IN THE SUPREME COURT OF MISSOURI

Case No. SC90329

OVERLAP, INC.,
Plaintiff/Respondent,

v.

A.G. EDWARDS & SONS, INC.,
Defendant/Appellant.

APPEAL FROM THE CIRCUIT COURT
OF JACKSON COUNTY, MISSOURI

The Honorable Roger Prokes
Circuit Judge, Sitting by Designation

SUBSTITUTE REPLY BRIEF OF CROSS-RESPONDENT/APPELLANT A.G. EDWARDS & SONS, INC.

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REPLY IN SUPPORT OF A.G. EDWARDS & SONS, INC.'S APPEAL

Introduction

As set forth in A.G. Edwards' opening brief, the trial court erred in submitting Overlap's contract claims to the jury because the governing contract does not prohibit A.G. Edwards from sharing Overlap numbers with its financial consultants for use in advising clients on their mutual fund portfolios. The trial court erred in submitting Overlap's fraud claims because there was no evidence that A.G. Edwards ever told Overlap that A.G. Edwards was not sharing Overlap numbers with its financial consultants.

In response, Overlap attempts to confuse the issues, referring to A.G. Edwards' unlicensed "enterprise-wide use of Overlap." Overlap employs vague generalizations of A.G. Edwards' alleged improper use of the program to avoid confrontation of the real issue before this Court – whether the contract prohibits A.G. Edwards from sharing hard data produced by the Overlap program, as opposed to sharing the computer program itself. This distinction is critical to resolution of this appeal. A.G. Edwards did not dispute damages for alleged improper installation of the Overlap program on 47 computers ($22,278). The issue before this Court is whether A.G. Edwards is liable for damages based upon the cost of the program for some 7,382 financial consultants who might have seen an Overlap number generated by one of A.G. Edward's licensed users.

A.G. Edwards' Managed Products Department purchased four Software licenses. The Managed Products Department supported financial consultants in connection with the sale of mutual funds. As part of its support role, Managed Products employees operated the Software and generated a percentage of overlap of mutual fund holdings – a single number (the "Overlap number" or "number"). A.G. Edwards believed that the licenses permitted Managed Products employees to share the number with A.G. Edwards' financial consultants, also A.G. Edwards' employees, to assist the latter in servicing their clients. The sharing of the number – not the sharing of the Software – is the "unlicensed enterprise use" that was the principal basis for the damages awarded by the jury.

The plain language of the license and the obvious intent of the contracting parties defeats Overlap's breach of contract claim. Overlap's interpretation would render the Software useless to the Managed Products Department, since they would be unable to use the Software to meaningfully support financial consultants. Moreover, Overlap cannot reconcile this contrived interpretation of the license with its admission that a licensed financial consultant is permitted to give the number to an unlicensed client. (See Tr. 482, L.F. 1100).[1]

Overlap's tort allegations fail for similar reasons. The jury properly decided that the license in effect at the time of the purported misrepresentations permitted A.G. Edwards to share Overlap numbers with its financial consultants. And the two distinct representations hypothesized in the misrepresentation instructions, standing alone (as they were made) were true. There is no evidence that A.G. Edwards misrepresented its use of the Overlap program. Finally, Overlap failed to prove that anyone would ever

[1] Overlap admits "[t]hat a licensed financial consultant can provide this report to his or her client is not disputed by Overlap and is not an issue in this case." (L.F. 1100).

have paid the damages awarded for A.G. Edwards' use of the Overlap numbers. The actual damages are pure speculation. And there is no evidence of conduct warranting punitive damages.

For these reasons, and the other reasons set forth in A.G. Edward's opening brief, the judgment of the trial court should be vacated in its entirety, and judgment should be entered in favor of A.G. Edwards on all counts. [2]

Supplemental Statement Of Facts

I. The Relevant Evidence

Overlap's Statement of Facts cites to various facts that were disputed by A.G. Edwards, and therefore are improperly included in Overlap's brief. See Supreme Court Rule 84.04(c). A.G. Edwards denies that Overlap told A.G. Edwards that it could not use the Software in the manner it was using it. Mr. Fryer told A.G. Edwards only that a proposed, future use – allowing the financial consultants direct access to the Software, and thus the number, through an automated report accessible at the financial consultants' desktops via the intranet – was not permitted by the licenses. (Tr. 511-512).

A.G. Edwards also denies that Greg Elston intentionally excluded Overlap data from an automated report it sent to Overlap so as to mislead Overlap that it was not providing physical reports generated by the Software to its financial consultants. The

[2] As to the breach of the Original License (Verdict A), the only issue that A.G. Edwards is appealing is the statute of limitations issue. Therefore, A.G. Edwards is not requesting a new trial on that claim on any other grounds raised in its appeal.

Overlap number was never part of the automated report. (Tr. 1048-49, 1081). A.G. Edwards wanted it to be, and, thus inquired about allowing its financial consultants direct access to the Overlap number from their desktops. (Tr. 599-600, 1089-90). Mr. Elston said "[a]s we discussed, attached please find **the program** for the MF Overview **that I hope Overlap can become a part of**." (Trial Ex 66) (SA 115) (emphasis added). Accordingly, any suggestion that Mr. Elston purposefully excluded Overlap data or output is false.

II. The Litigation.

Overlap claims that A.G. Edwards "defended the case from the outset of the litigation." (Resp. Sub. Br. 16). In truth, A.G. Edwards never filed any pleadings until it was added as a party. (L.F. 1-115). A.G. Edwards simply provided discovery materials and information to AGE Capital so that it could respond to the discovery propounded on it.

Argument

I. The Trial Court Erred As A Matter Of Law In Submitting Overlap's Absurd Contract Claim To The Jury.

Overlap does not directly respond to A.G. Edwards' argument that the Revised License allows Software users to share Overlap *numbers* with financial consultants. Instead Overlap focuses on A.G. Edwards' alleged "enterprise-wide use" of the Software, referring to (1) A.G. Edward's loading of a single software program onto multiple computers, (2) dissemination of Overlap analysis to financial consultants, and (3) "merging" of the Overlap analysis into other reports provided to financial consultants.

As set forth in A.G. Edwards' opening briefs, the first point is a non-issue as A.G. Edwards is not disputing the limited damages awarded for loading the Software onto additional computers. The second and third points are just different ways of saying the same thing. A.G. Edwards shared Overlap numbers – verbally or in writing, singly or as part of other reports – with its financial consultants. The dissemination referred to in these two points, however, is only of the Overlap number itself. It is undisputed that A.G. Edwards did not share the Overlap Software with its financial consultants.

Despite its attempt to confuse the issues, Overlap simply claims that the "user" to which the license refers is anyone who receives the Overlap number. Thus Overlap's interpretation of the Revised License means that the only person that can look at a report or receive the Overlap number generated by the Software is the single "user" of the computer loaded with the Software. This is a ridiculous interpretation of a software license. When this Court installs word processing software on its computers, it pays the vendor a one-time fee based on the number of computers on which the software will be loaded. It does not pay an additional fee based on the number of parties who receive or somehow use a copy of an opinion prepared with that software.

Moreover, Overlap's interpretation of its license cannot be reconciled with the fact that Overlap offers single user licenses to firms like A.G. Edwards. If those licenses are restricted in the manner Overlap now contends, that interpretation defeats the essential purpose of the contracts – to allow A.G. Edwards and similar firms to use the Overlap analysis to advise their clients with respect to their portfolios. The Overlap numbers are useless to the "user" of a particular computer if the numbers cannot be shared with the clients and their financial consultants. One Court has already expressly reached this conclusion. Overlap v. Alliance Bernstein Investments, 2007 WL 4373975 (W.D. Mo. Dec. 14, 2007) at *3 n.2.

Apparently recognizing the absurdity of its position and the precedent established in the Alliance case, Overlap concedes that A.G. Edwards can run Overlap analysis for clients. (Resp. Sub.Br. 20, L.F. 1100). Overlap then attempts to distinguish Alliance, stating that the court was "concerned" with whether Overlap's interpretation precludes a licensed user from sharing the Overlap information with a (unlicensed) client. That is precisely the point here.

