

**IN THE  
SUPREME COURT OF MISSOURI**

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**NO. SC87691**

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**DENNIS E. HESS,**

**Plaintiff/Appellant/Cross-Respondent,**

**v.**

**CHASE MANHATTAN BANK USA, N.A.,**

**Defendant/Respondent/Cross-Appellant.**

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**Appeal from the Circuit Court of Platte County  
Hon. Abe Shafer**

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**CHASE MANHATTAN BANK USA, N.A.'S  
SUBSTITUTE REPLY BRIEF AS CROSS-APPELLANT**

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## ARGUMENT

### **PLAINTIFF DID NOT MAKE A SUBMISSIBLE CASE ON HIS FRAUDULENT NONDISCLOSURE CLAIM.**

#### **A. Chase Preserved Its Cross-Appeal, Which Is Not Based on An Affirmative Defense; Even if It Were, It Was Tried by Consent.**

In its now-vacated opinion, the Court of Appeals held that Chase did not properly preserve its position that plaintiff should be held to the plain terms of the contract he entered into because, according to the Court, Chase was asserting an affirmative defense that it never pleaded, and thus abandoned. Plaintiff asks this Court to follow the lead of the Court of Appeals and refrain from addressing the merits of Chase's appeal. He makes that request based on an argument he raised only belatedly, partially, and halfheartedly in the appellate court.<sup>1/</sup>

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<sup>1/</sup> Plaintiff notes that Chase “nowhere challenges” the Court of Appeals’ holding that Chase did not preserve its “contract defense” (Plaintiff’s Substitute Reply Brief on Principal Appeal and Response Brief on Cross-Appeal (“Br.”) 17-18). Chase did not challenge that holding because this Court’s grant of transfer vacated the Court of Appeals’ opinion, *see, e.g., Collector of Revenue v. Parcels of Land Encumbered with Delinquent Tax Liens*, 566 S.W.2d 475, 476 n.1 (Mo. banc 1978), and this Court’s resolution of the case is “the same as on original appeal.” S. Ct. Rule 83.09. The trial court did not reject Chase’s argument because of a supposed failure to preserve, and plaintiff never argued in the trial court that Chase’s argument was based on an affirmative

Despite the mischaracterization by the Court of Appeals and plaintiff, Chase’s argument on appeal is not premised on either waiver or release. “Waiver is the intentional relinquishment of a known right.” *Horne v. Ebert*, 108 S.W.3d 142, 147 (Mo. App. W.D. 2003). Chase did not argue that plaintiff relinquished a “known right,” but rather that Chase had expressly disclaimed any duty to disclose. Plaintiff did not relinquish a right to disclosure or a right to rely on Chase’s silence—he *never acquired* any such right to begin with. Nor is Chase contending that plaintiff released it from liability “for its silence” (Plf’s Apdx A34). None of the terms of the Contract or Addendum are couched in the typical language — such as “release,” “extinguish,” “hold harmless,” or “discharge” — used in a release of claims or liability. Indeed, neither the Court of Appeals nor plaintiff points to any specific words that supposedly constitute a release. *See, e.g., Lunceford v. Houghtlin*, 170 S.W.3d 453, 459-60 (Mo. App. W.D. 2005) (discussing “the evolution of Missouri law regarding releases”).

An affirmative defense, such as waiver or release, “contemplates additional facts not included in the allegations necessary to support plaintiff’s case and avers that plaintiff’s theory of liability, even though sustained by the evidence, does not lead to recovery because the affirmative defense allows the defendant to avoid legal responsibility.” *Parker v. Pine*, 617 S.W.2d 536, 542 (Mo. App. W.D. 1981); *see also*

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defense. No reason thus existed for Chase to address the Court of Appeals’ mischaracterization of its argument based on plaintiff’s failure to make a submissible case.

*Glasgow Enters., Inc. v. Bowers*, 196 S.W.3d 625, 630 (Mo. App. E.D. 2006). In contrast, “[a]ny evidence which tends to show plaintiff’s cause never had legal existence is admissible on a general denial even though the facts are affirmative, if and insofar as they are adduced only to negative the plaintiff’s cause of action and are not by way of confession and avoidance.” *Parker*, 617 S.W.2d at 542; *see also Smith v. Thomas*, \_\_\_ S.W.3d \_\_\_, 2006 WL 2805147, at \*2 (Mo. App. W.D. Oct. 3, 2006) (quoting *Parker* and holding that although tenant did not plead affirmative defense of payment in response to landlord’s claim for rent due, evidence of tenant’s payment in full was admissible to negate “breach” element of landlord’s *prima facie* case).

Here, Chase is not arguing avoidance — its argument does not assume that plaintiff’s theory of liability is sustained by the evidence. Nor, as plaintiff repeatedly misrepresents, is Chase seeking “immunity” for its alleged fraud. Rather, Chase argues that “plaintiff’s cause never had legal existence.” Plaintiff did not and could not make a submissible case of fraudulent nondisclosure because Chase had no duty to disclose, and plaintiff had no right to rely on any alleged nondisclosure by Chase. As set forth in Chase’s opening brief (p. 22), both the duty to disclose and the right to rely are required elements of a fraudulent nondisclosure claim. Because Chase had no duty to disclose as a matter of law, and plaintiff therefore had no right to rely on its nondisclosure, plaintiff could not and did not present substantial evidence for at least two of the facts essential to liability. There was no fraudulent nondisclosure here, and thus Chase has nothing to avoid or confess. *See, e.g., Ringstreet Northcrest, Inc. v. Bisanz*, 890 S.W.2d 713 (Mo. App. W.D. 1995) (holding that substantially similar contract language negated the

elements of the plaintiff's fraudulent nondisclosure claim, without characterizing the defendant's argument as an affirmative defense).

