

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

BENNETT MARINE, INC.,
a Florida corporation,

CASE NO. 04-60326 CIV MARRA

Plaintiff,

vs.

LENCO MARINE, INC.,
a Florida corporation, RINKER
BOAT COMPANY, a Delaware
limited liability company, RICHARD
DeVITO, JR., an individual, and KIM
SLOCUM, an individual,

Defendants.

THIRD AMENDED COMPLAINT

Plaintiff Bennett Marine, Inc. (“Bennett Marine”), by undersigned counsel, sues Defendants Lenco Marine, Inc. (“Lenco”), Rinker Boat Company (“Rinker”), Richard DeVito, Jr. (“DeVito”), and Kim Slocum (“Slocum”), and states as follows:

The Parties

1. Bennett Marine is a Florida corporation with its principal place of business in Deerfield Beach, Florida. Bennett Marine designs, manufactures and sells trim tab systems for use on powerboats.

2. Lenco is a Florida corporation with its principal place of business in Stuart, Florida. Lenco designs, manufactures and sells trim tab systems for use on powerboats in direct competition with Bennett Marine.

3. Rinker is a Delaware limited liability company with its principal place of business in Indiana. Rinker manufactures and sells powerboats, including powerboats that utilize trim tab systems.

4. DeVito is the president of Lenco and directs and/or controls the conduct of Lenco as alleged herein.

5. Slocum is the president of Rinker and directs and/or controls the conduct of Rinker as alleged herein.

Jurisdiction and Venue

6. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1338(a) in that this is an action arising under the patent laws of the United States, more particularly, 35 U.S.C. § 271 *et seq.*

7. This Court has supplemental jurisdiction over the breach of settlement and unfair competition claims pursuant to 28 U.S.C. § 1367 in that the claims are so related to the patent infringement claim that they form part of the same case or controversy.

8. This Court has personal jurisdiction over Lenco in that Lenco is a Florida corporation with its principal place of business in Stuart, Florida, which lies within the Southern District of Florida.

9. This Court has personal jurisdiction over Rinker in that (a) Rinker conducts business in Florida, and, more particularly, in the Southern District of Florida; (b) Rinker purchases infringing trim tab systems in Florida, and, more particularly, in the Southern District of Florida; (c) Rinker ships powerboats that utilize the infringing trim tab systems into Florida, and, more particularly, into the Southern District of Florida; (d) Rinker representatives routinely come to Florida, and, more particularly, to the Southern

District of Florida, to promote the sale of powerboats that utilize the infringing trim tab system; and (e) Rinker sells powerboats that utilize the infringing trim tab systems to purchasers in Florida, and, more particularly, in the Southern District of Florida.

10. This Court has personal jurisdiction over DeVito in that, upon information and belief, he is a citizen and resident of Florida and is the moving, active and conscious force behind Lenco's infringing activities in this State.

11. This Court has personal jurisdiction over Slocum pursuant to Florida's long-arm statute, including Fla. Stat. § 48.193(b), in that he is the moving, active and conscious force behind Rinker's infringing activities in this State, including actively and knowingly aiding and abetting Rinker's infringement of the '780 Patent in violation of 35 U.S.C. §271(b).

12. Venue as to Lenco is proper in this District pursuant to 28 U.S.C. § 1391(b) and 28 U.S.C. § 1400(b) in that Lenco resides in this District. Venue as to Rinker is proper in this District pursuant to 28 U.S.C. § 1391(b) and 28 U.S.C. § 1400(b) in that, as a result of the above-described activities, Rinker is deemed to reside within this District.

13. Venue is proper in this District as to Richard DeVito pursuant to 28 U.S.C. § 1391(b) and 28 U.S.C. § 1400(b) in that Richard DeVito resides in this District.

14. Venue is proper in this District as to Kim Slocum in that the venue provisions for a corporation set forth in 28 U.S.C. §§ 1391(b) and 1400(b) apply equally to corporate officers and/or owners who direct and control the infringing conduct of a corporate defendant.