If, as the Alliance court held, the number can be shared by a licensed user with an unlicensed client for purposes of providing financial advice, surely a licensed Managed Products employee can also share the number with an unlicensed client. There is no distinction between a client and an unlicensed financial consultant. In other words, if an unlicensed client can receive the report from a licensed user, so can an unlicensed financial consultant.

Overlap cannot otherwise distinguish Alliance. The fact that A.G. Edwards sought severance of Overlap's cases against various defendants had nothing to do with the interpretation of the licenses at issue. Severance was necessary because the claims against the various defendants lacked commonality. The fact remains that the cases involved the very same license language that is in dispute here. (L.F. 31-36, see also Alliance, 2007 WL 4373975 at *3. (A11).

In a desperate attempt to retain the windfall awarded to it, Overlap asserts that "AGE cites no authority for the notion that if a Court finds an interpretation of a contract absurd, that it is permitted to unwind the jury's interpretation of the contract." (Resp. Sub.Br. 20, n. 3). Overlap does not understand the governing law. As stated in A.G. Edwards' opening brief, the interpretation of an unambiguous (and the determination of whether the contract is ambiguous) are questions of law for the court, not questions of fact for the jury. G.H.H. Invs. L.L.C. v. Chesterfield Mgmt. Assocs. L.P., 262 S.W.3d 687, 691-92 (Mo. Ct. App. 2008).

It is for the court in the first instance to determine whether the plaintiff has made a submissible breach of contract claim. As this Court has long held, the cardinal rule governing the court's interpretation of the contract is to determine the intent of the parties and give effect to that intent. J.E. Hathman, Inc. v. Sigma Alpha Epsilon Club, 491 S.W.2d 261, 264 (Mo. banc 1973). In so doing, the courts will avoid an interpretation that reaches an absurd or unreasonable result. State ex rel. Continental Life Ins. Co., 327

S.W.2d 1017, 1020 (Mo. 1931). A.G. Edwards' interpretation of the Revised License is the only one that effectuates the intent of the parties at the time they entered the agreements. And it is the only interpretation that avoids absurd results.

The trial court should have rejected Overlap's untenable position and entered judgment for A.G. Edwards on Overlap's claim for breach of the Revised License as a matter of law.

II. Overlap Did Not Prove The Requisite Element Of Its Misrepresentation Claims.

Overlap submitted its misrepresentation claims on the theory that A.G. Edwards told Overlap that the only persons that received the Overlap numbers were the licensees. It submitted its fraudulent omission claim on the theory that A.G. Edwards did not disclose that financial consultants were receiving the Overlap number. As set forth in A.G. Edwards' opening brief, there was no evidence in support of either claim. Overlap contrived such evidence by joining two unrelated statements and altering the context and meaning of the two separate statements. Overlap continues this charade in its brief.

Overlap's misrepresentation claims relate to A.G. Edwards' current use of the Software. (L.F. 1299, 1306). A.G. Edwards only made one statement to Overlap about its current use of the Software. A.G. Edwards told Mr. Fryer that it was using the Software for internal research. (Tr. 603). Overlap does not challenge the veracity of this statement. Since the financial consultants are A.G. Edwards' employees, sharing the Overlap numbers with those consultants is consistent with internal use.

Similarly, it is undisputed that A.G. Edwards wanted to give financial consultants direct access to the number through direct access to the Software through A.G. Edwards' intranet. (Tr. 511, 599-600, 1078-80, 1088-95; Trial Ex. 48) (A110). But the testimony referred to in Overlap's brief does not establish, as Overlap contends, that A.G. Edwards was negotiating for the right to simply disseminate the Overlap numbers to its financial consultants (its current use). A.G. Edwards was contemplating an expanded use of the Software itself – providing financial consultants direct access to the Software through a broader program that would generate automated reports containing, among other things, the number. The financial consultants could run the broader program from their desktops through A.G. Edwards' intranet. (Trial Ex. 48; Tr. 1078-81, 1088-1095) (A110). A.G. Edwards did not conceal its current use of the Software from Overlap.

Taken separately and in context, the statements that formed the basis for the jury instructions were undisputedly true. Overlap does not dispute this in its brief. But by improperly combining the statements into one alleged misrepresentation and adding the conjunction "but" between them, Overlap changed the meaning of the statements and fabricated evidence that did not exist. There was no evidence that Overlap either misrepresented or concealed its current use of the Overlap program. Overlap failed to make a submissible claim for fraud and/or negligent misrepresentation.

A. Overlap's Claim For Fraudulent Concealment Fails Because Overlap Did Not Plead Such A Claim.

Implicitly recognizing that A.G. Edwards never affirmatively misrepresented its use of the Software, Overlap argues that its misrepresentation claims were actually a claim for fraudulent concealment - *i.e.* that A.G. Edwards allegedly concealed its current use of the Software from Overlap. The court erred in submitting such a theory to the jury, however, because Overlap did not plead or prove any such claim. (L.F. 80-91, 1300).

Overlap argues that its pleading of a positive misrepresentation was sufficient to support a submission of a fraudulent concealment claim to the jury. (Resp. Sub. Br. 32, n.7). However, Missouri is a fact pleading state, which requires a plaintiff to plead ultimate facts of what plaintiff will attempt to establish at trial. Mo. S. Ct. R. 55.05. Overlap did not do so. (L.F. 87-9). Instead, Overlap argues that it was not required to plead facts to support its claim for fraudulent concealment, relying solely on a case that turns upon federal notice pleading requirements, Pelster v. Ray, 987 F.2d 514, 522 (8th Cir. 1993). This is not the applicable standard in Missouri.

To remedy its failure Overlap argues that its pleadings were amended by implication. (Resp. Sub. Br. 32, n.7). This argument fails because the evidence of concealment was relevant to prove the misrepresentation claim. "While it is true that pleadings may be amended by implied consent of the parties when evidence is introduced on an issue without objection . . . , such evidence must bear **only on that issue** and not be relevant to an issue already in the case." Smith v. Heisserer, 609 S.W.2d 485, 486 (Mo. Ct. App. 1980) (emphasis added).

By Overlap's own admission, the fraudulent concealment evidence was the same evidence that allegedly supported its misrepresentation claims. (See L.F. 1298, 1299, 1306; Tr. 517). During Mr. Fryer's direct examination, A.G. Edwards' counsel objected to the question: "Did anyone at A.G. Edwards during that meeting indicate that they were already providing the Overlap report to financial consultants." (Tr. 516). At the ensuing bench conference, the trial judge first suggested fraudulent concealment, asked Overlap's counsel: "[b]asically you're saying it's fraud by nondisclosure?" (Tr. 517). Overlap's counsel did not respond in the affirmative, instead arguing that the evidence related to the reliance element of the misrepresentation claim. (Tr. 517). Only later, did Overlap begin to argue the concealment theory. But it relied upon the same testimony to prove both its misrepresentation and concealment claims. (Tr. 517, 603-04, 1299, 1300, 1306; Resp. Sub. Br. 13). The pleadings were not amended by consent.

B. A.G. Edwards Had No Duty To Disclose Its Use Of The Reports.

As set forth in A.G. Edwards' opening brief, A.G. Edwards, had no duty to disclose to Overlap how it was using the Overlap numbers. Overlap responds that a duty arose because A.G. Edwards deceived Overlap about its current use of the Software and conducted misleading negotiations for "enterprise-wide use." As previously explained, A.G. Edwards merely negotiated for expanded use of the Software. There is no evidence that it concealed its current use.

Moreover, if Overlap's argument holds, then every time a party breaches a contract and does not inform the other contracting party, it has committed a fraud and is liable for punitive damages. This is not the law in Missouri. (See Ap. Sub. Br. 30-31).