The only case plaintiff has cited in the Court of Appeals or in this Court to support his affirmative-defense characterization is *Kesselring v. St. Louis Group, Inc.*, 74 S.W.3d 809 (Mo. App. E.D. 2002) (Br. 22-23). Notwithstanding plaintiff's claim that *Kesselring* involved an "identical contract defense," both the underlying circumstances and the contractual language in *Kesselring* were markedly different from those at issue here. Unlike this case, which involves a *nondisclosure* claim, the Court of Appeals in *Kesselring* determined that a partial disclosure made by the defendant brokers amounted to a misrepresentation. In addition, the relevant contract language relied on by the defendant brokers to defeat the plaintiff buyers' fraud claim purported to "hold Broker harmless" for false representations. That language, in Paragraph 21 of the parties' Asset Purchase Agreement, stated in relevant part:

"Purchaser ... acknowledges that Purchaser is relying solely on Purchaser's own inspection of the Seller's Business Assets and the representations of the Seller, and not the Broker, with regards to ... all ... material facts relied upon in entering this Agreement.... Purchaser acknowledges that Broker has not verified, and will not verify, the representations of Seller and should such representations be untrue, Purchaser agrees to look solely to Seller for relief and to hold Broker harmless in

connection with all losses and damages caused Purchaser thereby.” 74 S.W.3d at 815.

The Court of Appeals stated that summary judgment was inappropriate because the brokers’ argument that paragraph 21 constituted an admission that the buyers did not rely on the brokers’ representations gave that paragraph “the power of a release.” *Id.* at 815-16. Because the brokers had not pleaded release in their answer, the Court held that whether the plaintiffs reasonably relied on the brokers to provide the documents in question should be determined at trial and not on summary judgment. The Court based its holding at least in part on its concern that if the agreement barred the buyers from relying on the brokers’ representations, then the buyers could “never seek redress for those misrepresentations.” *Id.* at 816.

Plaintiff’s contention that *Kesselring* involved “an identical contract defense” ignores the critical distinction between paragraph 21 of the agreement at issue there, and paragraphs 9 and 10 of the Addendum that he signed. Whereas paragraph 21 provided that the plaintiffs were not relying on the brokers’ representations, *id.* at 811, paragraphs 9 and 10 of the Addendum stated that Chase had neither seen nor occupied the property, and was making no representations, guaranties, or warranties, either written or implied (L.F. 20). Unlike paragraph 21 of the agreement in *Kesselring*, the terms of the Addendum did not seek to “hold Chase harmless” or use other language common to a release in an attempt to insulate Chase from liability for any misrepresentations it may have made. Rather, it stated that Chase was making no representations at all. The parties agreed that plaintiff would not rely on Chase’s silence as any form of implied

representation. The Addendum thus did not operate to “release” Chase from liability for any fraud it may have perpetrated, but constituted the parties’ agreement that the transaction would take place without any representations, guaranties, or warranties from Chase as the seller. *Kesselring* is inapposite.

Even if Chase’s argument could conceivably be interpreted as based on release or waiver, at this point in the proceedings any pleading deficiencies are irrelevant. Under the plain terms of Rule 55.33(b), “[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.” *See also Damon Pursell Constr. Co. v. Missouri Hwy. & Transp. Comm’n*, 192 S.W.3d 461, 475 (Mo. App. W.D. 2006) (although the defendant did not plead affirmative defense of accord and satisfaction, under Rule 55.33(b) the issue was tried with the implied consent of the parties, and should be treated as if it had been raised); *Heins Implement Co. v. Missouri Hwy. & Transp. Comm’n*, 859 S.W.2d 681, 685 (Mo. banc 1993).

Plaintiff notes that in its Application for Transfer, Chase argued that even if the terms of the Addendum could conceivably be construed as a waiver or release, the issue was tried by consent (Br. 24). But he says that Chase based that argument merely on the fact that the terms of the Contract and Addendum were introduced at trial. In fact, however, Chase’s preservation of its argument went far beyond the mere introduction of the Contract and Addendum. Chase repeatedly and consistently argued that the terms of the Contract and Addendum precluded, as a matter of law, a finding that Chase had a duty to disclose or that plaintiff had a right to rely on its nondisclosure. Chase moved for

summary judgment on Count II based on the parties' agreement that Chase would make no disclosures. The argument on that motion was heard just prior to the commencement of trial, and this Court would search the 53 pages of hearing transcript in vain for any mention by plaintiff's counsel that Chase was really raising an affirmative defense (Tr. I:50-103). Chase renewed its argument at the close of plaintiff's case and the end of all evidence (Tr. XI:1947-1960; XII:2148), and in its post-trial motions (L.F. 65-72).

