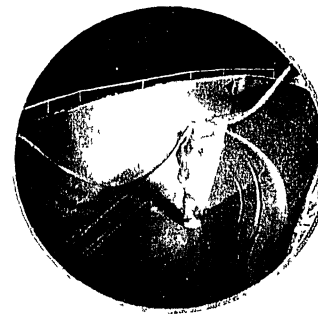
Before a mold is ever made, our engineers make sure that each yacht will ensure comfortable cruising and superior performance. With modern CAD/CAM systems, the yachts are tested in a variety of sea and weather conditions, which has also enhanced the overall safety and onboard convenience of each yacht.

A precision-crafted, handmade mold marks the start of the actual construction process. Next is lamination—a premium, abrasion-resistant gelcoat sprayed to a thickness of 22 mils, yielding that desirable high-luster finish. Throughout this phase, our technicians examine the results carefully to make sure a uniform, correct thickness has been applied for both aesthetics and durability.

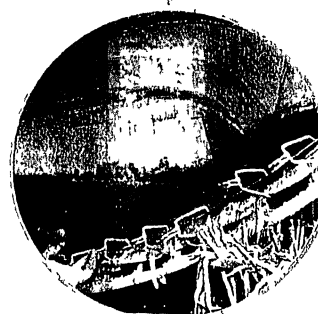
The next phase is hull construction. To monitor the weight of each fiberglass part, we employ Cruisers SPC, or Statistical Process Controls. This means each piece is plotted and graphed for the correct tolerances. Then, since a strong hull needs layers of fiberglass, resin and high-tech, unidirec-



Our use of state-of-the-art CAD/CAM technology during the design process allows us to enhance performance, safety and quality in the end product.

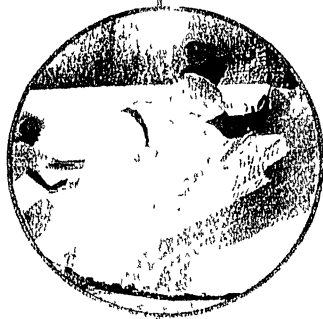


We spray a premium, abrasion-resistant gelcoat to a thickness of 22 mils to ensure an extremely high-luster finish.

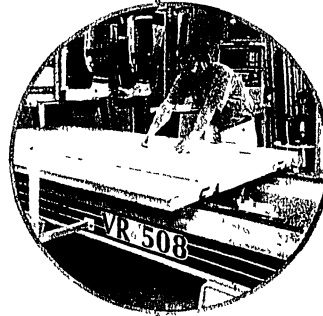


We use end-grain balsa coring to make each of our yachts lighter, stronger and quieter.

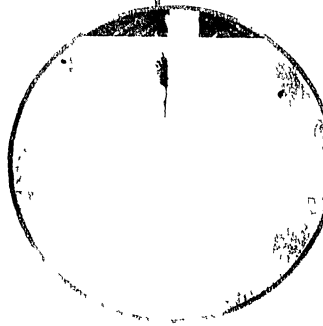
For greater structural strength and integrity, we pattern-cut and hand-lay unidirectional woven roving.



Each wooden component is cut to precise tolerances by computer-controlled routers for added structural integrity and to ensure a proper fit.



We paint all critical areas of the fiberglass-encapsulated hull stringers with a special catalyzed synthetic paint that protects against bilge water, fuel and other corrosive materials.



tional, knitted fabrics, we pattern-cut the fabrics to make sure the hulls are consistent for guaranteed structural integrity. To further aid in this mission, we hand-lay all the fabrics and encapsulate the hull stringers in fiberglass. That way, they are an integral part of the hull.

We use end-grain balsa-coring in our hulls, decks and liners to make our yachts stronger, more rigid and, as an extra benefit, quiet-running at any speed. Balsa core is an exceptional sound-absorber and, although it is lightweight, it adds integrity to the construction. Finally, to make our yachts more resistant to blistering, we use a vinylester barrier coat below the waterline.

A FEW OF OUR FAVORITE THINGS ■ At Cruisers Yachts, we definitely believe beauty runs more than skin deep, and we demonstrate this with every boat that we launch. Behind the sleek lines and broad shoulders of each yacht lies an elegant, roomy, well-appointed interior for ultimate comfort belowdecks as well as above

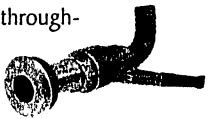
These interiors are assembled by modular construction. We use jigs and fixtures to make sure the modules are uniform, and we pride ourselves on both precision and overall structural integrity in this process. Each module is built separately from the boat; each component is carefully crafted for proper fit and function. Each stage of construction, for us, must always meet the highest possible standard of quality.

We use a numerically controlled router to produce accurate, consistent wood parts, made from marine-grade, solid-core mahogany plywood. This wood was selected for both its durability and its attractiveness, neither of which will be diminished during the yacht's life on the water.

Because we understand that a purchase of a Cruisers Yacht is a big investment, we don't stop there with our meticulous attention to detail. At key attachment points such as cleats, rails, hinges and chocks, we laminate aluminum back-up plates into the deck. These will not loosen over time as wood backing sometimes will, which is an important safety consideration.

We also use a special, catalyzed, synthetic paint to protect all bilge and engine areas from fuel and other corrosive agents. And, instead of plastic, we only use bronze through-hull fittings, which provide extra corrosion protection and durability. What's more, all underwater components are bonded in parallel to protect against electrolysis, provide surge protection, eliminate electrical interference and ensure that other parts will be safe if a wire breaks.

On several models, we use aluminum engine mounts instead of wood blocks for additional durability. We also use PVC piping for all plumbing lines instead of the more commonly found flex hosing; this will provide a virtually hassle-free plumbing system.



To ensure the highest quality, Cruisers Yachts fabricates more than 100 stainless steel and aluminum parts in our factory—bow rails, ladders, fuel and water tanks, motor mounts. And we use only high grade 316 stainless steel. We also diligently select our fabrics, made of the highest marine-grade vinyl upholstery. Plus, we use denser foam for greater comfort. Specially skilled professionals make sure the fabrics are hand-cut and precision-sewn for matching patterns and a proper fit.

The upholstery structure is made of XL plywood, which carries a lifetime warranty against rot and mildew. What's more, we fabricate our own lightweight, durable, acrylic Bimini tops and front and side curtains—with an extra Sea Mark® coating to prevent seam leakage—to make sure each yacht has an attractive, custom fit.

Clearly, Cruisers Yachts believes that the fit and finish is a critical part of boatbuilding. We only accept the very best workmanship, because we know you deserve the very best. Period.

AND WE GO THE DISTANCE ■ Each new yacht is fully tested and run-up to ensure it not only achieves the highest level of quality in every possible way, but also maintains our impeccable safety record. We spare no effort in the creation of each yacht because your safety, as well as your enjoyment, matter most.

We meet or surpass every standard set by the National Marine Manufacturers Association, the American

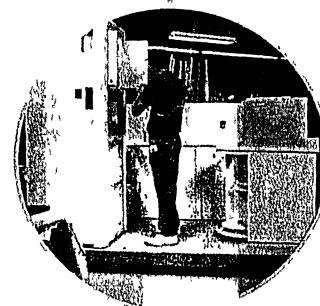
Boat & Yacht Council and the U.S. Coast Guard. And we are one of the first manufacturers to comply with the new European CE standards.

Our customer support network backs up our claims. Each customer is a member of the Cruisers Yachts family, and we are dedicated to maintaining our relationships with each and every Cruisers Yacht owner. No one will support you better, or value you more. For example, we are one of just a handful of manufacturers to offer a free 5-year Limited Structural Warranty and a free 2-year Limited Warranty against hull blistering on all of our models. And, you have our pledge:

If you ever experience a problem with your Cruisers Yacht that is protected by our warranty and cannot be handled by your dealer to your satisfaction, we will provide free factory assistance by offering personal advice or even send a trained service representative to your yacht.

Plus, our Owners Desk Hotline offers quick advice on simple maintenance procedures, new product information or any other questions you might have about your Cruisers Yacht. If you have any questions or problems, you may reach the Owners Desk at (920) 834-2770, Monday through Friday, between the hours of 8 a.m. and 4 p.m. Central Time.

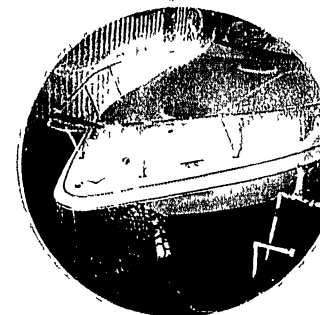
Above all else, everyone at Cruisers Yachts is dedicated to providing you with the best boat-buying experience possible. Enjoy.



Each subassembled interior module is crafted with solid-core mahogany plywood and is installed using a jig pin system, guaranteeing a perfect fit to the hull and stringers.



At Cruisers Yachts, we hand-craft all upholstery, curtains, cushions and acrylic covers for exceptional, custom fit and finish.



To make sure each Cruisers Yacht meets high quality standards in every way, each model is tested or sea-trialed to make sure it will meet or exceed all NMMA, ABYC and European quality standards.



Setting Standards for Safer Boating

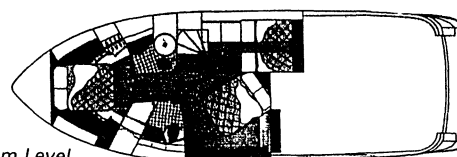


5000 SEDAN SPORT

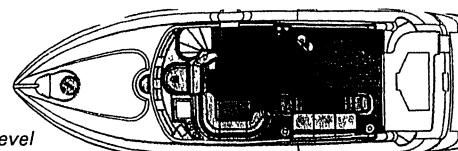


Designed to be the ultimate in cruising luxury and performance, the 5000 Sedan Sport is the flagship of the Cruisers Yachts fleet. With three staterooms, three deck levels, a unique indoor stairway to the bridge deck and deluxe appointments, the 5000 is in a class of her own.

Stateroom Level



Salon Level



SPECIFICATIONS

L O A with Integrated Swim Platform	49'6" / 15.1 m
Beam	15'6" / 4.7 m
Approximate Weight (Diesel) (Lbs)	38,000 / 17,195 K
Fuel Capacity—U S Gallons	600 / 2,268 L
Cabin Headroom	6'6" / 2.0 m
Height—Keel to Top of Windshield	15'3" / 4.7 m
Height—Keel to Top of Arch Including Radar	19'0" / 5.8 m
Draft	3'5" / 1.1 m
Bridge Clearance Including Radar Pedestal	16'5" / 5.1 m
Water System Capacity—U S Gallons	150 / 567 L
Waste Holding Capacity—U S Gallons	100 / 377 L

IE OPTIONS:

iesel Volvo: V-Drive Inboard

3P Diesel, 430 HP (316 Kw), IB
 A Diesel, 550 HP (410 Kw), IB
 IA DDEC Diesel, 625 HP (466 Kw), IB
 122 Diesel, 610 HP (449 Kw), IB

: V-Drive Inboard

iesel, 420 HP (313 Kw), IB
 iesel, 600 HP (448 Kw), IB

ABLE COLORS

rd, Monaco Blue, Majestic Burgundy,
 een

ARD FEATURES

ver, Windshield
 i
 covers-Bridge
 nd, Forward
 nd, Master
 n, Converts to King
 fa - Crescent Shaped
 liner Sofa w/ 2 Salon
 lon
 , Lower Station, Power Assist
 , Triple
 ybridge
 oner/Heater
 s
 Lower Station Windshield
 System, 20 Gallon (75.8 L)
 s), Inner Spring
 Oven (220 V Only)(N/A w/Oven)
 /Convection Oven (N/A in 220 V)
 n)
 r/Freezer w/ Ice Maker
 e 110 V Surround Sound System

on Bridge
 tric, (3 Burners)
 /Wiring, Jack & Dockside

1/2 VCR w/Remote & Antenna-
 in 220 V)
 -Flush-2
 ver, Sump
 r For Head Compartment
 ad Compartments-2
 er/Mooring Btu/Cleat
 '00' 5/16 Chain
 , Aluminum (w/Arch Lights)
 ator
 titlon Monitor
 ging System
 te, Transom
 item
 t, Anti-Fouling
 ilge
 Sliding Patio w/Screen
 ound
 xide Detectors
 em, Engine, Fresh Water
 ter Inlet
 ing, 240 V, 50 Amp
 ster Panel, AC/DC w/Voltmeters
 indicators
 rs - Transom
 ckpit, Self-Draining
 her (4)
 her, Automatic, w/Engines

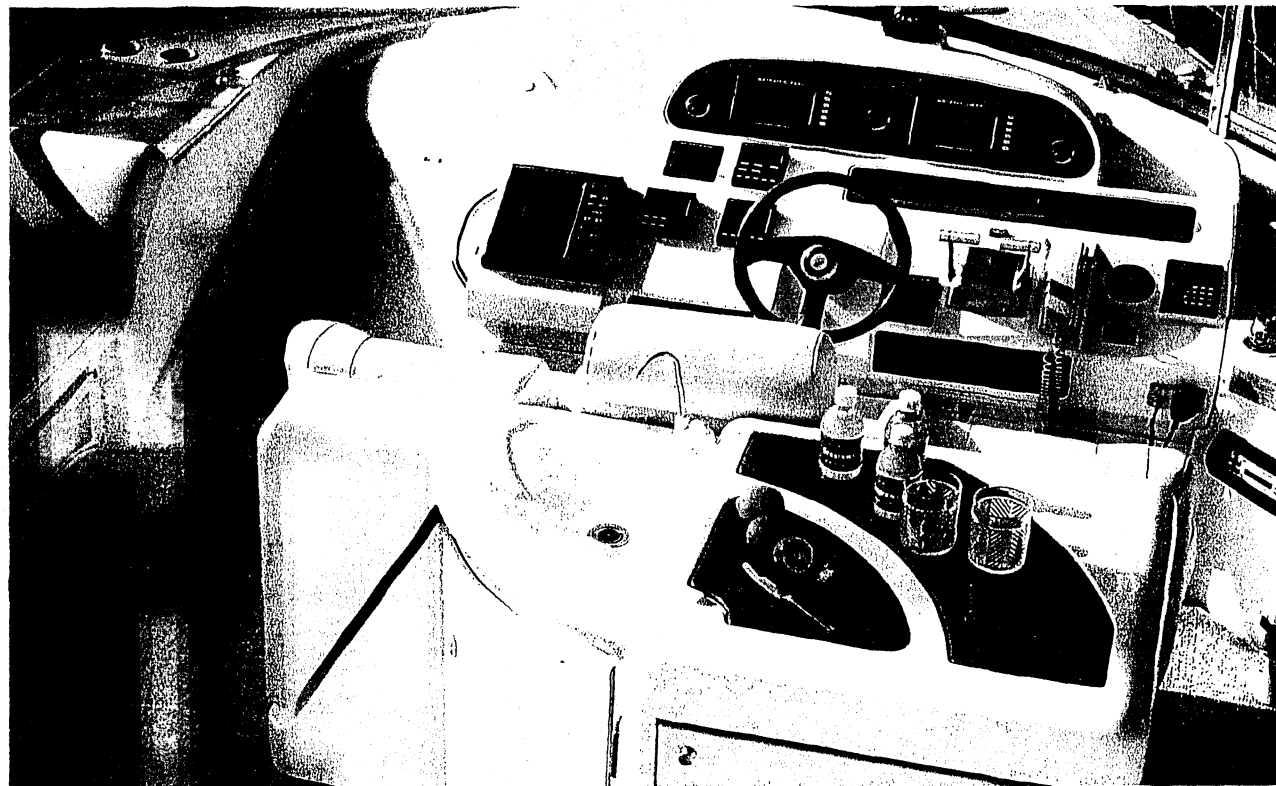
- Instrumentation
- Lights, Bilge (5)
- Lights, Cabin Side Boarding
- Lights, Cockpit Courtesy
- Lower Station Control - Full instrumentation
- Navigation Lights, International
- Propellers, Nibral
- Pump, Bilge, Automatic (6)
- Rail, Bow, Welded Stainless Steel
- Sea Water, Strainers
- Shaft Logs, Dripless
- Shower, Cockpit
- Steering, Power, Hydraulic
- Steering Wheel, Tilt, Non-Magnetic
- Swim Platform w/Boarding Ladder
- Table, Bridge
- Trim Tabs
- Wet Bar, Bridge
- Windlass, Remote Control, w/ Foredeck
- Foot Switch
- Windscreen
- Windshield, Safety Glass w/ Wipers(s)-3
- & Washer
- Compass
- Depth Sounder
- Hourmeters
- Synchronizer

OPTIONAL FEATURES

- Hard Top, Includes-Front/Side/ Aft Curtains
- Davit, Bridge w/ Inflatable (Must Have Forward Facing Arch)
- Double Sofa Sleeper w/ 2 Salon Chairs - Salon
- L Sofa w/ Triple Incliner - Salon
- L Sofa Sleeper w/Incliner - Salon
- Carpet Cover, Cabin - Acrylic Snap Down
- Coffee Maker (N/A in 220 V)
- Phone, Cell/Intercom
- Sheets, Custom Fitted
- Stove, Electric w/ Oven (3 Burners)(N/A w/ Microwave Convection or Microwave)
- Television & VCR w/ Remote Control, Forward Stateroom (N/A in 220 V)
- Television & VCR w/ Remote Control, Master Stateroom (N/A in 220 V)
- Television & VCR w/ Remote Control, Aft Stateroom (N/A in 220 V)
- Towel & Decorator Pillow Package
- Vacuum System, Central
- Washer/Dryer
- Macerator Pump Out For Holding Tank
- Y Valve & Overboard Discharge
- Batteries
- Bow Thruster
- Cabin Door, Stainless Steel, Sliding Patio w/Screen
- Carpeting, Cockpit
- Carpeting, Bridge
- Cockpit Decking, Teak
- Cradle, Storage
- Gangway w/ Davit System - Hydraulic Telescoping
- Ice Maker/Refrigerator - Bridge
- Oil Change System
- Retractable Power Cord (N/A in 220 V)
- Spotlight, Remote Control, 175,000 Candlepower
- Swim Platform, Extended, w/Hydraulic Lift
- Washdown System, Cockpit
- Washdown System, Anchor
- Radio, VHF

Cross Over
 5 Kw Kohler, Diesel w/FWC
)
 5 Kw Kohler, Diesel w/FWC

Interruption Outlet
 Impet Air

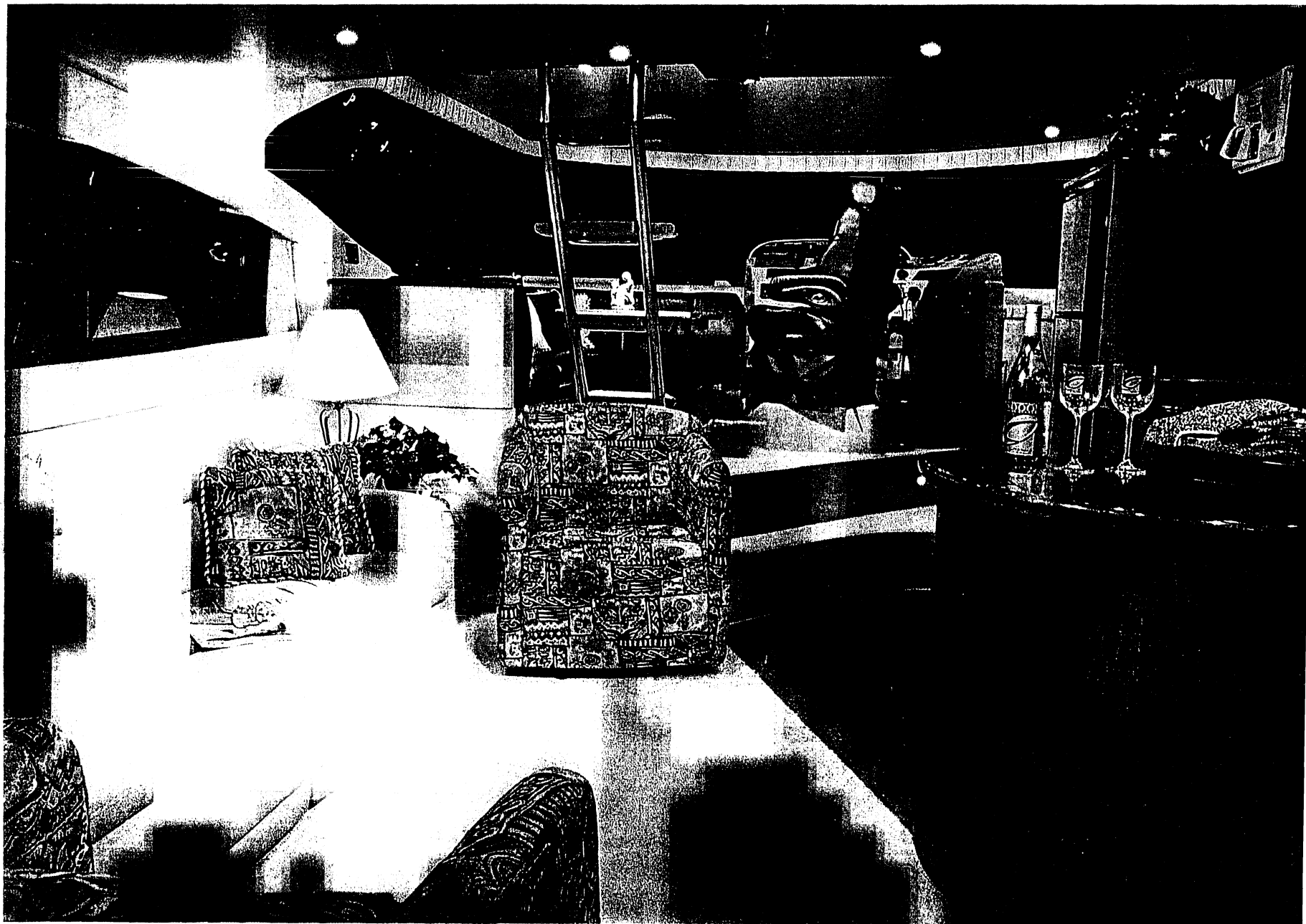


The 5000's well-designed bridge features a fully equipped wet bar with an optional refrigerator and icemaker, a stereo/CD player, a large, wrap-around settee for guests and crew, a triple-wide helm seat and plenty of room to move around comfortably.