C. There Was No Proof Of Fraudulent Inducement.

Overlap now claims that the purported misrepresentations fraudulently induced it into continuing to license the Software to A.G. Edwards. (Resp. Sub. Br. 28). At the time of the alleged misrepresentations, Overlap had already entered into the license agreements with A.G. Edwards. As such, there could not have been any "inducement" – the licensure preceded the alleged fraud.

Moreover, there was no evidence that Overlap would have stopped licensing the Software to A.G. Edwards had Overlap known that that A.G. Edwards was sharing Overlap numbers with its financial consultants. Mr. Fryer did <u>not</u> testify that he would have demanded that A.G. Edwards stop using the Software. Instead, Mr. Fryer testified, had he "known the truth," he "would have asked [A.G. Edwards] to pay me for the previous usage and pay for them going forward." (Tr. 528). In other words, he would have continued to negotiate with A.G. Edwards. It was only after A.G. Edwards and Overlap failed to reach an agreement on price that Mr. Fryer demanded that A.G. Edwards stop using the Software. (Tr. 530-35; Trial Ex. 21). Simply put, there was no inducement.

The cases cited by Overlap to support its new fraudulent inducement theory are distinguishable. The cases cited by Overlap all involve fraudulent inducement to enter into a contract. There is no allegation, let alone evidence, that A.G. Edwards did any thing to induce Overlap to enter into the licenses. Moreover, each of the cases cited by Overlap involve parties who did not have any relationship prior to entering into the contract at issue. See, e.g., Kincaid Enters., Inc. v. Porter, 812 S.W.2d 892, 897, fn. 2 (Mo. Ct. App. 1991); Trimble v. Pracna, 167 S.W.3d 706, 711 (Mo. banc 2005).

Such is not the case here. At the time of the alleged fraud, Overlap and A.G. Edwards were already operating under the license terms, which governed the conduct of the parties. Overlap's fraudulent inducement theory does not save its fraud claims.

D. Overlap's Damages Are Pure Speculation.

Unlike a claim for breach of contract, which only requires a party to prove damages, a tort claim requires a showing that a party's damages are proximately caused by the alleged misrepresentation. Larabee v. Eichler, 271 S.W.3d 542, 548 (Mo. banc 2008) (holding that misrepresentation must proximately cause injury). Overlap adduced no evidence that its injury (A.G. Edwards' use of the Software without payment) would not have occurred "but for" the purported misrepresentation that A.G. Edwards was not providing the software number to all of its financial consultants. And it produced no evidence of the amount of its alleged injury.

Mr. Fryer never testified that had he known that A.G. Edwards was providing the Software number to all of its financial consultants, he would have terminated the licenses. Instead, he testified that had he known the truth, he would have asked A.G. Edwards to pay for additional licenses. (Tr. 528). But there was no proof that A.G. Edwards would have agreed to pay for additional licenses. (Tr. 1221). Overlap is attempting to enforce a hypothetical deal – on the evidence established A.G. Edwards would never have agreed to. If Overlap had demanded A.G. Edwards' payment of this exorbitant sums for the right to share the Overlap numbers with financial consultants, A.G. Edwards could simply have returned the Software or refrained from that conduct if it was unable to negotiate another deal. There is no proof that it ever would have paid the cost of a separate license for each financial consultant that was provided an Overlap number. Overlap never obtained this deal from any of its other clients.[3]

Mprove v. KLT Telecom, Inc., 135 S.W.3d 481 (Mo. Ct. App. 2004), is nearly identical to this case. In Mprove, the court refused to find a causal connection between the alleged misrepresentation and plaintiff's purported damages because there was no evidence that defendant would have agreed to pay and plaintiff would have received more money. Mprove, 135 S.W.3d at 492-93. Such is the case here.

Overlap attempts to distinguish Mprove on the grounds that A.G. Edwards benefited from its alleged improper use of the Software. But even if that is true, Overlap wholly failed to prove the value of that benefit. Instead, it sought and received a windfall

[3] In its brief, Overlap states that "Overlap routinely negotiated multi-user licenses based on the number of financial consultants who would have access to the Overlap analysis." (Resp. Sub. Br. 7). The arrangements to which Overlap refers involved copying the disks containing the Software. (Tr. 562-64, 569). These arrangements did not relate to the number of financial consultant that received the number. The evidence also showed that Overlap allowed the copying of the Software under these arrangements without negotiating different licenses, only different prices. (Tr. 562, 569-70). Mr. Fryer admitted that the largest number of licenses any broker-dealer ever purchased from Overlap was a hundred. (Tr. 572).

based upon pure speculation. For this reason alone, the Court should reverse the fraud judgment.

III. <u>Overlap Failed To Make A Submissible Case On Punitive Damages</u>.

As argued in A.G. Edwards' prior brief, evidence of fraudulent conduct alone is not clear and convincing evidence of the evil motive or reckless indifference necessary to support a punitive damages claim. While Overlap cites cases in which the fraudulent conduct supported punitive damages, those cases do not stand for the proposition that fraudulent conduct alone supports punitive damages. For instance, one of Overlap's cases cited this Court for the conclusion that punitive damages in a fraud case are permissible only "when intentional fraud is committed <u>and</u> the offensive act is "outrageous because of the defendant's evil motive or reckless indifference to the rights of others.'" <u>Burnett v. Thrifty Imports, Inc</u>., 773 S.W.2d 508, 511 (Mo. Ct. App. 1989); (<u>Burnett v. Griffith</u>, 769 S.W.2d 780, 789 (Mo. banc 1989)). In that case, the Southern District found that mechanic's "nefarious purpose" in misrepresenting the condition of an engine (a matter within the superior knowledge of the mechanic) to induce the sale of new engine to a customer with no intention of ever supplying the new engine supported an award of punitive damages. <u>Burnett</u>, 773 S.W.2d at 511.

Overlap produced no evidence of such evil motive or reckless indifference in this case. Mere disagreement between the parties as to terms of the license agreements and the merits of their respective claims and defenses is not indicative of the indifference or disregard necessary to support a punitive damage award. The sole asserted basis for punitive damages is that A.G. Edwards' use of the Software was in breach of the licenses and A.G. Edwards did not reveal that use to Overlap. Even if A.G. Edwards did breach the Revised License, it had no duty to bring that breach to Overlap's attention particularly when A.G. Edwards believed in good faith that it was complying with the license.

This Court's decision in Alcorn v. Union Pacific Railroad Company, 50 S.W.3d 226, 248 (Mo. banc 2001) is instructive. Even though the Court found that railroad defendant was on notice of the hazardous condition of a railroad crossing, the railroad believed it had satisfied its duty to the public through passive warning signs. Id. at 248. Since there was "no clear evidence that Union Pacific knowingly violated an applicable regulation or statute," the Court held that punitive damages should not have been submitted to the jury and reversed the punitive damages award. Id.

The only additional evidence Overlap cites in support of punitive damages relates to its claim that Overlap loaded the Software on more than four computers. This evidence cannot support a punitive damage award because, at most, it establishes an alleged breach of license (contract) and not an independent tort.

IV. Overlap's Claims Are Barred By The Applicable Statute Of Limitations

Neither the law nor the facts support Overlap's contention that this was a "classic case of corporate misnomer." (See Resp. Sub. Br. 40). Overlap intended to name AGE Capital as a Defendant. The clearest evidence of this is the fact that when A.G. Edwards was finally added as a defendant, albeit untimely, Overlap continued to assert claims - including two new ones - against AGE Capital. (L.F. 31-57; 80-91). Relation back does not save its late claims against A.G. Edwards.

A. Overlap Made No Mistake In Naming AGE Capital As A Defendant.

The record demonstrates that Overlap clearly intended to sue AGE Capital. As this Court has recognized, there is no misnomer when party intends to and does sue the original defendant.

In Watson v. E.W. Bliss, Inc., 704 S.W.2d 667 (Mo. 1986), the Supreme Court allowed relation back where the plaintiff always intended to sue the same party, but was mistaken about describing the defendant in the original petition. Id. at 669. The Court stated that the correction of a misnomer has nothing to do with Rule 55.33(c)'s requirement concerning a change in party, but will relate back to the original petition as long as the correct defendant had notice of the original lawsuit. Id. at 670-71.