In addition, of course, plaintiff's counsel himself read the relevant terms of the Addendum to the jury, it was admitted into evidence, and some witnesses offered by plaintiff who had made offers on the property and signed the same form Addendum were cross-examined regarding its terms (Tr. IV:766-67, 781-83; VI:1045-47, 1089-91). Plaintiff never objected in the trial court that Chase was really arguing release or waiver, let alone that Chase had waived those defenses by not affirmatively pleading them, despite ample and repeated opportunities to do so. His failure to so object demonstrates that he correctly understood that Chase was not arguing avoidance, but that no fraudulent nondisclosure occurred. That inaction by plaintiff also deprived Chase of an opportunity to take whatever corrective action the court might have ordered.

Not until his brief to the Court of Appeals did plaintiff, citing the inapposite *Kesselring*, contend that Chase's argument should be rejected because "it never plead release as an affirmative defense" (Plf's Reply Br. Ct. Appeals 35 n.3). But that contention was buried in a footnote on the fourteenth page of his seventeen-page argument. Certainly if plaintiff had thought Chase's argument was truly based on an affirmative defense and — as he now asks this Court to hold—that the failure to so plead

was dispositive of Chase's cross-appeal, he would have raised the issue sooner, given its more prominence, and discussed it more fully. And until his brief to this Court, plaintiff had *never* argued that the terms of the Addendum constitute a waiver. Even if, *arguendo*, the defenses of waiver or release are at issue here, they were tried by consent and must be deemed to have been raised in the pleadings. Plaintiff's eleventh-hour sandbag argument is legally and equitably flawed and should be rejected.

Plaintiff's claim that "Chase's 'trial by consent' argument" fails because Chase did not request a jury instruction is just one more in a series of mischaracterizations of Chase's position (Br. 25). Chase's argument did not rely on or require any finding of fact by the jury but was based on a legal interpretation of the express terms of the Contract and Addendum, which of course is a question of law for the court. *See, e.g., Alack v. Vic Tanny Int'l of Mo., Inc.*, 923 S.W.2d 330, 337 (Mo. banc 1996); *Holbert v. Whitaker*, 87 S.W.3d 360, 362 (Mo. App. E.D. 2002). Whether a duty to disclose exists is also a question of law. *Ringstreet*, 890 S.W.2d at 724-25. This Court should reject plaintiff's invitation to refrain from addressing the merits of Chase's cross-appeal.

**B. Chase Did Not “Fail to Properly Present its Contract Defense for Decision,” and In Any Event Plaintiff Has Waived Any Such Argument.**

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In Point I.C of his brief, plaintiff argues that Chase’s Point Relied On *in its Court of Appeals’ brief* did not match up to the argument made by Chase on that point. He claims that although the Point Relied On “purported to frame the issue in terms of Mr. Hess’s failure to make a submissible case, its briefing did not make a submissible-case *argument*” (Br. 25, emphasis original). Plaintiff’s contention is baffling for several reasons. First, it is clearly directed only to Chase’s brief in the Court of Appeals and not its brief filed in this Court. But Chase’s Court of Appeals’ brief is not before this Court, nor did plaintiff raise this claim or make any other attack on Chase’s Point Relied On or the structure of its argument in his Response Brief in the Court of Appeals. Plaintiff’s argument about Chase’s brief filed in a different court is baseless and, in any event, comes too late for this Court to address.<sup>2/</sup>

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<sup>2/</sup> We note that plaintiff claims that certain of Chase’s arguments were not made in the Court of Appeals and are therefore barred by Rule 83.08(b) (Br. 65, 67). Although Chase cannot address the substance of that claim in this brief (because it relates to plaintiff’s now fully-briefed appeal), that rule precludes this Court from reviewing plaintiff’s newly-minted claim that Chase’s “briefing did not make a submissible-case *argument*” for that additional reason. Likewise, plaintiff never claimed in the Court of Appeals that Chase’s argument based on the terms of the Contract and Addendum is

Plaintiff's argument is a transparent attempt to resurrect a holding made by the Court of Appeals *sua sponte* in its now-vacated opinion. As in his opening brief, plaintiff seems unwilling to acknowledge that the Court of Appeals' opinion is a nullity. He states, for example, in the untitled beginning of his brief that "Chase's Brief offers no persuasive reason for this Court to disturb the well-reasoned conclusions reached by a unanimous panel of the Court of Appeals" (Br. 11). But this Court's grant of transfer not only "disturbed" the Court of Appeals' conclusions, it vacated that opinion. *See, e.g., Collector of Revenue v. Parcels of Land Encumbered with Delinquent Tax Liens*, 566 S.W.2d at 476 n.1.

Even if Chase's Point Relied On and argument from its Court of Appeals' brief were properly before this Court, plaintiff's contention that there is some sort of disconnect between the two is simply specious. Chase's Point Relied On stated that "the trial court erred in denying Chase's motions for directed verdict and for judgment notwithstanding the verdict because plaintiff did not make a submissible case on his fraudulent nondisclosure claim in that Chase had no duty to disclose and this plaintiff had no right to rely on any purported nondisclosure by Chase because the parties contractually agreed that Chase was making no representations, guaranties, or warranties, really a claim of "waiver," or that Chase's "contract defense" was not tried by consent. Plaintiff cannot invoke Rule 83.03(b) without suffering its consequences. Thus, this Court should not address either the waiver portion of Plaintiff's Points I and I.A, or his Points I.B and I.C.

either express or implied, regarding the property.” Chase’s argument explained that plaintiff could not, as a matter of law, establish the required “duty to disclose” or “right to rely” elements of a submissible claim of fraudulent nondisclosure because he had contractually agreed that Chase was making no disclosures whatsoever.

