

IN THE SUPREME COURT OF MISSOURI
SC NO. SC93182

CENTRAL TRUST AND INVESTMENT COMPANY,
Plaintiff/Appellant

vs.

SIGNALPOINT ASSET MANAGEMENT, LLC
Defendant/Respondent

APPEAL FROM THE CIRCUIT COURT OF GREENE COUNTY, MISSOURI
GREENE COUNTY CIRCUIT COURT CASE NO. 1031CV00117
THE HONORABLE MICHAEL J. CORDONNIER, CIRCUIT JUDGE

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Respondent, SignalPoint Asset Management, LLC (hereinafter “SignalPoint”), has reviewed the Statement of Facts filed by the Appellant, Central Trust and Investment Company (hereinafter “Central Trust”). Central Trust’s Statement of Facts fails to comply with the requirement of **Rule 84.04**¹ that the statement of facts be a fair and concise statement of the facts and for that reason, should be stricken.

Central Trust’s Statement of Facts does not set forth those facts that were presented by SignalPoint and were admitted by Central Trust. Rather, Central Trust has filed a Statement of Facts that is essentially a recitation of Central Trust’s Statement of Additional Material Facts which was filed with the trial court. As is detailed later, Central Trust has included in its statement of facts many purported facts that were actually denied or simply not supported by the record. Therefore, SignalPoint deems it necessary to present a statement of facts setting forth the material facts that were admitted by Central Trust and relied on by SignalPoint for its Motion for Summary Judgment.

Included within this statement of facts are some facts that Central Trust improperly denied at the trial court level in that the denials of Central Trust were not supported by appropriate citation to the discovery, exhibits or affidavits as required by **Rule 74.04(c)(2)**. For example, SignalPoint asserted the following statement of fact:

¹ Unless otherwise mentioned, all rule references are to Missouri Rule of Civil Procedure (2013).

119. Springfield Trust clients were not contractually bound to stay with Springfield Trust or Central Trust and could decide at any given point in time to move their accounts. (L.F. 159).²

Central Trust denied paragraph 119 and in doing so relied on the deposition testimony of Jamie Peebles, an executive vice president and southern regional manager for Central Trust, and Bob Jones, the president of Central Trust. (L.F. 428, 481). The cited portions of Bob Jones testimony are as follows:

Q. You guys who work in your industry – don't you kind of work on fee revenue?

A. Correct.

Q. And it's a percentage of assets under management?

A. Typically, that's the way our – our compensation works.

Q. And so if a million dollar account leaves and goes over to Troy Kennedy, can you associate the lost revenue with that?

A. Yes.

² The Statement of Facts that SignalPoint filed with the trial court is located in the Legal File at pages 146-165 and Central Trust's response thereto at pages 426-502. Central Trust filed additional facts with the trial court that are located at pages 556-576 and SignalPoint's response is set forth at pages 987-1017.

Q. How can you do that?

A. Well, that million dollar account would have had a fee associated with it, and that fee is the lost revenue.

Q. Okay. How long?

(L.F. 751).

The above cited to testimony of Bob Jones does not in any way establish one way or the other whether or not STC's and Central Trust's clients are contractually bound to continue their association with STC or Central Trust for any period of time.

The cited to testimony of Jamie Peebles is as follows:

Q. What percentage of Central Trust – your – your business down here in the Springfield area is, just ballpark, trust versus brokerage? Do you have any idea?

A. Well, when you say brokerage, it's really investment management.

Q. Okay.

A. Okay. Is that what you're –

Q. Yes ma'am. I'm sorry.

A. Okay. I would say 50 percent.

Q. Do you have any idea of the acquired business at Springfield Trust? Would it be your understanding that it's approximately the same ratio, 50 percent trust, 50 percent investment management?

A. There are agency accounts who we're serving as agent for the trustees, there are accounts where we serve as trustee, and then there are investment management accounts. So if you lump together the agent serving as trustee and the trustee accounts, I suspect it would be around 50-50.

(L.F. 828-29).

Again, the cited to testimony does not support the denial. As such, under **Rule 74.04** (c)(2), the fact is deemed admitted. Central Trust repeated this pattern of improperly denying several material facts. Therefore, SignalPoint deems it necessary to present an accurate Statement of Facts. What follows is a fair and concise statement of the facts relevant to the questions presented in this appeal.

Troy Kennedy worked for over eighteen years at Springfield Trust Company and Investments ("STC"). (L.F. 426). In that time, Kennedy brought in new clients, some of whom he continued to serve as the relationship manager. (L.F. 427) On November 20, 2009, STC was purchased by Central Trust. (L.F. 434). Troy Kennedy left his employment with STC that day. (L.F. 427). Upon the termination of his employment at STC, Troy Kennedy solicited clients of Central Trust. (L.F. 427). SignalPoint had no contact with Kennedy until the last week of December, 2009. (L.F. 498). On February

22, 2010, SignalPoint entered into an investment advisor representative agreement with Kennedy. (L.F. 500). That agreement provides that Kennedy is an independent contractor and has no right to bind SignalPoint, waive any of SignalPoint’s rights or obligate SignalPoint. (L.F. 331, 333, 500). SignalPoint serves as Kennedy’s registered investment advisor and Kennedy and ITI are affiliated with SignalPoint. (L.F. 1013, 1014). Kennedy and ITI offer their investment services through SignalPoint. (L.F. 1014).

On January 5, 2010, Central Trust filed suit against Troy Kennedy and ITI Financial, LLC, (“ITI”) a company Kennedy formed after leaving STC. (L.F. 2). On September 7, 2010, Central Trust amended its petition to assert additional claims against Kennedy and add SignalPoint as a party and assert new claims against SignalPoint. (L.F. 5). Central Trust asserted against SignalPoint claims of (a) Tortious Interference with Business Relations (Count VI); (b) Misappropriation of Trade Secrets (Count VII); and (c) Civil Conspiracy (Count VIII). (L.F. 33-38). The trial court granted summary judgment in favor of SignalPoint on July 13, 2011 and an amended summary judgment was entered on July 26, 2011, which Central Trust appealed. (L.F. 11, 14). Central Trust voluntarily dismissed its claims against Troy Kennedy and ITI on November 14, 2011, so those claims are not the subject of this appeal, and neither Kennedy or ITI is a party to this appeal. (L.F. 16).

The summary judgment entered by the court does not state the specific basis for the judgment, other than to state that there is no genuine dispute as to the material facts and that SignalPoint is entitled to judgment as a matter of law. (L.F. 1092-1094).

In 2008, Kennedy signed an employment contract with STC. (L.F. 434). The employment contract was for a term of six years, from January 1, 2008 to December 31, 2013. (L.F. 42) The employment contract was signed by Kennedy and John Courtney, the president and chairman of the board for STC. (L.F. 428, 435). Paragraph 9 of the contract contained the following non-compete provisions:

In consideration for the Employment Agreement, the Employee hereby covenants for a period of three (3) years and within one hundred (100) mile radius of Springfield, MO: a. *Not to solicit Springfield Trust Company Clients*; b. Not to solicit Springfield Trust Company employees and clients to terminate their relationship with Springfield Trust Company; c. Not to accept employment with or in any other manner engage in a business which, directly or indirectly, competes with Springfield Trust Company within a one hundred (100) mile radius of Springfield, MO and; d. provided STC's revenue do not fall below four million dollars (\$4,000,000) in any twelve (12) month period not to refer STC clients or prospects to any individual or business which directly or indirectly competes with STC.

(L.F. 436-37) (emphasis added).

That same paragraph of the employment contract also stated:

Notwithstanding the above, this Agreement and the covenant not to compete shall become void and unenforceable in the event of a sale of the Corporation [STC] or a sale of a controlling interest in the Corporation. This covenant not to compete shall not be applicable if a substantial interest in Corporation is sold (more than 50% of the stock) to individuals or other entities who are not shareholders as of 1/1/2007.

(L.F. 437) (emphasis added). Central Trust knew that Kennedy’s non-compete agreement would cease to be in effect upon the purchase of STC by Central Trust. (L.F. 493)

The employment contract also stated that Kennedy “shall continue serving on the Corporation’s Board of Directors as a full voting member and receive full Director’s fees for each meeting attended and shall also chair the advisory board for no additional fee.” (L.F. 430).

In July of 2009, Kennedy signed an Oath of Director with STC. (L.F. 428-29). Kennedy was the only signatory to the oath. (L.F. 429). The oath contained a confidentiality agreement that was not limited in any way by time, geography, market or any other limitation. (L.F. 45, 430, 432). The primary reason for the oath and confidentiality agreement was due to the possible sale of STC to Central Trust. (L.F. 432). It was given to the directors after STC had signed a confidentiality agreement with

Central Trust and only one week prior to the execution of a letter of intent with Central Trust. (L.F. 433).

Kennedy did not receive any additional compensation for signing the oath and STC took on no additional obligations or duties in return for Kennedy signing the oath. (L.F. 429-30).³ The oath contains no mention of any act, forbearance, or return promise that Kennedy was to receive from STC. (L.F. 431).

As previously indicated, on November 20, 2009, Central Trust purchased STC. (L.F. 434) The stock purchase agreement entered into between STC and Central Trust set forth that “Section 2.13 of Company’s Disclosure Schedule contains a list of all items of Intellectual Property material to the business or operations of Company.” (L.F. 255, 442-443).⁴ The stock purchase agreement defined “Intellectual Property” in such a manner so as to include “trade secrets”. (L.F. 254-255, 443). The definition of “trade secrets” in the stock purchase agreement also includes “customer lists”. (L.F. 254, 442).

³ Central Trust denied these facts at the trial court level. However, Central Trust’s citations again do not support the denials. For instance, John Courtney specifically testified that the directors did not receive any additional compensation for signing the oath. (L.F. 726-27). The portions cited to by Central Trust only establish that directors were regularly paid fees.

⁴ Central Trust denied this fact but, again, its citations do not support the denial. The purchase agreement clearly contains the language set forth above. (See L.F. 255).

Even though “trade secrets” are defined within the agreement as including customer lists, Section 2.13, the Disclosure Schedule, which contained “a list of all items of Intellectual Property material to the business or operations of Company [STC]” does not include any of STC’s customer or client’s names, or any client list of STC. (L.F. 255, 257, 272, 442, 444).⁵ Bob Jones, the president of Central Trust, admitted in his deposition that the schedule for Section 2.13 of the stock purchase agreement does not list customer lists and does not contain any customer information. (L.F. 271, 272, 428).

Prior to leaving his employment with STC, Kennedy began preparing for life after STC by checking office leases, phone expenses, computer expenses and other infrastructure expenses. (L.F. 1002). Kennedy told two or three clients of STC that he was not going to continue his employment with whoever purchased STC. (L.F. 1003). Also prior to November 20, 2009, Kennedy spoke with a competitor of STC about opening a branch in Springfield. (L.F. 1003). Kennedy told an individual at Dimensional Fund Advisers (“DFA”) that he was going to take as many STC clients as he was capable of taking. (L.F. 566).

Before Central Trust acquired STC, Kennedy informed Jamie Peebles, that he was going to solicit STC’s customers to try to get them to come with him if he left. (L.F. 478, 1003). Peebles passed this information on to Bob Jones, the president of Central Trust.

⁵ Again, these facts were denied but Central Trust’s citations do not support the denial. Schedule 2.13 of the agreement does not contain any mention of clients or client lists. (See L.F. 257).

(L.F. 478). This knowledge caused STC and Central Trust to revise their stock purchase agreement. (L.F. 488). John Courtney reduced the selling price of STC to allow Central Trust to negotiate with Kennedy. (L.F. 487).

Kennedy testified in his deposition that by August 28, 2009, he thought he was not going to work for Central Trust if Central Trust ended up purchasing STC. (L.F. 1005). John Courtney, of STC, knew as of September 2, 2009, that if Kennedy left some of the customers were also going to leave. (L.F. 491). Central Trust knew that if Kennedy left he was going to compete with Central Trust and come after Central Trust clients. (L.F. 485). John Courtney considered firing Kennedy for negotiating with a competitor before the Central Trust sale closed, but chose not to do so. (L.F. 486).

STC had a client database containing client information and almost every employee of STC, from the receptionist to the CEO, had access to the client database. (L.F. 457)

Kennedy testified during his deposition on May 10, 2011 that in August of 2009, before his employment with STC ended, he took a cell phone containing contacts and names of approximately 200 STC clients and a paper list of STC's clients and placed them in a safe deposit box. (L.F. 1006). He also placed in the deposit box a list of his clients and relationships at STC and a copy of his STC customer list that was attached as an exhibit to his employment contract. (L.F. 1006, 1007). During John Courtney's deposition on May 12, 2011, counsel for Kennedy offered to take counsel for Central

Trust to review and remove the contents of the safe deposit box, which counsel for Central Trust declined. (Supplemental L.F. 85).

On the date of the closing of the sale of STC to Central Trust (November 20, 2009) Kennedy began calling STC's/Central Trust's customers to solicit their business. (L.F. 1008). He formed ITI on November 21, 2009. (L.F. 1009).

Central Trust admitted that, as of February 23, 2010, the date when SignalPoint first began its contractual relationship with Kennedy, Central Trust had lost approximately \$160,000.00 in total closing business and of that amount, \$59,000.00 was not attributable to Kennedy. (L.F. 498; Supp. L.F. 330-331).

Prior to entering into any relationship with Kennedy, SignalPoint reviewed Kennedy's employment contract with STC and, upon reviewing it, believed that Kennedy was free to compete with Central Trust. (L.F. 502).

As previously stated, on September 7, 2010, Central Trust filed its First Amended Petition with the trial court in which it, for the first time, included three claims against SignalPoint. (L.F. 5). In its First Amended Petition, Central Trust alleged that it had developed a "Client Database" that contains names, contact information and personal and private information of its clients and prospective clients and that this "Client Database" constituted a trade secret. (L.F. 21).