General Allegations

15. On May 19, 1992, United States Patent No. 5,113,780 (“the ’780 Patent”), entitled “Automatic boat trim tab control,” was issued to Blake J. Bennett and David Hagstrom. Thereafter, the inventors assigned the ’780 Patent to Bennett Marine. A true and correct copy of the ’780 Patent is attached hereto as Exhibit 1.

16. Among other things, the ’780 Patent teaches a trim tab system wherein the trim tabs automatically return to their fully retracted position upon the termination or removal of power to the boat’s engine.

17. Bennett Marine is the owner of all right, title and interest in and to the ’780 Patent.

18. In or about 2002, Lenco, a competitor of Bennett Marine, began manufacturing, marketing and selling trim tab systems that directly infringe the ’780 Patent.

19. Bennett Marine provided notice of the infringement to Lenco, and the parties thereafter attempted to resolve their dispute pursuant to a Settlement Agreement dated February 25, 2003. A true and correct copy of the Settlement Agreement is attached hereto as Exhibit 2.

20. Among other things, the Settlement Agreement required Lenco to modify all of its instruction manuals, brochures, wiring diagrams and other materials to ensure that the Lenco trim tab system would not be installed in such a way that the trim tabs automatically return to their fully retracted position upon the termination or removal of power to the boat’s engine. In addition, Lenco was required to notify all of its customers that the Lenco trim tab systems must no longer be wired or installed in such a way that

the trim tabs automatically return to their fully retracted position upon termination or removal of power to the boat's engine.

21. Moreover, pursuant to the Settlement Agreement, Lenco was required to void any and all warranties to its trim tab system if wired or installed in such a way that the trim tabs automatically return to their fully retracted position upon termination or removal of power to the boat's engine. Lenco, however, continued and, upon information and belief, continues to honor any and all warranties for Lenco trim tab systems regardless of the manner in which they are wired or installed.

22. In fact, Lenco, at the direction of Richard Devito, has indemnified its customers, such as Rinker, against a claim of infringement by Bennett knowing full well that they have wired and installed, and continue to wire and install, Lenco trim tab systems in such a manner as to infringe the '780 Patent.

23. Bennett Marine has retained the undersigned law firms to provide legal representation in this matter and is obligated to pay the undersigned law firms reasonable fees and costs incurred in connection with said representation.

24. All conditions precedent to this action have been performed, satisfied or waived.

COUNT I
(Infringement of the '780 Patent by Lenco)

25. Bennett Marine realleges and reavers the allegations contained in paragraphs 1-24 above, as if fully set forth herein.

26. On information and belief, Defendant Lenco has manufactured, used, sold and distributed automatic trim tab retractor(s), including but not limited to an automatic

trim tab retractor sold under the name “Autotab Indicator and Retractor,” (hereinafter, “infringing product”), which infringes the claims of the ’780 Patent.

27. Lenco has marketed, sold and distributed its infringing product within the State of Florida and elsewhere and has caused damages in lost sales, lost reputation and diminished value of the ’780 Patent.

28. Bennett Marine has never made any licensing or patent agreement with Lenco and has never authorized Lenco’s use of the infringing product or its patent rights to the ’780 Patent, except as set forth in Exhibit 2 hereto.

29. Lenco has advised and counseled its customers, including but not limited to Rinker, how to install and connect Lenco’s trim tab retractors to the ignition switch of boats so that the trim tabs will retract and operate in a manner so as to infringe the ’780 Patent, i.e., automatically when the engine is turned off.

30. Lenco by virtue of its manufacturing, sale, offer for sale of the infringing product and specifically advising and encouraging its customers to adapt and wire Lenco’s trim tab retractors to the ignition switch to operate in a manner as claimed in the ’780 Patent has actively induced the direct infringement of the ’780 Patent and is liable as an infringer.

31. Lenco has also knowingly, willfully and wrongfully advised and reassured its customers that wiring the retractors to the ignition will not infringe the ’780 Patent. In fact, Lenco has indemnified Rinker against any claim of infringement of the ’780 Patent by Bennett Marine despite Rinker’s wiring of the Lenco trim tab retractor to the ignition switch.