Plaintiff appears to argue that a submissibility argument may be premised only on the lack of a sufficient evidentiary basis for a claim (Br. 25-27). But whether a claim is submissible may also be attacked on the grounds that the plaintiff cannot establish one or more elements of his claim as a matter of law. *See, e.g., Service Vending Co. v. Wal-Mart Stores, Inc.*, 93 S.W.3d 764, 770 (Mo. App. S.D. 2002) (trial court erred in denying directed verdict and JNOV motions because plaintiff failed to prove its claim for tortious interference with a business expectancy; contract terms established that plaintiff’s claimed “expectancy” was, as a matter of law, neither valid nor reasonable); *Faust v. Ryder Commercial Leasing & Servs.*, 954 S.W.2d 383, 393-94 (Mo. App. W.D. 1997) (holding, *inter alia*, that trial court properly directed a verdict for the defendant because the plaintiff could not make a submissible case on his claims of intentional and negligent misrepresentation; “as a matter of law, claims of intentional and negligent misrepresentation, which are predicated on reliance, will not lie where the reliance is based on a promise to hire as an employee at-will”).

Just as the contract terms in *Service Vending* precluded the plaintiff from making a submissible case of tortious interference as a matter of law, plaintiff here did not make a submissible claim of fraudulent nondisclosure because his contractual agreement that Chase was making no disclosures negated the “duty to disclose” and

“right to rely” elements of that claim. By definition, if plaintiff cannot establish one or more elements of his claim as a matter of law, those elements are not supported by the required substantial evidence.

Even assuming that Chase’s argument in its cross-appeal raises an affirmative defense, that Chase’s Court of Appeals’ brief did not properly “present” that defense, and that the issue is properly before this Court, *Damon Pursell Construction Company*, 192 S.W.3d 461, cited by plaintiff, defeats his argument seeking to avoid review of Chase’s cross-appeal. There, although the MHTC argued that the plaintiff contractor had not made a submissible case that it was entitled to additional compensation for its work, the Western District determined that the MHTC’s claim was actually based on the affirmative defense of accord and satisfaction. Although the Court stated that proper characterization was necessary to determine the appropriate standard of review, it did not suggest that the discrepancy precluded it from reviewing the MHTC’s point on appeal. Notably, the Court also concluded that although the MHTC had not pleaded accord and satisfaction, it had been tried with the parties’ implied consent and “shall be treated in all respects as if it had been raised in the pleadings.” *Id.* at 475.

*Beatty v. State Tax Commission*, 912 S.W.2d 492, 499 (Mo. banc 1995), and *Brizendine v. Conrad*, 71 S.W.3d 587, 593 (Mo. banc 2002), also cited by plaintiff, are likewise inapposite. Plaintiff cites *Beatty* for the proposition that an appellant must back up a contention with “relevant authority or argument,” and *Brizendine* for the proposition that Rule 84.04(d) requires that an argument be set out both in the point relied on and in the argument section of the brief, or it is considered abandoned. Both

statements are true, but neither was violated here. Chase’s brief as appellant cites several cases — most notably *Ringstreet*, which is directly on point — and contains a fully developed argument explaining why plaintiff did not make a submissible case on his fraudulent nondisclosure claim. Aside from plaintiff’s bogus “affirmative defense” straw-man, he does not identify any argument referred to in Chase’s brief that is not set out in its Point Relied On. Chase’s argument in fact tracks its Point Relied On, and is amply supported by relevant case law. Plaintiff’s diversionary efforts to prevent this Court from reviewing the merits of Chase’s appeal should be rejected.

**C. Plaintiff Did Not Make A Submissible Case of Fraudulent  
Nondisclosure.**

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Plaintiff's response to Chase's argument that, as a matter of law, it had no duty to make any disclosure to plaintiff, and thus cannot be liable for fraudulent nondisclosure, is three-fold. First, he maintains that regardless of the terms of the Contract and Addendum, Chase had a common law duty to disclose. Second, he argues that the Contract and Addendum cannot "immunize" Chase from liability because Chase supposedly fraudulently induced plaintiff into entering them. When he finally addresses Chase's contention that the parties contractually agreed that Chase was making no representations and therefore had no duty to disclose, plaintiff falls short in his attempt to distinguish *Ringstreet*, 890 S.W.2d 713. *Ringstreet* is in fact directly on point, and mandates reversal here. Moreover, *Ringstreet* presents the most rational, predictable, and fair result.