Kennedy did not ever provide any list of Central Trust clients to SignalPoint. (L.F. 498-499).⁶ Central Trust also did not ever provide a customer list to SignalPoint. (L.F. 496). In its statement of additional material facts, Central Trust did not come forth

⁶ In its response to certain statements of fact, including those facts regarding whether SignalPoint ever contacted any client of Central Trust and whether SignalPoint ever received a client list, Central Trust attempted to argue that Kennedy was an agent of SignalPoint. However, Central Trust did not ever plead any allegations of agency between Kennedy or ITI and SignalPoint or any allegation of vicarious liability. Central Trust never moved for leave to amend its petition to include any such allegations and, SignalPoint in its reply in support of its motion for summary judgment specifically raised this issue and argued that Central Trust was prohibited from presenting evidence and making arguments for legal liability claims that are not contained in Central Trust's petition. (L.F.1034-1035). Central Trust denied SignalPoint's statement that SignalPoint never received a client list, but in doing so relied only on deposition testimony of Kennedy which established that he has an independent advisor representative agreement with SignalPoint. At no point did Kennedy ever testify, nor did Central Trust present any evidence that SignalPoint received any client list. As such, these facts should be deemed admitted under **Rule 74.04(c)(2)**. *See Hutchens v. Burrell, Inc.*, 342 S.W.3d 399, 404-05 (Mo.App. W.D. 2011) and *Vogler v. Grier Group Management Co.*, 309 S.W.3d 328, 331 (Mo.App. E.D. 2010).

with any facts establishing that SignalPoint in fact received a copy of any STC/Central Trust list of clients or had access to STC's / Central Trust's "Client Database."

The only information that Central Trust claims SignalPoint has in its possession is the names, addresses and social security numbers of some of Central Trust's clients. (L.F. 477).

Prior to 2006, three STC client relationship managers left STC and solicited STC clients. (L.F. 462). STC knew that at least one of these individuals had taken some sort of customer list with her. (L.F. 247, 462). However, STC took no legal action in response to the three individuals who left STC and solicited STC clients, including the one who took the client list. (L.F. 462). In 2006, approximately fifteen years after STC was formed, STC first began requiring its client relationship employees to sign non-competition and non-solicitation agreements. (L.F. 461-62, 556).

Peebles testified that she had received feedback that at least two former employees of STC had solicited clients of Central Trust. (L.F. 463-464). However, neither STC nor Central Trust has ever sued either former employee of STC. (L.F. 464).

As early as 2001, STC identified the names of certain of its clients on its website. (L.F. 306-311, 463). STC also advertised names of its clients in the *Springfield Business Journal*. (L.F. 312-320, 463).

Bob Jones, the president of Central Trust, testified that Kennedy could use client names to get client addresses and client e-mail addresses. (L.F. 470). Jones also

indicated that the client's names and address are the client's information and that the client has control of this information. (L.F. 473). Jones testified that a client can decide where the client brings his business. (L.F. 474). John Courtney testified that Kennedy did not need a list of client names because Kennedy was good enough to remember everyone's names. (L.F. 445).

Peebles testified that there was a consistent pattern of clients telling her that they were leaving Central Trust because they have had a relationship with Kennedy, they know him and that is why they are moving. (L.F. 455)

Peebles testified that she did not know how many of the clients that Kennedy had dealt with in the past left STC/Central Trust before Kennedy became involved with SignalPoint. (L.F. 476). She also stated that, leaving aside the issue of Kennedy, she is not aware of any individual from SignalPoint ever contacting a client of Central Trust. (L.F. 476). Peebles testified that, leaving aside Kennedy, she is not aware of SignalPoint actively soliciting any of Central Trust's current clients. (L.F. 483).

Central Trust clients can decide to move their accounts to another competing business if they wish. (L.F. 481). Each client has control over his or her information and has control where that information goes. (L.F. 483). Central Trust clients are free to tell people that they are clients of Central Trust. (L.F. 495). Central Trust actually anticipated losing some of the business of STC due to the acquisition of STC by Central Trust. (L.F. 481)

Central Trust’s own privacy policy that is provided to clients informs the clients that Central Trust will share the client’s personal information with affiliates, which are defined as financial and non-financial companies related by common ownership or control. (L.F. 497-498). Listed affiliates include: Central Bank; City Bank; Empire Bank; First Central Bank; Metcalf Bank; ONB Bank & Trust Company; Boone County National Bank; Jefferson Bank of Missouri; Central Bank of Lake of the Ozarks; Ozark Mountain Bank; Third National Bank; Central Mortgage Company; First National Bank of Audrain County; First National Bank of St. Louis; Dogwood Insurance Agency, LLC; and InvestorServices Insurance, Inc. (L.F. 324).

SignalPoint does not consider client information to be a trade secret due to the Protocol for Broker Recruiting. (L.F. 327, 329, 500).

Although DFA and Fidelity also do business with Kennedy, Bob Jones made a business decision not to institute a legal action against either DFA or Fidelity because Kennedy did not have a non-compete and had already been approved by DFA and might have had clients that were not STC clients. (L.F. 496-497).

After the trial court granted summary judgment to SignalPoint, Central Trust moved for a new trial based on newly discovered evidence. (L.F. 14). The hearing on that motion was conducted on the record and a copy of the transcript has been provided to this Court. In that hearing, the trial court stated that, although it wasn’t going to go through and try to rule out certain counts of Central Trust’s petition, it would give counsel some idea of what the court was thinking could be submitted to a jury. (New

Trial Hearing⁷ 17-18). The trial court indicated that Central Trust should probably not expect to submit a misappropriation of trade secrets to a jury. (N.T.H. 17) The trial court also stated that, since SignalPoint was no longer a defendant, Central Trust should not expect to be able to submit on the civil conspiracy claim. (N.T.H. 18).

The majority of Central Trust’s Statement of Facts contains alleged facts that Central Trust included in its Statement of Additional Material Facts that it filed with the trial court but which were denied by SignalPoint. Other purported facts are not actually supported by those citations to the record given by Central Trust in its Statement of Facts. See Defendants’ Joint Motion to Strike Portions of Plaintiff’s Statement of Additional Material Uncontroverted Facts (L.F. 1040-1055). The Court of Appeals, Southern District, made specific note of Central Trust’s failure to follow Rule 74.04, stating that the pleadings filed by Central Trust “fail to comply in numerous instances with the requirement of Rule 74.04(c)(2) that all denials be supported by appropriate citation to exhibits, affidavits or other discovery documentation. A great deal of the time Central Trust’s denials cite to a document or exhibit that does not contain the fact or assertion that is supposed to be found or supported there.” (Opinion at pg. 11, footnote 9). For example, the following represents several purported facts (which appear in bold) contained within Central Trust’s statement of facts:

- **As long as a client maintains an account with Central Trust, fees are earned by Central Trust for continued management of the account.**

⁷ Hereinafter N.T.H.

(Central Trust’s Brief p.4). This statement is not contained in the record, or at least not in the portion of the record cited to by Central Trust. (L.F. 901, 990).

- **The “client list” turned out to be 39 pages of detailed, hand-written and printed documents (the “Client Lists”) containing STC/Central Trust’s client contact information, including names, addresses, phone numbers, e-mail addresses, personal and family information, and confidential banking information. And: Kennedy failed to produce the cell phone or Client Lists until after the hearing on the Motions for Summary Judgment which occurred on July 6, 2011.** (Central Trust’s Brief p.11). These purported facts should not be considered part of the record before this Court as they were not made part of the record prior to the trial court’s entry of summary judgment, even though Central Trust was aware of their existence before SignalPoint filed its Motion for Summary Judgment. (L.F. 1108-1138) (see response to Point IV). Moreover, the “client list” as Central Trust refers to it, was never made part of the record.
- **At that time, and before reaching an agreement to affiliate with Kennedy, SignalPoint understood that Kennedy would bring STC/Central Trust clients to SignalPoint *if* SignalPoint agreed to affiliate with Kennedy.** (Central Trust’s Brief, P. 11) (emphasis added). This purported fact was denied by SignalPoint at the trial court level (L.F. 1015, paragraph 140). As SignalPoint’s denial points out, the testimony

was that SignalPoint expected that the relationships Kennedy would bring with him were those relationships that Kennedy developed while he was at STC. (L.F. 1015). As is elaborated more fully on in the response to Point I, this is a key difference.

ARGUMENT

STANDARD OF REVIEW FOR POINTS I-III

This Court recently reiterated an appellate court’s standard of review for a trial court’s granting of summary judgment. In *Goerlitz v. City of Maryville*, 333 S.W.3d 450 (*Mo. banc 2011*), this Court stated the following:

The trial court makes its decision to grant summary judgment based on the pleadings, record submitted and the law; therefore, this Court need not defer to the trial court’s determination and reviews the grant of summary judgment *de novo*. In reviewing the decision to grant summary judgment, this Court applies the same criteria as the trial court in determining whether summary judgment was proper. Summary judgment is only proper if the moving party establishes that there is no genuine issue as to the material facts and that the movant is entitled to judgment as a matter of law. The facts contained in affidavits or otherwise in support of a party’s motion are accepted as true unless contradicted by the nonmoving party’s response to the summary judgment motion. Only genuine disputes as to material facts preclude summary judgment. A material fact in the context of summary judgment is one from which the right to judgment flows.

A defending party . . . may establish a right to summary judgment by demonstrating: (1) facts negating any one of the elements of the

non-movant’s claim; (2) that the non-movant, after an adequate period for discovery, has not been able and will not be able to produce sufficient evidence to allow the trier of fact to find the existence of any one of the elements of the non-movant’s claim; or (3) that there is no genuine dispute as to the existence of the facts necessary to support movant’s properly pleaded affirmative defense.

Goerlitz, 333 S.W.3d at 452-53. (Internal citations and quotations omitted).

Pursuant to Missouri Rule of Civil Procedure **74.04**, once a defendant moves for summary judgment, the opposing party must admit or deny the uncontroverted material facts set forth by the defendant. Once SignalPoint came forward with uncontroverted material facts negating any one of the elements of the claims against it by Central Trust, then Central Trust could only avoid summary judgment by showing that one or more of the material facts presented by SignalPoint is, in fact, genuinely disputed. *Taylor v. Compere*, 230 S.W.3d 606, 609 (Mo.App. S.D. 2007).

Where the trial court does not specify the basis for its judgment, the judgment will be upheld under any appropriate theory. *Southwestern Bell Yellow Pages, Inc. v. Robbins*, 865 S.W.2d 361, 369 (Mo.App. E.D. 1993).

I. The Trial Court Did Not Err In Granting Summary Judgment On Central Trust’s Misappropriation Claim As No Trade Secret Exists And/Or No Misappropriation Occurred

A. The Determination That Central Trust Has No Trade Secret Is A Question of Law

The trial court correctly held in its July 14, 2011 order that the identities of Central Trust’s customers/clients are not trade secrets as a matter of law. This Court should affirm that conclusion, which would dispense with every issue raised in Central Trust’s appeal. Missouri law is clear: whether or not certain information constitutes a trade secret is a question of law to be determined based on applicable facts. *State ex rel. Coffman Group L.L.C. v. Sweeney*, 219 S.W.3d 763, 769 (Mo.App. S.D. 2005). Central Trust argues that if it presents evidence that its customer lists may constitute a trade secret then a jury should decide the issue. This is an incorrect statement and is not supported by *Lyn-Flex West, Inc. v. Dieckhaus*, 24 S.W.3d 693 (Mo.App. E.D. 1999), the one case cited to by Central Trust as support for this proposition. The court in *Dieckhaus* held that the information presented was sufficient for it to determine, as a matter of law, that the claimed information was a trade secret. *Dieckhaus*, 24 S.W.3d at 699. At no point did the court hold that the jury should decide whether or not certain information is a trade secret.

B. Portions of Central Trust’s Substitute Brief Raise Issues Not Raised Below

In point I of its substitute brief, Central Trust has attempted to raise several new issues that were not raised in its original appellate brief filed with the Southern District. In particular, Central Trust argues, for the first time, that SignalPoint failed to make a *prima facie* showing that it was entitled to summary judgment; that SignalPoint failed to show facts negating any one of Central Trust’s *prima facie* elements or to demonstrate that Central Trust, after an adequate period of discovery, had not been able to produce evidence sufficient to find the existence of any one of Central Trust’s elements. Because these arguments were not contained within Central Trust’s original brief, they cannot now be raised for the first time. **Rule 83.08(b)**.

C. What Is The Claimed Trade Secret?

First, it is important to attempt to ascertain what exactly Central Trust is claiming as a trade secret. This is because, "[e]vidence of purported 'trade secrets' must be more than general assertions, but must be sufficiently specific to allow a determination by the court." *Healthcare Services of the Ozarks, Inc., v. Copeland*, 198 S.W.3d 604, 611 (*Mo.banc* 2006). Central Trust’s definition of its claimed trade secret has changed throughout the course of this proceeding. Like a bad movie that keeps spawning sequels, every time a court has indicated that the purported trade secret is, in fact, not a trade secret, Central Trust has attempted to revive its claim by changing its definition of its purported trade secret.

In its First Amended Petition, the petition on which SignalPoint was granted summary judgment, Central Trust stated that its claimed trade secret was its “Client Database.” (L.F. 21). It defined “Client Database” as a database maintained by Central Trust that “contains names, contact information, and personal and private information not available to the public of its clients and prospective clients.” (L.F.21). However, after an adequate period of discovery, Central Trust failed to come forward with any evidence demonstrating that SignalPoint had ever accessed, used or in any way published Central Trust’s “Client Database”.