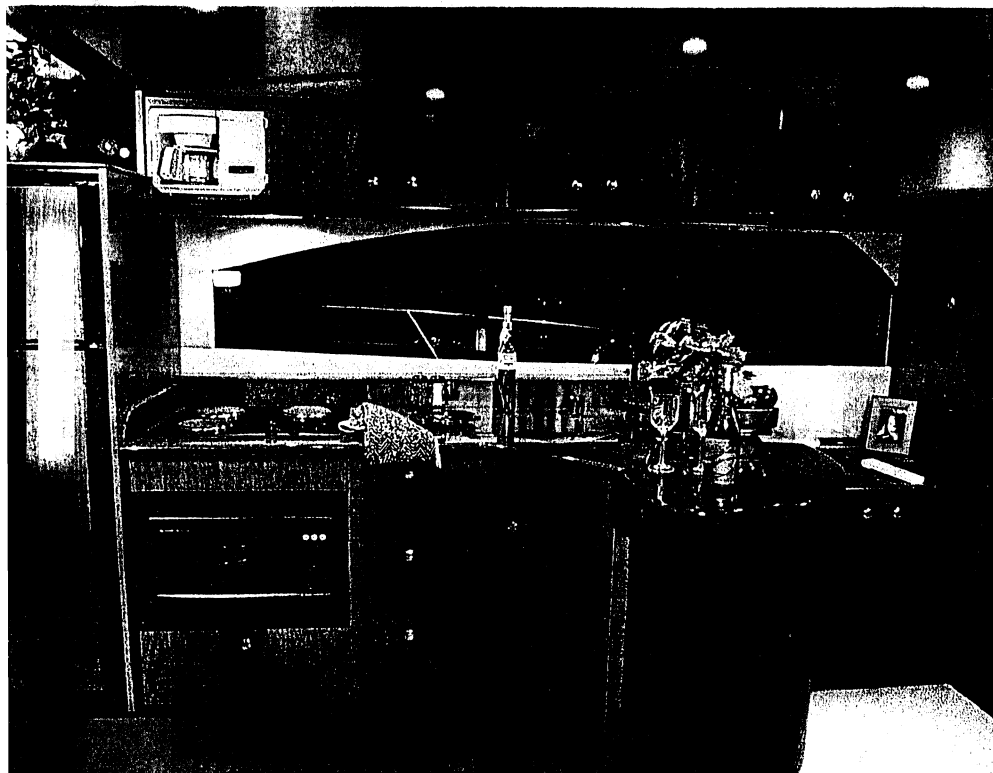


Also available for the 5000 is an extended swim platform with hydraulic lift—perfect for bringing along extra toys on the big cruise.

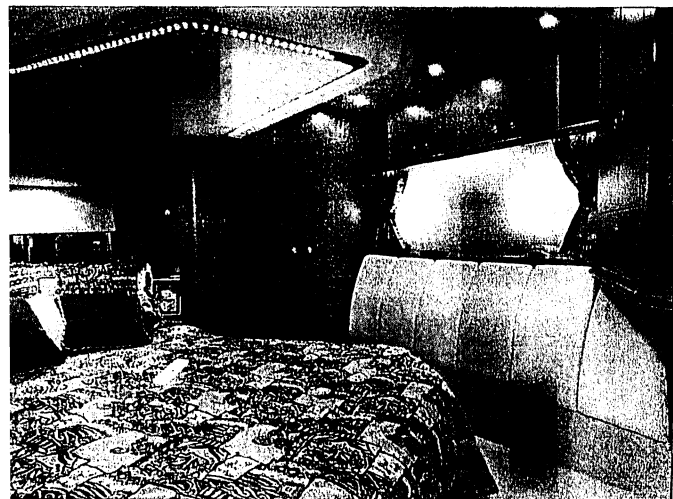
5000 SEDAN SPORT



The 5000's elegant salon incorporates a well-appointed galley, ergonomically designed lower helm station, a convertible, crescent-shaped dinette/sofa, a double incliner sofa and sweeping 360-degree views into its wide-open, airy living space.



2000's ultramodern, full-service galley includes a full-size refrigerator/freezer with maker, microwave/convection oven, three-burner stove, an optional coffeemaker, plenty of counter and storage space and elegant wood flooring.



Luxury master stateroom, located amidships to port, boasts a large island berth with inner-spring mattress, ample locker storage for gear aboard cruising, and private access to the main head.



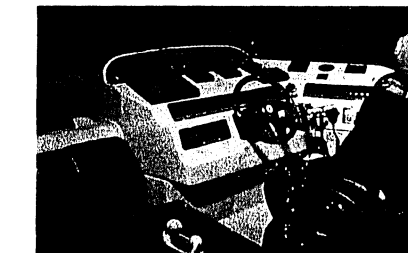
The port-side main head features a large vanity and sink, generous storage and a separate showering area with full standing headroom.



These comfortable twin berths in the midships stateroom can be easily converted to a king-size bed with a self-storing filler cushion. This cabin also serves as a laundry room with the available washer/dryer combo unit.



Also offering a large island berth with inner-spring mattress, lots of storage and luxurious comfort, the forward stateroom gives guests or family members ideal accommodations for vacation time on the water.



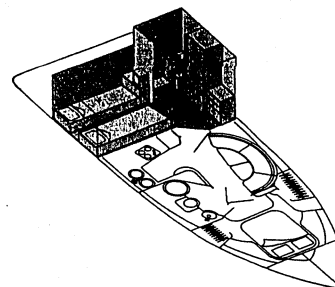
The central lower helm position offers exceptional visibility and an adjustable pilot seat.

The roomy starboard-side head, also accessible from the forward stateroom, features a stand-up shower stall, with seat.

4270 ESPRIT



The sleek 4270 Esprit introduced a new concept in express cruiser design: Comfort can go hand-in-hand with exhilarating performance. The 4270 boasts a comfortable second stateroom with private head and stand-up changing area, upping the ante in the express cruiser class.



SPECIFICATIONS

L.O.A. with Integrated Pulpit and Swim Platform	44'0"/13.4 m
L.O.A. with Integrated Swim Platform	41'6"/12.6 m
L.O.A. with Integrated Pulpit, Integrated Swim Platform and Optional Extended Swim Platform	46'6"/14.2 m
Beam	14'0"/4.3 m
Approximate Weight, (Gas) (Lbs)	19,500/8,833 K
Approximate Weight, (Diesel) (Lbs)	21,000/9,513 K
Fuel Capacity—U.S. Gallons	400/1,516 L
Cabin Headroom	6'6"/2.0 m
Height—Keel to Top of Arch	12'11"/3.9 m
Draft	42"/1.10 m
Bridge Clearance (w/Arch)	10'10"/3.3 m
Water System Capacity—U.S. Gallons	100/378 L
Waste Holding Capacity—U.S. Gallons	50/189 L

E OPTIONS:

V Drive Inboard
Diesel 325 HP (242 Kw) 1B
Diesel 350 HP (261 Kw) 1B
Diesel 420 HP (313 Kw) 1B

' Drive Inboard
320 HP (239) 1B
1P 385 HP (287) 1B Platinum Fresh
led
405 HP (302) 1B Fresh Water

el Volvo V Drive Inboard
P Diesel 370 HP (276 Kw) 1B
P Diesel 430 HP (316 Kw) 1B

V Drive Inboard
'I 310 HP (230 Kw) 1B
G MPI Horizon 386 HP (283
sh Water Cooled
I 400 HP (298 Kw) 1B

BLE COLORS

I Monaco Blue Majestic Burgundy
an

IRD FEATURES

le & Front

abin
I Forward
Convertible Crescent Shaped
ouble
e Companion Double
Seat (Removable Wrap

ier/Heater
Door Forward Stateroom

alley Top w/Surell Inlays
rstem 11 Gallon (41 7 L)
at Exchanger
Inner Spring
ven (220 V)
onvection Oven (N/A in 220 V)
Freezer
tilating w/Screen
tite w/Remote 120 Watt
sc CD
/ Amplifier & 2 Extra Speakers
c (3 Burners)
ring Jack & Dockside

/CR w/Remote & Antenna
)
ush
r Sump
For Head Compartment
Compartment
/Mooring Bit/Cleat
luminum (w/Arch Lights)
or
ion Monitor
ng System
Transom
m
Anti Fouling
le
k Access Center Walk Thru
ound
ide Detectors
r Inlet
ig 115 V 30 Amp
ig Second Outlet 30 Amp
r Panel AC/DC w/Voltmeters
icators
Transom

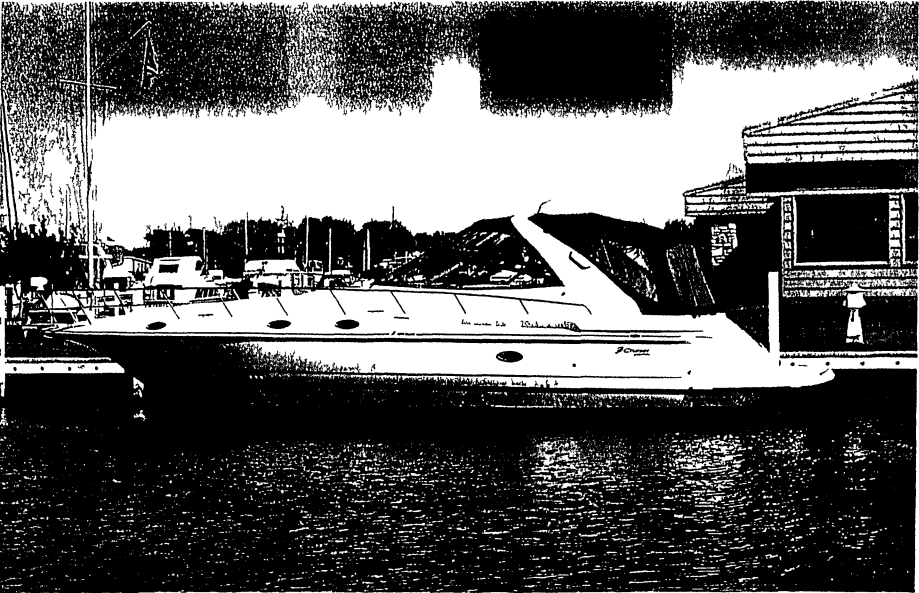
- Fiberglass Cockpit Self Draining
- Fire Extinguisher (3)
- Fuel System Cross Over
- Generator 10 0 Kw Kohler Gas w/FWC (N/A in 220 V)
- Generator 9 0 Kw Kohler Diesel w/FWC (N/A in 220 V)
- Generator 8 0 Kw Kohler Diesel w/FWC (220 V only)
- Ground Fault Interrupter Outlet
- Horn Dual Trumpet Air
- Instrumentation
- Lights Bilge (2)
- Lights Cabin Side Boarding
- Lights Cockpit Courtesy
- Navigation Lights International
- Propellers
- Pump Bilge Automatic (2)
- Sea Water Strainers
- Shaft Logs Dripless
- Shower Cockpit
- Steering Power Hydraulic
- Steering Wheel Tilt Non Magnetic
- Swim Platform w/Boarding Ladder Extended
- Trim Tabs
- Wet Bar Cockpit
- Windlass Remote Control w/Foredeck Anchor w/150 5/8" Line & 6 5/16" Cham Foot Switch
- Windshield Safety Glass & Wipers(s) 2
- Compass
- Depth Sounder
- Hourmeters 2
- Synchronizer

OPTIONAL FEATURES

- Cover Cockpit
- Lounge Cushions Foredeck
- Sunlounge Cockpit w/Table
- Carpet Cover Cabin Acrylic Snap Down
- Cherry Veneer Interior Package
- Coffee Maker (N/A in 220 V)
- Sheets Custom Fitted
- Television & VCR w/Remote Control Aft Stateroom (N/A in 220 V)
- Television & VCR w/ Remote Control Forward Stateroom (N/A in 220 V)
- Towel & Decorator Pillow Package
- Vacuum System Central
- Macerator Pump Out For Holding Tank
- Y Valve & Overboard Discharge
- Batteries
- Bow Thruster
- Carpeling Cockpit
- Cooling System Engine Fresh Water (Std on Diesel & Select Gas Engines)
- Cradle Storage
- Fire Extinguisher Automatic Gas Engines
- Fire Extinguisher Automatic w/Engines Shutdown Diesel Engines
- Generator Sound Shield
- Ice Maker/Refrigerator Cockpit
- Oil Change System
- Spotlight Remote Control 175 000 Candlepower
- Swim Platform Extended w/Hydraulic Lift
- Table Cockpit
- Washdown System Cockpit
- Windshield Stainless Steel Frame
- Radio VHF



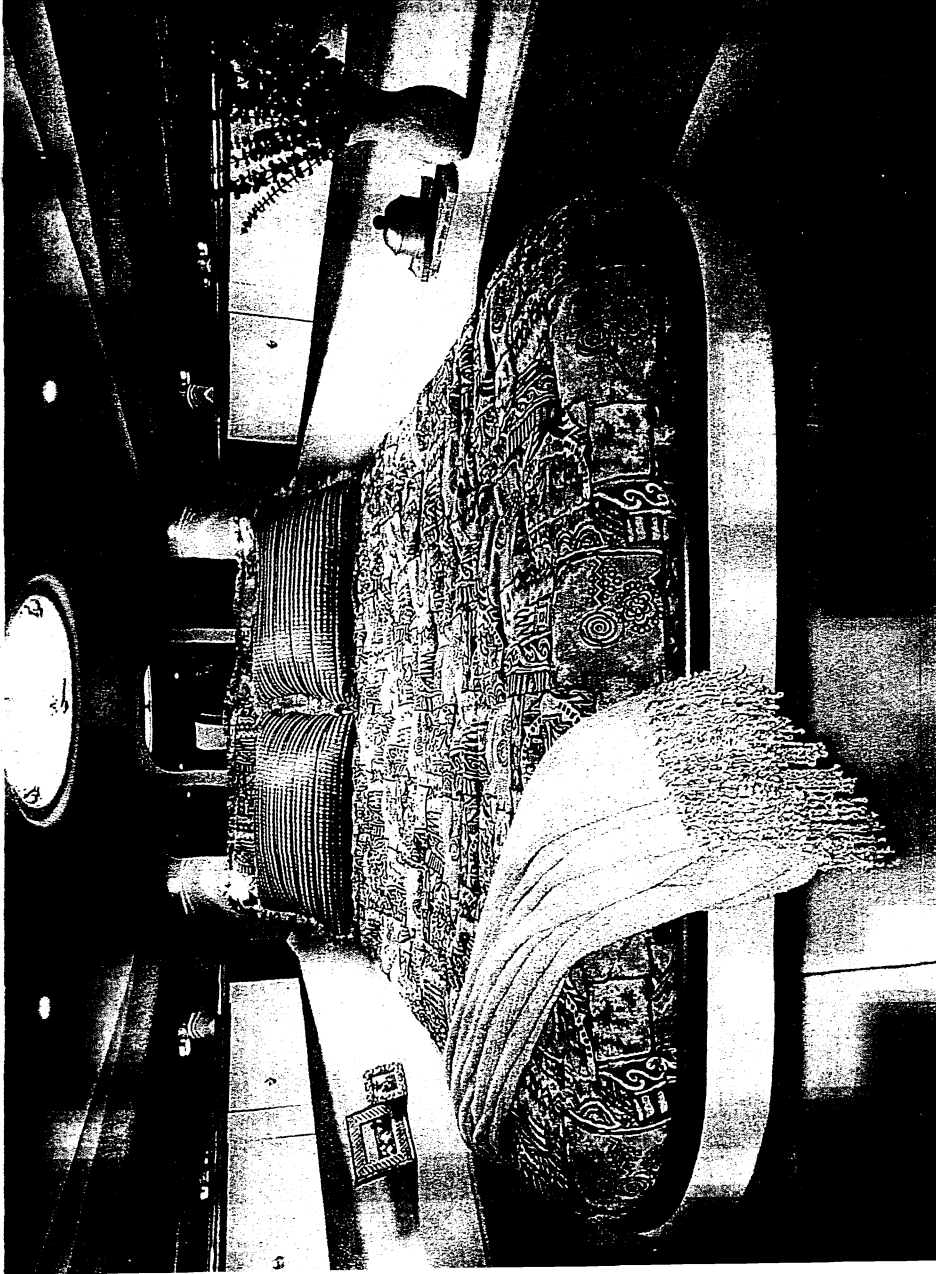
The 4270's large cockpit offers wrap around seating a wet bar, extended swim platform and a walk through windshield for ease of movement



The 4270 comes with a Bimini top, side curtains and camper top

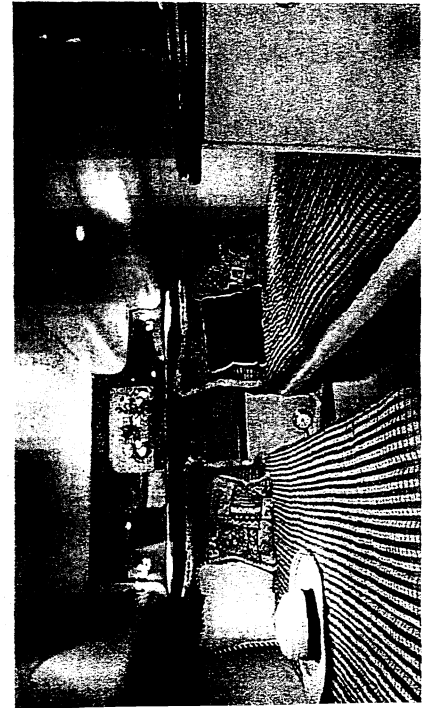


Despite her sleek lines the 4270's broad shoulders allow for a spacious interior layout. The salon features a convertible dinette/double berth with crescent shaped leatherette seating, plenty of natural light and impressive 6'6" headroom.



The 4270's master stateroom boasts a queen-size island berth with inner-spring mattress, elegant appointments and ample storage space for extended live-aboard cruising.

The private midcabin suite includes a head with shower and a separate changing area, both with full standing headroom.



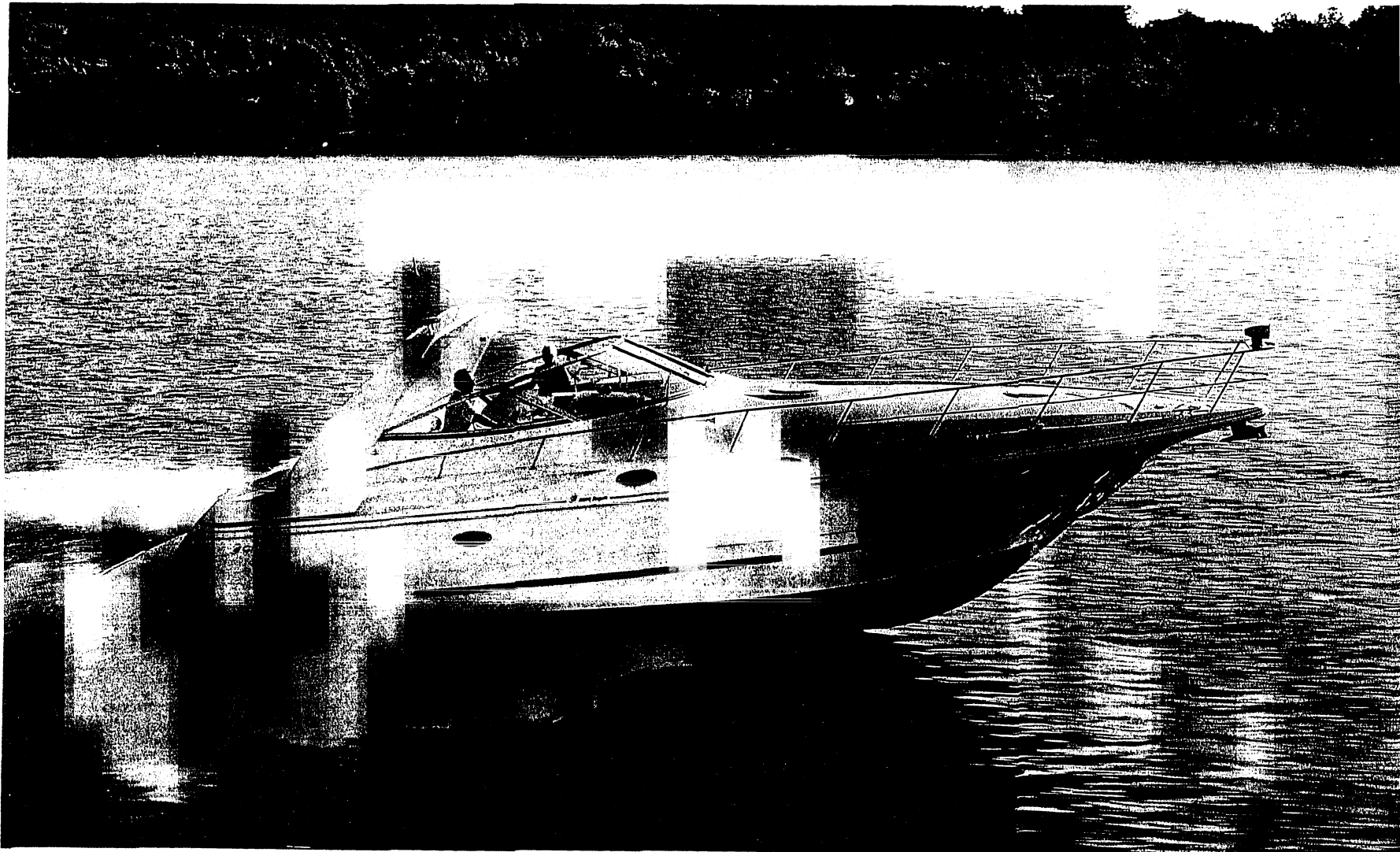
The 4270's special midcabin arrangement includes twin berths that can be converted to a single king-size bed using a self-storing filler cushion.



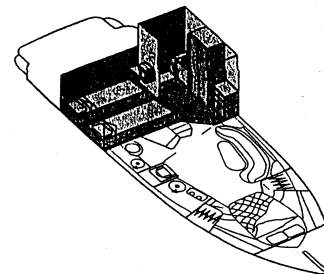
The well-appointed galley provides a large refrigerator/freezer, a microwave/convection oven, three-burner electric stove and lots of counter and storage space, plus it boasts attractive wood flooring.



The main head includes a separate, stand-up shower stall for added onboard comfort, and it is easily accessible from both the salon and the master stateroom.