**1. Chase had no common law duty to disclose.**

Plaintiff argues that Chase "has shown no basis to overturn the jury's finding that Chase had a duty to disclose based on its superior knowledge of EPA's active

investigation of the property” (Br. 28).<sup>3/</sup> As an initial matter, as pointed out in our opening brief, the Court held in *Ringstreet*, 890 S.W.2d at 724-25, that under the parties’ contractual agreement no duty to disclose existed as a matter of law. *See also Constance v. B.B.C. Dev. Co.*, 25 S.W.3d 571, 581, 584 (Mo. App. W.D. 2000); *Blaine v. J.E. Jones Constr. Co.*, 841 S.W.2d 703, 707-09 (Mo. App. E.D. 1992). Chase is not seeking to overturn the jury’s factual findings, but has very plainly insisted that as a matter of law plaintiff’s fraudulent nondisclosure claim never should have gone to the jury.

In any event, the jury’s verdict in favor of plaintiff required it to find not only that Chase had “superior knowledge . . . that the EPA was involved with environmental issues concerning the property,” but that Chase failed to disclose that knowledge “intending that plaintiff rely upon” Chase’s silence, and that “plaintiff relied on” Chase’s silence, “and in so relying plaintiff used that degree of care that would have been reasonable in plaintiff’s situation” (S.L.F. 8). Given Chase’s contractually-bargained for right to silence, Chase cannot, as a matter of law, have intended plaintiff to

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<sup>3/</sup> Although plaintiff alludes to the EPA’s “active” or “ongoing” investigations more than once (Br. 21, 28, 30, 33), neither the evidence at trial nor the jury’s verdict supports plaintiff’s allegation that Chase had *any* knowledge that the EPA was “actively investigating” the property, that any such investigation was taking place at the time of the sale to plaintiff, or indeed that Chase knew of any interest in or involvement with the property on the part of the EPA beyond its request to remove the paint containers (Tr. V: 869-72, 937-38, 948).

rely on that silence as a tacit representation of some sort regarding the property, nor could any such reliance by plaintiff have been reasonable under those circumstances.

The Court of Appeals confirmed in *Constance*, 25 S.W.3d at 580, that the duty to disclose is not triggered simply because one party has superior knowledge, but requires the other party's reliance as well. The Court held that when one party to a contract has superior knowledge, that party has a duty to disclose that knowledge only when it *is relied upon* to disclose it. *See also Blaine*, 841 S.W.2d at 707-09 (despite defendant's "superior knowledge" that it intended to build apartments on property adjacent to plaintiffs' houses, it had no duty to disclose that fact to plaintiffs before closing). Even assuming Chase can be said to have had superior knowledge, plaintiff cannot have actually or reasonably relied upon Chase to disclose any information to him in light of his contractual agreement that no representations were being made.<sup>4/</sup>

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<sup>4/</sup> Plaintiff takes issue with Chase's statement that it in fact did not have superior knowledge because plaintiff could have obtained the same information that Chase had – knowledge of the existence of the paint cans – had he inspected the property he was purchasing (Br. 31). He contends that his theory was not that Chase did not disclose the presence of the paint cans, but that it failed to disclose "*that U.S. EPA was actively involved with the property, with the effect on value and marketability, and the potential for substantial future liability, which such involvement entails*" (Br. 31). But, again, there was no evidence of any "active involvement" on the part of the EPA at the time of the sale, much less that Chase had any knowledge of it.

**2. Chase did not fraudulently induce plaintiff into entering into the Contract and Addendum.**

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Plaintiff cites a number of cases for the proposition that because Chase fraudulently induced him into entering the Contract and Addendum, Chase cannot rely on the parties' contractual recital that Chase was making no representations whatsoever with respect to the property (Br. 34-38). Plaintiff's argument is founded on a fundamental mischaracterization of his claim as one of fraudulent inducement. He did not argue at trial that some misrepresentation made by Chase induced him to enter into the Contract and Addendum. Rather, he claimed that Chase failed to disclose certain information to him about the property. *See, e.g.*, BLACK'S LAW DICTIONARY 686 (8th ed. 2004) (defining "fraud in the inducement" as "[f]raud occurring when a misrepresentation leads another to enter into a transaction with a false impression of the risks, duties, or obligations involved").

Plaintiff disingenuously argues that "there is no basis in Missouri law to distinguish fraudulent non-disclosure claims from affirmative misrepresentation claims" (Br. 39). But in *Ringstreet*, the Court of Appeals recognized the distinction between a claim of fraudulent inducement and the type of fraudulent nondisclosure alleged here, stating:

"In the case at bar, there are no allegations of affirmative misrepresentations, rather the allegations concern passive nondisclosure. In other words, the case at bar is not about an affirmative misrepresentation made to Ringstreet to induce

Ringstreet to purchase the Property; rather, the fraud allegations in this case concern passive nondisclosure, or silence, on Respondents' part with regard to the plumbing on the Property." 890 S.W.2d at 720-21.

The cases plaintiff cites are thus off-target because they all involve an active *misrepresentation* by the defendant, not the nondisclosure that is the basis of plaintiff's claim here. The distinction is critical because in those cases, the defendants were attempting to insulate themselves from liability for fraud they had already perpetrated. For example, in *Bening v. Muegler*, 67 F.3d 691, 698 (8th Cir. 1995), the defendant attorney made a number of affirmative misrepresentations to the plaintiff investors regarding their investment in a corporation he represented, but nonetheless sought to rely on an offering prospectus stating that investors were not relying on any representations set forth in the prospectus. The Eighth Circuit rejected the defendant's argument, holding that "when a fraudulent misrepresentation is used to induce entry into an agreement which then purportedly shields the declarant from the fraud, the contractual disclaimer will not bar an action for fraud." *Id.* In contrast, plaintiff's fraud claim is not premised on a supposed misrepresentation by Chase of a material fact regarding the property, but instead alleges that Chase did not disclose information which it had a duty to disclose. The Contract and Addendum here do not purport to "shield" Chase from liability for fraud, but recite the parties' understanding that Chase was making no representations, expressed or implied, regarding the property.