In its original brief filed with the Southern District, Central Trust argued that its claimed trade secret was its “Client Lists and client relationship information”. (Central Trust’s original brief, p. 34). Central Trust did not offer a definition of “Client Lists,” nor did it argue that its “Client Database” was a trade secret or that SignalPoint had misappropriated the “Client Database.”

Central Trust now refers to its claimed trade secret in yet a different manner. In its substitute brief, Central Trust repeatedly and exclusively refers to its “Client Information” and “Client Lists” as the information it is claiming as a trade secret. In its statement of facts, Central Trust defines “Client Lists” as the 39 pages of hand written and printed documents that were found in Kennedy’s lawyer’s safe deposit box. (p. 10). Central Trust defines “Client Information” as the information about the individuals that was contained on the “Client Lists”. (p. 10-11). However, since Central Trust failed to include the “Client Lists” as part of the record, there is no way to ascertain exactly what

the “Client Lists” or “Client Information” are. This alone is fatal to Central Trust’s appeal. Again, Central Trust did not come forward with any evidence to demonstrate that SignalPoint had ever seen, used or published either the “Client Lists” or the “Client Information.” In fact, Central Trust is not aware of anyone from SignalPoint ever contacting a client of Central Trust. (L.F. 476). Nor did Central Trust present any evidence of SignalPoint actively soliciting any of Central Trust’s clients. (L.F. 483).

SignalPoint is somewhat hampered in its ability to respond to Central Trust’s arguments by the fact that Central Trust itself cannot seem to determine what exactly it is claiming as a trade secret. It’s always harder to hit a moving, and ever changing, target. In its opinion, the Southern District made note that it too had a difficult time ascertaining exactly what Central Trust was claiming as a trade secret. (Opinion, page 8). Because Central Trust is now arguing beyond the scope of its original pleadings (its amended petition), and as Central Trust did not raise its current claim of trade secrets (the information contained on the 39 pages of documents) before either the trial court or the Southern District, its appeal should be dismissed and the summary judgment affirmed. However, in the event the Court chooses to address Central Trust’s new arguments, then SignalPoint will demonstrate herein why this most recent attempt, as well as the originally claimed trade secret (the “Client Database”), are not trade secrets.

D. Customer Contacts Are Not Trade Secrets

To the extent that Central Trust claims that its customer contacts constitute a trade secret, Missouri law clearly establishes that such information is not a trade secret. This

Court recently re-affirmed this long standing tenet of employer-employee law in *Western Blue Print Company, L.L.C. v. Roberts*, 367 S.W.3d 7 (Mo.banc 2012).

In *Western Blue Print*, the plaintiff brought an action alleging breach of fiduciary duty, tortious interference with business and civil conspiracy. *Western Blue Print*, 367 S.W.3d at 11. One of the defendants was a former employee of the plaintiff who had left employment with the plaintiff and joined a competitor. *Id.* at 12, 13. The plaintiff argued that this defendant had breached a fiduciary duty not to compete with the plaintiff when the defendant solicited customers of the plaintiff. *Id.* at 15-17. In analyzing the plaintiff's claim, this Court stated the following:

In the sales industry the good will of a customer frequently attaches to the employer's sales representative personally; the employer's product becomes associated in the customer's mind with that representative. [*Walter E. Zemitzsch, Inc. v. Harrison*, 712 S.W.2d 418, 421-22 (Mo.App. E.D. 1986) (quoting *Cont'l Research Corporation v. Scholz*, 595 S.W.2d 396, 401 (Mo.App. E.D. 1980)]. While these "customer contacts" are protectable, they are not protectable under a theory of confidential relationship or *trade secret*. *Zemitzsch*, 712 S.W.2d at 422. *Zemitzsch* acknowledged, "Because sales personnel may 'exert a special influence over that customer and entice that customer's business away from the employer,' the proper means of protection is a non-competition agreement." *Id.* (quoting *Cont'l Research Corporation*). *Zemitzsch* held an employee

should not be held liable for the company’s failure to take precautions to protect this information if it deems it confidential. *Id.* Similarly, [the defendant] is not liable for [the plaintiff’s] failure to protect its customer contacts[.]

Id. at 18. (emphasis added).

Thus, this Court clearly established that to the extent that Kennedy had a relationship with any of the STC’s/Central Trust’s clients, then in order to protect this customer contact information, STC needed to enter into a non-compete agreement with Kennedy. *Id.* STC did just that—it entered into an employment contract with Kennedy that contained non-compete provisions. However, Central Trust is bound by its predecessor’s contract with Kennedy, and the fact that it was rendered “void and unenforceable” when STC was sold to Central Trust. STC and Central Trust had contemplated that Kennedy would compete with Central Trust upon the sale, and would solicit its clients. Central Trust and STC even revised their stock purchase agreement to take this scenario into account, whereby STC reduced the selling price in order to allow Central Trust to negotiate with Kennedy. Central Trust cannot now virtually regenerate the very non-compete/non-solicitation agreement that it, itself, had rendered void and unenforceable by claiming that the identities of its clients/customs are somehow “trade secret.” *Western Blue Print* and *Zemitsch* prevent such an endeavor.

The customer names and other information learned by Kennedy during his tenure at STC are not trade secrets as a matter of law. Central Trust cannot prevent Kennedy’s

use of this information because it terminated the employment contract that contained prohibitions against its use. As stated by *Zemitsch*, Kennedy should not be held liable for Central Trust’s failure to take such precautions. Moreover, Central Trust failed to come forward with any evidence demonstrating that the names, clients, and information on the 39 pages (the “Client Lists” and “Client Information”) was anything other than persons with whom Kennedy had established a personal relationship while at STC. In fact, Central Trust admitted that the “Client List” was a list of Kennedy’s clients and his relationships from STC. (L.F. 1006).

E. Central Trust’s “Client Lists”, “Client Information” and “Client Database” Are Not Trade Secrets

Central Trust, along with the amicus parties Missouri Bankers Association and Missouri Chamber of Commerce misunderstand the holding of the Southern District. All three parties devote large portions of their briefs to the abstract argument that a list of customers can constitute a trade secret. They mistakenly read the Southern District’s opinion as holding that a list of customers compiled by a business can never constitute a trade secret. While the Southern District did question whether this Court “specifically intended for a customer list itself to be a trade secret” (Opinion p. 13, footnote 13), it did not ever state that a customer list cannot constitute a trade secret. Instead, the Southern District specifically stated that “under the facts in the record before us, the information at issue simply does not meet the statutory definition of a trade secret nor does it meet the six-factor test set out in case law.” Opinion at 9-10. And on this point, the Southern

District was correct as SignalPoint presented facts demonstrating that Central Trust’s claimed trade secret, whatever it may be, is not in fact a trade secret.

“Trade secret” is expressly defined by Missouri law. **Section 417.453** sets forth the following definition of the term:

- (4) “**Trade secret,**” information, including but not limited to, technical or nontechnical data, a formula, pattern, compilation, program, device, method, technique, or process, that:
 - (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and
 - (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Central Trust bears the burden of proof of establishing its asserted interests in its trade secrets. *Healthcare Services of the Ozarks, Inc., v. Copeland*, 198 S.W.3d 604, 611 (Mo.banc 2006).

i. Application of Statutory Definition of Trade Secret

Central Trust cannot meet either subpart (a) or (b) of the definition of trade secret set forth in §417.453. Under subpart (a), the purported trade secret must not be generally

known to or readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use. Under subpart (b), Central Trust must have made reasonable efforts to maintain the secrecy of its purported trade secret. Fundamentally, it was proper for Kennedy to have and know the names of the STC/Central Trust clients under his employment contract. As noted above, the contract (including its prohibition against solicitation) was rendered void and unenforceable. Thus, knowledge and use of the names of clients was anticipated and thus ascertainable by proper means. In addition, the contract itself had attached to it a large list of clients, each of whom worked with Kennedy. However, there was no covenant in the contract requiring Kennedy to keep this information confidential. Thus, it was proper, if he so desired, for Kennedy to use this list of customers after the sale of STC to Central Trust.

Further, Central Trust admits that it shares the personal information of its clients with Central Trust affiliates, which are defined as financial and non-financial companies related by common ownership or control. (L.F. 497-498). Those affiliates include: Central Bank; City Bank; Empire Bank; First Central Bank; Metcalf Bank; O & B Bank & Trust Company; Boone County National Bank; Jefferson Bank of Missouri; Central Bank of Lake of the Ozarks; Ozark Mountain Bank; Third National Bank; Central Mortgage Company; First National Bank of Audrain County; First National Bank of St. Louis; Dogwood Insurance Agency, LLC; and InvestorServices Insurance, Inc.

Section 417.453 defines a “person” as “a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government subdivision or

agency, or any other legal or commercial entity, whether for profit or not for profit[.]” The listed affiliates constitute separate entities and each falls within the definition of a “person” contained within §417.453. These other “persons” are not the same “person” as Central Trust. Because Central Trust shares the very information that it claims as a trade secret with these “other persons,” Central Trust cannot claim that same information is a trade secret under §417.453.

STC/Central Trust’s client information also fails to meet subpart (b) of the definition of trade secret contained in §417.453. That section requires that the claimed trade secret must be the subject of efforts that are reasonable under the circumstances to maintain its secrecy. Again, as it regards Kennedy, STC/Central Trust failed in its efforts to maintain secrecy by voiding the Kennedy contract, and by failing to include any covenants regarding confidentiality therein. STC (and Central Trust) had therefore satisfied itself that, with respect to Kennedy and upon a sale of STC, it would not claim confidentiality with respect to the names of its clients. This prevents any list simply containing the names of its clients from ever becoming a trade secret that could be enforced against Kennedy or anyone affiliated with Kennedy like SignalPoint.

The undisputed facts also show that STC/Central Trust failed in its requirement to make reasonable efforts to maintain the secrecy of its claimed trade secrets in other regards. To start with, almost every employee of STC, from the receptionist to the CEO, had access to the “Client Database” that contained the client information. (L.F. 457).

Central Trust presented no evidence demonstrating that each of these individuals were subject to a non-compete or non-disclosure agreement.

Additionally, it was not until 2006, approximately 15 years after STC was formed, that STC first began having its client relationship employees sign non-competition and non-solicitation agreements. (L.F. 461-462, 556). Prior to 2006, three separate client relationship managers left STC and solicited STC customers. (L.F. 462). At least one of these client managers took a list of STC's clients. (L.F. 462). Despite knowing that one of its former employees had taken a client list and was competing against it, STC took no legal action against the former employee. (L.F. 462). Furthermore, STC disclosed the identity of some of its own clients on its website and in newspaper advertising. (L.F. 463).

Moreover, Kennedy also does business with Fidelity and DFA. Fidelity and DFA receive the same client information that SignalPoint does, but Central Trust has made the decision not to pursue any action against Fidelity or DFA. Thus, the information is available to both of these entities yet Central Trust has failed to take any steps or actions against DFA or Fidelity to ensure that the information shared with them by Kennedy (the very same information that Kennedy shares with SignalPoint) remains confidential.

Central Trust also admits that each individual client has control over the client's information and the client can decide where the client wants to do his or her business. (L.F. 473, 474). The client can provide the client's own information to any other advisor or investment firm. (L.F. 482). Thus, the clients have access to this alleged trade secret

and can provide it to anyone they choose. Finally, as previously mentioned, Central Trust shares the client information with other “persons” (as defined by §417.453). Combined, all of these factors demonstrate that Central Trust cannot meet the secrecy requirement set forth in §417.453(4)(b).

ii. Application of Case Law Factors

Although not contained anywhere in the statute, Missouri courts have applied a six factor test to determine whether certain information constitutes a trade secret. Those factors are as follows:

- 1) the extent to which the information is known outside of the business;
- 2) the extent to which it is known by employees and others involved in the business;
- 3) the extent of measures taken by the business to guard the secrecy of the information;
- 4) the value of the information to the business and to its competitors;
- 5) the amount of effort or money expended by the business in developing the information; and
- 6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Copeland, 198 S.W.3d at 610, 611 (quoting Continental Research Corp. v. Scholz, 595 S.W.2d 396, 400-01 (Mo.App. E.D. 1980)).

In addition to failing to meet the required definition under §417.453, the information is also not a trade secret under the six factor analysis applied in *Copeland*.

First, the information is known outside of Central Trust's business. Central Trust voided the Kennedy contract, which included a provision preventing solicitation under certain circumstances, the result of which permitted Kennedy to use the knowledge of client's names to solicit them. Central Trust shares the information with its affiliates. STC's website and advertisement contained the names of certain STC clients. Former STC employees left STC and competed against STC. At least one of these employees took a client list with her when she left. Moreover, the very same information provided to SignalPoint is also being shared by Kennedy with DFA and Fidelity, but Central Trust has decided not to take action against either company.

Second, the information was known or accessible by essentially every employee at STC, none of which had any form of non-compete agreement until 2006 (and then only the client relationship employees).

Third, as previously discussed, Central Trust cannot meet the secrecy requirement. STC entered into an employment contract with Kennedy that contained a non-compete clause and attached a list of customers. The contract did not provide that it or the attached list were confidential. It did provide that the non-compete clause was void and unenforceable upon the sale of STC. As such, it was proper for Kennedy to have and know the names of the STC/Central Trust clients under his employment contract. As noted above, the contract's prohibition against solicitation was rendered void and

unenforceable by the sale of STC to Central Trust. Thus, knowledge and use of the names of clients was not only anticipated but was ascertainable by proper means. Moreover, it wasn't until very recently (2006) that STC actually required some of its employees to sign non-compete agreements. STC knew that at least one former employee kept a list of STC's clients but took no action against that employee. STC even publicly shared some of its clients' information.