After Watson, the Supreme Court expressed doubt that the misnomer exception to Rule 55.33(c) would apply to cases where a plaintiff *intentionally* sued the original defendant. In Bailey v. Innovative Management & Inv., Inc., 890 S.W.2d 648, 652 (Mo. banc 1994), the same corporation was named in both petitions; in the first petition it was named by its former name and in the second petition it was named by its current name. Id. at 652. Although the Supreme Court applied the Watson rule to allow relation back, the Supreme Court stated:

> The present case and Watson should be distinguished from cases in which the **petition filed before the statute of limitations names some other party in existence, not because of mistake in the name but because the pleader attempts to name a different party**.

Id. (emphasis added). See also, State ex rel. Hilker v. Sweeney, 877 S.W.2d 624, 628 (Mo. 1994) ("'relation back' is triggered only by a mistake in identifying a party defendant and not by a mistake in failing to add a party defendant").

The Supreme Court clarified the definition of misnomer in Johnson v. State, 925 S.W.2d 834, 835 (Mo. banc 1996). The Supreme Court specifically held that there is no misnomer where a plaintiff intentionally sues a specific defendant, albeit the wrong defendant. Id. at 835. In Johnson, the circuit court issued a subpoena duces tecum at the request of the prosecuting attorney as part of a criminal investigation. Id. The subpoena directed "Christie's" to produce certain documents and was served on Kent Johnson, who was identified on the return as the "manager being at the time of service in and in charge of the business of said company." Id. Johnson initially moved to quash the subpoena, but was denied. Id. Thereafter, he failed to comply with the subpoena, and the State moved for an order to show cause why Johnson should not be held in contempt. Id. At the hearing, Johnson testified that he was not employed by "Christie's," but rather was employed by St. Joseph Gifts, L.L.C., doing business as "Christie's." Id.

The Court of Appeals transferred the case to the Supreme Court, which stated "[t]he fact that an incorrect name is used is immaterial if the corporate defendant is not misled by the name designation **and there is no intention on the part of the plaintiff to sue a different entity.**" Id. (emphasis added). Because Johnson was not misled by the name designation and the State always intended to issue the subpoena to St. Joseph Gifts, L.L.C. doing business as Christie's, the Supreme Court enforced the subpoena. Id.; see also, Deane v. S.F. Pizza, Inc., 229 S.W.3d 223, 226 (Mo. Ct. App. 2007) (applying same rule to allow relation back where there was no "basis for concluding any intention by plaintiff to sue any party other than 'this' defendant.").

Unlike Watson, Johnson and Bailey, this is **not** a case of misnomer. Overlap intended to and did assert claims against the original defendant, AGE Capital. Overlap sent a demand letter threatening to sue A.G. Edwards. (Trial Ex. 21). Yet, when Overlap initiated this litigation, it sued AGE Capital, not A.G. Edwards. (L.F. 31-57). Thereafter, on at least ten occasions prior to the expiration of the statute of limitations, AGE Capital told Overlap that it had sued the wrong party and should have sued A.G. Edwards. (L.F. 58, 191, 194, 197, 201, 210, 213, 227, 230, 234). Overlap finally sought leave to file an Amended Petition adding A.G. Edwards on November 21, 2006, after the statute of limitations expired. (L.F. 63-79, 80-91). Instead of substituting parties as one might expect in the case of misnomer, Overlap **added** A.G. Edwards as a defendant and continued to assert claims against AGE Capital, including new claims for fraud and negligent misrepresentation. (Id.). Thereafter, Overlap did not dismiss AGE Capital for more than six months. (L.F. 454). These facts belie any conclusion of misnomer.[4]

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[4] Overlap did not immediately dismiss AGE Capital because it wanted to independently verify "that AGE Capital was not a proper defendant." (Resp. Sub. Br. 49). In other words, had Overlap decided that AGE Capital was a proper defendant, it would have continued with its claims against both parties. Moreover, AGE Capital first told Overlap that it sued the wrong party on October 8, 2003. Overlap had 3 years to depose a

B. A.G. Edwards Is Not Estopped From Arguing Relation Back.

Overlap argues that A.G. Edwards is estopped from arguing that the claims against it do not relate back to the original Petition because A.G. Edwards allegedly defended the case from the outset and was aware of the potential claims against it. (Resp. Sub. Br. 51). As an initial matter, whether a party has notice of the claims against it is irrelevant if there was no misnomer. Watson, 704 S.W.2d at 669.

Moreover, the record is clear that A.G. Edwards never defended the claims Overlap asserted against AGE Capital. AGE Capital advised Overlap that is sued the wrong party in its initial pleading. (L.F. 58).[5] A.G. Edwards never filed any pleadings until it was added as a party. (L.F. 1-115). In responding to discovery, AGE Capital advised Overlap that:

> The entity that should have been named as a defendant is A.G. Edwards & Sons, Inc. Rather than objecting and refusing to provide any information, defendant will answer these discovery requests as though they were directed to A.G. Edwards & Sons, Inc. based on

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corporate representative. It cannot now use its failure to take a deposition to avoid the statute of limitations bar.

[5] A potential defendant has no obligation to inform a potential plaintiff that he or she has a cause of action so that the plaintiff can timely file its claims within the statute of limitations. McCrary v. Truman Medical Center, 916 S.W.2d 831 (Mo. Ct. App. 1995); see also, Gilliam v. Gohn, 303 S.W.2d 101, 107 (Mo. 1957).

> the assumption and expectation that plaintiff will promptly file a motion to substitute parties to correct the error.

(L.F. 191, 194, 197, 201, 210, 234). In this regard, A.G. Edwards simply provided discovery materials and information to AGE Capital so that it could respond to the discovery propounded on it. This was done as a matter of cooperation, to spare Overlap the need to serve a third-party subpoena on A.G. Edwards. This activity does not constitute the undertaking of a defense of Overlap's claims against AGE Capital, and in any event, is irrelevant to the issue here. See Hilker, 877 S.W.2d at 628 (rejecting argument that relation back should be allowed because of defendant's active participation in the case prior to the formal amendment); see also, Bonney v. Environmental Engineering, Inc., 224 S.W.3d 109, 117-18 (Mo. Ct. App. 2007) (rejecting argument that defendant was estopped from asserting a statute of limitations defense).

Overlap's delay in adding A.G. Edwards as a party is inexplicable. The relation back doctrine does not give Overlap forever to change parties. When "the plaintiff does not change defendants for years after discovering the mistake, the not-yet-named defendant can no longer assume that the action would have been brought against him had it not been for the plaintiff's mistake." Springman v. AIG Mktg., Inc., 523 F.3d 685, 689 (7th Cir. 2008) (internal punctuation omitted). A party must proceed diligently once the identity of the proper party is discovered. Id. Overlap did not do so, and cannot now be afforded the benefits of the relation back doctrine.

C. Overlap's Fraud And Negligent Misrepresentation Claims Are Barred By The Applicable Statutes Of Limitations.

In one last attempt to save its untimely claims, Overlap argues that its claims for fraud and negligent misrepresentation were timely filed because "Overlap did not discover until long after its November 2001 cease-and-desist letters the facts sufficient to establish" the alleged misrepresentations.[6] (Resp. Sub. Br. 53; see also, Resp. Sub. Br. 55 (claiming after depositions in 2006, Overlap discovered, for the first time, A.G. Edwards' alleged enterprise-wide use of the Software)). This contention is squarely contradicted by its own Amended Petition, as well as Mr. Fryer's testimony at trial.

Overlap pled:

> In November 2001, **after** Plaintiff learned that Defendants may have been providing Overlap reports and Overlap information to all of their employed financial consultants in violation of the Overlap License, **Plaintiff demanded that Defendants cease and desist all conduct that violated the software license.**

(L.F. 88, ¶44 (emphasis added); see also Trial Ex. 21 (A108)). The cease and desist letter was dated November 19, 2001. (Trial Ex. 21)(A108). Moreover, at trial, Mr. Fryer admitted that prior to the date of the demand letter, Todd Grizzle, an A.G. Edwards' broker, told Overlap that A.G. Edwards' employees used to run and distribute

[6] Overlap does not argue, nor can it, that its other claims (breach of contract and unfair competition) were timely asserted against A.G. Edwards.

information and reports generated by the Software to its brokers. (L.F. 84, ¶24; Tr. 540-42).