Similarly, in *Maples v. Charles Burt Realtor, Inc.*, 690 S.W.2d 202 (Mo. App. S.D. 1985), the plaintiff homeowners sued their realtor for fraudulently misrepresenting that a termite report on the house they were purchasing showed no damage, when in fact the realtor knew that the only report that had been completed at that time showed infestation and damage. In rejecting the defendant's argument that an exculpatory clause in the sales contract constituted an affirmative defense to the plaintiffs' claim, the Southern District stated:

“A party simply may not, by disclaimer or otherwise, contractually exclude liability for fraud in inducing that contract.’ The rule that all prior and contemporaneous oral agreements and representations are merged in the written contract entered into by the parties does not apply to fraudulent representations made for the purpose of inducing a party to enter into such contract.” *Id.* at 212 (citations omitted).

If, for example, Chase had said to plaintiff: “If you buy this property, we will finance it for you at prime,” and then refused to do so, plaintiff could claim that he was fraudulently induced into signing the purchase contract. But that is not this case, unlike in *Bening; Maples; Wagner v. Uffman*, 885 S.W.2d 783, 786 (Mo. App. E.D. 1994); *Lollar v. A.O. Smith Harvestore Prods., Inc.*, 795 S.W.2d 441, 447-48 (Mo. App. W.D. 1990); and the other cases plaintiff cites, with the possible exception of *Kesselring*, 74 S.W.3d 809. No one was ever “induced” by silence.

As discussed above in Section A, although *Kesselring* did not involve an express pre-contractual misrepresentation like the other cases cited by plaintiff, the Court of Appeals determined that a partial disclosure made by the defendants amounted to a misrepresentation. The plaintiffs purchased the assets of a business owned by the defendant sellers and represented by the defendant brokers, who provided the plaintiffs with some relevant documents pertaining to those assets prior to closing. The plaintiffs argued that the defendants did not provide them with certain financial records until after the sale, which would have disclosed that the business had unpaid accounts with its suppliers. *Id.* at 813-14. The Court of Appeals determined that if the defendants gave the plaintiffs the impression that the files they provided contained all relevant business documents, they had the duty to disclose all such remaining documents. *Id.* at 814. No such partial disclosure is at issue here, and plaintiff does not contend that anything Chase said was misleading.

**3. Ringstreet is directly on point.**

When plaintiff finally gets around to addressing Chase's reliance on *Ringstreet*, 890 S.W.2d 713, his attempts to distinguish or circumscribe that opinion fall flat. He first contends that, "[i]f read as broadly as Chase proposes, *Ringstreet* would be inconsistent with *Kesselring* [] and *Bening*[], . . . both of which sensibly hold that a defendant who fraudulently induces a plaintiff to enter a contract cannot rely on provisions of that very contract to defeat the plaintiff's fraud recovery" (Br. 40). But as explained in Section C.2, *ante*, the Court in *Ringstreet* differentiated between cases

involving fraudulent inducement and those concerning the type of passive nondisclosure at issue in *Ringstreet* and here.

Plaintiff also purports to distinguish *Ringstreet* because it involved a “sophisticated commercial buyer[’s]” purchase of an apartment complex (Br. 40). But he points to no language in the opinion indicating that the Court’s resolution hinged on the status of the parties involved. Nor does any aspect of the case indicate that it would not have application in a residential real estate purchase, particularly when, as here, the buyer had previous experience as a home inspector and real estate agent. The transaction in *Ringstreet* and the one at issue here were both at arms’ length, and plaintiff has not articulated any reason why he should not be held to the bargain he struck.

Plaintiff next identifies two “critical distinctions” between *Ringstreet* and his claim. First, he seizes on *Ringstreet*’s emphasis on the plaintiff purchaser’s agreement that “it relies upon no warranties, representations or statements’ by Respondents in purchasing the Property,” noting that in contrast he “never contractually disclaimed reliance on Chase’s pre-sale conduct or statements” (Br. 40-41, citing 890 S.W.2d at 724).

Again plaintiff has made a distinction without a difference. The Addendum he signed very plainly acknowledged in both paragraphs 9 and 10 that Chase was making no representations, guaranties or warranties, written or implied, regarding the property (L.F. 20; Apdx A-5). Having thus contractually recognized Chase’s *right not to make* representations, he can hardly argue that his fraudulent nondisclosure claim survives because he did not also expressly agree not to rely on any representations by Chase. By

contractually agreeing that Chase was making no representations, plaintiff effectively agreed that Chase had no duty to disclose – and the lack of a duty to disclose in itself is fatal to plaintiff’s claim. *See, e.g., Kesselring*, 74 S.W.3d at 814 (nondisclosure serves as substitute for false representation element of fraud claim only when duty to disclose exists). In fact, the Court’s ultimate holding in *Ringstreet* was based on the lack of a duty to disclose, not on the plaintiff’s non-reliance: “Respondents did not have a duty to disclose the problem, and thus Ringstreet’s fraud claim must fail as a matter of law.” 890 S.W.2d at 724-25. Of course, in contractually agreeing to Chase’s right to be silent, plaintiff implicitly waived any right to rely on any disclosures or to interpret Chase’s silence as an implied representation regarding the property. The contract specifically provided that there would be no implied representations.