32. On information and belief, Lenco will continue to infringe on the '780 Patent, causing irreparable injury to Bennett Marine, unless enjoined by this Court.

33. Bennett Marine is not able to detect each and every future act of infringement and hence has no adequate remedy at law.

34. In anticipation of its infringing activities, Lenco, prior to the marketing and sale of the infringing product, made inquiry of third parties as to what Bennett Marine would do if Lenco infringed the '780 Patent, all in furtherance of its willful and deliberate infringement.

35. Lenco, in an attempt to disguise its willful infringement, has made superficial changes to the accompanying literature for the infringing product but continues to market and sell the infringing product.

36. Upon information and belief, Lenco is utilizing the infringing product in tie-in sales of trim tabs and hence is deriving additional income from the sale of trim tabs by reason of sale and distribution of the infringing product.

37. Bennett Marine has made demand that Lenco cease and desist from this infringement and Lenco has willfully failed and refused to do so.

38. Such aforementioned acts by Lenco constitute infringement of the '780 Patent.

39. Upon information and belief, Lenco's acts of infringement have been willful and deliberate.

COUNT II
(Breach of Settlement Agreement by Lenco)

40. Bennett Marine realleges and reavers the allegations contained in paragraphs 1-24 above, as if fully set forth herein.

41. Pursuant to the Settlement Agreement Lenco acknowledged that the '780 Patent is valid and enforceable.

42. Pursuant to the Settlement Agreement, both parties agreed that the Settlement may be enforced by injunctive relief, including temporary restraining order or preliminary injunction, as to any dispute or controversy arising under the Settlement Agreement.

43. Lenco has breached several provisions of the Settlement Agreement including but not limited to the following:

Paragraph 2: Lenco agrees with respect to any retraction device manufactured, marketed, sold or distributed after the effective date of this Agreement, to modify all brochures, pamphlets, instructions, cut art, advertisements and any other literature or media, in any form, concerning said retraction device shall refrain from using the words "automatic", "auto tab" or any other language which suggests that the retraction device operates automatically or simultaneously in connection with or in response to terminating the electrical power to the engine powering the boat through the engine ignition switch or any other switch or connection which terminates electrical power to the engine.

Paragraph 4: Lenco agrees that all wiring and installation instructions, printed, in electronic form or otherwise, for the retraction device shall include the following language in print of the same size and character as the other instructions contained thereon:

"This product must be installed and wired exactly as shown above. Failure to sire the trim tab indicator and retractor as shown will cause the cancellation of all warranties by the manufacturer."

Paragraph 10: Lenco will not advise or counsel any sales representative, builder, dealer, retailer, discounter, mail order or catalog customer, prospective or actual, supplier, distributor, inquirer, prospect or potential customer, or representative to wire Lenco's retraction device in any manner other than as shown in "Appendix B" of the Settlement Agreement.

Paragraph 11: Lenco warrants that it has sold or distributed 371 retraction devices with the instructions identified as "Appendix A"

(See Exhibit 2).

44. In disregard of the Settlement Agreement, Lenco: (a) failed to modify its marketing materials as required by paragraph 2 of the Settlement Agreement; (b) failed to cancel all warranties associated with the Lenco trim tab retractor despite the wiring and installation of the Lenco trim tab retractor to an engine switch rather than a non engine switch as required by paragraph 4 of the Settlement Agreement; (c) advised and counseled customers how to install and connect Lenco's trim tab retractors to the boat's ignition system so as to infringe the '780 Patent, in violation of paragraph 10 of the Agreement; and (d) at the time of the Settlement Agreement, sold in excess of 371 retraction devices, contrary to that warranted in paragraph 11 of the Settlement Agreement.

45. The above conduct constitutes material breaches of the Settlement Agreement, directly and proximately resulting in damages sustained by Bennett Marine, including but not limited to lost profits, the exact amount to be proved at trial.

COUNT III
(Fraud by Lenco)

46. Bennett Marine realleges and reavers the allegations contained in paragraphs 1-24 above, as if fully set forth herein.

47. Pursuant to paragraph 11 of the Settlement Agreement Lenco warranted that it had sold or distributed 371 retraction devices which were identified as covered under the '780 Patent.