By its own admission, Overlap discovered its claims more than six (6) years before it filed its Amended Statement of Claim. Thus, Overlap's fraud claims are time barred. See Judy v. Arkansas Log Homes, Inc., 923 S.W.2d 409, 416 (Mo. Ct. App. 1996). Similarly, Overlap's negligent misrepresentation claims are time barred. By November 19, 2001, Overlap knew that it had been damaged by the purportedly false statements. It knew A.G. Edwards had paid for four (4) licenses, but was providing information and reports generated by the Software to "all its financial consultants." (L.F. 83, ¶21, ¶22; 84, ¶24; 88, ¶44; tr. 540-42); Olean Assocs., Inc. v. Knights of Columbus, 5 S.W.3d 518, 522 (Mo. Ct. App. 1999).

D. A.G. Edwards Did Not Conceal Overlap's Discovery Of Its Fraud Claims.

Although not pleaded, Overlap now argues that A.G. Edwards took affirmative steps to conceal its fraud such that the statute of limitations must be tolled. (Resp. Sub. Br. 54-56). As an initial matter, fraudulent concealment is inapplicable to toll the statute of limitations where the plaintiff knows or should have known it had a cause of action. Tayborn v. Burstein, 748 S.W.2d 824, 826 (Mo. Ct. App. 1988); Gilmore v. Chicago Title Ins. Co., 926 S.W.2d 695, 699 (Mo. Ct. App. 1996) ("[F]raudulent concealment does not toll statute of limitations for fraud beyond what is provided for in § 516.120(5) . . ."). As discussed above, Overlap knew of its cause of action for fraud on before

November 19, 2001. Accordingly, Overlap cannot now argue that A.G. Edwards concealed the claims.

Next, Overlap claims that A.G. Edwards concealed the fraud by denying wrongdoing in response to the demand letter. Denials of liability after the plaintiff knows of the possibility of its claims do not toll the statute of limitations. See Whitlock Corp. v. Deloitte & Touche, L.L.P., 233 F.3d 1063, 1066 (7th Cir. 2000), cert. denied, 532 U.S. 973 (2001) ("Simple denials of liability do not toll the period of limitations . . ."); Matsumoto v. Republic Ins. Co., 792 F.2d 869, 872 (9th Cir. 1986) ("Here, . . . the [defendant's] denial of liability may have caused the [plaintiff] not to pursue a cause of action, but this does not toll the statute of limitations. . . . Otherwise . . ., no [defendant] could deny liability without indefinitely suspending the running of the statute of limitations.") (internal punctuation omitted).

Finally, Overlap claims that AGE Capital's conduct in discovery somehow prevented it from adding A.G. Edwards as a defendant in this case.[7] (Resp. Sub. Br. 55). This argument completely ignores that, in its discovery responses, AGE Capital was repeatedly and consistently candid in advising Overlap that it had named the wrong party.

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[7] Overlap's suggestion that A.G. Edwards' conduct in discovery was dilatory is a complete fabrication. In fact, the record shows that any delay in discovery was Overlap's own doing. A.G. Edwards produced documents on May 24, 2004. (S.A. 28). Thereafter, there was no significant discovery activity by Overlap for almost a year and a half. (S.A. 29) (see also L.F. 9-10).

(See L.F. 191, 194, 197, 201, 210, 234). Overlap could have timely substituted A.G. Edwards. Yet, for inexplicable reasons, Overlap waited approximately over 3 years, until it was out of time, to add A.G. Edwards as a party to this action.

Evidently, Overlap waited because it did not believe AGE Capital that A.G. Edwards was the proper party defendant. It now claims that it needed to confirm that A.G. Edwards was the proper party prior to adding it. (Resp. Sub. Br. 55). However, there was no need for Overlap to conclusively confirm that A.G. Edwards was the proper party defendant. Mo. S. Ct. R. 55.03 (requiring only reasonable inquiry before submission of claims against a party). Once it had reason to believe that A.G. Edwards was a proper party, it should have added it. It had over three years to timely do so.

Overlap cannot avoid the statute of limitations, which clearly bar Overlap's claims against A.G. Edwards in this case.

V. The Trial Court Erred In Excluding Parol Evidence To Determine The Ambiguity In The Revised License.

As set forth in Point I, A.G. Edwards submits that the Revised License is unambiguous and that the plain terms of that agreement allowed A.G. Edwards' to share the Overlap numbers with its financial consultants. But if the Court determines that the Revised License is ambiguous, then the trial court necessarily abused its discretion in excluding parole evidence of the license's meaning. Overlap asserts in its brief that A.G. Edwards is somehow estopped from asserting the latter argument based upon its earlier positions.

A.G. Edwards is simply arguing the points in the alternative, which is entirely permissible under Missouri law. See Rule 55.10 (allowing parties to plead in the alternative); Rule 84.04(d)(1)(appellant can assert multiple legal grounds for reversal as long as they are stated in separate points relied upon). A.G. Edwards believes that the Licenses unambiguously allow it to share the Overlap numbers as it has. But if this Court finds the agreement ambiguous, then the trial court erred in excluding parole evidence.

As the case cited by Overlap recognizes, judicial estoppel applies only to bind parties to allegations or admissions of fact in their own pleadings. Dick v. Children's Mercy Hosp., 140 S.W.3d 131 (Mo. Ct. App. 2004). Moreover, judicial estoppel applies only where a person has taken a position in litigation and succeeded in maintaining that position, to the prejudice of the other party. Taylor v. State, 254 S.W.3d 856, 858 (Mo. 2008). The doctrine does not bar an appellant from asserting alternative legal arguments.

Prior to the trial, A.G. Edwards sought to exclude parol evidence only to the extent that Overlap claimed that A.G. Edwards violated terms that did not exist in the Revised License. (L.F. 1008-09). Overlap clarified that it intended to rely on the "single user" provision of the license to argue that the financial consultants were users who were required to purchase a license in order to obtain the Overlap number. (Tr. 67-70). A.G. Edwards withdrew its motion prior to the Court issuing an order on A.G. Edwards' Motion in Limine. (Tr. 89, L.F. 1276).

Thereafter, A.G. Edwards sought to have parol evidence admitted as to Overlap's interpretation of its license (specifically, the single-user provision) in the ordinary course of its business because Overlap's interpretation was inconsistent with the one Overlap advanced in this case. (See Ap. Sub. Br. 46-49). These arguments as to parol evidence were not contradictory.[8]

In response to this argument, Overlap asserts, among other things, that the Revised License unambiguously prohibited A.G. Edwards from loading the Software onto multiple computers. Again, this is not the issue. A.G. Edwards is not disputing that point on appeal. The issue is whether the term "user" in the license refers to anyone that receives or views an Overlap number. Overlap itself interpreted the "single-user" provision to mean different things at different times. (Offer of Proof Ex. 810, p. 72, 74-75, 80-82, 86-88 (A171-180); Offer of Proof Ex. 812, p. 35-36, 38, 52-53, 106-107 (A181-92); Offer of Proof Ex. 813, p. 9-10 (A193-195)). If the license agreement was ambiguous, the jury should have been allowed to hear A.G. Edwards' proffered testimony regarding the meaning of the agreement and particularly the meaning of the term "user" therein. The testimony bears directly upon the meaning of this term.

If the Revised License was ambiguous, it was reversible error for the trial court to exclude A.G. Edward's testimony.

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[8] In any event, motions in limine are advisory in nature and are not binding. Wilkerson v. Prelutsky, 943 S.W.2d 643, 646 (Mo. banc 1997) (A ruling in limine is interlocutory in nature; it is a preliminary expression of the court's opinion as to the admissibility of evidence and is subject to change during the course of the trial.). As the posture of the case and the proof developed during trial, A.G. Edwards was free to offer parol evidence to support its defense of the claims asserted against it.