According to plaintiff, the second so-called “critical distinction” in *Ringstreet* is that the plaintiff there, who sued the defendants based on their failure to disclose that the complex’s water pipes routinely froze in winter, had been told prior to closing “that there had been one instance of pipes freezing” (Br. 41 (citing 890 S.W.2d at 724)). Plaintiff maintains that *Ringstreet* is thus inapposite because “Chase never told [him] *anything* about regulatory involvement with the property, which might have imposed upon him a duty of further inquiry” (Br. 36, emphasis original).

A careful review of the *Ringstreet* opinion demonstrates that the disclosure to the plaintiff there, in response to its president’s inquiry, regarding the one instance of freezing pipes was not central to the Court’s holding that the defendants had no duty to disclose. Rather, it was simply a factor that enhanced the Court’s admonishment that the

plaintiff should have inspected the plumbing more thoroughly: “Given the particular provisions of the real estate contract here, and *especially if*, as the record indicates, Ringstreet was told prior to purchasing the Property that there had been one instance of pipes freezing, Ringstreet *should have investigated* the potential problem further.” 890 S.W.2d at 724 (emphasis added). Other aspects of the opinion confirm that the contractual terms were at the heart of the Court’s affirmance of summary judgment to the defendants. *See, e.g., id.* at 721 (distinguishing *Blaine*, 841 S.W.2d at 704, because it “does not involve any assertion of a contract clause as a defense to a claim of passive nondisclosure amounting to fraud [, or] . . . address whether a specific contract provision bargained for by a seller might negate a seller’s duty to disclose defects and/or a buyer’s right to rely on a seller’s silence as a form of constructive representation of the absence of defects”).

Plaintiff next represents that the Southern District distinguished *Ringstreet* in *Artilla Cove Resort, Inc. v. Hartley*, 72 S.W.3d 291 (Mo. App. S.D. 2002), “on two grounds . . . equally applicable here” (Br. 42). But in fact, *Artilla* does not advance plaintiff’s case. There the defendant sellers of a resort engaged in both active misrepresentation and active concealment of structural defects in the property before closing on the transaction. In response to the plaintiffs’ inquiry regarding whether there were any problems not evident in their inspection, they were told by the defendants that the resort was in excellent condition. *Id.* at 298. The Court noted that this false response to the plaintiffs’ question was in contrast to *Ringstreet*, in which the buyer had been given notice of prior freezing in response to his inquiry. *Id.* at 298-99. In addition, an artificial

façade had been constructed to obscure bowing and cracking in a foundation wall. *Id.* at 297-98. Thus *Artilla* fits into the category of cases, cited by plaintiff in Section II.B.1 of his Substitute Reply Brief, holding that contractual disclaimers cannot be invoked to defeat a fraud claim when the plaintiff was fraudulently induced to enter into the contract.

Moreover, plaintiff fails to acknowledge that the Court in *Artilla* noted that the buyer in *Ringstreet* was provided full access to inspect the defective plumbing, whereas the false façade erected by the defendants in *Artilla* prevented access to the bowed foundation wall. 72 S.W.3d at 299. Here, the parties contractually agreed that plaintiff could conduct any type of property inspection he desired, including to address “health and/or environmental concerns” (L.F. 18), and it is undisputed that plaintiff was given unrestricted access to do so (Tr. VII:1242-43).

Plaintiff similarly maintains that the Court of Appeals’ opinion in *VanBooven v. Smull*, 938 S.W.2d 324 (Mo. App. W.D. 1997), also distinguished *Ringstreet* (Br. 42). But although he portrays *VanBooven* as a “fraud-by-nondisclosure” case, in fact the defendants used masking agents to conceal pet urine damage to the carpet in the house they sold to plaintiffs, and in response to the plaintiffs’ question about the condition of the carpet, told them that they were “unaware of any . . . problems.” *Id.* at 326. *VanBooven* was thus both a fraudulent misrepresentation and concealment case, significantly different from the “passive silence” in both this case and *Ringstreet*.

Furthermore, unlike the bargain struck by plaintiff and Chase here, under which Chase had no duty to disclose, the only document relied on by the defendants in *VanBooven* was a release stating that the plaintiffs accepted the property in its present

condition “and release the Sellers . . . from all further responsibility regarding the condition of the property.” *Id.* at 329. The Court of Appeals noted that under Missouri law, a release is not given effect when it is based on fraud. *Id.* at 329-30. It also rejected the defendants’ reliance on *Ringstreet*, distinguishing their situation from *Ringstreet* and from this case because “the parties did not contractually agree that the sellers made no representations or statements concerning the physical condition of the property; further, nothing said by the Smulls alerted the VanBoovens to the possibility of substantial damage to the carpet.” *Id.* at 330. Like *Artilla*, then, *VanBooven* stands for the proposition that pre-contract fraud cannot be waived by contractual terms. Nothing in *VanBooven* supports plaintiff’s claim that the holding in *Ringstreet* turned on the defendants’ disclosure that the pipes had previously frozen.