Central Trust claims in its substituted brief (p. 41) that “STC’s policies prohibited employees from taking client information out of the STC building”, that “employees who discussed clients in public were subject to termination” and that “STC’s client information was not accessible to the public.” None of these supposed facts were presented by Central Trust in its statement of additional facts as they should have been under **Rule 74.04** and as such SignalPoint was not given an opportunity to deny them by presenting evidence to the contrary. Moreover, the portions of the record that Central Trust cites to (L.F. 641-643, 661-62 and 998) do not support Central Trust’s claims. As such, they should be disregarded by this Court.

Fourth, contrary to Central Trust’s assertions, Kennedy never testified that the information was valuable. He did testify that the information is important, but that does not necessarily equate with economic value. (L.F. 622). Certainly, as an attorney it is important to know your own client’s name but again this does not necessarily mean that the same information is economically valuable. Central Trust failed to present a material fact on this issue. Moreover, the supposed facts that Central Trust relies on regarding

how SignalPoint treats its information were actually denied at the trial court level. (L.F. 996 and 997). In fact, SignalPoint does not consider its client information to be a trade secret due to the Protocol for Broker Recruiting. (L.F. 327, 329, 500).

In regards to the fifth factor, SignalPoint denied the only fact presented by Central Trust in support of its claim that it spent great time and money developing the information. (L.F. 988-989). As such, there appears to be no facts in the record that are relevant to the fifth factor.

As for the sixth factor, the information is easily obtained by certain other persons. As previously noted, Central Trust shares its client information with multiple other “persons” (its affiliates). As such, these affiliates would certainly not have any great difficulty in obtaining the information. The clients have the information and can share it. Also, at least one prior employee of STC took a client list with her when her employment ended. Certainly, the information is not difficult for her to obtain. Moreover, the names of many clients were on a list attached to Kennedy’s own contract, and there was no requirement that the list or the contract remain confidential. As such, the information was easily and properly available to Kennedy. Central Trust and STC did not even consider the information a trade secret at the time of the sale, as the schedule of intellectual property in their agreement didn’t list customer lists or customer information. Finally, so long as Kennedy knows the name of the client (which Courtney testified he was good enough to remember without a list), then he can look up all of the other information in the phone book or on the internet. In its brief, Central Trust expressly

recognizes that “Kennedy learned the identity of STC’s clients exclusively through his employment and directorship at STC.” (Central Trust’s brief, p. 48). As this Court stated in *Western Blue Print*, such information is not protected by trade secret because it constitutes customer contacts. *Western Blue Print, L.L.C., 367 S.W.3d at 18.*

Applying the six factor analysis to the record in this case bolsters the conclusion that neither the “Client Lists,” the “Client Information” nor the “Client Database” are a trade secret as a matter of law under the facts and circumstances of this case.

Central Trust’s reliance on *Lyn-Flex West, Inc. v. Dieckhaus, 24 S.W.3d 693 (Mo.App. E.D. 1999)* is misplaced. First, in *Dieckhaus*, the evidence established that the claimed trade secret was more than just a list of clients. Instead, it was price book maintained by a shoe manufacturing company that contained not only a list of clients, but also “the technical and detailed information concerning products manufactured for each of those customers, the materials used in production and manufacturing of each product and the precise dimensions of each part comprising the insole, including notes and codes unique to each customer[.]” *Dieckhaus, 24 S.W.3d at 696.* There was no dispute that the price book was considered confidential, that it was valuable and the information was only given to those who needed it. *Id. at 696, 698-99.* The information was not known outside of the business; was not even independently known to all of the plaintiff’s employees; the book was kept under lock and key and only one employee had the ability to print a new copy of it; it was valuable to competitors; the book had required a great

deal of time and effort to compile; and finally the specifications in the book could not be easily duplicated or remembered. *Id. at 698, 699.*

The differences between the facts in *Dieckhaus* and this case are obvious. To start with, Central Trust’s claimed secret consists essentially of the names of its clients. There is no specific compilation of technical data or product descriptions. Central Trust failed to come forth with any evidence demonstrating that the “Client Lists” contained any detailed and technical information about each client’s investments or even the fees being charged each individual client. Central Trust also failed to present any facts demonstrating that the “Client Lists” contained information regarding the amount of assets for each individual client that were invested through Central Trust.

Second, at least some of the client information is known outside of Central Trust. This is because STC posted the names of some of its clients on its website and used some of their names in advertising. Additionally, at least one former STC employee took a client list with her when she left STC and began competing against STC. Moreover, the information regarding STC clients was well known by STC employees as practically every employee had access to the client database. Finally, Central Trust shares the information with other persons.

Third, uncontroverted evidence was presented that Kennedy was good enough to remember the client names without needing a client list and therefore, any information on any client list was independently known by Kennedy.

Fourth, prior to Kennedy’s employment with STC ending, at least three former employees of STC had left and solicited STC clients. One of these employees had taken a client list containing names of STC’s clients. However, STC never took any legal action against any of these three individuals. In fact, it wasn’t until approximately fifteen years after its inception that STC began to require some of its employees to sign non-compete agreements.

Fifth, no facts were ever presented that SignalPoint actually received any “Client Lists.” In fact, the only information that Central Trust claims SignalPoint has in its possession is the names, addresses and social security numbers of some of Central Trust’s clients. The supposed trade secret information consists entirely of the client’s own information, which belongs to the client.

Unlike in *Diekhaus*, the information was available to virtually every STC employee, is available outside of Central Trust’s business and, as Central Trust admits, Kennedy could remember all of the client’s names anyway. Once the client’s name is known, the contact information can be obtained from the phone book or the internet. Finally, Central Trust hasn’t presented any facts establishing that its claimed trade secret is valuable or that it was the product of a great deal of effort and time.

F. No Misappropriation Occurred

SignalPoint presented uncontroverted material facts demonstrating that Central Trust’s claimed information was not a trade secret. Central Trust failed to raise

additional material facts that would create a genuine dispute regarding whether its claimed information is a trade secret. Because there is no trade secret, there can be no misappropriation. However, assuming *arguendo*, that it was a trade secret, SignalPoint was still entitled to summary judgment as no misappropriation occurred. Misappropriation is defined in **Section 417.453** as follows:

- (a) Acquisition of a trade secret of a person by another person who knows or has reason to know that the trade secret was acquired by improper means; or
- (b) Disclosure or use of a trade secret of a person without express or implied consent by another person who:
 - a. used improper means to acquire knowledge of the trade secret; or
 - b. before a material change of position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake; or
 - c. at the time of disclosure or use, knew or had reason to know that knowledge of the trade secret was:

- i. derived from or through a person who had utilized improper means to acquire it;
- ii. acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
- iii. derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use[.]

§417.453 (2).

Misappropriation cannot occur under subpart (a) as there is no evidence that SignalPoint has ever acquired Central Trust’s trade secret. Instead, the evidence is that SignalPoint does not have and has never seen the 39 pages of documents, the cell phone or the information contained therein. Nor is there any evidence that SignalPoint has ever had access to or accessed the “Client Database.”⁸ Moreover, in its original brief filed with the Southern District, Central Trust only argued that a misappropriation had occurred under **§417.453(2)(b)c.** (Central Trust’s original brief, p. 38). Therefore, under

⁸ Central Trust also failed to present any evidence that Kennedy accessed the information contained in the safe deposit box after it was originally placed in the safe deposit box.

Rule 83.08, Central Trust is barred from raising new arguments, including what appears to be an argument that misappropriation occurred under **§417.453(2)(a)**.

Central Trust also cannot demonstrate a misappropriation under **§417.453(2)(b)c** . In order to do so, Central Trust needed to produce evidence demonstrating that (1) SignalPoint disclosed or used the trade secret, and (2) at the time of the disclosure or use, knew or had reason to know that the trade secret was either (i) derived from Kennedy and that Kennedy used improper means to acquire it; (ii) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or (iii) derived from Kennedy and that Kennedy owed a duty to Central Trust to maintain its secrecy or limit its use. **§417.453(2)(b)c**.

i. No Evidence of Use or Disclosure

Central Trust cannot point to any facts in the record to support its claim that SignalPoint has either used or disclosed Central Trust’s “Client Lists”, “Client Information” or “Client Database.” As previously stated, SignalPoint did not have access to and has not seen the lists (the “Client Lists” and “Client Information”) that were contained in the safe deposit box.⁹ Nor has SignalPoint ever had access to or accessed the “Client Database.”

⁹ Because Central Trust did not ever make the contents of the safe deposit box part of the record, SignalPoint did not address whether or not the safe deposit box had been accessed by anyone between the time when Kennedy deposited the information and when

Central Trust knew, *prior* to SignalPoint filing its motion for summary judgment, of the existence of the documents in the safe deposit box. Despite this, Central Trust took no affirmative action to obtain the contents of the safe deposit box. Even when Central Trust obtained the information after the summary judgment hearing before the trial court, it failed to actually make the “Client Lists” part of the record when it filed its motion for reconsideration. It failed to present facts demonstrating that SignalPoint knew of even one client’s name or even one client’s information from the safe deposit box or that SignalPoint was using this information in any manner. As such, Central Trust failed to demonstrate that SignalPoint even has the information that Central Trust claims is a trade secret.

Central Trust may attempt to argue that the use of any of its clients’ contact information or client names constitutes misappropriation. However, Central Trust cannot claim that each of its client’s names is a trade secret. First, it never pleaded this issue. (L.F. 21). Second, each individual client’s information belongs to that client and that client is free to disclose that information to any person or any company. Third, Central Trust admits that either it or STC has publicly disclosed individual client names in the past.

it was opened for inspection. Although not part of the record, the safe deposit records indicate that the information was not accessed by anyone between the time when Kennedy deposited the items and the time of the inspection for this case.

There are no facts presented and even no allegation that SignalPoint ever disclosed any alleged trade secret of Central Trust. Therefore, the only issue is whether SignalPoint used a trade secret of Central Trust. SignalPoint did not receive Central Trust’s “Client List”. (L.F. 498-499). Central Trust is not aware of SignalPoint ever contacting any client of Central Trust or of SignalPoint soliciting any client of Central Trust. (L.F. 476-477, 483). If SignalPoint never had the actual trade secret, then certainly it cannot be found to have ever used or disclosed it.

ii. (i) No Knowledge or Reason To Know That Kennedy Allegedly Obtained Any Information Through Improper Means and (iii) Not Derived From A Person Who Owed A Duty To Central Trust To Maintain Secrecy Or Limit Use

Even assuming, *arguendo*, that there is trade secret and that a use or disclosure occurred, the facts presented to the trial court all support a conclusion that SignalPoint did not know or have any reason to know that either the “Client Lists” or the “Client Information” were a trade secret or acquired through improper means or from a person who owed Central Trust a duty to maintain the secrecy of the information or limit its use.

§417.453(1) defines “improper means” as “theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.” Relying on *Insituform Technologies, Inc. v. Reynolds, Inc.*, 398 F.Supp.2d 1058 (E.D. Mo. 2005), Central Trust argues that in order to establish a *prima facie* case of misappropriation against SignalPoint, all it need demonstrate is that

SignalPoint aided and abetted Kennedy’s acts of misappropriation. This is an incorrect reading of the *Reynolds* case.

In *Reynolds*, the plaintiff was pursuing a misappropriation claim against a company that was a competitor and that company’s vice president. *Reynolds, Inc., 398 F.Supp.2d 1058 at 1063*. The *Reynolds* court stated that in order for the plaintiff to make a case against the vice president, it need not show that the vice president personally accepted or disclosed the plaintiff’s secrets, but instead it need only show evidence from which a jury could infer that the vice president aided and abetted the competing company’s misdeeds. *Id. at 1063-64*.

In support of its statement, the *Reynolds* court cites to *Grothe v. Helterbrand, 946 S.W.2d 301 (Mo.App. S.D. 1997)*. *Grothe* states the general rule that merely holding a corporate office will not subject an employee to personal liability for the company’s misdeeds, but notes that officers can be held individually liable if there is evidence demonstrating that the officer had actual or constructive knowledge of and participate in the wrong. *Grothe, 946 S.W.2d at 304*. The court went on to note that, “were the rule to the contrary, the agent of a corporation could shield himself from liability for almost any kind of wrong, providing he was acting in the capacity of agent[.]” *Id. (quoting Boyd v. Wimes, 664 S.W.2d 586 (Mo.App. W.D. 1984)) (internal quotations omitted)*.

Understood in this context, the *Reynolds* court properly interpreted Missouri law for when an officer of a corporation may be considered personally liable for the misdeeds of the corporation. However, *Reynolds* is inapplicable to this situation as SignalPoint is

not an officer, employee or agent of Kennedy. Central Trust never pleaded an agency relationship between Kennedy and SignalPoint. Moreover, the agreement entered into between Kennedy and SignalPoint provides that Kennedy is an independent contractor and has no right to bind SignalPoint, waive any of SignalPoint’s rights or obligate SignalPoint. (L.F. 331, 333, 500). Therefore, *Reynolds* is not applicable to this situation and Central Trust’s statement that all it need show is “sufficient evidence from which a jury could reasonably infer that [SignalPoint] aided and abetted [Kennedy’s] acts of misappropriation” (Central Trust’s Brief p. 51) is an incorrect statement of the law.

Other than its improper reliance on *Reynolds*, Central Trust offers very little argument or evidence to support a finding of misappropriation under §417.453(2)(b)(c)(i) or (iii). What “facts” it does rely on, upon close examination, turn out to be distortions of the record or are simply not supported at all by the portions of the record cited to by Central Trust.

Prior to Kennedy having any involvement with SignalPoint, Kennedy and STC had negotiated a specific employment contract which allowed Kennedy to compete and solicit STC clients in the event that STC was sold. Central Trust even knew that Kennedy’s non-compete agreement would not be in effect upon its acquisition of STC if an agreement was not reached with Kennedy for future employment at Central Trust. Prior to entering into any agreement with Kennedy, SignalPoint reviewed Kennedy’s employment contract with STC and, upon reviewing it, believed that Kennedy was free to compete with Central Trust. (L.F. 502). Based upon the language of the contract, this

was a logical conclusion as it specifically stated that it became void and unenforceable in the event of the sale of STC.