VI. A Juror's Failure To Disclose His Involvement In Prior Litigation Mandates A New Trial.

Overlap ignores this Court's long-established precedent that any intentional non-disclosure by a juror is per se prejudicial and that counsel has no duty to investigate the jurors' voir dire answers during trial. Instead, Overlap asks this Court to fashion a new rule that (1) requires counsel to investigate a Juror's *voir dire* responses during trial absent any reasonable basis to do so, and (2) presumes a juror is biased in favor of a particular party based on the information he or she fails to disclose. Any such a rule in impractical, unworkable, and should be rejected.

A. Counsel Should Not Be Required To Investigate The Truthfulness Of A Juror's Voir Dire Responses During Trial.

Jurors take an oath to tell the truth. If Overlap's proposed rule were to be adopted, this oath would be rendered meaningless. In fact, Overlap contends that counsel should always assume that jurors lie during *voir dire.* Overlap's solution is to require counsel to conduct a Case.net search on each juror to confirm the truth of his/her *voir dire* responses, absent any legitimate reason to do so.

This Court has already rejected such a rule, which, at its core, undermines the essence of the jury system and the sanctity of the juror's oath. Instead, the rule adopted by the Court requires an investigation of *voir dire* responses only after a party actually becomes aware of a juror's nondisclosure or false answer. Brines by and through Harlan v. Cibis, 882 S.W.2d 138 (Mo. banc 1994).

In this case, Juror Hillerman's intentional nondisclosure was not apparent to A.G. Edwards prior to the verdict. A.G. Edwards accepted the truthfulness of Juror Hillerman's *voir dire* responses and had no reason to question his service. Only after, what A.G. Edwards believed to be an improbable verdict was rendered, did A.G. Edwards begin to question whether the jury was somehow tainted. It conducted a search of the Case.net database, and discovered that Juror Hillerman intentionally failed to disclose his involvement in prior litigation.

B. It Is Improper To Assume That A Juror Is Predisposed To Favor Any Party.

Overlap also asks this Court to ignore well settled law that holds when a juror fails to disclose prior litigation, prejudice is presumed. Brines, at 138. Instead, Overlap speculates that because Juror Hillerman was a defendant in the undisclosed litigation, he was predisposed, if at all, in favor of the defendant in this case, A.G. Edwards. Since the verdict was against A.G. Edwards, Overlap contends that A.G. Edwards was not prejudiced by Juror Hillerman's presumed bias.

Overlap's argument is based on a flawed assumption that a juror will always favor the similarly situated party. A juror who fails to disclose his involvement as a defendant in prior litigation may favor either the plaintiff or the defendant. Brines, 882 S.W.2d at 140 (court presumed that juror who was defendant in prior litigation favored defendant); Headrick v. Dowdy, 450 S.W.2d 161 (Mo. 1970) (court presumed that juror who was plaintiff in prior litigation favored defendant). Overlap's argument that Juror Hillerman was biased in favor of A.G. Edwards is pure speculation. It is equally plausible that Juror Hillerman was biased against A.G. Edwards.

Ultimately, any assumption or speculation in this regard is simply irrelevant. Intentional non-disclosure warrants a new trial absent any proof of prejudice because it prejudices the entire judicial process – not just one party or the other. A juror who fails to honestly and truthfully answer *voir dire* questions violates his or her oath, and precludes counsel from informed use of peremptory strike.

Conclusion

For the reasons stated above and in A.G. Edwards' opening brief, A.G. Edwards respectfully prays for the relief requested in its opening brief.

<u>OPPOSITION TO RESPONDENT'S CONTINGENT CROSS APPEAL</u>

<u>Argument</u>

Overlap alleges three errors in its cross appeal. These errors relate to (1) the trial court's granting of A.G. Edwards' Motion for Directed Verdict on Overlap's claim for common law unfair competition; (2) the trial court's denial of prejudgment interest; and (3) the trial court's exclusion of the testimony of Jose Lovato.

Overlap properly preserved the first issue for appeal – the issue related to the trial court's grant of A.G. Edwards' Motion for Directed Verdict on Overlap's claim for common law unfair competition. Overlap did not preserve the later two claimed errors because it failed to raise them in a motion for new trial.

I. <u>The Trial Court Was Correct And Did Not Err In Granting A.G. Edwards' Motion For Directed Verdict Because Overlap Did Not Make A Submissible Case For Unfair Competition Under Missouri Common Law</u>.

Overlap's claim for common law unfair competition fails because:

- Overlap did not establish a valid, protectable trademark;
- Overlap did not establish public confusion;
- Overlap failed to establish that A.G. Edwards misappropriated the Overlap Software or data;
- Overlap's data is not proprietary;
- Overlap's claims for common law unfair competition are preempted by federal trademark and copyright laws;

- Overlap's claims are barred by the nominative fair use doctrine;
- The Revised License is a "naked license," which invalidates any trademark Overlap claims it has;
- Overlap failed to establish damages.

As more fully set forth below, Overlap did not make a submissible case for common law unfair competition for each of these reasons.[9]

A. Standard Of Review.

The standard of review for the trial court's grant of a motion for directed verdict is whether plaintiff made a submissible case. Investors Title Co., Inc. v. Hammonds, 217 S.W.3d 288, 296 (Mo. banc 2007). A case may not be submitted unless each and every fact essential to liability is predicated upon legal and substantial evidence. Dynes v. State Farm Fire & Cas. Co., 188 S.W.3d 454, 456 (Mo. banc 2006). In determining whether Overlap has made a submissible case, this Court views the evidence in the light most favorable to Overlap, giving Overlap the benefit of all reasonable inferences therefrom and disregarding A.G. Edwards' evidence except to the extent that it aids Overlap's case. Dunn v. Enterprise Rent-A-Car Co., 170 S.W.3d 1, 3 (Mo. Ct. App. 2005).

"However, no fact essential to submissibility may be inferred in the absence of a substantial evidentiary basis." Mprove, 135 S.W.3d at 489. This Court may not supply

[9] The trial court also properly directed the verdict in favor of A.G. Edwards on Overlap's claim for common law unfair competition because the claim is barred by the applicable statute of limitations.

missing evidence and can not give Overlap the benefit of speculative, unreasonable, or forced inferences. Id. Liability cannot be based on conjecture, guesswork, or speculation beyond inferences reasonably to be drawn from the evidence. Id.

B. The Trial Court Did Not Specify The Reasons For Its Grant Of A.G. Edwards' Motion For Directed Verdict; Therefore The Dismissal Of Overlap's Claim For Unfair Competition Can Be Affirmed For Any Reason.

The trial court did not give any reason as to the basis upon which it granted A.G. Edwards' Motion for Directed Verdict. (Tr. 965; L.F. 1278). When the Court gives no reason for its grant of a defendant's Motion for Directed Verdict, this Court must sustain the trial court's decision if any reason justifies doing so. Obermeyer v. Kirshner, 38 S.W.2d 510, 513 (Mo. Ct. App. 1931).

Plaintiff's claims of common law unfair competition are based on (1) A.G. Edwards' purported violation of Overlap's trademark and/or (2) A.G. Edwards' purported misappropriation of the Software output. Under either theory, Overlap failed to make a submissible case of unfair competition claim.

C. Overlap's Claim For Unfair Competition Based On Its Trademark Theory.

In order to prevail on a claim for unfair competition based on trademark infringement, a complainant must demonstrate that it has a valid, protectable trademark and that the defendant's use of a colorable imitation of the trademark is likely to cause confusion among consumers. See Gilbert/Robinson, Inc. v. Carrie Beverage-Missouri, Inc., 758 F. Supp. 512, 527 (E.D. Mo. 1991), aff'd, 989 F.2d 985 (8th Cir. 1993) (The same facts that support a claim for trademark infringement support a claim for unfair competition under Missouri common law.); see also WSM, Inc. v. Hilton, 724 F.2d 1320, 1331 (8th Cir. 1984) (Missouri common law on unfair competition is coextensive with federal trademark law).