The 3870 Esprit offers the same world-class performance and unique interior layout as her sistership, the 4270 Esprit, allowing her to sleep six comfortably.



SPECIFICATIONS

L.O.A. with Integrated Pulpit and Swim Platform	40'3"/12.3 m
L.O.A. with Integrated Swim Platform	38'11.6 m
L.O.A. with Integrated Pulpit, Integrated Swim Platform and Optional Extended Swim Platform	43'13.1 m
Beam	13'6"/4.1 m
Approximate Weight (Lbs) (Gas)	17,500/7,927 K
Approximate Weight (Lbs) (Diesel)	19,000/8,607 K
Fuel Capacity—U.S. Gallons	300/1,136 L
Water System Capacity—U.S. Gallons	75/283 L
Waste Holding Capacity—U.S. Gallons	50/189 L
Cabin Headroom	6'5"/1.9 m
Height—Keel to Top of Arch	13'1"/4.0 m
Draft	36"/92 cm
Bridge Clearance	11'173.4 m

ENGINE OPTIONS:

MerCruiser V Drive Inboard

- T 7 4 L MPI 310 HP (230 Kw) IB
- T 7 4 L MAG MPI Horizon 380 HP (283 Kw) IB
- Fresh Water Cooled
- T 8 2 L MPI 400 HP (298 Kw) IB

Volvo Diesel V Drive Inboard

- T TAMD63P Diesel 370 HP (276 Kw) IB
- T TAMD73P Diesel 430 HP (316 Kw) IB

Yanmar V Drive Inboard

- T 7 4 MP 320 HP (239 Kw) IB
- T 7 4 HO MP 385 HP (287 Kw) IB Platinum
- Fresh Water Cooled
- T 8 2 MP 405 HP (302 Kw) IB Fresh Water Cooled

Caterpillar V Drive Inboard

- T 3 1/2 Diesel 325 HP (242 Kw) IB
- T 3 1/2 Diesel 350 HP (261 Kw) IB
- T 3120TA Diesel 420 HP (313 Kw) IB

AVAILABLE COLORS

Mineral Sand Monaco Blue Majestic Burgundy
Magna Green

STANDARD FEATURES

- Camper Top
- Curtains Side & Front
- Top Bimini
- Amidship Cabin
- Berth Island Forward
- Dinette/Sofa Convertible Crescent Shaped
- Helm Lounge Companion Double
- Helm Seat Double
- Rear Cockpit Seat (Removable Wrap Around)
- Air Conditioner/Heater
- Comforters
- Fiberglass Galley Top w/Surell Inlays
- Hot Water System 10 5 Gallon (39 8 L) w/Engine Heat Exchanger
- Microwave Oven
- Refrigerator/Freezer
- Skirt Ventilating w/Screens
- Stereo Cassette w/Remote 120 Watt
- Stowage Electric
- Telephone Wiring Jack & Dockside Receptacle
- Television & VCR w/Remote & Antenna Salon(N/A in 220 V)
- Anchor Roller/Mooring Bit Cleat
- Head Manual Pump 2
- Pump Shower Sump
- Shower Head Compartments
- Arch Radar Aluminum (w/Arch Lights)
- Battery Isolator
- Battery Condition Monitor
- Battery Charging System
- Blower Bilge
- Boarding Gate Transom
- Bonding System
- Bottom Paint Anti Fouling
- Cabin Foredeck Access Center Walk Thru
- Cabin Walk Around
- Carbon Monoxide Detector
- Dockside Water Inlet
- Dockside Wiring 115 V 30 Amp
- Dockside Wiring Second Outlet 30 Amp
- Electrical Master Panel AC/DC w/Voltmeters & Function Indicators
- Fender Holders Transom
- Fiberglass Cockpit Self Draining
- Fire Extinguisher (3)
- Ground Fault Interrupter Outlet
- Gunwale Molding Stainless Steel

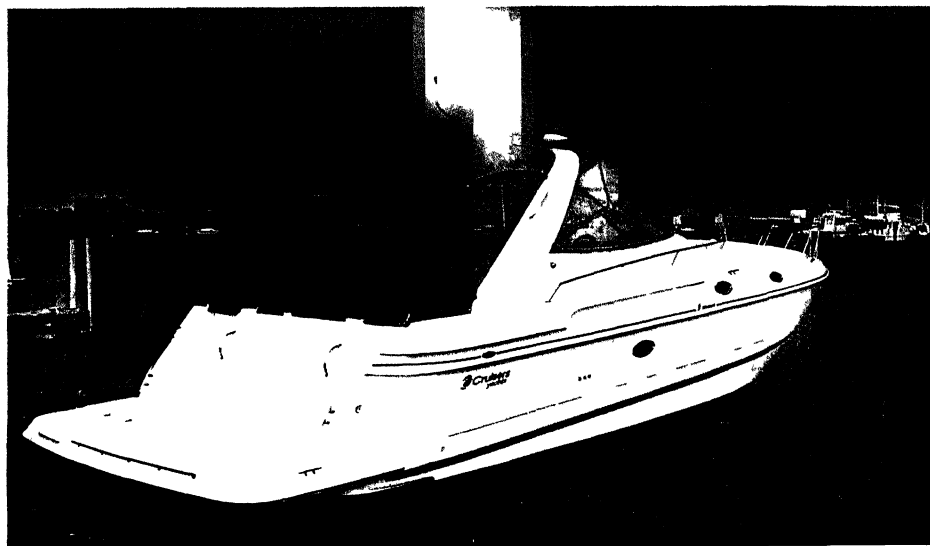
- Lights Cabin Side Boarding
- Mufflers
- Navigation Lights International
- Pump Bilge Automatic
- Shaft Logs Dripless
- Propellers
- Shower Cockpit
- Steering Hydraulic
- Steering Wheel Tilt Non Magnetic
- Swim Platform Extended w/Boarding Ladder
- Trim Tabs
- Wet Bar Cockpit
- Windshield Safety Glass
- Windshield Wipers (2)
- Compass
- Depth Sounder
- Hourmeters 2
- Synchronizer

OPTIONAL FEATURES

- Cover Cockpit
- Lounge Cushions Foredeck
- Sunlounge/Table (1) Cockpit
- Bulkhead & Door Forward Stateroom
- Carpet Cover Cabin Acrylic Snap Down
- Cherry Veneer Interior Package
- Coffee Maker (N/A in 220 V)
- Mattress(es) Inner Spring
- Microwave/Convection Oven (N/A in 220 V)
- Sheets Custom Fitted
- Stereo Single CD Player w/Helm Remote 120 Watt
- Changer 6 Disc CD
- Speakers Extra Pair w/160 Watt Amplifier
- Subwoofer w/240 Watt Amplifier & 2 Extra Speakers
- Television & VCR w/Remote Control Forward Stateroom (N/A in 220 V)
- Television & VCR w/Remote Control Aft Stateroom (N/A in 220 V)
- Towel & Decorator Pillow Package
- Vacuum System Central
- Head Electric Pump
- Head Vacu Flush
- Macerator Pump Out For Holding Tank
- Y Valve & Overboard Discharge
- Anchor w/150 5/8" Line & 6 5/16" Chain
- Batteries
- Carpeting Cockpit
- Cooling System Engine Fresh Water (Std on Diesel & Select Gas Engines)
- Cradle Storage
- Fire Extinguisher Automatic Gas Engines
- Fire Extinguisher Automatic w/Engines Shutdown Diesel Engines
- Fuel System Cross Over
- Generator 6 5 Kw Kohler Gas w/FWC & Sound Shield (N/A in 220 V)
- Generator 10 0 Kw Kohler Gas w/FWC (N/A in 220 V)
- Generator 9 0 Kw Kohler Diesel w/FWC (N/A in 220 V)
- Generator 5 0 Kw Kohler Gas w/FWC & Sound Shield (220 V Only)
- Generator 8 0 Kw Kohler Diesel w/FWC (220 V Only)
- Generator Sound Shield
- Ice Maker/Refrigerator Cockpit
- Oil Change System
- Sea Water Strainers (Std w/Diesel Engines)
- Spotlight Remote Control 175 000 Candlepower
- Swim Platform Extended w/Hydraulic Lift
- Table Cockpit
- Washdown System Cockpit
- Windlass Remote Control w/Foredeck Foot Switch Includes Anchor w/150 5/8" Line



On the water entertaining is easy with the 3870's large cockpit, which includes a wet bar, optional refrigerator and wrap around rear seating for guests

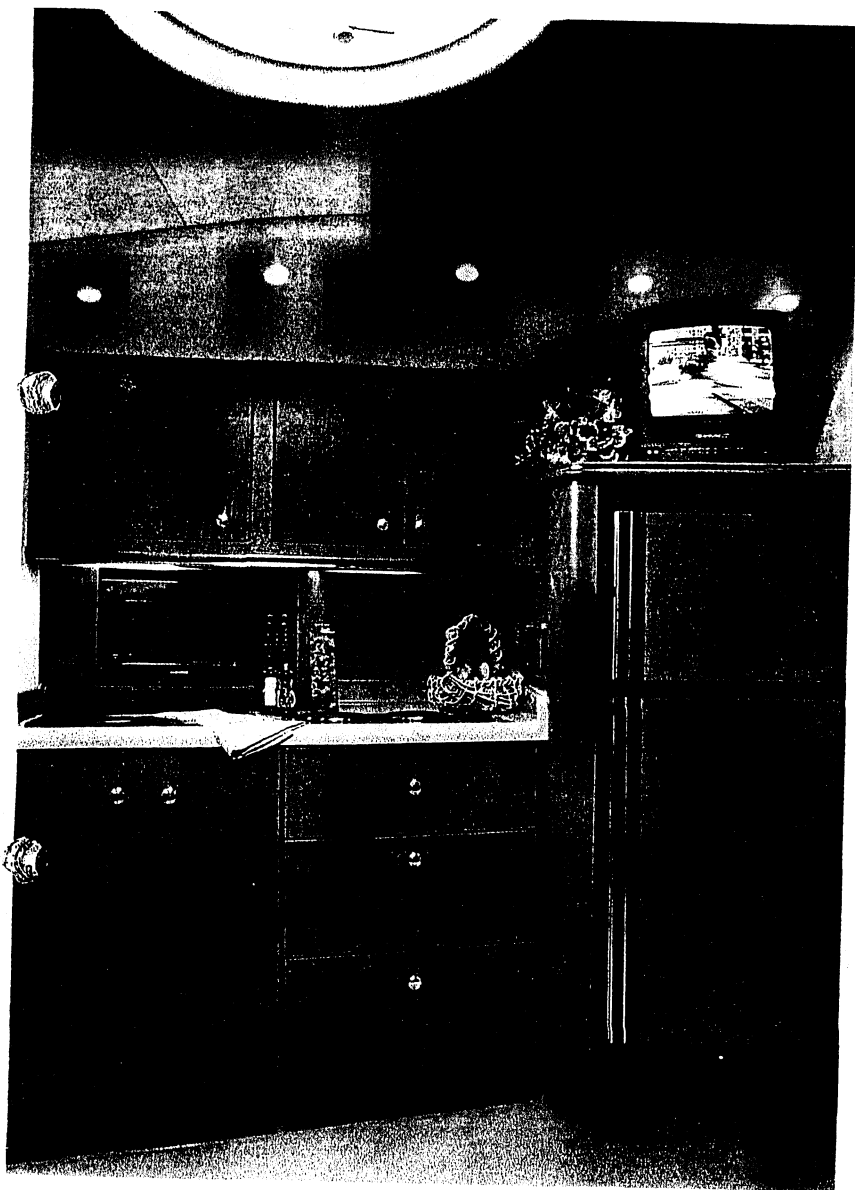


Hand-cut and hand sewn fabrics ensure that the 3870 will have easy-to-manage, custom-fit tops and curtains

870 ESPRIT

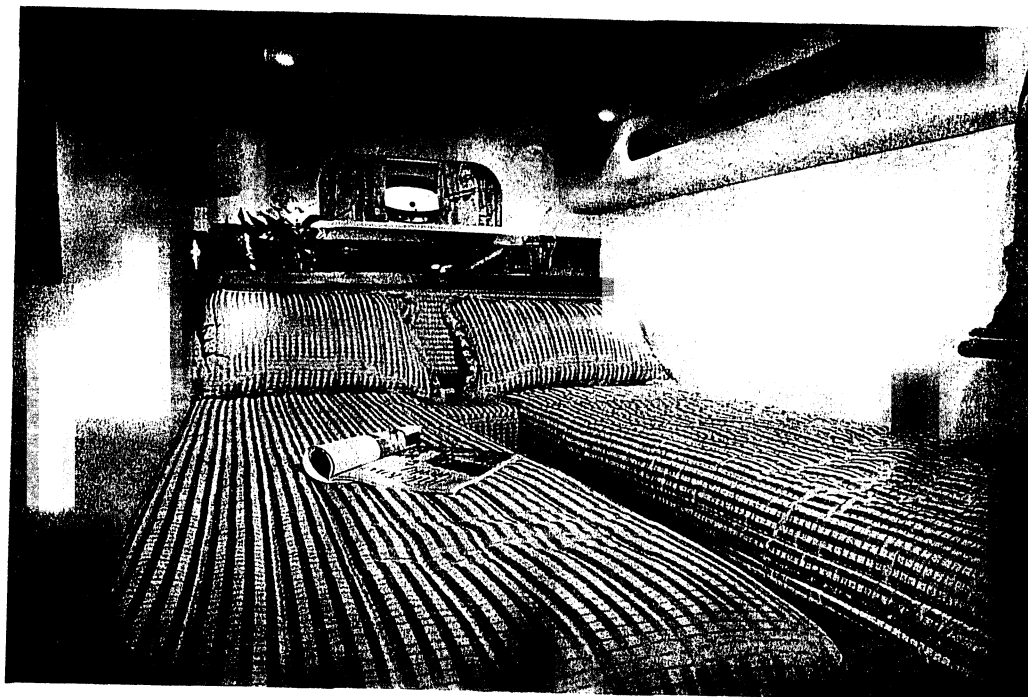


• salon offers plenty of open living space with a crescent shaped leatherette
ette/double berth and a fully equipped galley. An island berth lies forward,
which can be closed off from the salon. Shown with available cherry veneer interior.

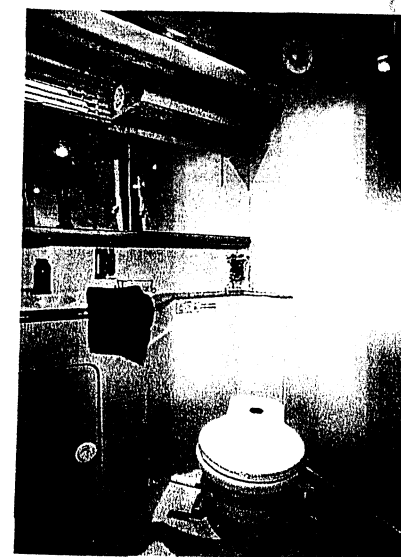


In addition to the large refrigerator/freezer, microwave oven, double-burner electric stove and plenty of cupboards and drawers, the 3870 also comes equipped with a stereo with cassette player and a TV/VCR.

The midcabin suite includes a stand-up changing area and head with shower. Contained behind a bulkhead door, this arrangement offers an unheard-of level of privacy for guests on boats in this class.

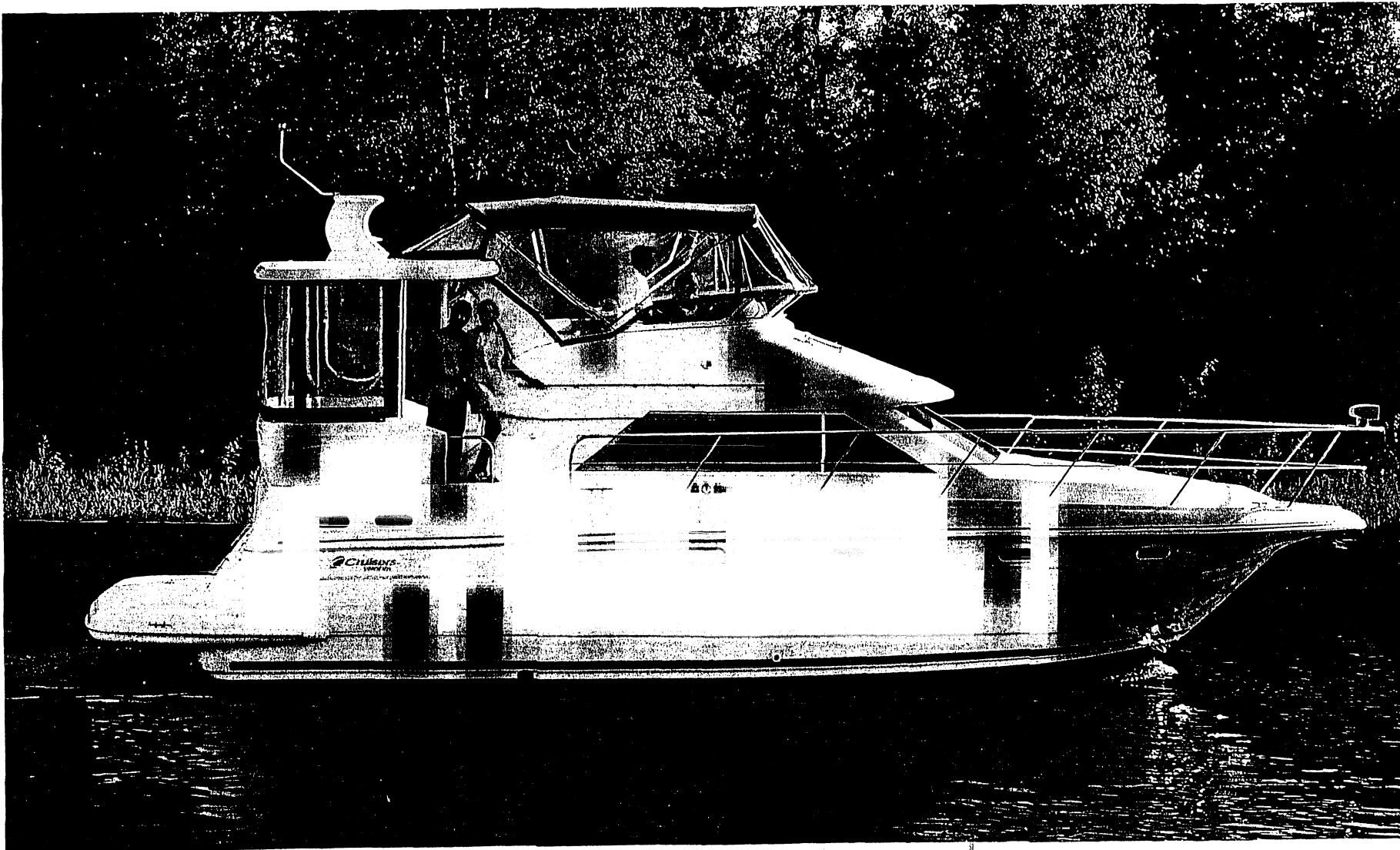


The 3870's second cabin includes twin berths that can be converted to a king-size with a self-storing filler cushion.

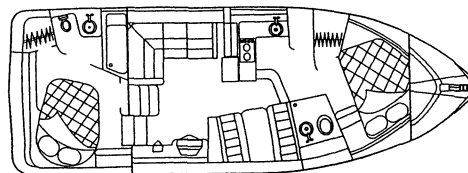


The main head provides full standing headroom and a separate stand-up shower stall for additional convenience.

3750 MOTORYACHT



Cruising comfort for the whole family is taken to new levels with the 3750 Motoryacht. This deluxe aft-cabin design offers smooth handling, unsurpassed living space, molded-in steps instead of ladders, contemporary styling and all the comforts of home for the ultimate experience in pleasure cruising.