48. Lenco agreed to pay Bennett Marine a royalty of \$70.00 for each retraction device sold that was covered under the '780 Patent.

49. In justifiable reliance of Lenco's representation, Bennett Marine agreed that the royalty payment of \$25,970.00 constituted full payment for the license granted to Lenco for each of the 371 infringing products already sold.

50. Upon information and belief, at the time of execution of the Settlement Agreement, Lenco had in fact sold more than 371 retraction devices, the exact number to be proven at trial.

51. Lenco's representations to Bennett Marine were materially false and misleading as they omitted material facts, disclosure of which was necessary, as Bennett Marine would not have granted the license and/or accepted the said sum as full payment for the license but for the representations of Lenco.

52. Lenco knew or was reckless in not knowing that its representation and omissions to Bennett Marine regarding the number of retractors sold was materially false and misleading and that its omissions and representations were material.

53. Lenco's misrepresentations and omissions were made with the intent to defraud Bennett Marine and to induce Bennett Marine to enter into the Settlement Agreement.

54. Lenco had actual knowledge that its conduct as aforesaid was wrongful and that there was a high probability that said conduct would cause injury or damage to Bennett Marine, and despite that knowledge, intentionally pursued its wrongful course of conduct resulting in injury or damage to Bennett Marine.

55. Bennett Marine relied to its detriment on Lenco's representations and would not have entered into the Settlement Agreement or accepted the said payment but for the representations of Lenco.

56. By reason of the foregoing, Lenco's untrue statements of material fact and material omissions were intended to induce Bennett Marine to settle its patent infringement claim against Lenco for less than an amount that was fair, reasonable and owed.

57. In justifiable reliance on Lenco's misrepresentations and omissions, Bennett Marine has suffered substantial damages (the full amount to be proven at trial) proximately caused by the aforesaid conduct including, but not limited to, lost profits, attorney's fees and costs.

COUNT IV
(Unfair Competition by Lenco)

58. Bennett Marine realleges and reavers the allegations contained in paragraphs 1-57 above, as if fully set forth herein.

59. Lenco has engaged in acts which are contrary to honest business practices and which individually and collectively constitute unfair competition pursuant to Fla. Stat. § 501.204 and otherwise under the laws of Florida.

60. Upon information and belief, such acts, constituting unfair competition include, *inter alia*,

(a) Distribution of wiring diagrams with the infringing product which encourage the end user to violate the claims of the '780 Patent;

(b) Oral representations and statements to distributors, representatives and customers to encourage violation of the claims of the '780 Patent;

(c) Counseling, advising and instructing customers, including but not limited to Rinker, to install and connect the infringing device in such a manner so as to violate the rights of Bennett Marine under the '780 Patent;

- (d) Disparagement of Bennett Marine's products and the '780 Patent;
- (e) Reassuring customers in connection with their infringement of the '780 Patent by indemnifying such customers against any claim of infringement of the '780 Patent by Bennett Marine as a result of the wiring of Lenco's trim tab retractor to an engine switch;
- (f) Refusal to cease and desist from the wrongful infringement of the '780 Patent;
- (g) Palming off the infringing product as a valid and legal adaptation of the '780 Patent; and
- (h) Such future wrongful acts as shall be determined by discovery and subsequent amendment to this Complaint.

61. Such acts by Lenco are deceptive or fraudulent and are likely to cause consumer confusion regarding the '780 Patent.

62. Lenco had actual knowledge that its conduct as aforesaid was wrongful and that there was a high probability that said conduct would cause injury or damage to Bennett Marine, and despite that knowledge, intentionally pursued its wrongful course of conduct resulting in injury or damage to Bennett Marine.

63. As a result of the actions of Lenco Marine, the Plaintiff has suffered loss of income, loss of sales and injury to its reputation and customer good will.

COUNT V
(Inducement of Infringement of the '780 Patent by DeVito)

64. Bennett Marine realleges and reavers the allegations contained in paragraphs 1-39 above, as if fully set forth herein.

65. Upon information and belief, at all relevant times, Richard DeVito was the moving, active and conscious force behind Lenco's conduct as aforesaid.