1. Overlap Can Not Establish That It Owned A Valid, Protectable Trademark.

Overlap failed to establish its ownership of a valid, protectable trademark. The only trademark in evidence is owned by William Chennault. (Trial Ex. 220) (A 358). There was no evidence to show that Overlap ever acquired or was assigned the trademark underlying Overlap's claim.

Even if the trademark was somehow acquired by Overlap, the trademark in evidence was for Class 9 goods. (See Trial Ex. 220). (A358). Class 9 goods include computer software, not reports or data printed from the Software. The trademark was not registered for Class 16 goods, which includes printed reports, until sometime in 2005, well after A.G. Edwards ceased using the Software. (Tr. 925).

Plaintiff allowed unauthorized or improper uses of the term "overlap" to exist in the market place, and, thus compromised whatever rights it may have ever had – if any. (L.F. 564, 585-86, Trial Ex. 524, 525) (A 129, 133). See Minnesota Specialty Crops, Inc. v. Minnesota Wild Hockey Club, LP, No. Civ. 00-2317 JRT/FLN, 2002 WL 1763999, at *10 (D. Minn. July 26, 2002); citing Haghighi v. Russian-American Broadcasting Co., 173 F.3d 1086, 1088 (8th Cir. 1999) (stating that waiver occurs when a party voluntarily and intentionally relinquishes or abandons a known right); see also Health Care & Retirement Corp. of America v. Heartland Home Care, Inc., 396 F. Supp. 2d 1262, 1267 (D. Kan. 2005) (stating that waiver is the "expression of an intention not to insist upon what the law affords"). The weakness of Plaintiff's mark compels rejection of any infringement claim based on the mark.

Overlap's mark also fails because it is a weak, unprotectable mark. A proposed "trademark" falls into one of four categories to determine whether trademark protection is available: (1) generic, (2) descriptive, (3) suggestive, and (4) arbitrary/fanciful. Schwan's IP, LLC v. Kraft Pizza Co., 460 F.3d 971, 974 (8th Cir. 2006). As a general rule, the law affords no protection for trademarks that are "generic" or merely "descriptive." In the present case, the term "overlap" can only be considered generic or descriptive – at best. Thus, Overlap has no enforceable trademark rights in the common term "overlap."

A generic mark is one that refers to the common name or the nature of an article and it is not entitled to trademark protection. Co-Rect Prods., Inc. v. Marvy! Advertising Photography, Inc., 780 F.2d 1324, 1329 (8th Cir. 1985). Generic terms are in the public domain and available for all to use. Clipper Cruise Line, Inc. v. Star Clippers, Inc., 952 F.2d 1046, 1047 (8th Cir. 1992). As such, they are precluded from trademark protection under any circumstances. Id.

A descriptive mark designates the characteristics, qualities, effects, or other features of the product. Co-Rect Prods., 780 F.2d at 1329. As a general rule, descriptive phrases, such as "overlap," are not eligible for protection. Trademark protection may be extended to descriptive marks only if they have become distinctive by acquiring secondary meaning. Id.; Duluth News-Tribune v. Mesabi Publishing Co., 84 F.3d 1093, 1096 (8th Cir. 1996).

Leaving aside the issue of the generic quality of the term "overlap," the word certainly does describe the characteristics, qualities, or features of those items – specifically the analysis of the "overlap" of holdings in a portfolio. At a minimum, the mark is descriptive. Thus, in order to be afforded any protection under Missouri law with respect to the term "overlap," Plaintiff must prove the existence of "secondary meaning" for the term. Secondary meaning refers to a mark that "has become distinctive of the Plaintiff's goods in commerce." Cellular Sales, Inc. v. MacKay, 942 F.2d 483, 486 (8th Cir. 1991). In other words, Plaintiff must present evidence that consumers associate "overlap" with Plaintiff rather than with the product itself. Id.

As evidence that a mark has acquired secondary meaning, courts will accept direct evidence of customer confusion, or, because direct evidence may be difficult to find, evidence from consumer surveys showing likelihood of confusion. Id. In the present case, Overlap has no evidence to show secondary meaning. "More is needed to establish the necessary consumer association than merely the self-serving testimony of the plaintiff that some of his customers were confused." Co-Rect Prods., 780 F.2d at 1333. Similarly, there was no evidence that that secondary meaning existed prior to the date on which the defendant commenced using the same or similar mark. Such evidence is required to show secondary meaning. Id. at 1330.

To avoid the lack of secondary meaning, Overlap now claims that the mark was suggestive. Overlap failed to adduce any competent, substantial or probative evidence with respect to the distinctiveness (strength) of its marks in Missouri or anywhere else. This alone defeats its claims. Davis v. Walt Disney Co., 430 F.3d 901, 903 (8th Cir. 2005), cert. denied, 547 U.S. 1159 (2006) (holding that courts must consider strength of plaintiff's mark in evaluating the likelihood of confusion and therefore whether defendant infringed on plaintiff's mark).

Because Overlap never established that it owned a valid, protectable trademark, Overlap failed to make a submissible case on its unfair competition claim. Cynergy Ergonomics, Inc. v. Ergonomic Partners, Inc., No. 4:08-CV-243, 2008 WL 2064967, at *2 (E.D. Mo. May 14, 2008) (Missouri common law trademark claim requires valid, distinctive mark or name); Gilbert/Robinson, Inc., 758 F. Supp. at 527 (The same facts that support a claim for trademark infringement support a claim for unfair competition under Missouri common law).

2. Overlap Did Not Establish Public Confusion.

In order to establish a submissible unfair trademark claim under Missouri common law, Plaintiff was also required to demonstrate that defendant's alleged use of the mark is likely to confuse ordinary consumers as to whether Overlap sponsored, endorsed, or is otherwise affiliated with the defendant's products. Hubbard Feeds, Inc. v. Animal Feed Supplement, Inc., 182 F.3d 598, 602 (8th Cir. 1999). The likelihood of consumer confusion is the "hallmark of any trademark infringement claim." Minnesota Mining &

Mfg. Co. v. Rauh Rubber, Inc., 130 F.3d 1305 (8th Cir. 1997) (quoting Polymer Techn. Corp. v. Mimran, 37 F.3d 74, 80 (2d Cir. 1994)).

To determine whether a likelihood of confusion exists, the court must consider (1) the strength of the marks; (2) the similarity between the parties' marks; (3) the competitive proximity of the parties' products; (4) defendant's intent to confuse; (5) evidence of actual confusion; and (6) the degree of care reasonably expected of potential customers. Duluth News-Tribune, 84 F.3d at 1096 (citing Anheuser-Busch, Inc. v. Balducci Publications, 28 F.3d 769, 774 (8th Cir. 1994), cert. denied, 513 U.S. 1112 (1995). Overlap failed to establish a likelihood of confusion.

(a) Overlap Failed To Adduce Any Evidence of Public Confusion.

There must be confusion regarding the source of the product. Mere use of a mark does not constitute infringement. Prestonettes, Inc. v. Coty, 264 U.S. 359, 368 (1924) (use of originator's registered trademark by firm that repackaged originator's cosmetics products upheld); Minnesota Mining & Mfg. Co., 130 F.3d at 1308 (upholding use of trademark in manner that does not "deceive the public"). A party may use a mark in a truthful way so long as it is not likely to create confusion in the consumer's mind as to the source of the product. Calvin Klein Cosmetics Corp. v. Lenox Labs., Inc., 815 F.2d 500, 503 (8th Cir. 1987). No claim exists where consumers would reach the correct conclusion regarding the source of the product. Twentieth Century Fox Film Corp. v. Marvel Enters., Inc., 220 F. Supp. 2d 289, 296 (S.D.N.Y. 2002).