In its brief, Central Trust makes the claim that SignalPoint understood Kennedy would bring STC clients to SignalPoint if it agreed to affiliate with him. (p. 51). It cites to page 1015 of the legal file to support this allegation. A review of the legal file demonstrates that this claim is not supported and that the relied upon statement of fact (#140) was denied. On page 1015, Central Trust makes the same claim and then cites to pages 58 and 59 of the deposition of Michael Orzel, the managing member of SignalPoint. The following exchange occurred on those pages:

Q. After your meeting with him [Kennedy] that first time – you said it lasted for about an hour – was it – was it clear to you that the *relationships that Mr. Kennedy was going to bring initially would have been relationships that he developed while at Springfield Trust Company?*

A. That was my understanding.

(L.F. 778-779). (emphasis added).

Clearly, SignalPoint expected Kennedy to bring relationships with individuals with whom he had developed a relationship while at STC. Clients whom Kennedy had a relationship with fall within the definition of “customer contacts” discussed *supra* (part C). See *Copeland, 198 S.W.3d at 611* (defining “customer contacts” as “essentially the influence an employee acquires over his employer’s customers through personal

contact). “Customer contacts” are not trade secrets and can only be protected by a non-compete agreement. *Western Blue Print, L.L.C., 367 S.W.3d at 18; Harrison, 712 S.W.2d 418, 421, 422*. The non-compete agreement became void once Central Trust purchased STC. SignalPoint reviewed Kennedy’s employment contract and determined it no longer had any effect. As such, there was nothing inappropriate about SignalPoint expecting Kennedy to bring with him clients with whom Kennedy had developed a relationship because Kennedy’s contract specifically permitted such activities under the circumstances.

Apparently recognizing that it failed to present any evidence or facts indicating that SignalPoint had knowledge of any alleged improper misappropriation by Kennedy, Central Trust has instead attempted to bootstrap its misappropriation claim by alleging that SignalPoint should have known of the claimed trade secret because SignalPoint considers its own client information to be confidential. The problem with this argument is that Central Trust is confusing confidentiality involving “customer contacts” with a trade secret. In fact, SignalPoint readily admits that its client information is not a trade secret. (L.F. 499-500).

Central Trust continues to compound the issue by stating in its Brief that “SignalPoint also admitted knowing Kennedy had obtained STC/Central Trust’s Client Information while under a duty to protect its secrecy and limit its use.” (p. 52). However, this alleged fact is not contained anywhere in Central Trust’s Additional Statement of Material Facts that it filed with the trial court. Nor is it supported by L.F. 899 or 1015,

the two sections that are cited to by Central Trust. This statement is, quite frankly, untrue and fabricated and as such should be disregarded.

Next, Central Trust relies on the letter it sent on February 11, 2010, to SignalPoint. That letter is located at p. 48 in the legal file. In the letter, which was sent by the same law firm representing Central Trust in this litigation, Central Trust stated that it believed Kennedy had misappropriated “Central Trust’s **customer contacts** and customer information.” (emphasis added) (L.F. 48). The letter does not state how Kennedy obtained the information. It doesn’t allege Kennedy improperly accessed the “Client Database” or that he had a print out or other list of all of Central Trust’s clients. It does not include a copy of the oath of director. All it states is that Central Trust has filed a lawsuit against Kennedy and is claiming that he misappropriated customer contacts and customer information. As previously indicated, SignalPoint had reviewed Kennedy’s employment agreement and determined that the non-compete provision ceased to be in effect once Central Trust purchased STC. As such, pursuant to Missouri law, Kennedy is free to compete with Central Trust and may actively solicit Central Trust clients that he had a relationship with (Central Trust’s “customer contacts”). Therefore, the February 11, 2010 letter does not in any way demonstrate that SignalPoint knew or had reason to know that the “customer contacts and customer information” were a trade secret or that Kennedy had obtained such information by improper means or while under any duty to maintain their secrecy or limit their use.

In criticizing the Southern District for noting that Kennedy could remember the names of his clients, Central Trust again fails to understand the distinction in Missouri between trade secrets and customer contacts. This court has held that customer contacts are not trade secrets and as such must be protected by a proper non-compete agreement. *Western Blue Print, L.L.C., 367 S.W.3d at 18*. Having held that the claimed information was not a trade secret under the facts presented, the Southern District turned to whether or not the information constituted “customer contacts” such that it must be protected by a non-compete agreement. However, Central Trust admitted in oral argument that the non-compete provision contained in Kennedy’s employment agreement was not relevant to its claims against SignalPoint. (Opinion, p. 12). Because the information was not a trade secret and because no non-compete existed, there is no basis for Central Trust’s claims against SignalPoint.

Since Central Trust does not discuss the oath of director, it appears to have waived its claim that the oath should have given SignalPoint reason to know that Kennedy had derived information from improper means. However, Central Trust included the language of the oath in its statement of facts. Therefore, SignalPoint will address the oath of director.

First, SignalPoint is obviously not bound by the oath since it was not a party to it. Second, Central Trust did not ever present any evidence that SignalPoint was even aware of the oath. Third, the oath fails for lack of consideration.

Kennedy did not receive any consideration for signing the oath. Central Trust may argue that the consideration was STC agreeing to allow Kennedy to continue serving on the board. However, STC was already contractually bound by its employment contract with Kennedy to maintain Kennedy on the board of directors. That contract had a term that ran through December 31, 2013 so it was in effect on the date of the oath. As such, a continuing position on the board of directors cannot constitute consideration. STC did not take on any additional obligations or duties in return for Kennedy signing the confidentiality agreement and Kennedy received no specific compensation for signing the oath.

Even if this Court believes that the oath somehow constitutes a contract, it is still unenforceable as an unreasonable restraint on trade. Public policy favors a free economy based on competition. *Dwyer, Costello and Knox, P.C. v. Diak*, 846 S.W.2d 742, 747 (Mo.App. E.D. 1993). Missouri law disfavors contracts that attempt to restrict trade or commerce. §416.031. This Court has stated that non-compete agreements will only be enforced in limited circumstances. *Copeland*, 198 S.W.3d at 610. Such an agreement will only be enforced if it is “no more restrictive than is necessary to protect the legitimate interests of the employer.” *Id.* The agreement will only be enforced if it is narrowly tailored both in its geographical and temporal scope. *Id.* Any restrictions can only be enforceable to the extent that they protect either trade secrets or customer contacts. *Id.* An agreement cannot attempt to prevent mere competition. *Id.*

The 2009 oath attempts to require Kennedy to not “use for any purpose, disclose to any person or entity, any confidential information acquired during the course of my term as a Director of Springfield Trust & Investment Company.” (L.F. 45). “Confidential information” is broadly defined in the oath to include essentially any information that Kennedy learned in his capacity as a director (including knowledge of STC’s clients, methods of operation, “know how, processes, procedures”, and “clients personal information”). (L.F. 45). The oath does not contain any geographical or temporal limitation. Due to the lack of limitations and overbroad definition of “confidential information”, the oath is invalid as a restraint on trade and commerce. *See Diak, 846 S.W.2d at 747, 748* (stating that a person cannot be compelled to erase the knowledge, skills and experience gained over course of employment; that a director is free to end his tenure and enter a competing business; and that clients are absolutely privileged to pick their own professional providers).

Finally, Central Trust concedes in its own Brief that “[t]here is no evidence SignalPoint asked Kennedy which clients were transferred from Central Trust[.]” (Central Trust’s Brief p.52). This admission further demonstrates that SignalPoint did not know of any alleged misappropriation.

iii. No Evidence SignalPoint Acquired Any Information Under Circumstances Giving Rise To A Duty To Maintain Its Secrecy Or Limit Its Use

Central Trust does not actually argue that SignalPoint acquired any information under circumstances giving rise to a duty to maintain its secrecy or limit its use. Instead, Central Trust argues that the information “was acquired by Kennedy under circumstances giving rise to his duty to maintain its secrecy or limit its use[.]” (Central Trust’s Brief p. 51) (emphasis added). However, **§417.453(2)(b)(c)(ii)** states that in order for a misappropriation to have occurred, SignalPoint must have used or disclosed the claimed trade secret and known or reasonably should have known at the time of the use or disclosure that the knowledge was acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use.

Kennedy is not an agent, employee or member of SignalPoint. Whether or not Kennedy may or may not have had a duty to maintain the secrecy or limit the use of the claimed trade secret is irrelevant to whether SignalPoint had a duty to maintain secrecy or limit use under **§417.453(2)(b)(c)(ii)**.

In any case, as has already been discussed, there is no evidence that SignalPoint ever actually acquired Central Trust’s “Client Database”, “Client Lists” or “Client Information.”

Even if the information was a trade secret and SignalPoint had acquired it, Central Trust offers no argument as to why SignalPoint should have had a duty to maintain its secrecy or limit its use. To the extent that Central Trust’s argument is that Kennedy had a duty, it is a duplication of the argument under §417.453(2)(b)(c)(i) and (iii) and SignalPoint will not repeat its arguments for why no misappropriation occurred under those sections.

G. Central Trust Failed to Present Uncontroverted Facts That It Has Been Damaged

Every citation contained in the damages section of Central Trust’s brief (p. 56) is to a statement of fact that was actually denied at the trial court level. (See L.F. 1009-10, Statement of Fact #s 114 and 115; L.F. 1017, Statement of Fact # 146). As such, Central Trust failed to come forward, after an adequate period of discovery, with any evidence of damages.

H. Conclusion

Missouri law is clear that customer contacts are not trade secrets and are only protectable by a non-compete agreement. *See Western Blue Print, L.L.C., 367 S.W.3d at 18; Walter E. Zemitzsch, Inc. v. Harrison, 712 S.W.2d 418, 421, 422.* Even if this Court believes that the “Client List” or “Client Information” is distinguishable from “customer contacts,” it is still the case that either the “Client Lists” or “Client Information” are not trade secrets and that SignalPoint did not misappropriate them.

Central Trust is barred from claiming that Kennedy engaged in improper conduct as, upon Central Trust's purchase of STC, the non-compete provisions of Kennedy's contract became void and unenforceable. Central Trust cannot now attempt to enforce a non-competition/non-solicitation agreement through the guise of a trade secrets claim having taken the very action to release Kennedy from the terms of his employment contract. SignalPoint (or DFS or Fidelity for that matter) can be in no worse shape than Kennedy in this regard, having done business with him only after the non-compete provisions in his contract was terminated by Central Trust's acquisition of STC.

There are other reasons that Central Trust's trade secret claim fails. Central Trust shares its clients' information with other persons. Former STC employees competed with STC and solicited STC clients after leaving STC. At least one former employee even had a client list but no action was ever taken against any of the former employees. STC/Central Trust disclosed the names of some of its clients in advertising. Even STC and Central Trust did not consider the information to be a trade secret in their sale agreement. These facts show that no trade secrets exist.

Moreover, SignalPoint demonstrated that it has never received the "Client Lists," the "Client Database" or the "Client Information," nor has SignalPoint contacted or solicited any of Central Trust's clients, negating Central Trust's claim of misappropriation.

Since there is no genuine dispute to these facts, then the trial court did not err in granting summary judgment on Central Trust's misappropriation claim.

II. The Trial Court Did Not Err In Granting Summary Judgment On Central Trust’s Tortious Interference Claim

A. Standard of Review

SignalPoint incorporates the standard of review set forth on pages 19-20.

B. Portions of Central Trust’s Substitute Brief Raise Issues Not Raised Below

In point II of its substitute brief, Central Trust has attempted to raise several new issues that were not raised in its original appellate brief filed with the Southern District. In particular, Central Trust argues, for the first time, that SignalPoint failed to make a *prima facie* showing that it was entitled to summary judgment; that SignalPoint failed to show facts negating any one of Central Trust’s *prima facie* elements or to demonstrate that Central Trust, after an adequate period of discovery, had not been able to produce evidence sufficient to find the existence of any one of Central Trust’s elements. Because these arguments were not contained within Central Trust’s original brief, they cannot now be raised for the first time. **Rule 83.08(b)**.

C. Elements of Tortious Interference

In order for Central Trust to demonstrate that the trial court erred in entering summary judgment on its claim for tortious interference, Central Trust must show a genuine issue of fact as to the existence of: (1) a valid business expectancy; (2) SignalPoint’s knowledge of the relationship; (3) a breach induced or caused by

SignalPoint’s intentional interference; (4) absence of justification; and (5) damages. *Stehno v. Sprint Spectrum L.P.*, 186 S.W.3d 247, 250 (Mo. banc 2006). As the record demonstrates, SignalPoint presented undisputed material facts establishing that Central Trust cannot meet at least one of these five elements.

D. No Valid Business Expectancy

Central Trust failed to come forth with facts establishing that it had a valid business expectancy with regard to those clients that left Central Trust and followed Kennedy. “In order to have a claim for interference with a valid business expectancy, it is necessary to determine if the expectancy claim was reasonable and valid under the circumstances alleged. If it is not, there was nothing for defendants to have interfered with.” *Service Vending Company v. Wal-Mart Stores, Inc.*, 93 S.W.3d 764, 769 (Mo. App. S.D. 2002) (quoting *Gott v. Midwest Bank of Dexter*, 963 S.W.2d 432, 438 (Mo.App. S.D. 1998)).