66. Upon information and belief, at all relevant times, Richard DeVito was personally responsible for Lenco's decision to continue marketing, selling and distributing the infringing product.

67. Upon information and belief, at all relevant times, Richard DeVito was personally responsible for Lenco's decision to advise and counsel Lenco's customers, including but not limited to Rinker, how to install and connect Lenco's trim tab retractors to the ignition switch of boats so that the trim tabs will retract and operate in a manner so as to infringe the '780 Patent, i.e., automatically when the engine is turned off. In fact, Richard DeVito was personally responsible for Lenco entering into an indemnification agreement with Rinker against any claim by Bennett Marine of infringement of the '780 Patent as a result of Rinker's wiring of the Lenco trim tab retractor to an engine switch.

68. Upon information and belief, at all relevant times, Richard DeVito engaged in the aforesaid conduct despite notice and actual knowledge of the '780 Patent and of Bennett Marine's rights thereunder.

69. Upon information and belief, at all relevant times, Richard DeVito actively and knowingly aided and abetted Lenco's infringement of the '780 Patent in violation of 35 U.S.C. §271(b).

70. Upon information and belief, Richard DeVito's conduct as aforesaid was deliberate, knowing, willful and intentional.

71. The aforesaid conduct of Richard DeVito has damaged Bennett Marine though, among other things, lost sales, lost reputation, and diminished value of the '780 Patent.

72. Upon information and belief, Richard DeVito will continue to cause Lenco to infringe the '780 Patent, causing irreparable injury to Bennett Marine, unless enjoined by this Court.

73. Bennett Marine has no adequate remedy at law.

COUNT VI
(Infringement of the '780 Patent by Rinker)

74. Bennett Marine realleges and reavers the allegations contained in paragraphs 1-24 above, as if fully set forth herein.

75. In or about 2002, Rinker began purchasing trim tab systems from Lenco, including trim tab systems with an automatic retraction feature. Rinker installed and wired the Lenco trim tab systems on Rinker boats in such a manner that the trim tabs automatically returned to their fully retracted position upon the termination or removal of power to the boat's engine.

76. Upon information and belief, in or about early 2003, Rinker became aware that its installation and wiring of the Lenco trim tab systems infringed the '780 Patent.

77. Thereafter, in or about November 2003, Bennett Marine provided written notice directly to Rinker, advising Rinker of the '780 patent, of Bennett Marine's ownership of the '780 Patent and its rights thereunder, and of the fact that Rinker's conduct – particularly the installation and wiring of Lenco trim tab systems in such a manner that the trim tabs automatically return to their fully retracted position upon termination or removal of power to the boat's engine, and the subsequent marketing,

promotion, distribution and sale of boats that utilize said trim tab systems – infringe the '780 Patent. Bennett Marine demanded that Rinker cease and desist from engaging in this infringing conduct.

78. Despite having knowledge that Rinker was installing and wiring Lenco trim tab systems in a manner that infringed the '780 Patent, Rinker continued installing and wiring the Lenco trim tab systems in such a manner that the trim tabs automatically return to their fully retracted position upon the termination or removal of power to the boat's engine.

79. Bennett Marine has never granted Rinker any license, or entered into any other type of agreement with Rinker, or authorized Rinker in any way, to install, wire, modify, manufacture, market or sell trim tab systems wherein the trim tabs automatically return to their fully retracted position upon termination or removal of power to the boat's engine.

80. At all relevant times, Rinker has installed and wired trim tab systems in its boats in a manner that infringes the '780 Patent.

81. At all relevant times, Rinker has marketed, sold and distributed boats with the infringing trim tab systems within the State of Florida and elsewhere.

82. At all relevant times, Rinker engaged in the aforesaid conduct despite notice and actual knowledge of the '780 Patent and of Bennett Marine's rights thereunder.

83. At all relevant times, Rinker's conduct as aforesaid was deliberate, knowing, willful and intentional.

84. Rinker's infringing conduct has damaged Bennett Marine through, among other things, lost sales, lost reputation, and diminished value of the '780 patent.