SPECIFICATIONS

L.O.A. with Integrated Pulpit, and Extended Swim Platform	40'10"/12.4 m
L.O.A. with Integrated Swim Platform	37'8"/11.8 m
Beam	13'8"/4.2 m
Approximate Weight (Lbs) (Gas)	19,400/8,730 K
Approximate Weight (Lbs) (Diesel)	20,700/9,315 K
Fuel Capacity—U.S. Gallons	300/1,136 L
Cabin Headroom	6'6"/2.0 m
Height—Keel to Top of Windshield	15'6"/4.8 m
Height—Keel to Top of Arch	18'5"/5.7 m
Draft	38"/101 cm
Bridge Clearance (w/Arch)	15'8"/4.8 m
Water System Capacity—U.S. Gallons	70/265 L
Waste Holding Capacity—U.S. Gallons	54/205 L

ENGINE OPTIONS:

MerCruiser: Inboard

- T 7.4 L MPI 310 HP (230 Kw), IB
- T 7.4 L MAG MPI Horizon 380 HP (283 Kw), IB, Fresh Water Cooled
- T 8.2 L MPI, 400 HP (298 Kw), IB

Detroit Diesel Volvo: Inboard

- T TAM063P Diesel, 370 HP (276 Kw), IB

Crusader: Inboard

- T 7.4 MP, 320 HP (239 Kw), IB
- T 7.4 HO MP, 385 HP (287 Kw), IB Platinum, Fresh Water Cooled
- T 8.2 MP 405 HP (302 Kw), IB, Fresh Water Cooled

Caterpillar: Inboard

- T 3116TA Diesel, 325 HP (242 Kw), IB
- T 3116TA Diesel, 350 HP (261 Kw), IB

AVAILABLE COLORS

- Mineral Sand, Monaco Blue, Majestic Burgundy, Magna Green

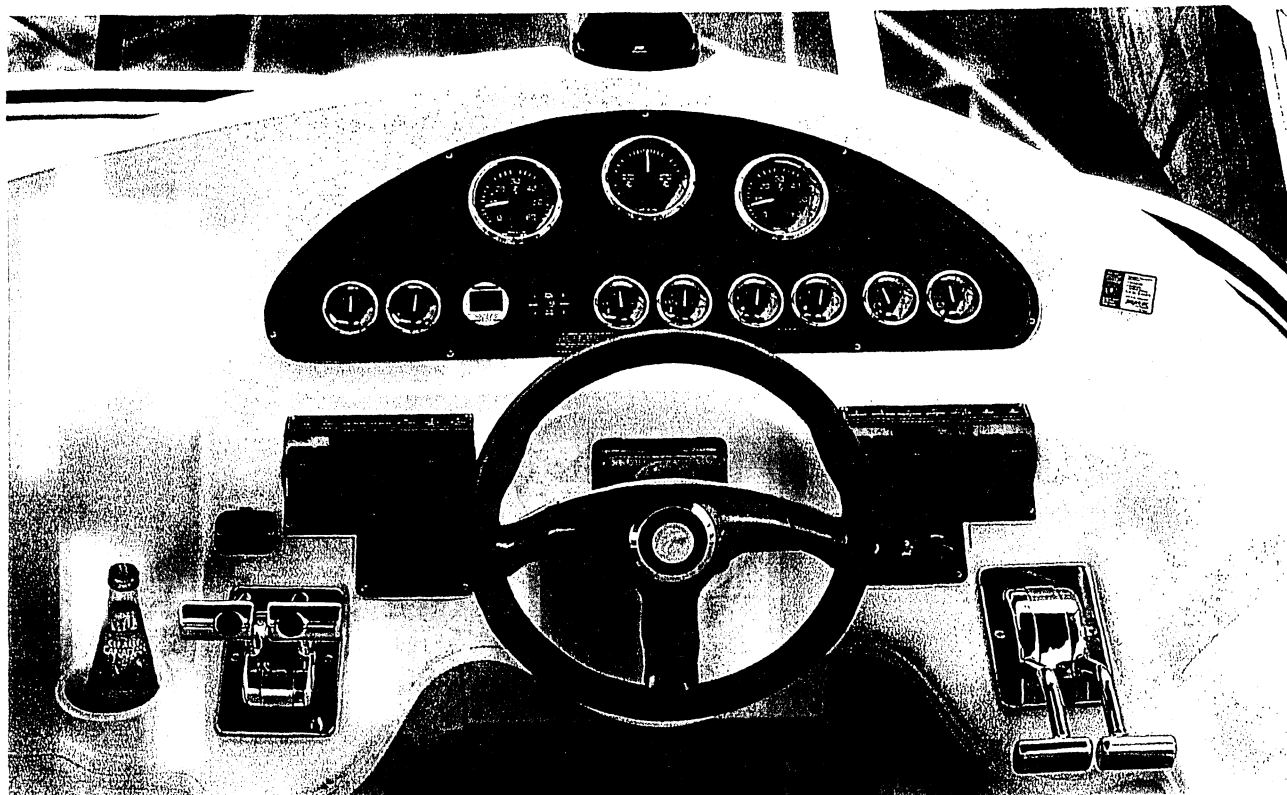
STANDARD FEATURES

- Hardtop (Includes Front/Side/Aft Curtains)
- Privacy Cover, Windshield
- Top, Bimini (Includes Front/Side/Aft Curtains)
- Berth, Double, Forward
- Berth, Island, Aft Cabin
- Dinette/Double Berth
- Helm Seat, Custom
- Lounge, Flybridge
- Sofa/Sleeper, Salon
- Mattress, Inner Spring Master Stateroom
- Bulkhead And Door, Forward Stateroom
- Comforters
- Fiberglass Galley Top w/Surell Inlays
- Hot Water System, 11 Gallon (41.7 L) w/Engine Heat Exchanger
- Microwave Oven (N/A w/oven)
- Refrigerator/Freezer
- Stereo, Cassette w/Remote, 120 Watt
- Electric 2 Burner w/oven (N/A w/oven)
- Telephone Wiring, Jack & Dockside Receptacle
- Television w/Remote & Antenna, Salon (N/A in 220 V)
- Head, Manual Pump-2
- Pump, Shower, Sump
- Shower, Head Compartments
- Anchor Roller/Mooring Bit/Cleat
- Arch, Radar, Aluminum w/Pedestal
- Battery, Isolator
- Battery Condition Monitor
- Battery Charging System
- Bonding System
- Bottom Paint, Anti-Fouling
- Blowers, Bilge
- Cabin Walk Around
- Carbon Monoxide Detectors
- Dockside Water Inlet
- Dockside Wiring, 115 V, 30 Amp
- Dockside Wiring, Second Outlet, 30 Amp
- Electrical Master Panel, AC/DC w/Voltmeters & Function Indicators
- Fire Extinguisher (4)
- Ground Fault Interrupter Outlet
- Gunwale Molding, Stainless Steel
- Horn, Dual Trumpet Air
- Instrumentation
- Lights, Bilge (4)
- Lights, Cockpit Courtesy
- Navigation Lights, International
- Propellers
- Pump, Bilge, Automatic (2)
- Shaft Logs, Dripless

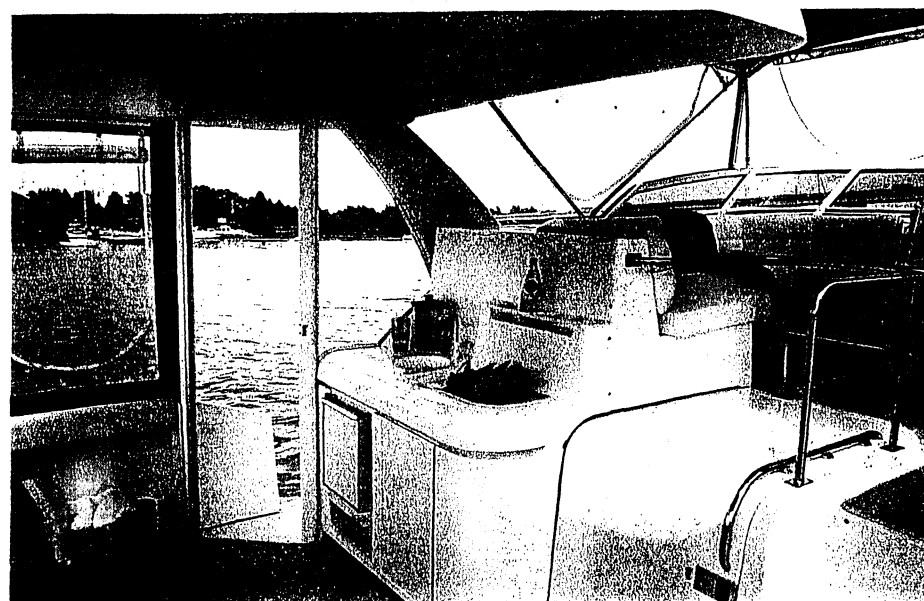
- Shower, Cockpit
- Steering Wheel, Tilt, Non-Magnetic
- Steering, Hydraulic
- Swim Platform, Extended, w/Boarding Ladder
- Trim Tabs
- Wet Bar, Cockpit
- Windscreen
- Compass
- Hourmeters (2)
- Synchronizer

OPTIONAL FEATURES

- Cover, Flybridge
- Lounge Cushions, Sundeck, Flybridge w/Table
- Sofa w/ Double Incliner
- Air Conditioner/Heater
- Carpet Cover, Cabin - Acrylic Snap Down
- Cherry Veneer Interior Package
- Coffee Maker (N/A in 220 V)
- Microwave/Convection Oven (N/A in 220 V)
- Sheets, Custom Fitted
- Stereo, Single CD Player w/Helm Remote, 120 Watts
- Changer, 6 Disc CD
- Speakers, Extra Pair w/ Amplifier
- Subwoofer w/240 Watt Amplifier & 2 Extra Speakers
- Stove w/ Oven
- Television w/Remote Control, Aft Stateroom (Connected to VCR) (N/A in 220 V)
- Television w/ Remote Control, Forward Stateroom (Connected to VCR) (N/A in 220 V)
- Towel & Decorator Pillow Package
- VCR, Salon (N/A in 220 V)
- Vacuum System, Central
- Head, Electric Pump
- Head, Vacu-Flush
- Macerator Pump Out for Holding Tank
- Y Valve & Overboard Discharge
- Anchor w/150' 5/8" Line & 6' 5/16" Chain
- Batteries
- Carpeting, Cockpit
- Carpeting, Bridge
- Cooling System, Engine, Fresh Water (Std. on Diesel and Select Gas Engines)
- Cradle, Storage
- Fire Extinguisher, Automatic, Gas Engines
- Fire Extinguisher, Automatic, w/ Engines Shutdown, Diesel Engines
- Fuel System, Cross Over
- Generator, 6.5 Kw Kohler, Gas w/FWC & Sound Shield (N/A in 220 V) (N/A w/Air Conditioner/Heater)
- Generator, 10.0 Kw Kohler, Gas w/FWC (N/A in 220 V)
- Generator 9.0 Kw Kohler, Diesel w/FWC (N/A in 220 V)
- Generator, 5.0 Kw Kohler, Gas w/FWC & Sound Shield (220 V Only) (N/A w/Air Conditioner/Heater)
- Generator, 8.0 Kw Kohler, Diesel w/FWC (220 V Only)
- Ice Maker, Cockpit
- Oil Change System
- Sea Water, Strainers (Std. w/Diesel Engines)
- Spotlight, Remote Control, 175,000 Candlepower
- Switch, Spotlight, Lower Station
- Table, Bridge
- Windlass, Remote Control w/Foredeck Foot Switch, Includes Anchor w/ 150' 5/8" Line and 6' 5/16" Chain
- Windlass, Wiring Only
- Depth Sounder
- Radio, VHF
- Wing Doors

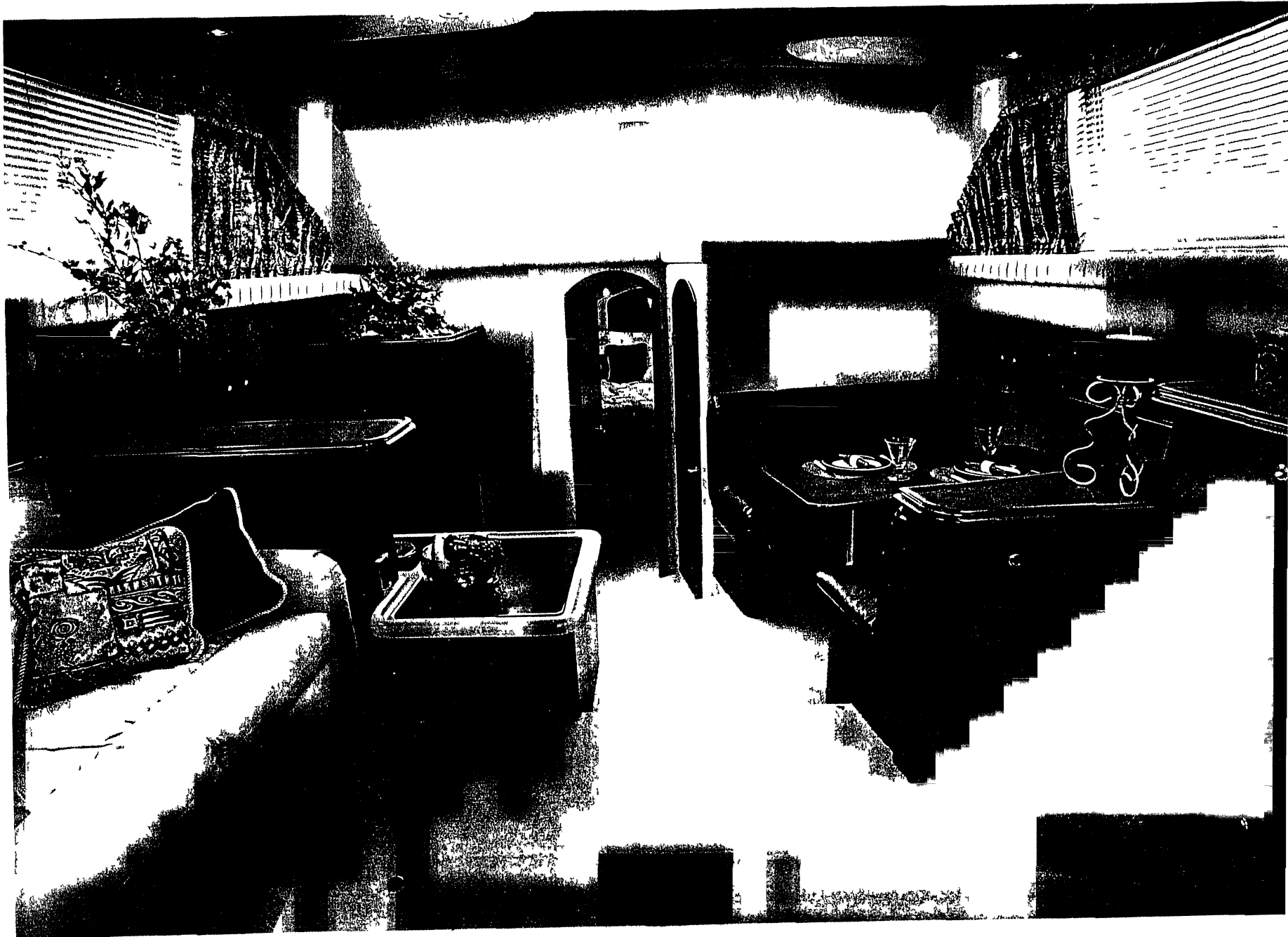


The ergonomically designed helm station offers paired gauges, accessible controls and room for additional electronics.



The 3750's aft deck features optional wing doors, a well-appointed wet bar, plenty of space for relaxing or entertaining on board, and convenient molded-in steps to all areas of the boat and swim platform.

3750 MOTOR YACHT



The 3750's bright spacious salon features a booth style dinette/double berth to starboard a galley to port and 6'6" headroom throughout Shown with available cherry veneer interior



Y's full-service galley includes a large refrigerator, microwave oven, electric stove and impressive storage space.



Forward stateroom offers a large double berth and ample space.



The master stateroom aft boasts a large island double berth with inner spring mattress and generous storage for cruising vacations.

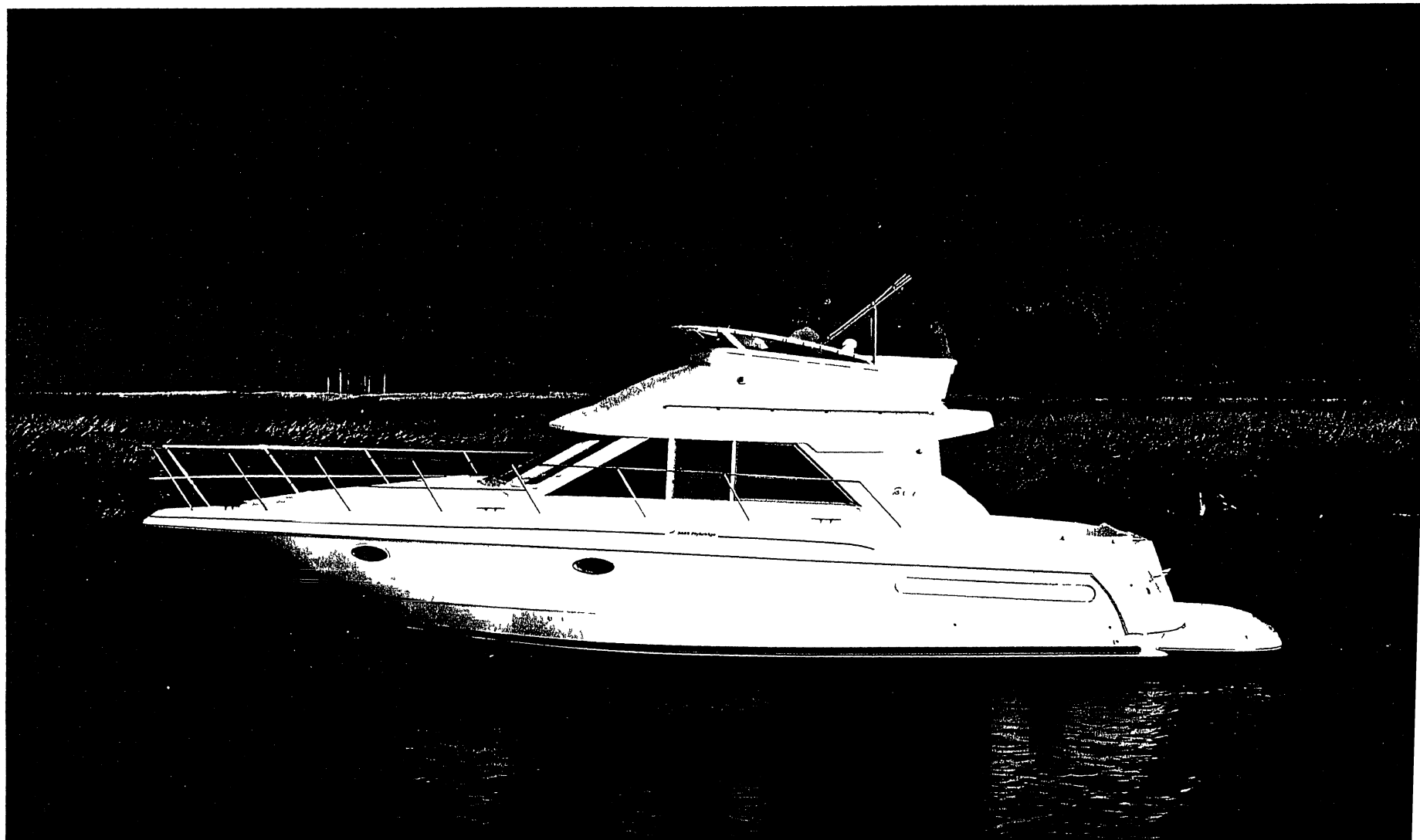


The forward head has a shower and standing headroom.

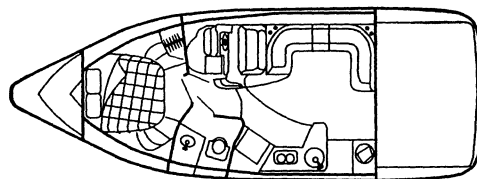


The master head, part of the aft-cabin suite, features standing headroom, a large vanity and sink and, as a special touch, a bath tub with shower.

3585 FLYBRIDGE



The 3585 Flybridge is a successful blend of performance and design innovation. With molded in steps, incredible maneuverability, roomy bridge and cockpit areas and comfortable accommodations, we have taken the classic flybridge concept and made it uniquely our own.



SPECIFICATIONS

L O A with Integrated Pulpit	37'4" / 11.3 m
L O A	35' / 10.6 m
L O A With Integrated Pulpit and Optional Extended Swim Platform	39'3" / 12 m
Beam	13'4" / 0 m
Approximate Weight (Gas) (Lbs)	17,100 / 7,695 K
Approximate Weight (Diesel) (Lbs)	18,200 / 8,190 K
Fuel Capacity—U S Gallons	300 / 1,136 L
Cabin Headroom	6'6" / 2.0 m
Height—Keel to Top of Windshield	13'9" / 4.2 m
Height—Keel to Top of Arch	15'9" / 4.8 m
Draft	41" / 1.04 m
Bridge Clearance (w/Arch)	13'7" / 4.1 m
Bridge Clearance (w/o Arch)	11'7" / 3.5 m
Water System Capacity—U S Gallons	70 / 265 L
Waste Holding Capacity—U S Gallons	40 / 152 L

ENGINE OPTIONS:

Cruiser V Drive Inboard

- 4 L MPI 310 HP (230 Kw) 1B
- 4 L MAG MPI Horizon 380 HP (283 kw)
- Fresh Water Cooled
- 12 L MPI 400 HP (298 Kw) 1B

Yacht Diesel Volvo V Drive Inboard

(AMD63P Diesel 370 HP (276 Kw) 1B

Yacht V Drive Inboard

- 4 MP 320 HP (239 KW) 1B
- 4 HO MP 385 HP (287 KW) 1B Platinum
- Fresh Water Cooled
- 32 MP 405 HP (302 KW) 1B Fresh Water
- Cooled

Yacht V Drive Inboard

3116TA Diesel 325 HP (242 Kw) 1B

AVAILABLE COLORS

- Mid Monaco Blue Majestic Burgundy
- Signa Green

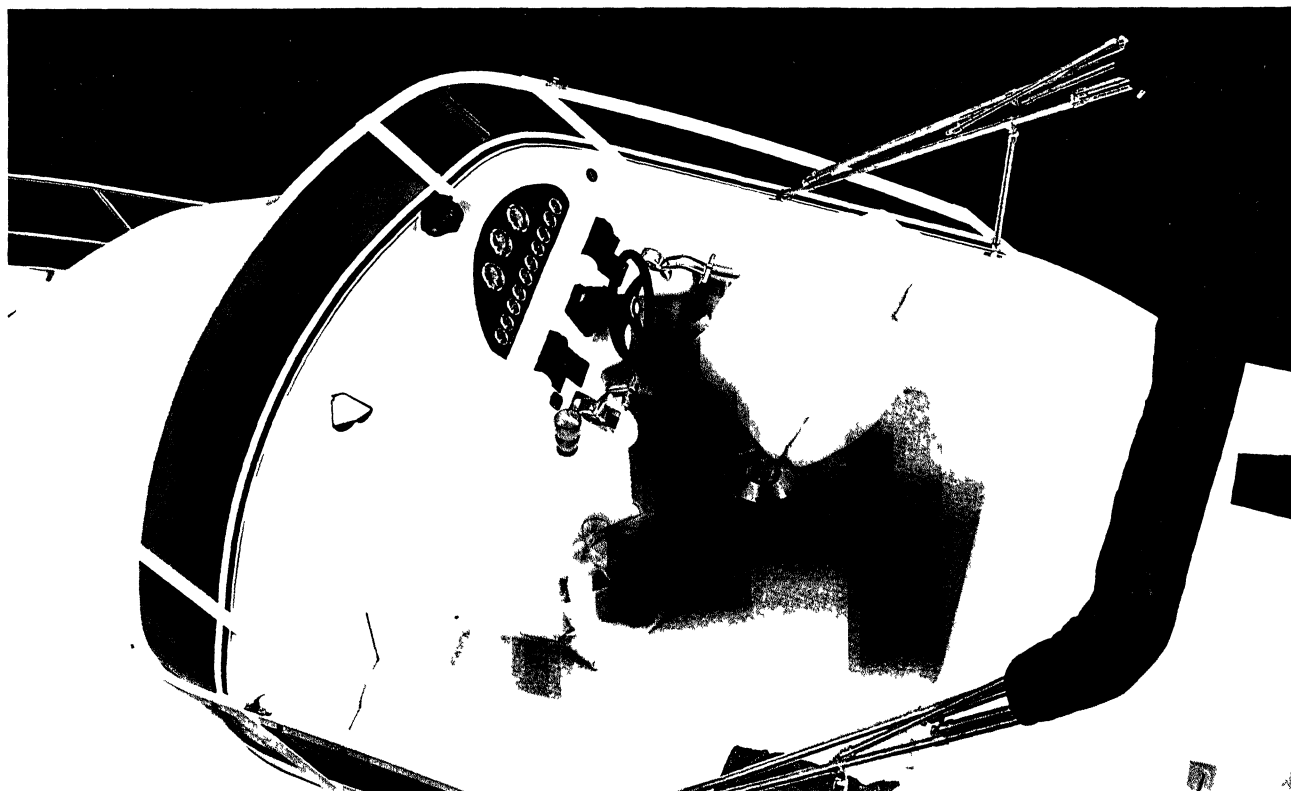
STANDARD FEATURES

Privacy Cover Windshield
 Bimini (Includes Front/Side/Aft
 Curtains)
 Midship Cabin w/ Screened Hatch
 North Island Forward
 Net/Sofa Convertible Crescent Shaped
 Helm Seat Custom
 Flybridge Lounge
 Bulkhead & Door Forward Stateroom
 Comforters
 Perglass Galley Top w/ Surell Inlays
 Hot Water System 10.5 Gallon (39.8L)
 Engine Heat Exchanger
 Microwave Oven
 Refrigerator/Freezer
 Skylight Ventilating w/Screens
 Stereo Cassette w/Remote 120 Watt
 Dye Electric
 Head Manual Pump
 Pump Shower Sump
 Inboard Head Compartment
 Roll-over/Mooring Bit/Cleat
 Shock Isolator
 Battery Condition Monitor
 Battery Charging System
 Garding Gate Transom
 Garding Step w/Grab Rail
 Lifting System
 Bottom Paint Anti Fouling
 Lower Bilge
 Cabin Walk Around
 Carbon Monoxide Detector
 Outside Water Inlet
 Outside Wiring 115 V 30 Amp
 Outside Wiring Second Outlet 30 Amp
 Electrical Master Panel AC/DC w/Voltmeters
 Function Indicators
 Anchor Holders Transom
 Perglass Cockpit Self Draining
 Fire Extinguisher (3)
 Ground Fault Interrupter Outlet
 Unwale Molding Stainless Steel
 Horn Dual Trumpet Air
 Instrumentation
 Lights Bilge (3)
 Lights Cabin Side Boarding
 Lights Cockpit Courtesy
 Lower Station Control (Includes Lower
 Compass Windshield Wipers & Trim Tab
 Switch)
 Navigation Lights International
 Propellers
 Pump Bilge Automatic (2)
 Shaft Logs Driftless
 Steering Hydraulic
 Steering Wheel Tilt Non Magnetic

