SUPREME COURT OF FLORIDA
STATE OF FLORIDA

BONITO BOATS, INC.,

Plaintiff/Appellant,

vs.

CASE NO. ~~86-~~68829

THUNDER CRAFT BOATS, INC.,

Defendants/Appellee.

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# REPLY BRIEF OF AMICUS CURIAE NATIONAL MARINE MANUFACTURERS ASSOCIATION

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On Appeal from the Fifth District Court of Appeal
State of Florida

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# ARGUMENT

The essence of the Appellee's argument is that a purported "overriding" interest in "free competition" which the Appellee claims is embodied in federal patent law* completely displaces the states' power to regulate predatory forms of competition with respect to unpatented articles. Under this reasoning, federal patent law leaves no room for the states to require even a minimal level of commercial ethics in the duplication of unpatented articles, and unscrupulous competitors are free to procure a single such article and use it in a direct molding process to flood the market with knockoffs at little or no cost. According to the Appellee, the State of Florida violated the Constitution when it enacted legislation seeking to afford limited protection from such depredations to an important industry of the state.

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* The central theme of the Appellee's brief is that promotion of free competition -- which to the Appellee apparently means competition unconstrained by ethical or moral considerations -- is the principal objective of patent law. This contention is at odds with the case law and the language of the patent statute. The promotion of competition is at best a collateral objective of patent law; the primary goal of that law is to foster creativity and invention by granting limited monopolistic rights to inventors. _See_ _Graham_ v. _John Deere Co._, 383 U.S. 1, 9 (1966) ("The patent monopoly was not designed to secure to the inventor his natural right in his discoveries. Rather, it was a reward, an inducement, to bring forth new knowledge."); _Roberts_ v. _Sears Roebuck & Co._, 723 F.2d 1324, 1345 (7th Cir. 1983) (en banc) (Posner, J., concurring and dissenting)("The purpose of allowing people to obtain patents is strictly utilitarian -- to create incentives to invent useful things.").

This argument is flawed. As recognized by the United States Court of Appeals for the Federal Circuit in Interpart Corp. v. Italia, 777 F.2d 678 (Fed. Cir. 1985), there is no conflict between state statutes such as the Florida law at issue and federal patent law because those enactments have entirely different objectives and serve differing interests. The Appellee's suggestion that this Court should give no weight to the Interpart decision because of the Federal Circuit's allegedly "flawed analysis" of patent law, Answer Brief of Appellee at 21, must be rejected. It is the Appellee that has misperceived the function of federal patent law and the effect of that law on the states' power to restrain unconscionable methods of competition.

The Supreme Court's decision in Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1973), makes clear that the states retain the power to regulate unfair practices with respect to intellectual property, provided that such regulation does not usurp the function of the federal patent system. As illustrated by the Sears/Compco cases upon which the Appellee principally relies, the states may not enact legislation which effectively creates a state patent system. However, contrary to the Appellee's suggestion, the Florida statute at issue does no such thing. Unlike the state laws involved in Sears/-Compco, the Florida "anti-splash" statute does not purport to bar the copying of unpatented articles. Rather, the law

simply provides that those who engage in such copying may not resort to a particular method which the Florida legislature has deemed unethical. The focus of the law is not on the right to copy the design or ideas underlying unpatented articles but on the methodology that may be employed for that purpose. By its limited regulation of such methodology, Florida has hardly withdrawn any ideas from the public domain; instead, it has merely concluded that one particular means of transforming an idea or concept into a concrete product violates the state's notions of commercially ethical behavior. Nothing in the relevant law says that Florida cannot make such a judgment.

## CONCLUSION

In essence, the Appellee is urging this Court, like the Courts below, to hold the Florida statute at issue unconstitutional through a strained interpretation of Supreme Court precedent and an unduly expansive reading of the statute so as to place it in conflict with federal patent law. This suggested approach is directly contrary to this Court's precedents holding that Florida courts have a duty to uphold Florida legislation absent a clear showing of unconstitutionality. Since no such showing has been made in this action, the decision of the

Fifth District Court of Appeal should be reversed and the action remanded for further proceedings.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Amicus Curiae National Marine Manufacturers Association has been furnished to: JOHN S. SCHOENE, ESQ., Baker & Hostetler, 1300 Barnett Plaza, Post Office Box 112, Orlando, Florida 32802, and HAL K. LITCHFORD, ESQ., Davis, Litchford, Downing & Christopher, One South Orange Avenue, Suite 500, Orlando, Florida 32802, this 30th day of September, 1986, by John A. Heller.