As previously mentioned in response to Point I, Kennedy had a specifically negotiated contract with STC which contained non-compete provisions and stated Kennedy could not solicit STC clients, but the agreement also provided that the contract would have no effect if STC was sold. Thus, pursuant to Kennedy’s contract with STC, Kennedy had the ability to compete with Central Trust once Central Trust purchased STC. As Central Trust admits, its clients are free to move their accounts anywhere they wish and are not contractually bound to continue to do business with Central Trust. (L.F. 481). Additionally, Central Trust actually anticipated losing some of the business of STC

due to the acquisition of STC by Central Trust. (L.F. 481). Central Trust admitted that, as of February 23, 2010, the date when SignalPoint first began its contractual relationship with Kennedy, Central Trust had lost approximately \$160,000.00 in total closing business and of that amount, \$59,000.00 was not attributable to Kennedy. (L.F. 498). John Courtney, of STC, knew as of September 2, 2009, that if Kennedy left, some of the customers were going to leave. (L.F. 491). Central Trust knew that if Kennedy left he was going to compete with Central Trust and come after Central Trust clients. (L.F. 485).

Before Central Trust acquired STC, Kennedy informed Peebles that he was going to try to get STC's clients to come with him if he left. (L.F. 478). Peebles passed this information on to Bob Jones, the president of Central Trust. (L.F. 478).

This knowledge caused STC and Central Trust to revise their stock purchase agreement. (L.F. 488). John Courtney reduced the selling price of STC to allow Central Trust to negotiate with Kennedy. (L.F. 487). Ultimately, Central Trust did not reach an agreement with Kennedy and Kennedy began soliciting clients almost immediately after the transaction between STC and Central Trust closed.

Under these circumstances, Central Trust could not have a reasonable and valid expectancy of keeping all of the clients with whom Kennedy dealt while he was with STC. As previously mentioned, the clients were free to take their business wherever they wished and Central Trust had knowledge that Kennedy was going to solicit the clients. The contractual agreement entered into between STC and Kennedy establishes that it was

the intent of the parties that Kennedy would be allowed to compete with any entity that purchased STC.

Furthermore, Peebles testified that there was a consistent pattern of clients telling her that they were leaving Central Trust because they have had a relationship with Kennedy and they know him and that is why they are moving. (L.F. 455).

Because Kennedy was not bound by a non-compete, then, under Missouri law, Kennedy was entitled to solicit his customer contacts. As stated in response to Point I, Central Trust failed to adequately protect its client contacts, which are not a trade secret under Missouri law. As this Court recently stated, customer contacts are protectable, but not under a theory of confidential relationship or trade secret. *Western Blue Print, L.L.C., 367 S.W.3d at 18*. “Because sales personnel may exert a special influence under that customer and entice that customer’s business away from the employer, the proper means of protection is a non-competition agreement.” *Id.* (quoting *Zemitzsch, 712 S.W.2d at 422*). As in *Western Blue Print*, SignalPoint cannot be held liable for Central Trust’s/STC’s failure to protect its customer contacts.

As this Court stated in *Stehno*, a “business expectancy that is contrary to the terms of a contract on which the expectancy depends is unreasonable.” *Stehno, 186 S.W.3d at 251*. SignalPoint established that Central Trust’s customers are not contractually bound to continue doing business with Central Trust for any period of time in the future. (L.F. 481). The clients can leave anytime they wish. Under such a situation, there can be no reasonable business expectancy.

Thus, for all of the above stated reasons, as a matter of law, Central Trust’s professed expectancy with regard to Kennedy’s clients is neither reasonable nor valid under the circumstances. *See Service Vending Company, 93 S.W.3d at 770.*

E. SignalPoint Had No Knowledge Of Any Such Relationship

Prior to entering into any agreement with Kennedy, SignalPoint reviewed Kennedy’s employment contract with STC and determined that, because STC had been purchased by Central Trust, Kennedy was free to compete with Central Trust and solicit Central’s clients. That agreement specifically forbade Kennedy from soliciting STC clients but became “void and unenforceable” upon Central Trust’s purchase of STC. Furthermore, Central Trust acknowledges that its clients are free to do business with whomever they choose and can leave Central Trust at any time. Additionally, SignalPoint established that Kennedy never provided it with a list of Central Trust clients. Central Trust failed to present any facts to the contrary. As such, SignalPoint had no way of knowing which clients of Kennedy’s were former Central Trust/STC clients and which were new clients.

The main case relied upon by Central Trust is distinguishable. In *Howard v. Youngman, 81 S.W.3d 101 (Mo.App. E.D. 2002)*, a prospective buyer of real estate entered into a contract with the seller of the property. *Howard, 81 S.W.3d at 107.* The prospective buyer did not timely apply for the loan described in the contingency clause of the real estate contract and obtained different financing. *Id. at 106.* The defendants argued that because of this failure, the contract had terminated. *Id.* On appeal, one of the

defendants argued that it did not have knowledge of the contract because it thought the contract had terminated (but it was aware of the existence of the contract). *Id. at 113*. However, the *Howard* court determined that the contract had not terminated and therefore the defendant did have knowledge of the contract even though the defendant mistakenly believed that the contract had terminated. *Id.*

The facts present in this case are markedly different than those present in *Howard*. In this situation, there is no dispute as to the language of Kennedy’s employment contract with STC. There is also no dispute that Central Trust clients are free to leave Central Trust at any time. Central Trust did not demonstrate that SignalPoint was aware of the 2009 oath of director. Finally, neither Central Trust nor Kennedy ever provided SignalPoint with a list of Central Trust clients. (L.F. 496, 498). As such, SignalPoint had no way of knowing that any of Kennedy’s clients were clients with whom Central Trust had a valid business expectancy.

Central Trust again repeats its incorrect assertion that “SignalPoint knew Kennedy would bring STC/Central Trust’s clients to SignalPoint.” (Central Trust’s Brief, p. 64). As has been previously demonstrated, this supposed fact was denied at the trial court level and the actual testimony was that SignalPoint expected Kennedy to bring with him some persons with whom he had developed relationships with while at STC.

F. No Intentional Interference By SignalPoint

Central Trust states, in conclusory fashion, that it presented substantial evidence to the trial court supporting its contention that SignalPoint induced Central Trust clients to terminate their contracts and relationships with Central Trust. However, it does not cite to any portion of the record that actually supports this contention. Instead, it cites to only portions of the record regarding actions taken by Kennedy and then claims that SignalPoint should have done something to curtail Kennedy’s solicitation of Central Trust clients. In fact, almost all of Central Trust’s brief is about Kennedy and/or ITI and what Kennedy did, but almost none of the facts pertain to SignalPoint.

Central Trust again repeats its incorrect statement that SignalPoint knew that the clients Kennedy would bring with him were Central Trust’s clients. Next, it states that “[p]resumably, SignalPoint received transfer paperwork authorizing Central Trust to transfer the accounts to SignalPoint.” (Central Trust Brief, p. 64, citing to L.F. 899). However, Central Trust did not include this claim in its statement of facts and does not cite to any portion of the record to support this claim. Instead, Central Trust cites to it memorandum in opposition to SignalPoint’s Motion for Summary Judgment (L.F. 899) which is not a reference to discovery, exhibits or affidavits as required under **Rule 74.04**. As such, there are no facts in the record to support Central Trust’s “presumption.” Central Trust next claims that it “presented substantial evidence that, without SignalPoint’s affiliation with Kennedy and ITI, Kennedy and ITI could not, by themselves have taken Central Trust’s clients.” (Central Trust’s Brief, p. 65). Leaving

aside that SignalPoint denied the statements of fact relied upon by Central Trust and cited to by it, Central Trust ignores the fact that Kennedy also affiliates with DFA and Fidelity.

As previously mentioned, there was never any allegation that Kennedy was an agent of SignalPoint or that SignalPoint is somehow vicariously liable for Kennedy's actions. Instead, the only facts that were presented to the trial court were that SignalPoint did not contact any of Central Trust clients and that SignalPoint never solicited any of Central Trust's clients. Not only is Kennedy not an agent of SignalPoint, he began soliciting those clients well before he had any contact with SignalPoint. Finally, Central Trust failed to come forward with any facts indicating that SignalPoint (as opposed to Kennedy) took any actions to induce Central Trust clients to leave Central Trust.

Quite simply, SignalPoint established that Central Trust had no evidence that it had ever contacted or solicited Central Trust's clients. Central Trust did not come forth with any facts to the contrary. Therefore, as a matter of law, SignalPoint did not intentionally interfere with Central Trust's business expectancies.

G. Justification Exists

Even if the court believes that Central Trust had a valid business expectancy, that SignalPoint knew of this expectancy and that SignalPoint somehow acted intentionally to interfere with this expectancy, summary judgment was still proper because SignalPoint presented uncontroverted facts establishing justification. As previously mentioned, the

employment contract between STC and Kennedy clearly established that Kennedy could compete with STC and its successor, Central Trust.

Furthermore, under Missouri law, SignalPoint would be justified in interfering with Central Trust’s business affairs if any action taken by SignalPoint was not legally improper. *Environmental Energy Partners, Inc. v. Siemens Building Technologies, Inc.*, 178 S.W.3d 691, 703 (Mo.App. S.D. 2005). “Actions are improper if they are independently wrongful notwithstanding injury caused by the interference.” *Id.* Competition can constitute a valid justification. *Briner Electric Co. v. Sachs Electric Co.*, 680 S.W.2d 737, 741 (Mo.App. E.D. 1984). Central Trust appears to acknowledge that SignalPoint has a legitimate economic interest in any such expectancy, therefore, Central Trust must show that SignalPoint somehow employed improper means in seeking to further its interests. (Central Trust Brief, p. 66).

In its Brief, Central Trust argues that the improper action taken by SignalPoint was the misappropriation of Central Trust’s trade secrets. However, as SignalPoint has set forth in its response to Central Trust’s first point, not only is the information claimed by Central Trust not a trade secret, but there were no facts presented to indicate that SignalPoint misappropriated the information even if it is considered a trade secret.

Central Trust also argues that SignalPoint had knowledge of potential violations by Kennedy of Kennedy’s employment contract and Kennedy’s fiduciary duties as well as Kennedy’s 2009 oath of director. (Central Trust Brief, p. 67). Central Trust does not cite to any portion of the record to support its claim that Signalpoint had such knowledge.

Undoubtedly, this is because the only facts that were presented were that the employment contract entered into between Kennedy and STC provided that, upon STC's purchase by another entity, the employment contract between STC and Kennedy became null and void. Central Trust did not even demonstrate that, at the time of the alleged interference, SignalPoint knew of the oath of director.

Furthermore, Missouri law clearly states that SignalPoint would be justified in interfering with Central Trust's business. Justification exists if SignalPoint has a legitimate economic interest in the business expectancy between Central Trust and its clients. *Community Title Company v. Roosevelt Federal Savings & Loan Association*, 796 S.W.2d 369, 372 (Mo. banc 1990). Additionally, justification exists if SignalPoint is engaging in competitive conduct. *Environmental Energy Partners, Inc.*, 178 S.W.3d 691, 703. So long as SignalPoint does not employ wrongful means, it can compete with Central Trust and cause Central Trust's clients not to continue their relationship with Central Trust. *Briner Electric Co.*, 680 S.W.2d at 741.

Even assuming, *arguendo*, that Kennedy did in fact have a fiduciary duty or was bound by the oath of director and breached that fiduciary duty or oath, Central Trust fails to cite to any law for the proposition that SignalPoint should somehow be liable for Kennedy's breach. This appeal is against SignalPoint only and not Kennedy and, as previously mentioned, there is no allegation that Kennedy was an agent of SignalPoint's or that SignalPoint is somehow vicariously liable for Kennedy's actions.

Finally, it is important to keep in mind that clients are absolutely privileged to pick their professional providers. *Schott v. Beussink, 950 S.W.2d 621, 624-5 (Mo.App. E.D. 1997)*. Because Kennedy's non-compete agreement had terminated and because Central Trust clients were free to choose whomever they wished to associate with, then clearly SignalPoint was justified in taking whatever actions it may have taken. Moreover, Central Trust has not presented any facts that SignalPoint somehow employed wrongful means.

H. Conclusion

The main thrust of Central Trust's complaint is not that SignalPoint took any action that was incorrect; rather, Central Trust's main complaint is that SignalPoint took no action to curtail Kennedy in Kennedy's solicitation of Central Trust clients. However, SignalPoint had no duty or obligation to do so. Again, Central Trust does not cite to any authority for the proposition that SignalPoint had any duty to undertake such actions. It is difficult to understand how such a duty could exist when, as the record demonstrates, no facts were ever presented that SignalPoint had knowledge of Central Trust's alleged trade secrets. Moreover, as demonstrated in response to Point I, the claimed information is not a trade secret and even if it was, there was no evidence presented that would support a claim of misappropriation.

For all of the above stated reasons, the trial court did not err in granting summary judgment to SignalPoint on Central Trust's tortious interference claim.

III. The Trial Court Did Not Err In Granting Summary Judgment On Central Trust’s Conspiracy Claim As No Civil Conspiracy Exists Under These Facts

A. Standard of Review

SignalPoint incorporates the standard of review set forth on pages 19-20.

B. Portions of Central Trust’s Substitute Brief Raise Issues Not Raised Below

In point III of its substitute brief, Central Trust has attempted to raise several new issues that were not raised in its original appellate brief filed with the Southern District. In particular, Central Trust argues, for the first time, that SignalPoint failed to make a *prima facie* showing that it was entitled to summary judgment; that SignalPoint failed to show facts negating any one of Central Trust’s *prima facie* elements or to demonstrate that Central Trust, after an adequate period of discovery, had not been able to produce evidence sufficient to find the existence of any one of Central Trust’s elements. These arguments are contained in the point relied upon as well as in a conclusory, entirely unsupported paragraph located on page 71 of Central Trust’s Brief. Because these arguments were not contained within Central Trust’s original brief, they cannot now be raised for the first time. **Rule 83.08(b).**

C. Argument

Central Trust focuses primarily on the same claims it makes in Points I and II, and SignalPoint will not repeat its arguments to those claims. However, SignalPoint would note that because the trial court did not err in granting summary judgment to SignalPoint on Central Trust's misappropriation and tortious interference claim, then no conspiracy claim can exist against SignalPoint. *Royster v. Baker*, 365 S.W.2d 496, 499, 500 (Mo. 1963); see also *Tindall v. Holder*, 892 S.W.2d 314, 321 (Mo.App. S.D. 1994) (holding that civil conspiracy is not in itself actionable in the absence of the underlying wrongful act or tort).