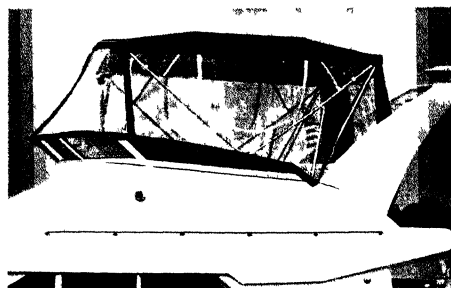
- Switch Trim Tabs Lower Station
- Trim Tabs
- Wet Bar Cockpit
- Windscreen
- Windshield Wiper(s)
- Compass
- Hourmeters 2 (Std w/Diesel Engines)
- Synchronizer

OPTIONAL FEATURES

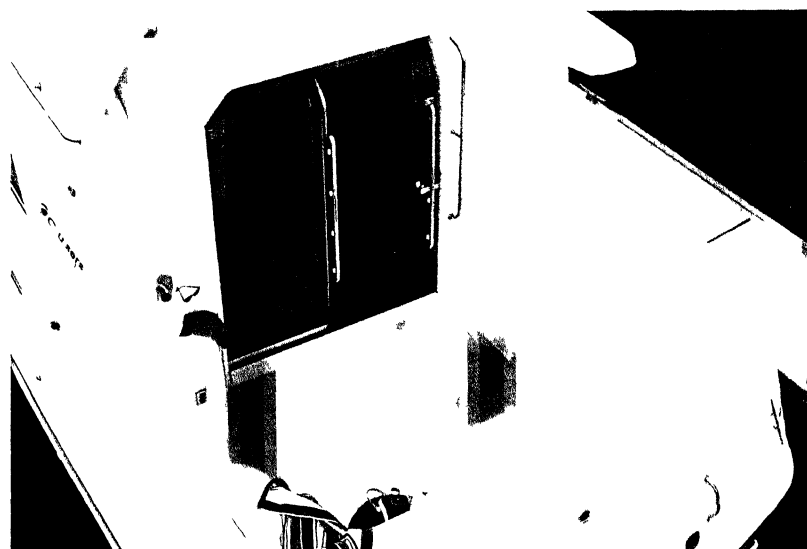
- Cover Flybridge
- Sun Cover Aft Cockpit
- Helm Seat Extra (N/A w/Flybridge Sundek
Lounge Cushion or Bridge Table)
- Lounge Cushions Foredeck
- Lounge Filler Cushions Sundek Flybridge
w/Table
- Rear Cockpit Seat Wrap Around
- Air Conditioner/Heater
- Carpet Cover Cabin Acrylic Snap Down
- Cherry Veneer Interior Package
- Mattress(es) Inner Spring
- Sheets Custom Fitted
- Stereo Single CD Player w/Helm Remote
120 Watts
- Changer 6 Disc CD
- Speakers Extra Pair w/Amplifier
- Subwoofer w/Amplifier & 2 Extra Speakers
- Television And VCR w/Remote And Antenna
(N/A In 220 V)
- Television w/Remote Control Forward
Stateroom (N/A In 220 V)
- Towel & Decorator Pillow Package
- Vacuum System Central
- Head Electric Pump
- Head Vacu Flush
- Macerator Pump Out For Holding Tank
- Y Valve & Overboard Discharge
- Anchor w/ 150 5/8 Line & 6 5/16 Chain
- Arch Radar Aluminum (w/Arch Lights)
- Batteries
- Carpeting Cockpit
- Carpeting Bridge
- Cooling System Engine Fresh Water
(Std on Diesel and Select Gas Engines)
- Cradle Storage
- Fire Extinguisher Automatic Gas Engines
- Fire Extinguisher Automatic w/Engines
Shutdown Diesel Engines
- Fuel System Cross Over
- Generator 4.0 Kw Kohler Gas w/FWC
(N/A In 220 V)
- Generator 6.5 Kw Kohler Gas w/FWC &
Sound Shield (N/A In 220 V)
- Generator 9.0 Kw Diesel w/FWC
(N/A In 220 V)
- Generator 3.5 Kw Kohler Gas (220 V Only)
- Generator 5.0 Kw Kohler Gas w/FWC &
Sound Shield (220 V Only)
- Generator 8.0 Kw Kohler Diesel w/FWC
(220 V Only)
- Ice Maker Cockpit
- Oil Change System
- Refrigerator Bridge
- Sea Water Strainers (Std w/Diesel Engines)
- Shower Cockpit
- Spotlight Remote Control 100 000
Candlepower
- Spotlight Remote Control 175 000
Candlepower
- Swim Platform Extended w/ Boarding
Ladder
- Switch Spotlight Lower Station
- Table Bridge
- Washdown System Cockpit
- Windlass Remote Control w/Foredeck Foot
Switch Anchor w/ 150 5/8 Line & 6 5/16
Chain
- Windlass Winch Only
- Depth Sounder
- Radio VHF



The 3585's spacious bridge deck provides a well appointed helm station wrap around seating for guests and superb visibility



In the event of intense sun or unwelcome rain the 3585 comes equipped with a bridge enclosure for maximum onboard comfort

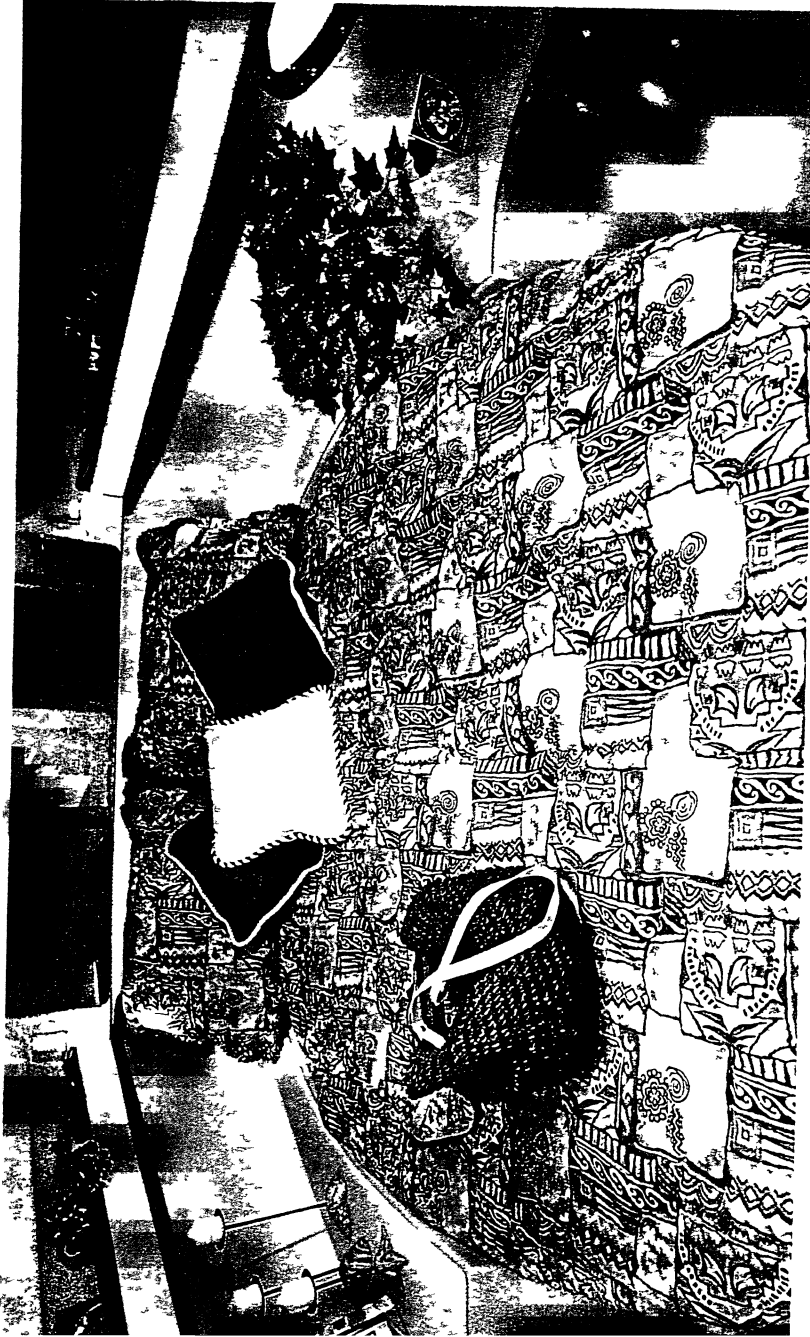


The cockpit area boasts L shaped seating extra room for deck chairs and molded in steps to the bridge for increased safety and convenience

3585 FLYBRIDGE

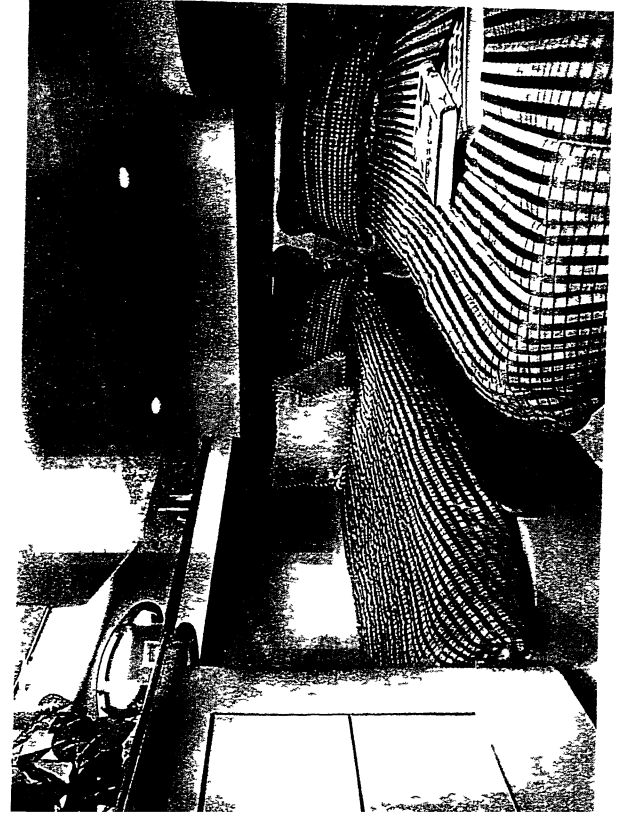


The 3585's cheerful living space is comprised of a convertible crescent shaped dinette/double berth, a deluxe lower helm station and a complete galley to port with large refrigerator/freezer microwave and electric stove

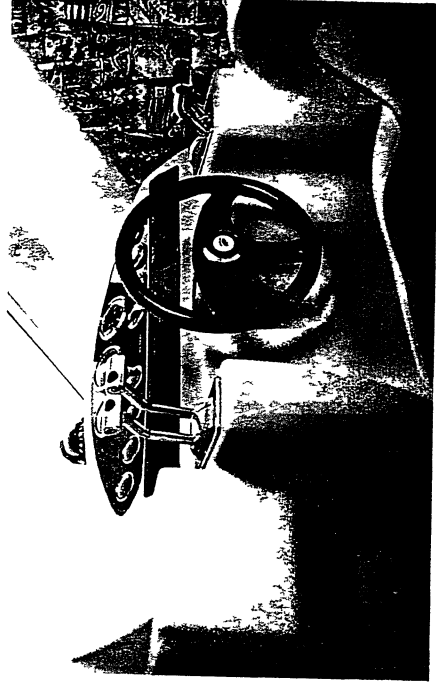


The roomy head has a separate stand up shower, adding to the 3585's significant list of cruising amenities

The fully enclosed master stateroom has a queen size island berth and lots of locker storage for personal items

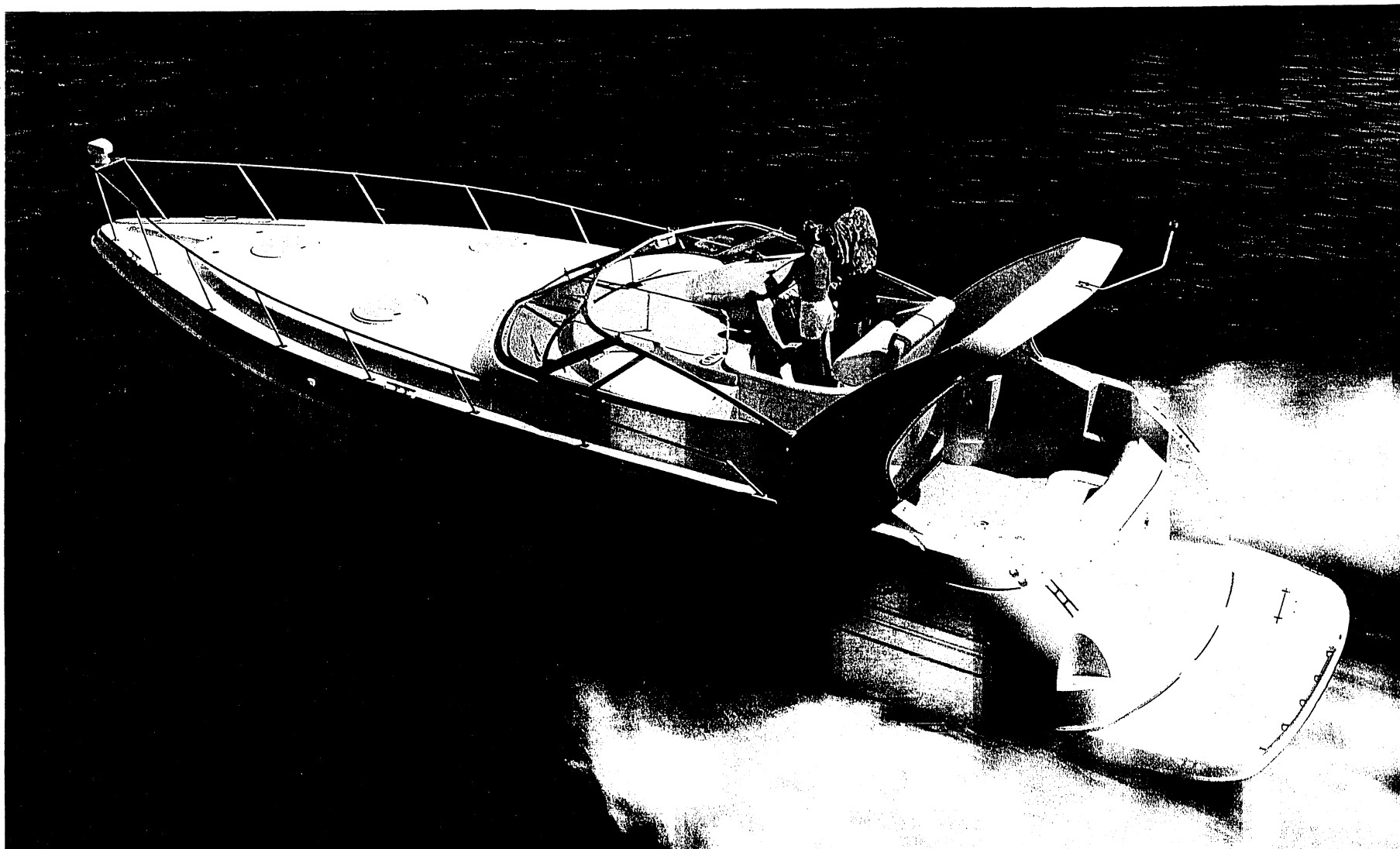


In keeping with our reputation for innovation, the 3585's midcabin boasts twin berths that convert to a king size using a self storing filler cushion. The stateroom also includes plenty of storage and natural lighting

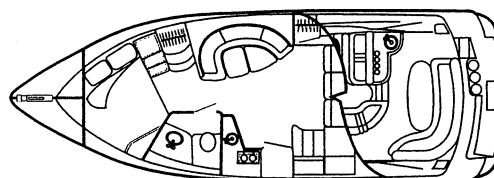


The lower helm station offers ergonomically placed controls, excellent visibility and comfortable double wide seat

3575 ESPRIT



Effectively combining express-style performance with luxurious cruising appointments, the 3575 Esprit offers exceptional roominess, elegance and handling.



SPECIFICATIONS

L.O.A. with Integrated Pulpit and Swim Platform	37'4"/11.3 m
L.O.A. with Integrated Swim Platform	35'/10.6 m
L.O.A. with Integrated Pulpit, Integrated Swim Platform and Optional Extended Swim Platform	39'3"/12 m
Beam	13'/4.0 m
Approximate Weight (Lbs) (Gas)	16,000/7,627 K
Approximate Weight (Lbs) (Diesel)	17,100/7,695 K
Fuel Capacity—U.S. Gallons	300/1,136 L
Cabin Headroom	6'6"/2.0 m
Height—Keel to Top of Windshield	10'3"/3.1 m
Height—Keel to Top of Arch	12'8"/3.8 m
Draft	41"/104 cm
Bridge Clearance (w/Arch)	10'10"/3.3 m
Bridge Clearance (w/o Arch)	8'2"/2.5 m

ENGINE OPTIONS:

IerCruiser: V Drive Inboard

T 7 4 L MPI 310 HP (230 Kw) 1B
T 7 4 L MAG MPI Horizon 380 HP (283 Kw) 1B
Fresh Water Cooled
T 8 2 L MPI 400 HP (298 Kw) 1B

etroit Diesel Volvo V Drive Inboard

T TAMDE63P Diesel 370 HP (276 Kw) 1B

rusader V Drive Inboard

T 7 4 MP 320 HP (239 Kw)
T 7 4 HO MP 385 HP (287 Kw) Platinum
Fresh Water Cooled
T 8 2 MP 405 HP (302 Kw) 1B Fresh Water Cooled

aterpillar V Drive Inboard

T 3116TA Diesel 325 HP (242 Kw) 1B

AVAILABLE COLORS

line of Sand Monaco Blue Majestic Burgundy
Magna Green

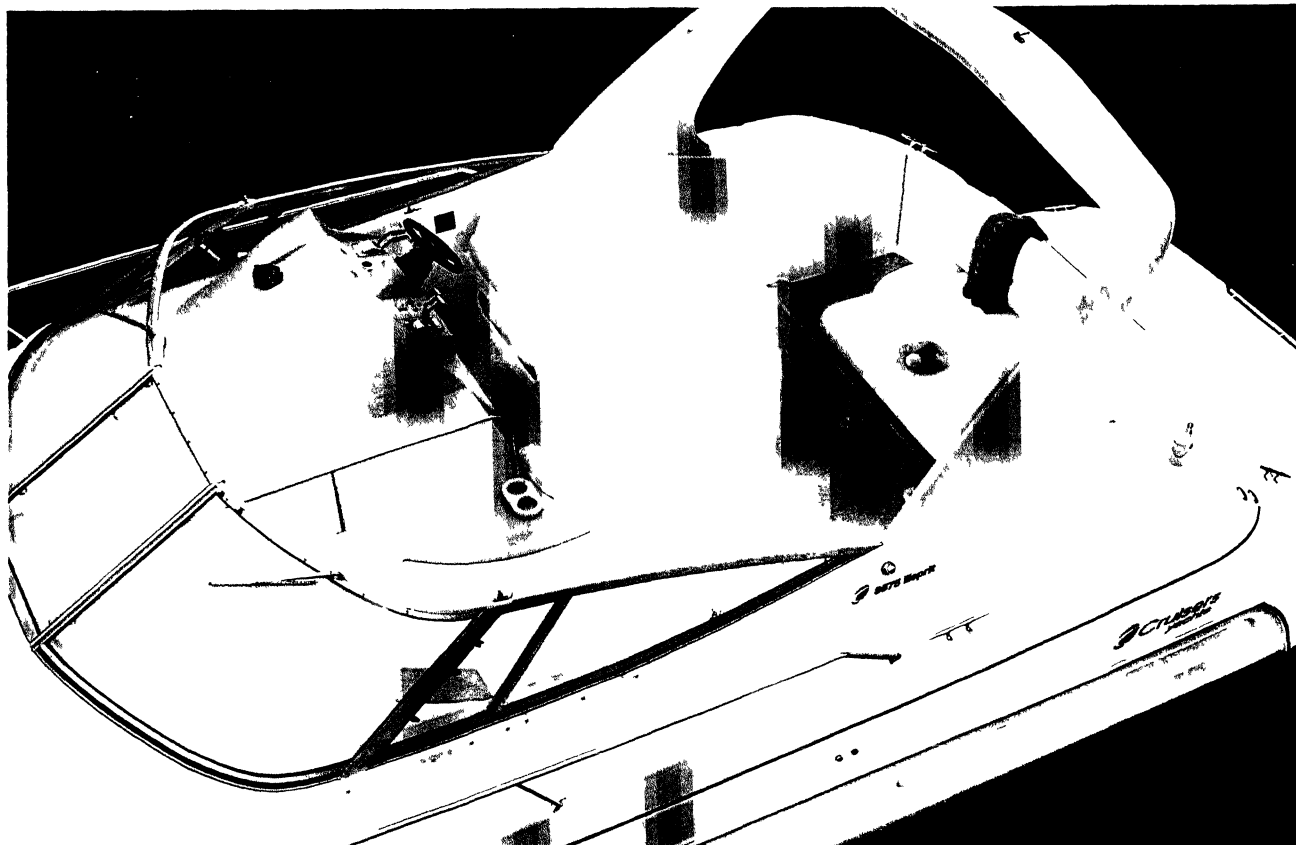
STANDARD FEATURES

Aft Curtain
Arch Radar Aluminum (w/Arch Lights)
Curtains Front Side
Top Bimini
Berth Double Forward
Dinette/Sofa Convertible Crescent Shaped
Helm Lounge Companion Double
Helm Seat Double
Rear Cockpit Seat
Comforters
Curtain Privacy Forward Sleeper
Fiberglass Galley Top w/Surell Inlays
Hot Water System 10 5 Gal (39 8L)
w/Engine Heat Exchanger
Microwave Oven
Refrigerator/Freezer
Skylight Ventilating w/Screens
Stereo Cassette w/Remote 120 Watt
Stove Electric
Window Blinds
H/E Manual Pump
F/H Shower Sump
Shower Head Compartments
Anchor Roller/Mooring Bit/Cleat
Battery Isolator
Battery Condition Monitor
Battery Charging System
Boarding Gate Transom
Bonding System
Bottom Paint Anti Fouling
Blowers Bilge
Cabin Foredeck Access Center Walk Thru
Cabin Walk Around
Carbon Monoxide Detector
Dockside Water Inlet
Dockside Wiring 115 V 30 Amp
Dockside Wiring Second Outlet 30 Amp
Electrical Master Panel AC DC w/Voltmeters
& Function Indicators
Fender Holders Transom
Fiberglass Cockpit Self Draining
Fire Extinguisher (3)
Ground Fault Interrupter Outlet
Horn Dual Trumpet Air
Instrumentation
Lights Bilge (3)
Lights Cabin Side Buoys
Lights Cockpit Courtesy
Mufflers
Navigation Lights International
Propellers
Pump Bilge Automatic (2)
Shaft Logs Driftless
Shower Cockpit
Speedometer

- Steering Wheel Tilt Non Magnetic
- Steering Hydraulic
- Swim Platform w/Boarding Ladder
- Trim Tabs
- Wet Bar Cockpit
- Windshield Safety Glass
- Windshield Wipers (2)
- Compass
- Hourmeters (2)
- Synchronizer

OPTIONAL FEATURES

- Cover Cockpit
- Lounge Cushions Foredeck
- Sunlounge Cockpit w/Table
- Air Conditioner/Heater
- Bulkhead & Door Forward Stateroom
- Carpet Cover Cabin Acrylic Snap Down
- Cherry Veneer Interior Package
- Coffee Maker (N/A in 220 V)
- Mattress(es) Inner Spring
- Sheets Custom Fitted
- Stereo Single CD Player w/Helm Remote 120 Watts
- Changer 6 Disc CD
- Speakers Extra Pair w/ Amplifier
- Subwoofer w/Amplifier & 2 Extra Speakers
- Television & VCR w/Remote & Antenna Salon (N/A in 220 V)
- Television w/Remote Control Forward Stateroom (N/A in 220 V)
- Towel & Decorator Pillow Package
- Head Electric Pump
- Head Vacu Flush
- Macerator Pump Out for Holding Tank
- Y Valve & Overboard Discharge
- Anchor w/ 150 5/8 Line & 6 5/16 Chain
- Batteries
- Carpeting Cockpit
- Cooling System Engine Fresh Water (Std on Diesel and Select Gas Engines)
- Cradle Storage
- Fire Extinguisher Automatic Gas Engines
- Fire Extinguisher Automatic w/Engines Shutdown Diesel Engines
- Fuel System Cross Over
- Generator 4 0 Kw Kohler Gas w/FWC (N/A in 220 V)
- Generator 6 5 Kw Kohler Gas w/FWC & Sound Shield (N/A in 220 V)
- Generator 5 0 Kw Kohler Diesel (N/A in 220 V)
- Generator 3 5 Kw Kohler Gas (220 V Only)
- Generator 5 0 Kw Kohler Gas w/FWC & Sound Shield (220 V Only)
- Generator 4 0 Kw Kohler Diesel (220 V Only)
- Ice Maker Cockpit
- Oil Change System
- Sea Water Strainers (Std w/Diesel Engines)
- Spotlight Remote Control 100 000 Candlepower
- Spotlight Remote Control 175 000 Candlepower
- Swim Platform Extended w/Boarding Ladder
- Table Cockpit
- Washdown System Cockpit
- Windlass Remote Control w/Foredeck Foot Switch Anchor w/ 150 5/8 Line & 5/16 Chain
- Windlass Wiring Only
- Depth Sounder
- Radio VHF



The well laid out cockpit of the 3575 includes a wet bar plenty of seating for guests an offset companionway for additional ease of movement and a walk through windshield

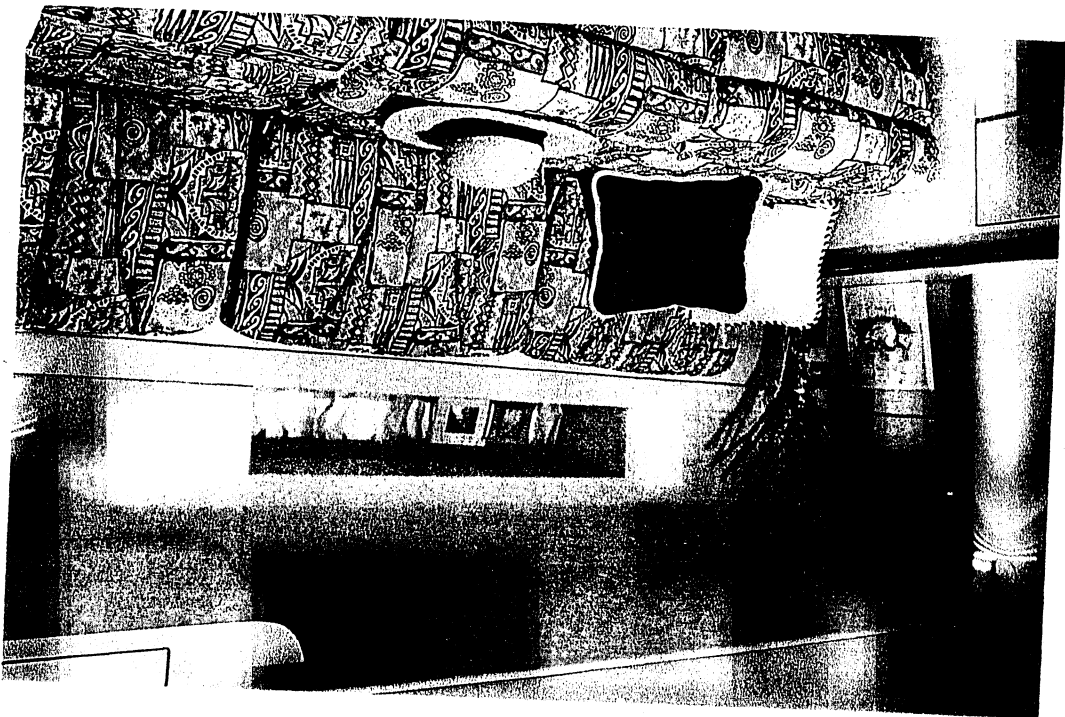


The custom fitted camper top adds to the function of the 3575 on the water

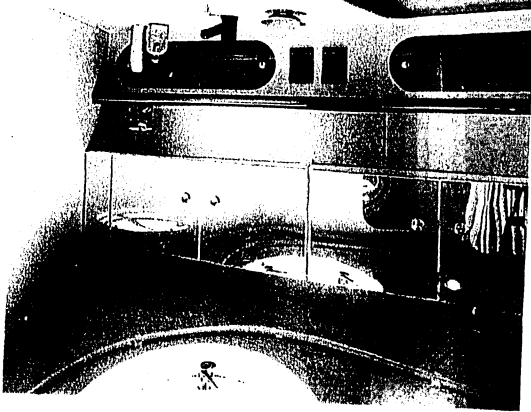
3575 ESPRIT



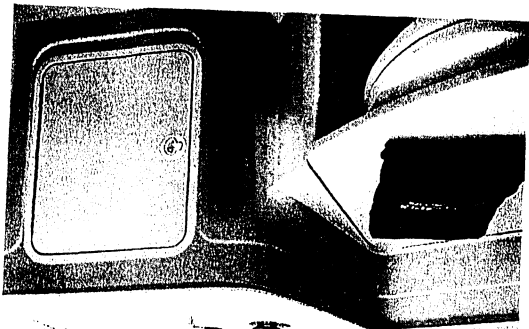
The 3575's interior includes a crescent-shaped, convertible dinette/double berth and a forward double berth with a privacy curtain to separate the stateroom area from the salon.



A convertible aft sofa/sleeper ensures comfortable sleeping accommodations for six aboard the 3575. A privacy curtain may also be drawn to enclose this living space.

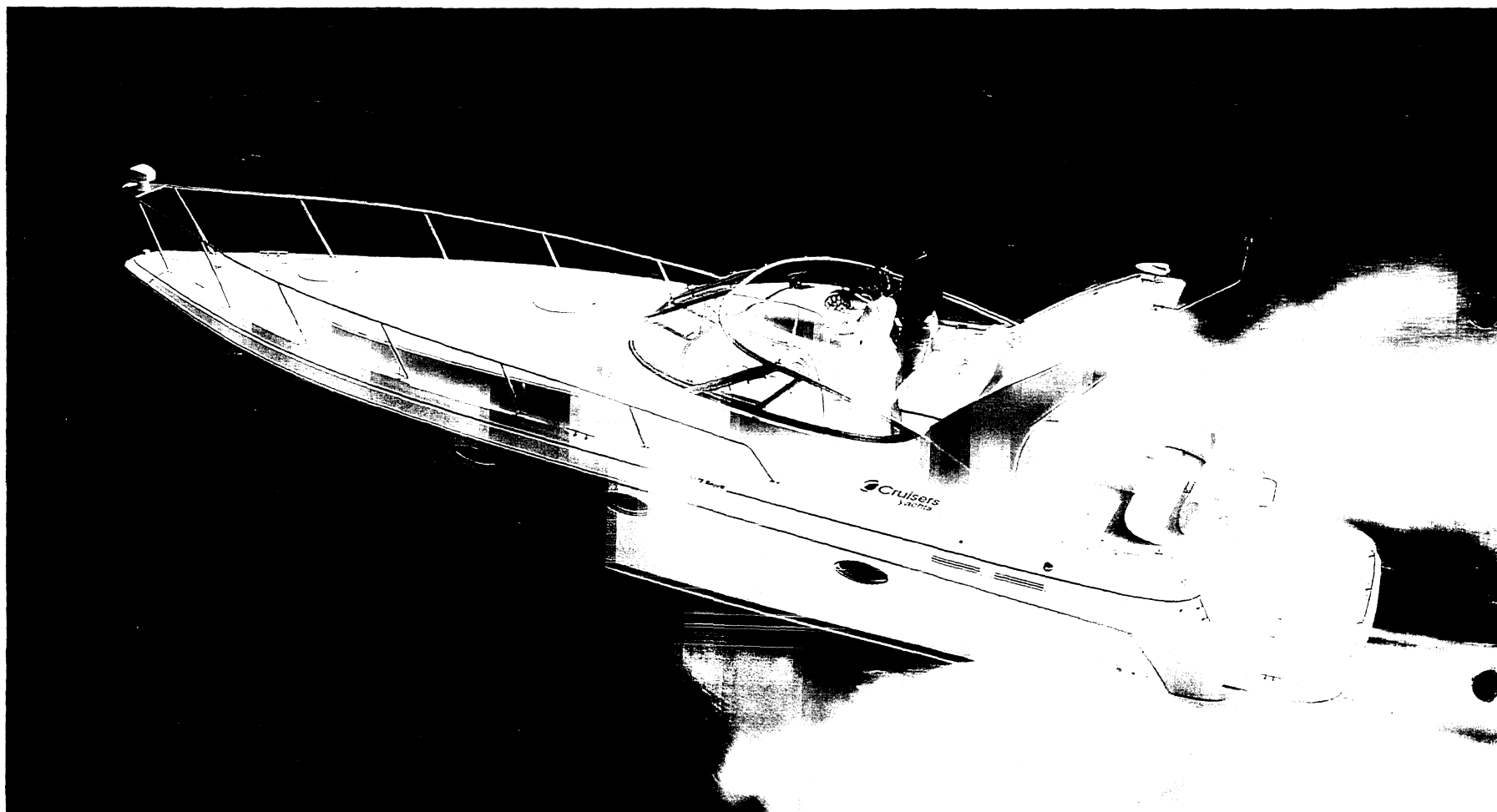


A large head provides full standing of headroom, plenty of natural light and a shower.

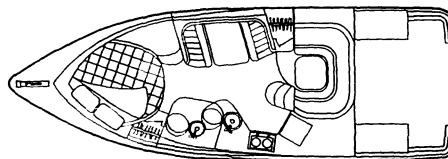


Features a large refrigerator/freezer conveniently located at eye level, a burner electric stove, a microwave and ample counter space for preparing meals on board.

3375 ESPRIT



Offering the best performance and cruising accommodations in its class, the 3375 Esprit offers a choice of either stern-drive or inboard power, superb handling and sleeping accommodations for six.



SPECIFICATIONS

L.O.A. with Integrated Pulpit and Swim Platform	34'10"/10.6 m
L.O.A. with Integrated Swim Platform	32'10"/10.0 m
L.O.A. with Integrated Pulpit, Integrated Swim Platform and Optional Extended Swim Platform	37'6"/11.4 m
Beam	11'8"/3.5 m
Approximate Weight (Lbs) (Gas)	12,500/5,670 K
Approximate Weight (Lbs) (Diesel)	13,500/6,124 K
Fuel Capacity—U.S. Gallons	240/908 L
Cabin Headroom	6'4"/1.9 m
Height—Keel to Top of Windshield	9'6"/2.9 m
Height—Keel to Top of Arch	11'0"/3.3 m
Draft (Stern Drive Down)	36"/92 cm
Draft (Stern Drive Up)	24"/61 cm
Bridge Clearance (w/Arch)	9'3"/2.8 m
Water System Capacity—U.S. Gallons	40/151 L
Waste Holding Capacity—U.S. Gallons	30/114 L

ENGINE OPTIONS:

MerCruiser Stern Drive

157 L EFI 260 HP (193 Kw) 10 Bravo III Drive
 T 350 MAG MPI 300 HP (224 Kw)
 Bravo III Drive
 T 4 L MPI 300 HP (224 Kw) 10 Bravo III Drive
 T 4 L 300 HP (224 Kw) 10 Bravo III Drive
 T D 4 2 L 200 HP (148 Kw) Diesel
 10 Bravo II Drive
 T D 4 2 L D Tron C 225 HP 167 Kw Diesel 10
 Bravo II Drive

Volvo Stern Drive

157 GS DP 250 HP (186 Kw) 10
 157 GS DP 280 HP (209 Kw) 10
 T 4 GL DP 310 HP (230 Kw) 10
 T KAMD43 DP 216 HP (159 Kw) Diesels 10

MerCruiser V Drive

157 L MPI 260 HP (192 Kw) 1B
 157 L MPI 300 HP (224 Kw) 1B
 T 4 GL MPI 310 HP (230 Kw) 1B
 T 4 L MAG MPI Horizon 380 HP (283 Kw) 1B
 Fresh Water Cooling

Crusader V Drive

157 MP 305 HP (228 Kw)
 157 MP 320 HP (239 Kw) 1B
 T 4 HO MP 385 HP (287 Kw) 1B Platinum
 Fresh Water Cooling

Yanmar V Drive

41 HbTE Diesel 230 HP 17 Kw 1B

AVAILABLE COLORS

Mineral Sun Monoco Blue Majestic Burgundy
 Tagna Green

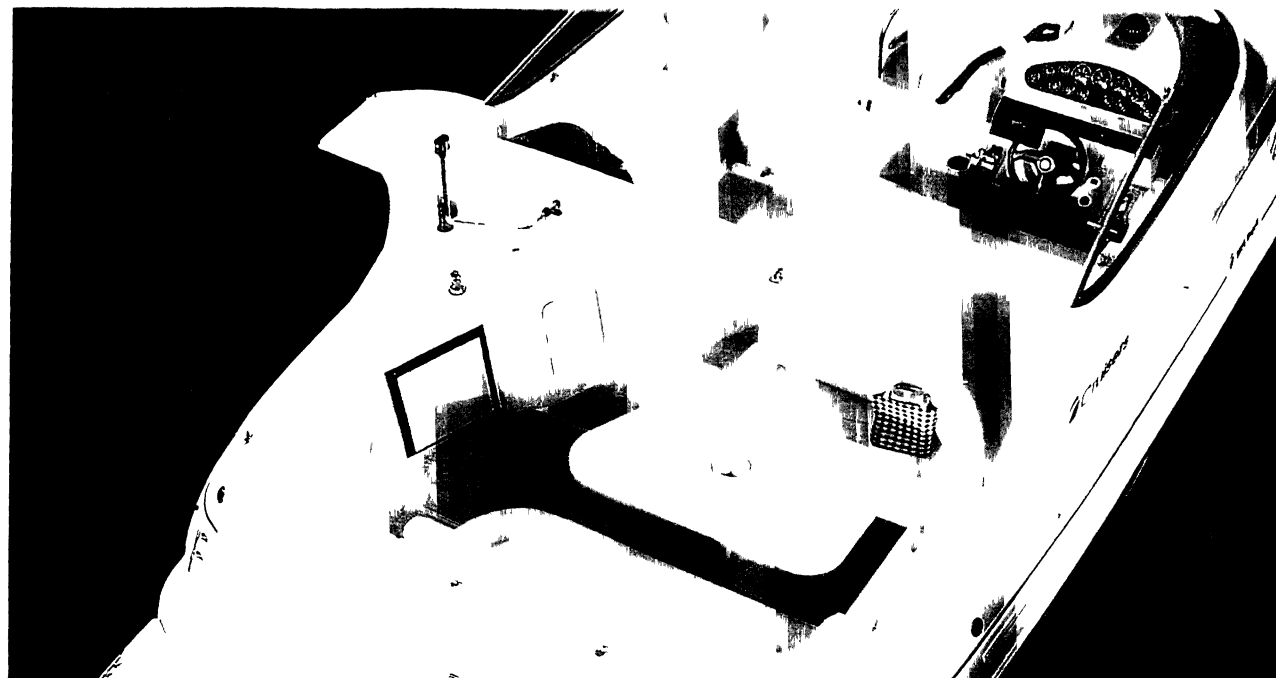
STANDARD FEATURES

- Up Bimini Side Aft
- Windshield Cabin w/Screened Hatch
- Berth Double Forward
- Companion Seat Double
- Dinette Double Berth
- Helm Seat Double
- Rear Cockpit Seat
- Luggage Compartment Forward Sleeper
- Fiberglass Galley Top w/Sunrail Inlay
- Hot Water System 10 Gallon (39.8 L) w/Engine Heat Exchanger
- Microwave Oven
- Refrigerator/Freezer
- Stereo Cassette w/Remote 120 Watts
- Stove Electric
- Head Manual Pump
- Shower Head Compartment w/Sump Pump
- Anchor Roller & Cleat/Mooring Bit
- Arch Radar Aluminum (w/Arch Lights)
- Battery Isolator & Charging System
- Battery Condition Monitor
- Boarding Gate Transom
- Bonding System
- Bottom Paint Anti Foulant
- Glovers Bilge Gas Power Only
- Cabin Foredeck Access Center Walk Thru
- Carbon Monoxide Detectors
- Dockside Water Inlet
- Dockside Wiring 115 V 30 Amp w/Zinc Sacrificial Anode and Outlet Included w/Air Conditioner 115 V Option
- Electrical Master Panel AC DC w/Voltmeter & Junction Indicators
- Flare Guns (Lock & Self Draining)
- Fire Extinguishers 3
- Ground Fault Interrupter Outlet
- Gunwale Molding Stainless Steel
- Hardware Deck Including Anti Theft Cleats
- Horn Dual Trumpet Air
- Lights Bilge (3)

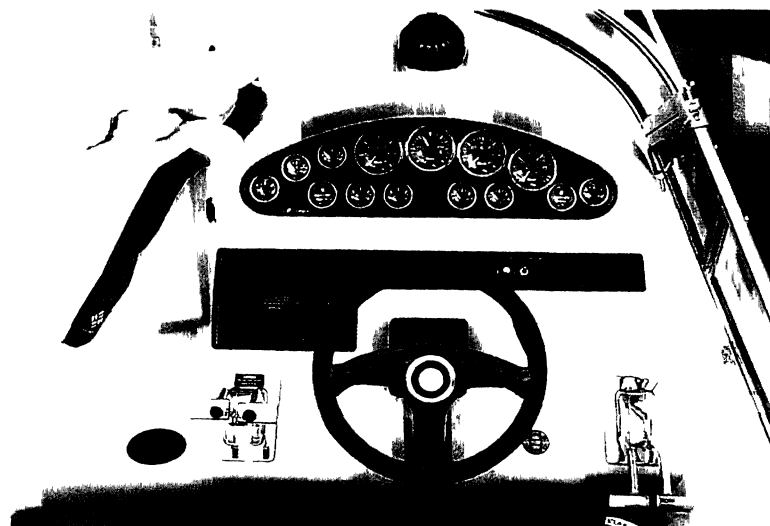
- Navigation Lights International
- Power Steering Stern Drive
- Propellers
- Pump Bilge Automatic
- Rail Bow Welded Stainless
- Rope Locker Box
- Shower Cockpit
- Speedometer
- Steering Wheel Tilt Non Magnetic
- Steering Hydraulic
- Swim Platform w/Boarding Ladder
- Trim Tabs
- Wet Bar Cockpit
- Windshield Safety Glass & Wiper (1)
- Compass
- Synchronizer