85. Upon information and belief, Rinker will continue to infringe the '780 Patent, causing irreparable injury to Bennett Marine, unless enjoined by this Court.

86. Bennett Marine has no adequate remedy at law.

COUNT VII
(Inducement of Infringement of the '780 Patent by Slocum)

87. Bennett Marine realleges and incorporates by reference the allegations in paragraphs 1-24 and 74-86 above as though fully set forth herein.

88. Upon information and belief, at all relevant times, Kim Slocum was the moving, active and conscious force behind Rinker's conduct as aforesaid.

89. Upon information and belief, at all relevant times, Kim Slocum was personally responsible for Rinker's decision to continue installing and wiring Lenco trim tab systems in a manner that infringes the '780 patent, and to continue marketing, selling and distributing boats that utilize the infringing trim tab systems.

90. Upon information and belief, at all relevant times, Kim Slocum engaged in the aforesaid conduct despite notice and actual knowledge of the '780 Patent and of Bennett Marine's rights thereunder.

91. Upon information and belief, at all relevant times, Kim Slocum actively and knowingly aided and abetted Rinker's infringement of the '780 Patent in violation of 35 U.S.C. §271(b).

92. Upon information and belief, Kim Slocum's conduct as aforesaid was deliberate, knowing, willful and intentional.

93. The aforesaid conduct of Kim Slocum has damaged Bennett Marine though, among other things, lost sales, lost reputation, and diminished value of the '780 patent.

94. Upon information and belief, Kim Slocum will continue to cause Rinker to infringe the '780 Patent, causing irreparable injury to Bennett Marine, unless enjoined by this Court.

95. Bennett Marine has no adequate remedy at law.

WHEREFORE, Bennett Marine prays for the following relief:

(a) A judgment that Lenco, Rinker, Richard DeVito, and Kim Slocum have infringed and/or are presently infringing the '780 Patent under 35 U.S.C. §271(a) and (b);

(b) Temporary and permanent injunctive relief enjoining Lenco, and all persons acting by or under its authority or control, from infringing, inducing or contributing to the infringement of the '780 Patent, from assisting or abetting others in infringing the '780 Patent, and from the deceptive practices set forth herein;

(c) Temporary and permanent injunctive relief enjoining Rinker, Kim Slocum, and all persons or entities acting by or under their authority or control, from installing and/or wiring trim tab systems in any manner that infringes the '780 Patent, and from marketing, distributing and selling boats that utilize trim tab systems that infringe the '780 Patent;

(d) Temporary and permanent injunctive relief requiring Rinker to re-install and/or re-wire the trim tab systems in every boat currently in Rinker's possession, or under the control of Rinker, so that the trim tab systems do not infringe the '780 Patent;

(e) An accounting from Lenco as to all profits derived from the sale of the infringing product;

(f) An accounting from Richard DeVito as to all salary, bonuses and other forms of compensation attributable to the sale of the infringing products, to the extent that Lenco accounted for said salary, bonuses and other forms of compensation as expenses to offset Lenco's profits;

(g) An accounting from Rinker as to all profits derived from the sale of products that utilize or utilized infringing trim tab systems;

(h) An accounting from Kim Slocum as to all salary, bonuses and other forms of compensation attributable to the sale of products that utilize or utilized infringing trim tab systems, to the extent that Rinker accounted for said salary, bonuses and other forms of compensation as expenses to offset Rinker's profits;

(i) An award of treble damages as to which Lenco, Rinker, Richard DeVito, and Kim Slocum are jointly and severally liable;

An award of compensatory damages to be awarded at trial and consequential damages including but not limited to lost profits;

(j) An award of punitive damages against Lenco with respect to the fraud and unfair competition claims;

(k) An award of prejudgment and post-judgment interest;

(l) An award of Bennett Marine's costs and reasonable attorney's fees incurred in connection with these proceedings; and

(m) Such other and further relief as the Court deems proper and just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY certify that on April 9, 2008, I electronically filed the foregoing document with the Clerk of the Court CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified below in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties not authorized to receive electronically Notices of Electronic Filing.

s/Christina DeAngelis

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