Central Trust argues that because the trial court overruled Kennedy and ITI's Motions for Summary Judgment, then its conspiracy claim against SignalPoint also should have survived summary judgment. This is a *non-sequitur*. First, there are no pending claims in this lawsuit against Kennedy or ITI. Central Trust dismissed its claims against ITI and Kennedy. As such, there is no appeal of any action taken by the trial court as to Kennedy and ITI.

Second, even if this Court decides to entertain Central Trust's argument, Central Trust ignores the fact that Kennedy and ITI were separate defendants in the underlying lawsuit. (See L.F. 18). The trial court could very well support its refusal to grant summary judgment to Kennedy and ITI on the civil conspiracy claim on the basis that the trial court believed that a potential claim survived as to a conspiracy between ITI and Kennedy. Central Trust's Amended Petition contained one claim for civil conspiracy

which was made against all three defendants. (L.F. 37). Obviously, by granting summary judgment to SignalPoint on this issue, the trial court believed that the only pending claim of conspiracy remaining to Central Trust was against Kennedy and ITI.

Third, during the hearing on the motion for new trial, the trial court did provide somewhat of an explanation for its rulings and the court's expectations of what could be submitted to a jury by Central Trust. In the hearing, the trial court stated that, although it "was not going to go through and try to rule out certain counts" it did want to inform Central Trust that since SignalPoint was no longer a defendant, Central Trust should not expect to be able to submit a claim for civil conspiracy. (N.T.H 17-18).

Central Trust also argues that this Court's recent decision in *Western Blue Print* stands for the proposition that its claim should have been presented to a jury. However, that is not what this Court held. In *Western Blue Print*, this Court merely held that the trial court had not erred in overruling the defendant's motion for judgment notwithstanding the verdict. *Western Blue Print, L.L.C., 367 S.W.3d at 23*. Obviously, pursuant to **Rule 74.04** and the summary judgment standard, if SignalPoint established that there was no genuine dispute as the material facts and that, based on those facts, it was entitled to judgment as a matter of law, then the trial court did not err in granting that judgment.

Finally, a conspiracy requires a meeting of the minds with an unlawful objective. Central Trust did not present any facts to support an allegation that Kennedy and SignalPoint had an unlawful objective. SignalPoint reviewed Kennedy's contract and

determined he was free to compete with Central Trust as Kennedy was not bound by a non-compete agreement. It was SignalPoint's expectancy that Kennedy would bring with him those relationships he had developed while at STC. Because he wasn't bound by a non-compete agreement, Kennedy was free to compete with Central Trust.

IV. The Trial Court Did Not Err In Refusing To Grant A New Trial

A. Standard Of Review

Motions for new trial based on newly discovered evidence are within the sound discretion of the trial court. *McCullough v. Commerce Bank*, 349 S.W.3d 389, 394 (Mo.App. W.D. 2011). Motions for new trial based on newly discovered evidence are viewed with disfavor, granted only in exceptional circumstances, entertained reluctantly, examined cautiously and construed strictly. *Sims v. Burlington Northern & Santa Fe Railroad Company*, 111 S.W.3d 454, 457 (Mo. App. E.D. 2003); *McCullough*, 349 S.W.3d at 394.

In regards to Central Trust’s claim for a new trial under **Rule 74.06**, the trial court was vested with broad discretion in determining whether or not to set aside the judgment under **Rule 74.06** and its decision should not be reversed unless the record clearly and convincingly proves an abuse of discretion. *In re Marriage of Hendrix*, 183 S.W.3d 582, 587 (Mo. banc 2006). “An abuse of discretion occurs when a trial court’s ruling is clearly against the logic of the circumstances then before the court and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration.” *Id.*

B. No Newly Discovered Evidence

In order for Central Trust to successfully make a claim of new evidence, it must have shown that (1) the evidence came to the knowledge of Central Trust after the trial; (2) the failure of Central Trust to discover the evidence sooner was not the result of a lack

of due diligence; (3) the evidence is so material that a new trial would produce a different outcome; and (4) the evidence is not merely cumulative or used to impeach the credibility of a witness. *Hancock v. Shook*, 100 S.W.3d 786, 798 (Mo. banc 2003).

The trial court did not err in denying Central Trust’s Motion for a New Trial on the Basis of New Evidence as Central Trust was aware of the alleged new evidence prior to SignalPoint even filing its Motion for Summary Judgment and took no steps to obtain the actual documents and/or cell phone prior to the court’s ruling on the Motion for Summary Judgment. Central Trust admits that its attorney learned of this information in the deposition of Troy Kennedy on May 11, 2011, fifteen days before SignalPoint filed its motion for summary judgment. Central Trust’s responses to SignalPoint’s Motion for Summary Judgment and Statement of Facts demonstrate that Central Trust was well aware of this so-called newly discovered evidence prior to the trial court entering its judgment and even prior to SignalPoint filing its Motion for Summary Judgment.

For example, in Central Trust’s response to Statement of Fact No. 101 (L.F. 474-475), Central Trust states as follows:

. . . in August 2009, Kennedy took a cell phone containing the contacts and names of approximately 200 STC clients and put it in a safe deposit box. According to Kennedy, in August 2009, he also prepared a list of his clients and relationships at STC and put it in a safe deposit box. Kennedy also had in a safe deposit box a copy of his STC customer list that

was attached as an exhibit to the employment contract.” (L.F. 475)
(internal citations omitted).

As support for these statements, Central Trust cited to the deposition of Kennedy. Central Trust cannot claim that the evidence was discovered after trial. *See Zundel v. Bommarito, 778 S.W.2d 954, 958, 959 (Mo. App. E.D. 1989)* (holding that documents that counsel was aware of prior to trial did not constitute newly discovered evidence even if the documents were not available at the time of trial because they could not be located), and *Morgan v. Wartenbee, 569 S.W.2d 391 (Mo. App. 1978)* (settlement was not newly discovered evidence in light of the fact that counsel’s questions during cross examination demonstrated that counsel was aware of the settlement).

C. Failure of Due Diligence

Moreover, not only was Central Trust aware of this so-called newly discovered evidence prior to SignalPoint ever filing its Motion for Summary Judgment, Central Trust took no action even though it had remedies available to it. It could have reviewed and obtained the contents of the safe deposit box when that option was offered by counsel for Kennedy on May 12, 2011. It could have filed a motion to compel with the trial court or could have asked the trial court for a motion for continuance to respond to SignalPoint’s Motion for Summary Judgment until such time as it received the “newly discovered evidence.” Central Trust failed to do any of the above, and as such it cannot now claim that the trial court abused its discretion by failing to grant it a new trial on the basis of the so-called newly discovered evidence. *Zundel, 778 S.W.2d at 959.*

D. Evidence Is Cumulative

The evidence that Central Trust claims as newly discovered evidence is cumulative in nature. Central Trust already had in its possession the deposition testimony of Kennedy in which Kennedy testified that he had placed the cell phone and the client list in the safe deposit box. Central Trust presented this information to the trial court in its response to SignalPoint's Motion for Summary Judgment. Central Trust has failed to state how the actual list and cell phone is not cumulative of Kennedy's testimony.

E. Same Outcome

Unfortunately, the majority of Central Trust's argument section on this point is directed to Kennedy and ITI, who are not parties to this appeal. Neither SignalPoint nor its counsel had any greater access to the safe deposit box than Central Trust. Furthermore, SignalPoint's corporate representative was unaware of the existence of the safe deposit box until Central Trust's attorney asked him about it in his deposition. (L.F. 1153-1154)

Central Trust attempts to argue that the so-called newly discovered evidence would have produced a different result on SignalPoint's Motion for Summary Judgment. Central Trust relies on the trial court's July 14, 2011 trade secret order finding that "the identities of Plaintiff's customers/clients is not, as a matter of law, a trade secret as that term is used in the Uniform Trade Secrets Act." However, this order was not made part of the summary judgment entered by the court. Nor was it denominated a judgment. In

its summary judgment, the trial court did not set forth any specific reason for why it was granting summary judgment other than to state that there was no genuine issue as to the material facts and that, based on those facts, SignalPoint was entitled to judgment as a matter of law.

Moreover, Central Trust attempts to argue that at the time that the trial court entered its summary judgment and amended summary judgment, the only evidence before the court was that Kennedy had memorized Central Trust’s customer information. However, as Central Trust’s response to SignalPoint’s Statement of Facts reveals, Central Trust had presented evidence to the court of the existence of the cell phone and the client lists.

Even if all of the sundry allegations made by Central Trust against ITI, Kennedy and their counsel are true,¹⁰ Central Trust has failed to present any material facts related to SignalPoint. No facts were presented that SignalPoint had access to the safe deposit box, the client lists, the cell phone or even knew of their existence. Nor did Central Trust

¹⁰ On several occasions, Central Trust claims that Kennedy’s response to a discovery request to produce “all documents or communications concerning customers of Central Trust, including customer lists” was “None.” As support, Central Trust cites to L.F. 1007, which does not actually support this claim. Central Trust fails to inform the Court that Kennedy actually stated in his discovery responses that he would produce all customer lists in his possession. (L.F. 870, 1007).

present any evidence that SignalPoint, or even Kennedy for that matter, had ever accessed the safe deposit box.

The trial court did not err in denying the motion for new trial for all of the following reasons: Central Trust had knowledge of the “newly discovered evidence” prior to SignalPoint even filing its Motion for Summary Judgment and failed to take any steps to seek any relief from the trial court; the “new” information was cumulative of information already presented to the trial court; and the evidence would not have led to a new result.

F. No New Trial Under Rule 74.06

As to Central Trust’s claim that a new trial should have been granted under **Rule 74.06**, the facts and Central Trust’s own Brief demonstrate that SignalPoint did not engage in any misconduct. Further, as demonstrated above, Central Trust was not in any way prejudiced by the alleged misconduct of ITI, Kennedy and/or their counsel. Central Trust presented essentially the same evidence to the trial court in its response to SignalPoint’s Motion for Summary Judgment. The actual documents and cell phone are cumulative of Kennedy’s testimony about those same objects. Central Trust repeatedly states in its Brief that SignalPoint had access to the client lists that Central Trust claims as a trade secret. However, Central Trust is not able to point to any fact to support this allegation. Central Trust did not present any fact to the trial court indicating that SignalPoint had access to the client list(s) or the cell phone or that SignalPoint was aware of the safe deposit box before the lawsuit was filed against SignalPoint.

Therefore, for the above stated reasons, the trial court did not err in refusing to grant Central Trust's motion for a new trial.

V. Response To Amicus Brief Of Missouri Chamber Of Commerce

Initially, SignalPoint notes that the Chamber of Commerce (the “Chamber”) indicates that is adopting the Points Relied On contained in Central Trust’s brief. However, the Chamber’s argument section does not actually follow Central Trust’s Points, nor does it contain its own Points. Moreover, the Chamber adopts Central Trust’s statement of facts, which SignalPoint has thoroughly demonstrated are not a fair, concise or even accurate statement of the facts. For these reasons, it should not be considered.

If one were to only read the Chamber’s brief and not the actual opinion of the Southern District, one might get the impression that the Southern District held that a list of clients can never constitute a trade secret and that customer lists and customer information can only be protected by a non-compete agreement. However, this is not what the Southern District held.

The Chamber argues that the Southern District dismissed this Court’s statement in *Whelan Security Co.* that “customer lists . . . are protectable as a trade secret and can include information about prospective employers.” The Southern District did note that the language was contained in a footnote and was dicta. (Opinion p. 12). These are both correct statements as *Whelan Security Co.* was not a trade secrets case. *Whelan Security Co.*, 379 S.W.3d at 840. The Southern District also questioned whether this Court ever intended for a customer list itself to be considered a trade secret, as neither *Whelan Security Co.*, nor the case relied upon by it, *National Rejectors, Inc. v. Trieman*, 409

S.W.2d 1 (Mo. banc 1966), is a case involving an actual claim that a client list constitutes a trade secret.

In any case, the Southern District’s comments were mere dicta themselves, as the Southern District had already held that, based on the uncontroverted facts in front of it, the claimed information was not a trade secret. (Opinion, p. 9-10). At no time did the Southern District ever hold that a list of clients cannot ever, as a matter of law, be a trade secret.

The Chamber also misunderstands the underlying facts in this case. First, it accuses the Southern District of confusing customer lists with “customer contacts.” However, at no time did the Southern District confound these two subjects. Instead, the Southern District found that based on the facts in the record, the claimed information was not a trade secret. Because the information was not a trade secret, the only other protection available under Missouri law is through a non-compete agreement, which protects “customer contacts.” The Southern District’s discussion of “customer contacts” derives from the fact that the record indicates that if SignalPoint received any information from Kennedy, it was information of clients with whom Kennedy had developed a relationship while at STC.¹¹ The Southern District specifically pointed out that Central

¹¹ The Southern District made specific note of Central Trust’s response to SignalPoint’s statement of facts wherein Central Trust stated that Kennedy “prepared a list of his clients and relationships at STC and put it in a safe deposit box” and also had in the safe deposit box “a copy of his STC customer list that was attached” to Kennedy’s

Trust had not alleged an agency relationship between Kennedy and SignalPoint and had failed to produce any information demonstrating that SignalPoint had ever seen the claimed information. (Opinion, p. 4, 13). Additionally, the Chamber does not mention that Central Trust, in its original brief, spent a significant amount of time arguing that Kennedy’s employment agreement with STC somehow bolstered its claim of a trade secret.