OPTIONAL FEATURES

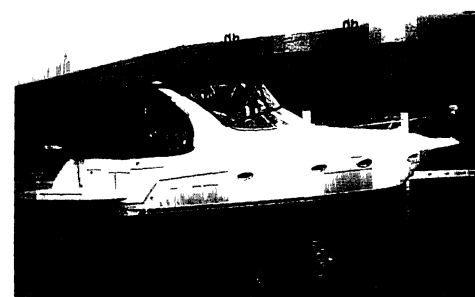
- Camper Top
- Cover Cockpit
- Dinette Sofa Convertible Crescent Shaped
- Lounge Cushions Foredeck
- Sunlounge Cockpit w/Table
- Air Conditioner/Heater (Includes Sea and Dockside Wiring Outlet)
- Bulkhead & Door Forward Stateroom
- Carpet Cover Cabin Acrylic Snap Down
- Cherry Veneer Interior Package
- Coffee Maker (N/A in 220 V)
- Mattresses Inner Spring
- Sheets Custom Fitted
- Stereo Single CD Player w/Helm Remote 120 Watts
- Changer 6 Disc CD
- Speakers Extra Pair w/160 Watt Amplifier
- Subwoofer w/240 Watt Amplifier & 2 Extra Speakers
- Television/VCR w/Remote & Antenna (N/A in 220 V)
- Towel & Decorator Pillow Package
- Head Electric Pump or Head Vacuum
- Macerator Pump Out for Holding Tank
- Y Valve & Overboard Discharge
- Anchor w/150 1.2 Line & 6 1.4 Chain
- Batteries
- Carpeting Cockpit
- Cooling Fresh Water (Std on Diesels and Select Gas Engines)
- Cradle Storage
- Fire Extinguisher Automatic Gas Engines
- Fire Extinguisher Automatic w/Engine Shutdown Diesel Engines
- Fuel System Cross Over
- Generator 40 Kw Kohler FWC Gas Power (N/A in 220 V)
- Generator 60 Kw Kohler Gas Power w/FWC (N/A in 220 V)
- Generator 50 Kw Kohler FWC Diesel Power (220 V Only)
- Generator 30 Kw Kohler FWC Gas Power (220 V Only)
- Generator 50 Kw Kohler Gas Power w/FWC (220 V Only)
- Generator 40 Kw Kohler FWC Diesel Power (220 V Only)
- Oil Change System
- Refrigerator Cockpit (N/A in 115 V)
- Spotlight Remote Control 100000 Landlepower
- Spotlight Remote Control 15000 Landlepower
- Swim Platform Extended w/Boarding Ladder
- Table Cockpit
- Fresh Water System Cockpit
- Remote Control w/Foredeck Foot Includes Anchor w/150 1.2 Line & 6 1.4 Chain
- Winch Only
- Depth Indicator



The 3375's roomy cockpit includes a wet bar, shower, plenty of seating and an optional refrigerator

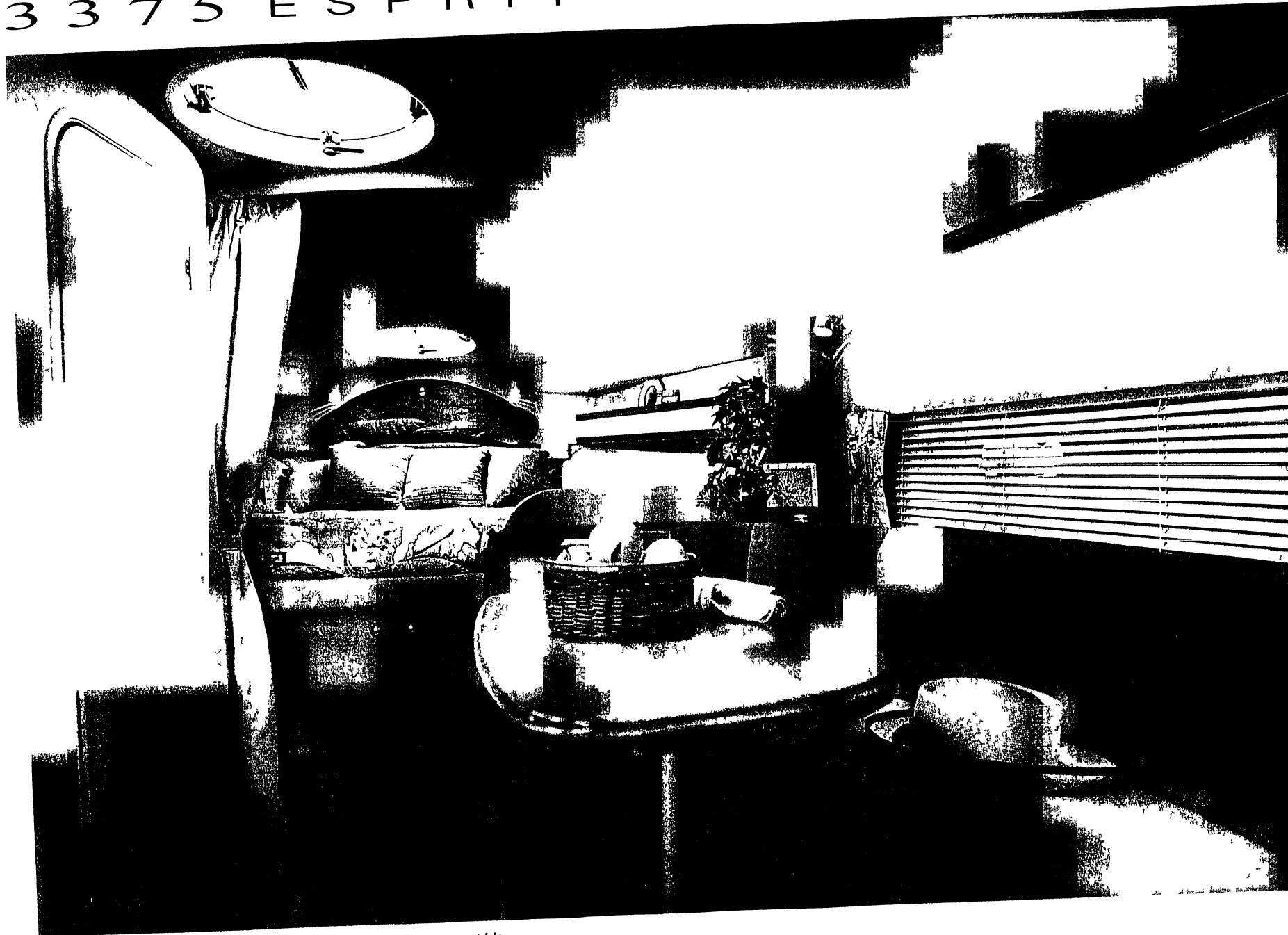


The elegantly designed helm station includes controls located immediately to hand and room for additional electronics



A custom-fitted camper top is a welcome addition when inclement weather threatens

3375 ESPRIT



The roomy interior of the 3375 shown with crescent-shaped convertible dinette/double berth includes a spacious forward berth with privacy curtain and lots of storage space



The full-service galley, located just to port of the companion-way, features a large refrigerator/freezer, microwave and double-burner electric stove.

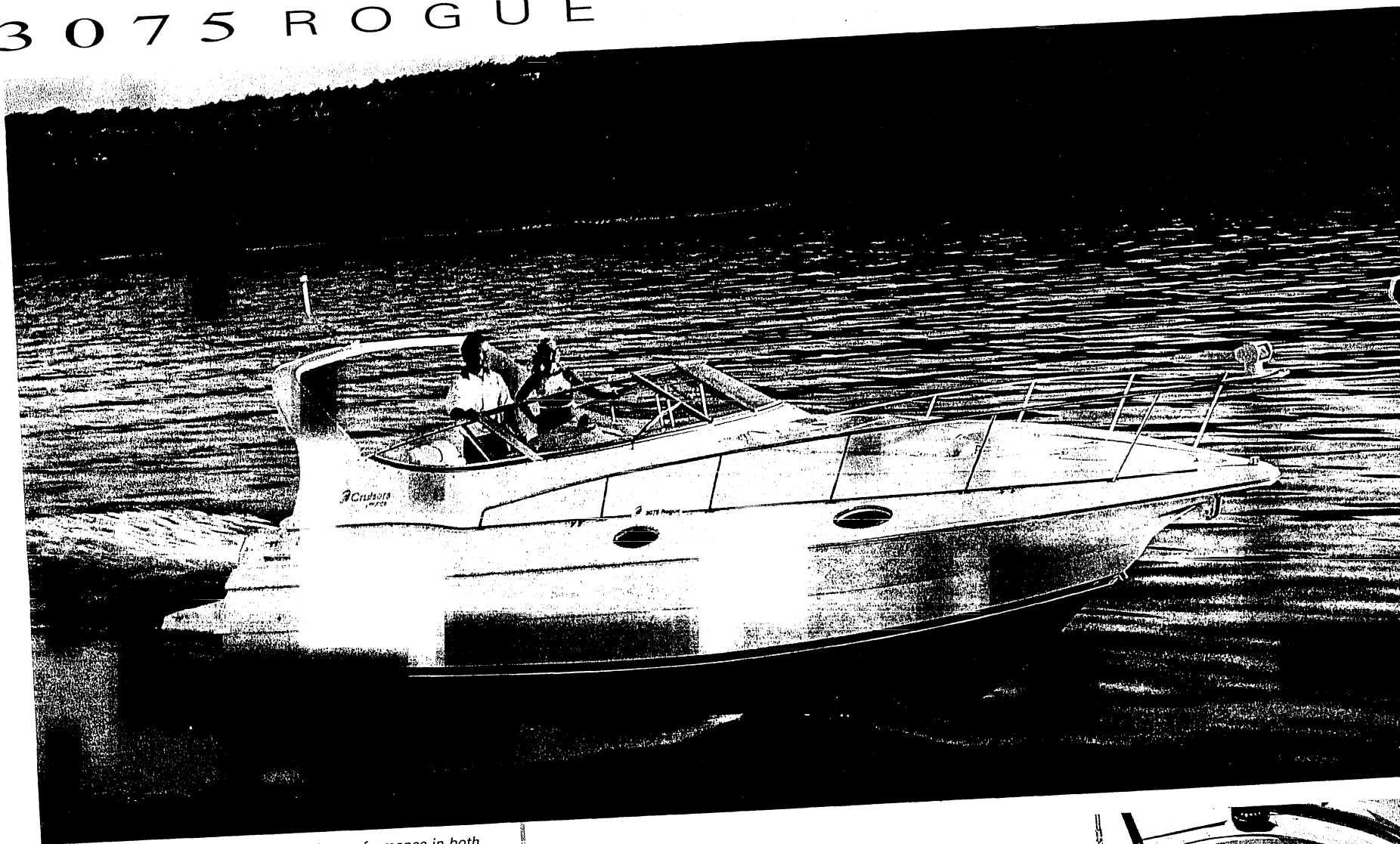


The spacious head features standing headroom and a shower, a luxury for a boat in this class.

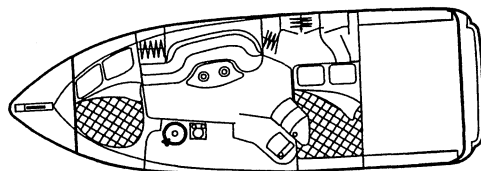


The 3375 also provides a settee aft of the companion-way to starboard, which easily converts into a double berth for overnight guests and includes a privacy curtain.

3075 ROGUE



The attractive 3075 Rogue offers superior performance in both stern-drive and inboard power. This remarkable cruiser handles smoothly and provides excellent overnight accommodations.

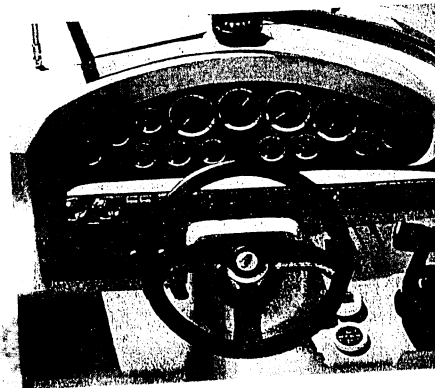


SPECIFICATIONS

L.O.A with Integrated Pulpit and Swim Platform
 L.O.A with Integrated Swim Platform
 L.O.A with Integrated Pulpit, Integrated Swim Platform and Optional Extended Swim Platform
 Beam
 Approximate Weight (Gas) (Lbs)
 Approximate Weight (Diesel) (Lbs)
 Fuel Capacity—U.S. Gallons
 Cabin Headroom
 Height—Keel to Top of Windshield
 Height—Keel to Top of Arch
 Draft (Stern Drive Down)
 Draft (Stern Drive Up)
 Bridge Clearance (w/o Arch)
 Bridge Clearance (w/Arch)
 Water System Capacity—U.S. Gallons
 Holding Capacity—U.S. Gallons

30'10"/9.4 m
 29'7"/9.02 m
 33'4"/10.2 m
 10'4"/3.2 m
 9,500/4,315 K
 9,800/4,451 K
 150/568 L
 6'3"/1.9 m
 9'0"/2.74 m
 10'10"/3.3 m
 33"/84 cm
 22"/56 cm
 7'0"/2.1 m
 9'0"/2.7 m
 35/132 L
 32/121 L

The elegant helm station keeps you well informed of all engine functions.



GINE OPTIONS:

Cruiser: Stern Drive

- 0 L 220 HP (164 Kw) IO Alpha Drives
- 0 L EFI 230 HP (171 Kw) IO, Alpha Drive
- 7 L 250 HP (186 Kw), IO, Alpha Drive
- under Rotating
- 7 L 250 HP (186 Kw) IO, Bravo III Drives
- 7 L EFI, 260 HP (193 Kw) IO, Alpha Drive
- under Rotating (s s Props)
- 7 L EFI, 260 HP (193 Kw), IO,
- two III Drives
- 50 MAG MPI 300 HP (224 Kw)
- two III Drive
- 4 2 L, 200 HP (148 Kw) Diesel, IO,
- two II Drive
- 4 2 L D-Tronic, 225 HP (167 Kw) Diesel,
- two II Drive

Cruiser: V-Drive

- 7 L 220 HP (164 Kw), IO
- 7 L 250 HP (186 Kw), IO
- 7 L 280 HP (209 Kw), IO
- AMD31P DP 139 HP (103 Kw), Diesel IO
- AMD43DP 216 HP (159 Kw) Diesel IO

Cruiser: V-Drive

- 7 L 260 HP (192 Kw), IB
- 7 MPI, 300HP (224 Kw), IB

Cruiser: V-Drive

- 7 MP, 305 HP (228 Kw), IB

Cruiser: V-Drive

- 1LHSTE Diesel, 230 HP (172 Kw), IB

AVAILABLE COLORS

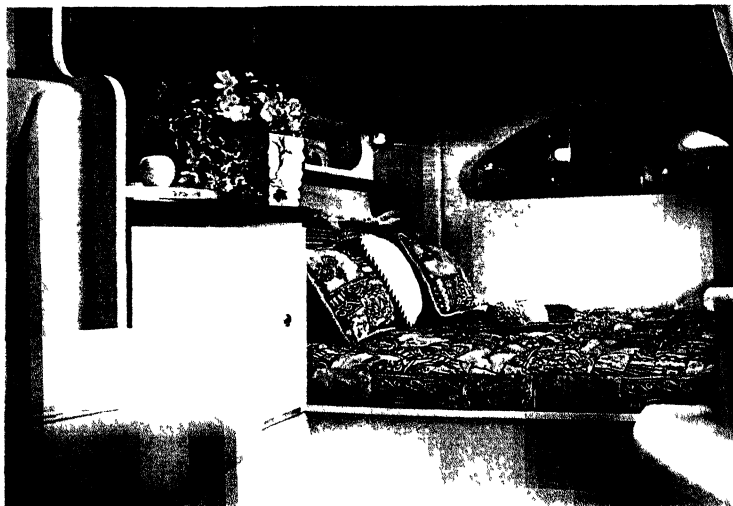
- aral Sand, Monaco Blue Majestic Burgundy,
- igna Green

STANDARD FEATURES

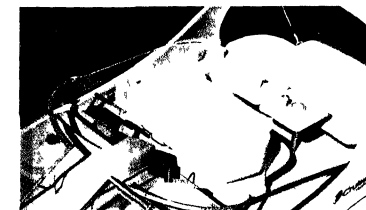
- rtains, Side
- p, Birmini
- nldship Cabin w/Screened Hatch
- rth, Double, Forward
- rth, Fixed Aft Stateroom
- nte, F-150 - Convertible, Crescent Shaped
- e, 3 Triple
- ar-Cockpit Seat
- rtain, Privacy, Forward Sleeper
- apery Package
- erglass Galley Top w/Surell Inlays
- t Water System 6 Gallon (22.7L),
- Engine Heat Exchanger
- rfrigerator, Electric Cabin
- areo, Cassette w/ Remote, 120 Watts
- ove, Electric
- ad, Manual Pump
- ower, Head Compartment(s) w/Sump
- mp
- ichor Roller and Cleat/Mooring Bit
- ittery, Isolator and Charging System
- ittery Condition Monitor
- arding Gate, Transom
- nding System
- ower, Bilge, Gas Power Only
- ibin Foredeck Access Center Walk Thru
- rbon Monoxide Detectors
- ockside Wiring, 115 V w/Zinc Saver
- econd Outlet included w/Air
- nditioner/Heater Option)
- ctical Master Panel, AC/DC w/Voltmeters
- d Function Indicators
- erglass Cockpit, Self-Draining
- e Extinguishers (3)
- ound Fault Interrupter Outlet
- nswale Molding, Heavy Duty
- rdware, Deck, Including Amidship Cleats
- rn, Recessed, Flush Mount
- trumentation
- ghts, Bilge (2)
- Lights, Cockpit Courtesy
- Mercathode (MerCruiser IOs Only)
- Navigation Lights, International
- Power Steering-Stern Drive
- Propellers
- Pump, Bilge Automatic
- Rail, Bow, Welded Stainless
- Rope Locker, Bow
- Speedometer
- Steering Wheel, Tilt, Non-Magnetic
- Steering, Hydraulic-Inboard
- Swim Platform w/Boarding Ladder
- Trim Tabs
- Windshield, Safety Glass and Wiper (1)
- Compass
- Synchronizer
- Cover, Cockpit
- Lounge/Berth, Convertible, Aft Stateroom
- Lounge Cushions, Foredeck
- Sunlounge - Cockpit (Includes Table)
- Air Conditioner/Heater (Includes Second
- Dockside Wiring Outlet)
- Carpet Cover, Cabin - Acrylic Snap Down
- Coffee Maker (N/A in 220 V)
- Microwave Oven
- Stereo, Single CD Player w/Helm Remote
- 120 Watts
- Changer, 6 Disc CD
- Speakers, Extra Pair w/160 Watt Amplifier
- Subwoofer w/240 Watt Amplifier & 2 Extra
- Speakers
- Television/VCR w/Remote & Antenna
- (N/A in 220 V)
- Towel and Decorator Pillow Package
- Head, Electric Pump
- Macerator Pump Out For Holding Tank
- Y Valve and Overboard Discharge
- Anchor w/150 1/2" Line & 6' 1/4" Chain
- Arch, Radar Aluminum (w/Arch Lights)
- Batteries
- Bottom Paint, Anti-Fouling
- Carpeting, Cockpit
- Cooling, Fresh Water (Std on Diesels)
- Cradle, Storage
- Dockside Water Inlet
- Fire Extinguisher, Automatic Gas Engines
- Fire Extinguisher, Automatic, w/Engine
- Shutdown, Diesel Engines
- Fuel System, Cross Over
- Generator, 4.0 Kw Kohler w/FWC
- Gas Power (N/A in 220 V)
- Generator, 6.5 Kw Kohler Gas Power
- w/FWC (N/A in 220 V)
- Generator, 3.5 Kw Kohler w/FWC Gas Power
- (220 V Only)
- Generator, 5.0 Kw Kohler, Gas Power
- w/FWC (220 V Only)
- Gunwale Molding, Stainless Steel
- Ice Maker, Cockpit
- Shower, Cockpit
- Spotlight, Remote Control, 100,000
- Candlepower
- Spotlight, Remote Control, 175,000
- Candlepower
- Swim Platform, Extended w/Boarding
- Ladder
- Table, Cockpit
- Washdown System, Cockpit
- Wet Bar, Cockpit
- Windlass, Remote Control w/Foredeck Foot
- Switch Includes Anchor w/150 1/2 Line &
- 6' 1/4" Chain
- Windlass Wiring Only
- Depth Finder
- Hourmeter(s) (Std w/Diesel Engines)
- Radio VHF



The 3075 features a full-service galley with refrigerator, a comfortable dinette/double berth and a large forward berth with privacy curtain.



Depending on owner needs, the 3075 can come equipped with this standard midcabin fixed berth or an optional convertible settee/double berth. A curtain can keep this area separate from the salon for additional privacy and convenience.