**4. Under the terms of the Contract and Addendum, plaintiff had no right to rely on Chase’s purported nondisclosure.**

As we explained in our opening brief, the parties’ contractual agreement that Chase would remain silent regarding the property, and that there would be no implied representations, not only precludes a determination that Chase had a duty of disclosure, but also negated any right plaintiff may otherwise have had to rely on Chase’s silence by inferring from it a representation of fact (Chase’s Subst. Br. 36-37). In response, plaintiff mischaracterizes Chase’s argument, first by claiming that Chase is relying on the “as is” clause to defeat his right to rely on Chase’s nondisclosure (Br. 43-45). But as explained in our opening brief and here, Chase’s argument is founded on its contractual right to be silent in paragraphs 9 and 10 of the Addendum, not on the “as is”

clause. *See Ringstreet*, 890 S.W.2d at 720 (plaintiff’s reliance on “as is” provision was misplaced when defendants focused on other, more specific contractual provisions in seeking summary judgment on plaintiff’s fraud claim). The cases plaintiff cites for the proposition that “Missouri courts have repeatedly rejected Chase’s suggestion that the ‘as is’ clause defeats Mr. Hess’ right to rely” (Br. 43) are thus inapposite for two reasons: Chase’s argument does not depend on the “as is” clause, and both cases cited by plaintiff involved affirmative misrepresentations by a car dealer. Likewise, the cases he cites to the effect that the impact of the “as is” clause on his right to rely on Chase’s nondisclosure at least presents a jury issue are off the mark for the same reasons (Br. 44).<sup>5/</sup>

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<sup>5/</sup> Plaintiff’s citation of these cases is inappropriate for other reasons as well. He cites *Werremeyer v. K.C. Auto Salvage Co.*, 2003 WL 21487311, at \*4 (Mo. App. W.D. June 30, 2003), and represents that it was affirmed in relevant part by this Court’s opinion reported at 134 S.W.3d 633 (Mo. banc 2004) (Br. 37, 43, 44). In fact, the Western District’s opinion was vacated upon transfer to this Court, which is why it remains unpublished, and has no precedential effect. *See, e.g., Philmon v. Baum*, 865 S.W.2d 771, 774 (Mo. App. W.D. 1993). And, his purported quotation from *DeLong v. Hilltop Lincoln-Mercury, Inc.*, 812 S.W.2d 834, 839 (Mo. App. E.D. 1991), contains highly misleading bracketed inserts that wrongly suggest that the case involved a claim of fraudulent nondisclosure.

Plaintiff unsuccessfully attempts to distinguish *Volker Court, LLC v. Santa Fe Apartments, LLC*, 130 S.W.3d 607 (Mo. App. W.D. 2004). Just as plaintiff here claims the right to rely on Chase's silence even in the face of his contractual agreement that Chase would be making no representations, the plaintiff in *Volker* claimed the right to rely on the defendant's supposed offer to sell real estate even though the would-be seller expressly stated that he would need his partner's approval. *Id.* at 610. Like the plaintiff in *Volker*, plaintiff here had no right to rely as a matter of law.

Finally, plaintiff maintains that Chase's argument fails because, although the jury necessarily found that he relied on Chase's silence using "that degree of care that would have been reasonable in plaintiff's situation," Chase does not contend that that finding was supported by insufficient evidence (Br. 44, quoting S.L.F. 8). Once again, though, plaintiff misconstrues Chase's argument. Because plaintiff contractually acknowledged Chase's right not to make any representations, implied or express, and Chase exercised that right, *as a matter of law* he had no right to rely on Chase's nondisclosure of information as some sort of tacit statement that the property was problem-free.

Plaintiff freely entered into a contract stating in plain language that Chase was making no representations whatsoever. His dogged reliance on plainly inapposite cases dealing with active misrepresentations demonstrates the lack of authority supporting his position that he should be excused from his contractual commitment. His claim that Chase should be liable for exercising its bargained-for right to make no

representations should never have gone to the jury, and the judgment in his favor and against Chase should be reversed.

## **CONCLUSION**

For the reasons stated here and in our opening brief, the judgment against Chase on plaintiff's fraudulent nondisclosure claim should be reversed and the case remanded with instructions to enter judgment for defendant.

Respectfully submitted,

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**CERTIFICATE REQUIRED BY SUPREME COURT RULE 84.06(c)**

I hereby certify that the foregoing brief includes the information required by Supreme Court Rule 55.03 and complies with the limitations contained in Supreme Court Rule 84.06(b)(1). The foregoing brief contains 7,725 words.

The undersigned further certifies that the disk simultaneously filed with the briefs filed with this Court under Supreme Court Rule 84.05(g) has been scanned for viruses and is virus-free.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of Chase Manhattan Bank USA, N.A.'s Substitute Reply Brief as Cross-Appellant, as well as a diskette formatted in Word XP were mailed first class, postage pre-paid, on this 27th day of October, 2006, to:

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