There is no evidence that SignalPoint ever had any customer list, including the list from the safe deposit box. There is likewise no evidence that SignalPoint ever accessed STC’s/Central Trust’s “Client Database” (in fact there is no evidence that Kennedy accessed the “Client Database” after his last day of employment). This is why what the claimed trade secret is becomes so important. If the claimed trade secret is a database or list of all of STC’s clients, then Central Trust failed to come forward with evidence that Kennedy or SignalPoint ever used or disclosed the trade secret. Moreover, Central Trust is prevented from arguing that parts of the client list or client database also constitute a trade secret because STC itself disclosed parts of its client list / client database in its own public advertising.

Perhaps realizing these limitations, Central Trust now claims, for the first time, that the claimed trade secret is actually the list contained in the safe deposit box and the information on that list. However, Central Trust, despite having knowledge of the safe deposit box before SignalPoint filed its motion, failed to come forth with evidence to

employment contract. (L.F. 475).

allow a trier a fact to find that SignalPoint has even part of the information contained on the “Client List.” Additionally, as the “Client List” contains information of only individuals with whom Kennedy had a relationship, then the Southern District’s discussion of “customer contacts” was appropriate.

Next, the Chamber claims that the Southern District improperly applied the law to the facts in order to arrive at the conclusion that the claimed information is not a trade secret. It argues that sharing information with affiliated companies should not destroy the trade secret status. In so arguing, the Chamber ignores the definition of trade secret under **§417.453(4)(a)** which states that the information cannot be generally known to and be readily ascertainable by proper means by other persons who can obtain economic value from its disclosure. Presumably, the only reason Central Trust shares the information with affiliates is because the affiliates can obtain economic value from the information. Those affiliates are “persons” within the definition set forth in **§417.453(3)**. The Chamber makes the same mistake that Central Trust does—it conflates confidentiality with trade secret and implies that if no trade secret exists, then the information cannot be considered confidential or protected. Such is not the case. Confidentiality and non-compete agreements can be entered into to protect this information.

The Chamber also fails to recognize that several former STC employees had solicited STC clients and at least one former employee had taken a list of STC clients. No legal action was ever taken against these former employees.

The Chamber criticizes the Southern District for pointing out that the information is the client's and that each client has control over his or her own business. Again, there is nothing in the record that indicates SignalPoint ever had access to a list or a client database. The Chamber fails to understand that the record does not indicate that SignalPoint ever received any information about a client other than from the client or with the client's permission. Upon SignalPoint filing its motion for summary judgment, it became Central Trust's burden to come forward with evidence demonstrating that there were facts from which a jury could find the existence of each of the elements of its misappropriation claim. Because Central Trust failed to do so, summary judgment was properly granted.

VI. Response to Amicus Brief of Missouri Bankers Association, Inc.

The Missouri Bankers Association, Inc. (MBA) also adopts Central Trust’s inadequate and inaccurate statement of facts. As such, the MBA has also failed to present a fair and concise statement of the facts. Additionally, the MBA raises new issues in its brief that it did not raise in its suggestions in support of transfer and doesn’t raise or develop arguments made in its suggestions in support of transfer.

In its brief, the MBA argues that the Gramm-Leach-Bliley Act (GLBA) and the Missouri Right to Financial Privacy Act (MRFP) should alter the conclusion reached regarding whether the claimed information was a trade secret. These are entirely new issues that were never raised by Central Trust at either the trial court level or before the Southern District. The MBA then criticizes the Southern District for reading the Missouri Uniform Trade Secrets Act “in a vacuum.” Presumably, the MBA did not take the time to actually review Central Trust’s amended petition, SignalPoint’s summary judgment motion and the pleadings filed therewith and the responses thereto, or Central Trust’s original brief filed before the Southern District. If it had, it would not criticize the Southern District for allegedly failing to raise issues that Central Trust did not ever plead or argue. After all, it is not the Southern District’s, or this Court’s, function to act as an advocate for an appellant. *Thummel v. King*, 570 S.W.2d 679, 686 (Mo. banc 1978).

The MBA’s arguments should not be addressed by this Court because Central Trust never included any allegations regarding the GLBA or the MRFP and has never argued these issues at any level, including in its substitute brief. No record has ever been

developed on any of these issues. However, the MBA does not let these facts get in the way of its brief. Undaunted, it makes broad ranging, factually unsupported statements in its brief. For instance, the MBA states in categorically conclusory fashion the following: 1) that the trial court granted summary judgment to not only SignalPoint but also to Kennedy and ITI; 2) that every business entity that is a party to this litigation is a “financial institution” under the GLBA; 3) that the Privacy Rule under the GLBA applies to the parties herein; 4) SignalPoint is subject to **17 C.F.R. § 248**; 5) SignalPoint and ITI are “non-affiliate third party(ies)” in relation to STC and Central Trust; 6) that a customer list was provided to SignalPoint; 7) that SignalPoint is an “employing” firm for both ITI and Kennedy; 8) that Kennedy and ITI are agents of SignalPoint; 9) that all parties to this case are themselves, or are employees, of “financial institutions” under the MRFPA; 10) that at least some of the documents involved in this case are “financial records” under the MRFPA; and 11) that Kennedy and ITI are agents of SignalPoint. All of these statements, many of which are mere legal conclusions, are made without any citation to the record as required by **Rule 84.04(e)**. Some of them (such as #1, 6 and 11) are just incorrect. Nor is there any legal argument, citation to statute or case-law, or analysis to support these conclusions. As such, these arguments are so under-developed as to be considered waived. *Carlisle v. Rainbow Connection, Inc.*, 300 S.W.3d 583, 586 (Mo.App. E.D. 2009) (“Mere conclusions and failure to develop an argument with support from legal authority preserve nothing for review”); and *Washington v. Blackburn*, 286 S.W.3d 818, 822 (Mo.App. E.D. 2009) (stating that an argument that fails to comply with **Rule 84.04(e)** preserves nothing for appeal).

Moreover, the MRFPA is not even applicable. That act prohibits financial institutions from granting access to financial records to government authorities except in certain circumstances. *See* §408.677; 408.680; 408.690. There is no allegation that SignalPoint is a government authority or that it improperly granted access to financial records.

Even if this Court were to assume that the GLBA applied and that SignalPoint, Kennedy and ITI were subject to the Privacy Rule under the GLBA, there is nothing in the record to indicate that any unauthorized disclosure of non-public information has occurred. As has been repeated multiple times before, SignalPoint never had access to a “Client Database” and never saw any “Client Lists”. There is no claim that SignalPoint engaged in an unauthorized disclosure of non-public information. There is no allegation that Kennedy or ITI are agents of SignalPoint—and in fact the record supports a finding that Kennedy is not an agent of SignalPoint.

Again, there is nothing in the record that would support a claim that SignalPoint has engaged in any unauthorized disclosure of non-public information. In fact, Jamie Peebles, an executive vice president and southern regional manager for Central Trust, testified that if Kennedy knew the name of an individual, he could obtain that person’s address, phone number or email address without having looked at STC’s / Central Trust’s client database. (L.F. 183). Kennedy contacts persons with whom he had already developed a relationship with. If that person decides to invest through Kennedy, then Kennedy, with that person’s permission, provides that person’s information to

SignalPoint. This is expressly permitted under the GLBA. **15 U.S.C. §6802(e)**. At no time does SignalPoint ever have unauthorized access to non-public information, much less ever disclose such information in an unauthorized manner. SignalPoint only receives an individual's information if that individual has voluntarily provided that information.

Additionally, the GLBA provides for regulation of financial institutions by agencies of the U.S. government. *See* **15 U.S.C. §6801**. The MBA cites to no authority for the proposition that a party seeking to establish a trade secret can, instead of taking its own protective measures, rely on a third party's enforcement of certain laws that have nothing to do with trade secrets. The MBA's argument is further weakened by the fact that there is no private cause of action under the GLBA. *Dunmire v. Morgan Stanley DW, Inc.*, **475 F.3d 956, 960 (8th Circ. 2007)**. As such, assuming *arguendo*, that Kennedy violated the GLBA, then Central Trust has no means of enforcing the GLBA or of requiring Kennedy to stop violating the GLBA. Thus, merely relying on the GLBA would not constitute "efforts that are reasonable under the circumstances to maintain [the claimed trade secret's] secrecy" as required by Missouri law. **§417.453(4)(b)**.

Moreover, it is somewhat ironic that the MBA relies on the GLBA when one of the purposes of that act was to increase competition in the financial services industry. *In re Gjestvang*, **405 B.R. 316, 320 (E.D. AR 2009)** (Citing to House Conference Report No. 106-434 at 245 (1999)). However, by its arguments, both Central Trust and the MBA are actually attempting to prevent Kennedy from using his customer contacts to compete with Central Trust.

Central Trust chose to bring its misappropriation claim under Missouri law, and in particular, pursuant to **§417.453**. As such, the MBA cannot now complain that the Missouri Uniform Trade Secrets Act does not account for or take into consideration what role other laws, such as the GLBA, should play in determining whether certain information is a trade secret. Both the Chamber and the MBA may want Missouri law to be that the disclosure of claimed trade secret information to other persons (affiliates) does not render that information a non-trade secret. However, that is not what **§417.453** states and, despite their arguments, the MBA and the Chamber cannot avoid the language of **§417.453**.

If the Court were to adopt the MBA's approach, it would be essentially re-writing **§417.453** to remove the requirement that Central Trust make reasonable efforts to maintain secrecy (because it could just rely on a third party) as well as the requirement that the information not be generally known to other persons (because sharing with other "persons" would be allowed so long as those "persons" are affiliates). As such, the MBA's arguments are best directed to the Missouri Legislature, not this Court.

In the second portion of its argument, the MBA also argues that the Southern District incorrectly interpreted and applied Missouri law when it found that the information at issue was not a trade secret. The MBA incorrectly claims that the Southern District held that, in the lack of a non-compete agreement, a list of customers can never be a trade secret. The MBA misreads the opinion in the same manner that the Chamber does.

As previously explained, the Southern District did not ever state that a list of customers can never be a trade secret. Instead, the Southern District held that, based on the facts in front of it, the claimed information was not a trade secret. Second, the Southern District reviewed Central Trust’s pleadings and its brief and determined that the information Central Trust was claiming to be a trade secret was in fact customer contact information. (Opinion, p. 8-9). In fact, the Southern District noted that the list of customers contained within the safe deposit box was a list of Kennedy’s customers and relationships. (Opinion, p. 8). (emphasis added). In its current brief, Central Trust claims that this very same information is the claimed trade secret (the “Client Lists”). Therefore, it appears that even Central Trust is in agreement with the Southern District’s holding that the information at issue is “customer contact” information.

As an alternative holding, the Southern District held that the information at issue is merely customer contact information and that such information, under Missouri law, is not a trade secret. The MBA’s attempts to substitute “client lists” and “client information” for the phrase “customer contact information” should be ignored. By misstating the holding of the Southern District, the MBA is attempting to create an issue that doesn’t exist.

CONCLUSION

The vast majority of Central Trust's brief discusses actions allegedly taken by Kennedy. Of course, this appeal is to SignalPoint only, and not Kennedy. Central Trust's arguments are short on any facts regarding SignalPoint or actions taken by SignalPoint.

The trial court did not err in granting summary judgment to SignalPoint on all of Central Trust's claims against it.

First, in regard to the trade secret claim, Central Trust cannot establish that the claimed information is a trade secret. It shares this information with other persons. All of the information belongs to the client and each client is free to disclose it to whomever he or she chooses. Central Trust has not taken reasonable steps to ensure its secrecy. Prior to Kennedy, several other employees left STC and competed with it, and one of the former employees even took a client list.

Second, even if the information is a trade secret, no misappropriation occurred. SignalPoint never received a copy of any client list. Nor has SignalPoint contacted any of Central Trust's clients. As such, no use or disclosure of the client list by SignalPoint ever occurred.

The trial court also did not err in granting summary judgment on the tortious interference claim. The employment agreement between STC and Kennedy establishes the parties' intent to prevent solicitation of clients only so long as STC was not sold to

another entity. After STC was purchased by Central Trust, the agreement ceased to exist and, based on the agreement, SignalPoint was reasonable in understanding that Kennedy was free to compete. Under Missouri law, Kennedy was free to solicit those clients with whom he had an established relationship. Furthermore, no facts were presented that SignalPoint ever acted in an improper manner or even solicited any of Central Trust's clients or took any action to interfere with Central's business.

Nor was there error in granting summary judgment on the conspiracy claim or in refusing the motion for new trial. As the misappropriation and tortious interference claims fail, and because no meeting of the minds for an unlawful purpose was ever shown, then summary judgment was proper on the conspiracy claim. Because Central Trust was aware of all of the so called "newly discovered evidence" prior to SignalPoint filing for summary judgment, then the trial court acted properly in denying the motion for new trial.

For all of the above stated reasons, this Court should affirm the trial court's summary judgment.

Respectfully submitted.

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Certification of Compliance With Rule 84.06(c)

COMES NOW Lance A. Roskens and hereby certifies, pursuant to Rule 84.06(c), as follows:

1. This brief includes the information required by Rule 55.03.
2. This brief complies with the limitations contained in Rule 84.06(b).
3. There are 22,353 words contained in this brief.
4. There are zero lines of monospaced type in this brief.

By: /s/Lance A. Roskens
Lance A. Roskens

Certificate of Service

I, the undersigned, hereby certify that on the 30th day of August, 2013, the foregoing instrument was electronically filed using the CM/ECF electronic filing system which sent notification of such filing to counsel of record Jennifer Growcock, Eric Trelz, Charles Baird, Keith Thornburg, Dale Doerhoff and Thomas Weaver.

By: /s/Lance A. Roskens
Lance A. Roskens