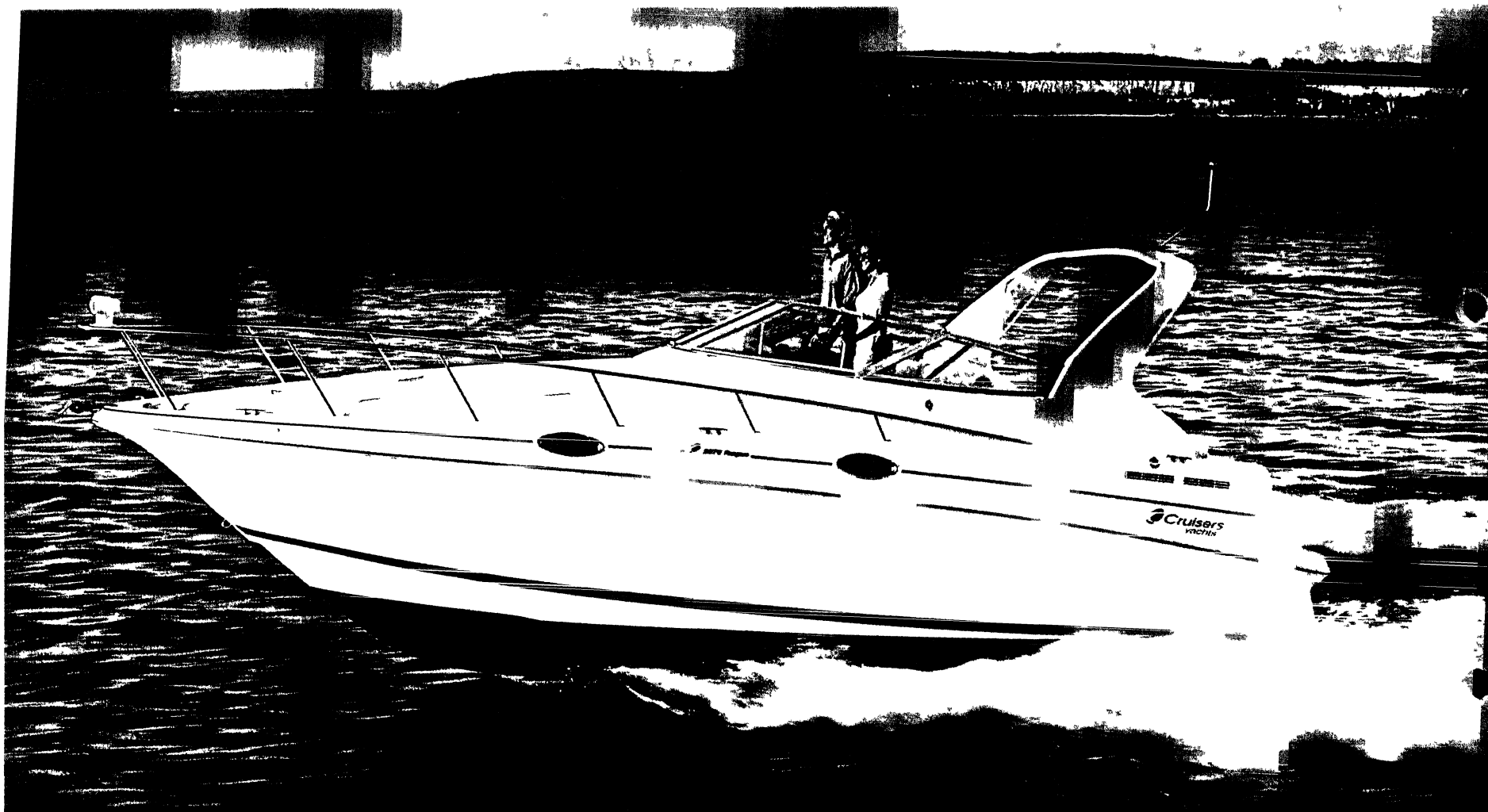


A triple-wide helm seat and fore-and-aft-facing cockpit lounge seating make for a comfortable day on the water.

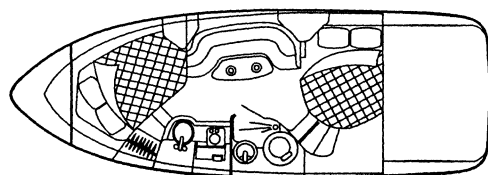


The head boasts full standing headroom and a roomy showering area, an extra plus for longer trips.

2870 ROGUE



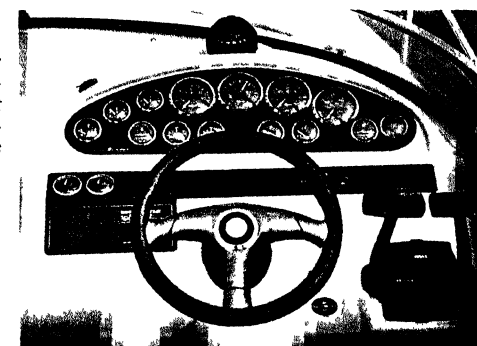
A nimble, high-quality performer, the 2870 Rogue brings excellent handling and attractive styling together with extraordinary belowdecks comfort



SPECIFICATIONS

L O A with Integrated Swim Platform	28'6"/8.69 m
L O A With Integrated Swim Platform and Optional Extended Swim Platform	31'9"/4 m
Beam	10'3"/3.05 m
Approximate Weight (Lbs) (Gas)	8,500/3,850 K
Approximate Weight (Lbs) (Diesel)	8,800/3,986 K
Fuel Capacity—U S Gallons	110/416 L
Water System Capacity—U S Gallons	30/113 L
Waste Holding Capacity—U S Gallons	20/75 L
Cabin Headroom	6'3"/1.9 m
Height—Keel to Top of Windshield	9'3"/2.82 m
Height—Keel to Top of Arch	10'8"/3.25 m
Draft (Stern Drive Down)	35"/89 cm
Draft (Stern Drive Up)	20"/51 cm
Bridge Clearance	7'7"/2.31 m

*Excellent visibility
and room for navigational
equipment
are important features
of the 2870's
helm station*



ENGINE OPTIONS:

MerCruiser Stern Drive

- 7.4 L MPI 300 HP (224 Kw) 10 Bravo III Drive
- 6.0 L 220 HP (164 Kw) 10 Alpha Drives
- 5.0 L EFI 230 HP (171 Kw) 10 Alpha Drive
- 5.7 L 250 HP (186 Kw) 10 Alpha Drive
- Counter Rotating
- 5.7 L 250 HP (186 Kw) 10 Bravo III Drives
- 5.7 L EFI 260 HP (193 Kw) 10 Alpha Drive
- Counter Rotating (S/S Props)
- 5.7 L EFI 260 HP (193 Kw) 10 Bravo III Drives
- 7.350 MAG MPI 300 HP (224 Kw) Bravo III Drive
- 4.2 L 200 HP (148 Kw) Diesel 10 Bravo II Drive
- 4.2 L D Tronic 225 HP (167 Kw) Diesel 10 Bravo II Drive

MerCruiser Drive

- 7.4 L MPI 310 HP (230 Kw) 10
- 5.0 GL DP 220 HP (164 Kw) 10
- 5.7 GS DP 250 HP (186 Kw) 10
- KAMD43 DP 216 HP (159 Kw) Diesel 10
- TAMD31P DP 139 HP (103 Kw) Diesel 10

AVAILABLE COLORS

Mineral Sand Monaco Blue Majestic Burgundy
Magna Green

STANDARD FEATURES

- Camper Top
- Curtains Side
- Top Bimini
- Amidship Cabin w/Screened Hatch
- Berth Double Forward
- Berth Fixed Aft Stateroom
- Dinette/Sofa Convertible Crescent Shaped
- Helm Seat Double
- Rear Cockpit Seat
- Curtain Privacy Forward Sleeper
- Drapery Package
- Fiberglass Galley Top w/Surell Inlays
- Hot Water System 6 Gallon (22.7 L)
- w/Fresh Water Heat Exchanger (10.5 Gallon)
- Refrigerator Electric Cabin
- Stereo Cassette w/Remote 120 Watt's
- Stove Electric
- Head Manual Pump
- Shower Head Compartment w/Sump Pump
- Anchor Roller & Cleat
- Battery Isolator And Charging System
- Battery Condition Monitor
- Blower(s) Bilge Gas Power Only
- Boarding Gate Transom
- Bonding System
- Cabin Foredeck Access Center Walk Thru
- Carbon Monoxide Detectors
- Dockside Wiring 115 V w/Zinc Saver (Second Outlet Included w/Air Conditioner/Heater Option)
- Electrical Master Panel AC/DC w/Voltmeter & Function Indicators
- Fiberglass Cockpit Self Draining
- Fire Extinguishers (3)
- Ground Fault Interrupter Outlet
- Gunwale Molding Heavy Duty
- Hardware Deck Including Armchairs
- Horn Recessed Flush Mount
- Instrumentation
- Lights Bilge (2)
- Lights Cockpit Courtesy
- Mercathode (MerCruiser IOs)
- Navigation Lights International
- Power Steering
- Propellers
- Pump Bilge Automatic

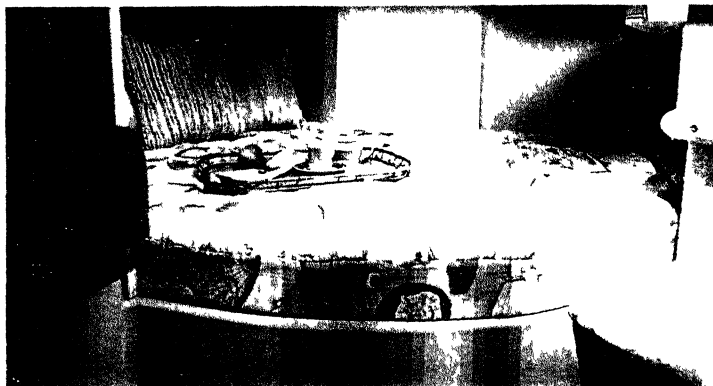
- Rope Locker Bow
- Speedometer
- Steering Wheel Tilt Non Magnetic
- Swim Platform w/Boarding Ladder
- Trim Tabs
- Windshield Safety Glass
- Windshield Wiper
- Compass
- Synchronizer Twin Engines

OPTIONAL FEATURES

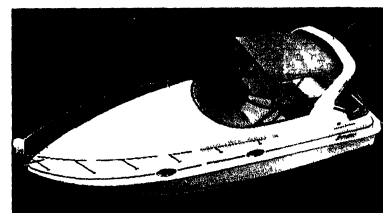
- Cover Cockpit
- Lounge Cushions Foredeck
- Sunlounge Cockpit (Includes Cockpit Table)
- Air Conditioner/Heater (Includes Second Dockside Wiring Outlet)
- Carpet Cover Cabin Acrylic Snap Down
- Microwave Oven
- Stereo Single CD Player w/Helm Remote 120 Watts
- Changer 6 Disc CD
- Speakers Extra Pair w/160 Watt Amplifier
- Subwoofer w/240 Watt Amplifier & 2 Extra Speakers
- Television/VCR w/Remote & Antenna (N/A in 220 V)
- Towel & Decorator Pillow Package
- Head Electric Pump
- Macerator Pump Out For Holding Tank
- Y Valve & Overboard Discharge
- Anchor w/150 1/2 Line & 6 1/4 Chain
- Arch Radar Aluminum (w/Arch Lights)
- Batteries
- Bottom Paint Anti-fouling
- Carpeting Cockpit
- Cooling Fresh Water (Std on Diesels)
- Cradle Storage
- Dockside Water Inlet
- Fire Extinguisher Automatic Gas Engines
- Fire Extinguisher Automatic w/Engine Shutdown Diesel Engines
- Generator 4.0 Kw Kohler w/FWC Gas Power (N/A in 220 V)
- Generator 3.5 Kw Kohler w/FWC Gas Power (220 V Only)
- Generator Sound Shield (Std on 6.5 Kw 110 V 5.0 Kw 220 V) Kohler Gas Generator
- Gunwale Molding Stainless Steel
- Shower Cockpit
- Spotlight Remote Control 100 000 Candlepower
- Swim Platform Extended w/Boarding Ladder
- Table Cockpit
- Washdown System Cockpit
- Windlass Remote Control w/Foredeck Foot Switch, Includes Anchor w/150 1/2 Line & 6 1/4 Chain
- Windlass Wiring Only
- Depth Finder
- Hourmeter(s) (Std w/Diesel Engines)
- Radio VHF



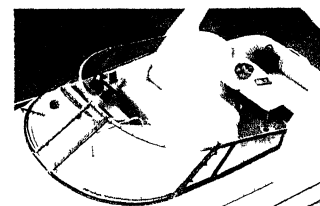
The wide-open interior layout includes a galley with refrigerator and electric stove, a crescent-shaped convertible dinette/double berth and a generous double berth forward with privacy curtain



The 2870 accommodates overnight guests with a fixed double berth aft and a curtain for additional privacy



The custom fitted camper top can be easily set up to keep guests well protected and comfortable



The 2870 boasts a double wide helm seat, fore and aft facing cockpit settees and a walk through windshield with molded-in steps for convenient foredeck access



The head features full standing headroom and a shower

APPAREL

For order information and pricing see your Cruisers Yachts dealer or contact Image Apparel today at 920-834-5606, fax 920-834-5608 or E-mail: imageapp@netnet.net



WOOL LEATHER JACKET: Heavyweight Melton wool in the body with genuine cowhide leather set-in sleeves. Quilt-lins with durable wool/acrylic knit trim collar, cuffs and waistband. Coordinated leather pocket trim and snaps. Sizes S-XXL.

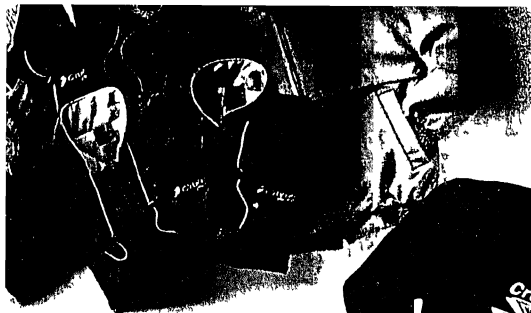
BERBER LONG SLEEVE HENLEY AND PANT/SHORTS: 100% cotton one button Henley top with rounded open bottom. Shorts or pants with elastic waistband, draw-cord and side pockets. Available in ten colors, sizes S-XL.



V-NECK AND CREW-NECK SWEATERS: 100% cotton, jersey stitched top and seed stitched bottom and sleeves. Crew-neck is available in twelve colors; V-neck comes in eight standard colors and a variety of custom colors. Both available in sizes S-XXXL.



MOUNTAINEER JACKET: Wind proof/water resistant Pu-coated Toughlan® nylon shell with Anti-Pilling heavy-weight panda fleece lining. Available in sixteen color combinations (varies with larger sizes). Sizes S-6XLT.



mesh lining throughout body and sleeves Drawstring with cord locks Available in eight color combinations sizes S XXXL



APPLIQUE SWEATSHIRT 9.5 ounce sweatshirt with suede Cruisers Yachts applique Available only in black sizes S XXL



DROP BOTTOM COOLER BAG Matte weave nylon with water resistance PVC coating and reflective self repairing coil zipper Cooler in lower compartment mesh mid compartment and large top compartment with drawcord Includes adjustable shoulder sling and keychain flashlight 23.5 x 11.5 in diameter Available in four color combinations



CAN COOLERS Teal blue outside with granite liner Minimum purchase of six coolers required

HENLEY AND CREW RIBBED TEE 100% cotton crew tee shirt Three button long sleeve 100% red knit Henley Available in six color combinations M XXL



RAINWEAR JACKET 100% nylon ripstop seam sealed with waterproof breathable 2000m interior coating Mesh and taffeta inner lining in body and sleeves and hood hidden in collar Full front zipper closure with storm flaps and Velcro® closure Available in three color combinations sizes S XXXL

RAINWEAR PANTS 100% nylon ripstop seam sealed with waterproof breathable 2000m interior coating Nylon taffeta lined Available in navy only sizes S XXXL

3 IN 1 SYSTEM JACKET Expedition cloth taslan shell with wind and water resistant coating Fully lined outer shell with fleece zip out adds warmth and wicks away moisture Gusseted sleeve cuffs with hook and loop closures and elastic waist Available in four color combinations sizes S XXL

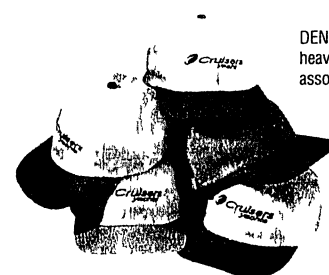


A TERRY VELOUR ROBE 100% cotton terry velour 3/4 length sleeves 48 long Four available colors Adult one size fits most

B LONG SLEEVE HENLEY PULLOVER 100% cotton textured berber knit three wood tone buttons double rib knit neck and cuffs Full cut Eight colors sizes S XXL

C DRAWCORD TOP AND PANT/SHORTS 100% cotton drawcord cowlneck top and drawcord pant or shorts with elastic waistband All available in ten colors sizes S XL

D DRAWSTRING KNIT PULLOVER 100% cotton textured berber knit with stand up collar and drawstring two wood tone buttons double rib knit cuffs and waistband Oversized fit Ten colors sizes S XXL



DENIM CAP 100% washed cotton heavy denim twill Available in six assorted colors

5000

4270

3870

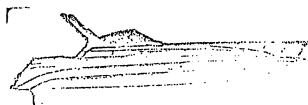
3585

3575

3375

3075

2870



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Information contained in this brochure was accurate at time of printing. Optional accessories are shown in some photographs. Because of constant product improvement Cruisers Yachts reserves the right to change standard features, colors, power and accessory options without notice. A free copy of the Cruisers Yachts limited warranty is available at your dealer or from Cruisers Yachts Division of KCS International Inc.

“APPENDIX D”

Controlling Legal Provisions

Official Comment § 2-313

Prior Uniform Statutory Provision: Sections 12, 14 and 16, Uniform Sales Act.

Changes: Rewritten.

Purposes of Changes: To consolidate and systematize basic principles with the result that:

1. "Express" warranties rest on "dickered" aspects of the individual bargain, and go so clearly to the essence of that bargain that words of disclaimer in a form are repugnant to the basic dickered terms. "Implied" warranties rest so clearly on a common factual situation or set of conditions that no particular language or action is necessary to evidence them and they will arise in such a situation unless unmistakably negated. This section reverts to the older case law insofar as the warranties of description and sample are designated "express" rather than "implied".

2. Although this section is limited in its scope and direct purpose to warranties made by the seller to the buyer as part of a contract for sale, the warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract. They may arise in other appropriate circumstances such as in the case of bailments for hire, whether such bailment is itself the main contract or is merely a supplying of containers under a contract for the sale of their contents. The provisions of Section 2-318 on third party beneficiaries expressly recognize this case law development within one particular area. Beyond that, the matter is left to the case law with the intention that the policies of this Act may offer useful guidance in dealing with further cases as they arise.

3. The present section deals with affirmations of fact by the seller, descriptions of the goods or exhibitions of samples, exactly as any other part of a negotiation which ends in a contract is dealt with. No specific intention to make a warranty is necessary if any of these factors is made part of the basis of the bargain. In actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement. Rather, any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof. The issue normally is one of fact.

4. In view of the principle that the whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell, the policy is adopted of those cases which refuse except in unusual circumstances to recognize a material deletion of the seller's obligation. Thus, a contract is normally a contract for a sale of something describable and described. A clause generally disclaiming "all warranties, express or implied" cannot reduce the seller's obligation with respect to such description and therefore cannot be given literal effect under Section 2-316.

This is not intended to mean that the parties, if they consciously desire, cannot make their own bargain as they wish. But in determining what they have agreed upon good faith is a factor and consideration should be given to the fact that the probability is small that a real price is intended to be exchanged for a pseudo-obligation.

5. Paragraph (1)(b) makes specific some of the principles set forth above when a description of the goods is given by the seller.

A description need not be by words. Technical specifications, blueprints and the like can afford more exact description than mere language and if made part of the basis of the bargain goods must conform with them. Past deliveries may set the description of quality, either expressly or impliedly by course of dealing. Of course, all descriptions by merchants must be read against the applicable trade usages with the general rules as to merchantability resolving any doubts.

6. The basic situation as to statements affecting the true essence of the bargain is no different when a sample or model is involved in the transaction. This section includes both a "sample" actually drawn from the bulk of goods which is the subject matter of the sale, and a "model" which is offered for inspection when the subject matter is not at hand and which has not been drawn from the bulk of the goods.

Although the underlying principles are unchanged, the facts are often ambiguous when something is shown as illustrative, rather than as a straight sample. In general, the presumption is that any sample or model just as any affirmation of fact is intended to become a basis of the bargain. But there is no escape from the question of fact. When the seller exhibits a sample purporting to be drawn from an existing bulk, good faith of course requires that the sample be fairly drawn. But in mercantile experience the mere exhibition of a "sample" does not of itself show whether it is merely intended to "suggest" or to "be" the character of the subject-matter of the contract. The question is whether the seller has so acted with reference to the sample as to make him responsible that the whole shall have at least the values shown by it. The circumstances aid in answering this question. If the sample has been drawn from an existing bulk, it must be

regarded as describing values of the goods contracted for unless it is accompanied by an unmistakable denial of such responsibility.

If, on the other hand, a model of merchandise not on hand is offered, the mercantile presumption that it has become a literal description of the subject matter is not so strong, and particularly so if modification on the buyer's initiative impairs any feature of the model.

7. The precise time when words of description or affirmation are made or samples are shown is not material. The sole question is whether the language or samples or models are fairly to be regarded as part of the contract. If language is used after the closing of the deal (as when the buyer when taking delivery asks and receives an additional assurance), the warranty becomes a modification, and need not be supported by consideration if it is otherwise reasonable and in order (Section buyer when taking delivery asks and receives an additional assurance), the warranty becomes a modification, and need not be supported by consideration if it is otherwise reasonable and in order (Section 2-209).

8. Concerning affirmations of value or a seller's opinion or commendation under subsection (2), the basic question remains the same: What statements of the seller have in the circumstances and in objective judgment become part of the basis of the bargain? As indicated above, all of the statements of the seller do so unless good reason is shown to the contrary. The provisions of subsection (2) are included, however, since common experience discloses that some statements or predictions cannot fairly be viewed as entering into the bargain. Even as to false statements of value, however, the possibility is left open that a remedy may be provided by the law relating to fraud or misrepresentation.

Cross References

Point 1: Section 2-316.
Point 2: Sections 1-102(3) and 2-318.
Point 3: Section 2-316(2)(b).
Point 4: Section 2-316.
Point 5: Sections 1-205(4) and 2-314.
Point 6: Section 2-316.
Point 7: Section 2-209.
Point 8: Section 1-103.

Definitional Cross References

"Buyer". Section 2-103.
"Conforming". Section 2-106.
"Goods". Section 2-105.
"Seller". Section 2-103.