Here, the numbers were genuine Overlap numbers produced by genuine Overlap software. There was no evidence that A.G. Edwards was attempting to create copies or imitations and pass them off as the real thing. They were the real thing. There is no unfair competition where the goods are genuine. Polymer Tech. Corp. v. Mimran, 975 F.2d 58, 61 (2d Cir. 1992); Summit Tech., Inc. v. High-Line Med. Instruments Co., 922 F. Supp. 299, 307 (C.D. Cal. 1996).

Overlap claims that because one of A.G. Edwards' employees testified that he was not sure of the source of overlap data, it presented sufficient evidence of confusion. However, in order to state a claim for unfair competition, the law is clear that public confusion is required.[10] As an initial matter, lack of knowledge is not sufficient to establish any confusion. Nonetheless, even if lack of knowledge is sufficient to establish confusion (which it is not), confusion among employees of the defendant is insufficient to meet the public confusion element. 1-800 Contacts, Inc. v. WhenU.com, Inc., 414 F.3d 400, 409 (2d Cir.), cert. denied, 546 U.S. 1033 (2005) ("a company's internal utilization of a trademark in a way that does not communicate it to the public" is not a trademark violation); see also McCarthy on Trademarks, 23:5 (4th ed. 2004) ("Private, in-house use cannot confuse the public."); 4 Callmann on Unfair Competition, Trademarks and

[10] Throughout the entire case, Overlap only complained about the internal use of its marks by A.G. Edwards' financial consultants. To the extent that the Software number was distributed to the public, Overlap admits that any such use is proper under the Licenses, and therefore does not constitute unfair competition. (Tr. 482).

Monopolies § 22:25 n.1 (4th ed. 2004) ("[A] defendant who does not sell, but merely uses internally within his own company, the trademarked product of another, is not a trademark infringer or unfair competitor by virtue of such use.").

(b) A.G. Edwards and Overlap Do Not Compete in the Sale of the Same or Similar Products.

At the base of any unfair competition claim is competition among the parties. Overlap is in the business of selling software. A.G. Edwards sells mutual funds. A.G. Edwards does not offer any products that compete with Overlap, nor does it necessarily have the same customers. There is no evidence that anyone ever confused the Overlap reports with the reports of some other company.

D. Overlap's Claim For Unfair Competition Based On Its Misappropriation Theory.

Overlap asserts a common law unfair competition claim based on A.G. Edwards' purported misappropriation of Overlap's allegedly proprietary number. In this regard, Overlap claims that its unfair competition claim is not the copying of the Software, but rather the widespread usage of the proprietary Overlap number. (Resp. Sub. Br. 91-92). The trial court properly granted directed verdict on Overlap's claim for unfair competition based on misappropriation.

1. A.G. Edwards' Alleged Unlicensed Use of the Software Alone, Cannot State a Cause of Action for Unfair Competition.

Overlap claims that A.G. Edwards' alleged use of the Software for A.G. Edwards' own business purposes constitutes common law unfair competition. That is not the law in Missouri. If it were, an unfair competition claim would arise every time a company fails to pay a supplier.

Each of the cited cases involves a situation where the defendant used its own name to sell the goods of another without informing the public that the goods actually belong to the plaintiff. In the 1924 case heavily relied upon by Overlap, National Tel. Directory v. Dawson Mfg. Co., 263 S.W. 483 (Mo. Ct. App. 1924), the defendant took the plaintiff's phone books, ripped off the covers, put on its own covers, and distributed the books.

In the other case heavily relied on by Overlap, National Broadcasting Co. v. Nance, 506 S.W.2d 483, 484 (Mo. Ct. App. 1974), the defendants purchased music tapes from the plaintiffs, rerecorded them, and sold the new tapes under the defendants' own label. In both cases, the court determined that an unfair competition claim was proper because the defendant used its own name to sell goods belonging to another. Id. at 485 ("defendants have put a new cover on copies of plaintiffs' products and sold it as their own").[11]

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[11] Both Nance and Dawson involve claims of common law misappropriation asserted prior to Congress's revision of the copyright law of the United States. Under the revision, Congress specifically preempted state copyright law which is "equivalent to any of the exclusive rights within the general scope of copyright . . . and come with in the subject matter of copyright" as designated by federal law. 17 U.S.C. § 301 (effective January 1, 1978).

This conclusion is confirmed by the more recent decision by the Missouri Court of Appeals in Essex v. Getty Oil Co., 661 S.W.2d 544 (Mo. Ct. App. 1983), which analyzed the Nance decision. The court explained that unfair competition can include misappropriation of property, but there is no misappropriation where the defendant represents that the goods are the product of the plaintiff. Id. at 555.

Overlap failed to adduce any evidence that the information at issue did not come from genuine Overlap Software. See Polymer Tech. Corp. v. Mimran, 975 F.2d at 61. The evidence introduced at trial was that A.G. Edwards correctly and accurately identified each Overlap Analysis as an "Overlap Analysis." There is no evidence that A.G. Edwards called it an "A.G. Edwards Analysis" or anything other than an "Overlap Analysis" which, of course, is exactly what it was. A.G. Edwards did not "rip the label" off the Overlap product and claim that it was an A.G. Edwards product.

It is nonsensical to suggest that A.G. Edwards failed to accurately identify the source of the information. "Overlap" is the name of the plaintiff's company, and "Overlap" is the name it chose for the number created by its software. Indeed, the term Overlap merely describes the number – the degree to which mutual funds contain the same holdings. Therefore, the analysis was referred to as an "Overlap Analysis." Had A.G. Edwards called it a "Coca-Cola Analysis" or a "Microsoft Analysis" then Overlap would have a point. But to claim that correctly identifying the name of the company from which the information came can somehow confuse people is nonsensical.

E. Overlap's Misappropriation Theory Of Unfair Competition Is Another Disguise For Its Breach Of Contract Claim.

As discussed above, the relationship between Overlap and A.G. Edwards was purely contractual and under Missouri law the mere failure to perform a contract cannot serve as the basis of tort liability. Titan Contr. Co. v. Mark Twain Kansas City Bank, 887 S.W.2d 454, 459 (Mo. Ct. App. 1994).

F. The Overlap Software Output Is Not Proprietary, And Therefore Is Subject To Public Use.

Even if Overlap can establish a claim for common law unfair competition based on its misappropriation theory, the Overlap number is public information, which cannot be misappropriated.

Mr. Fryer admitted that the Overlap "proprietary" number is the exact measurement of overlap between mutual fund holdings. (Tr. 592-93). Accordingly, the Overlap number is public domain fact, which cannot be misappropriated. Int'l News Serv. v. Associated Press, 248 U.S. 215 (1918); C.B.C. Distrib. & Mktg. v. Major League Baseball Advanced Media, L.P., 505 F.3d 818, 823 (8th Cir. 2007), cert. denied, ___ U.S. ___, 128 S. Ct. 2872 (2008); Dow Jones & Co. v. Int'l Sec. Exch., Inc., 451 F.3d 295, 301-02 (2d Cir. 2006).[12]

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[12] Moreover, as established in an offer of proof, the method of calculating the number was fully disclosed by Overlap in its patent application. Overlap's patent was declared invalid. (Tr. 644-48; Trial Ex. 754, ¶¶35, 36 (part of Offer of Proof Exhibit 810 –

G. Overlap's Common Law Unfair Competition Claims Are Preempted By Federal Law.

1. Preemption Related To Overlap's Trademark Theory Of Unfair Competition.

Congress enacted the Lanham Act to, among other things, govern trademark infringement and unfair competition. The Lanham Act governs trademark infringement of federally registered marks (15 U.S.C. §1114) and unregistered marks (15 U.S.C. §1125). Overlap registered its federal trademark on March 12, 1996. (L.F. 733, ¶ 15). To the extent that Overlap's unfair competition claim is based upon acts of trademark infringement (which Overlap has admitted),[13] those claims are preempted by the Lanham Act, the federal law governing such acts. Sargent & Co. v. Weld Feed Mfg. Co., 195 F.2d 929, 935 (8th Cir. 1952) ("Congress has entered and preempted the field of trademark law in its application to interstate commerce."); Goddard, Inc. v. Henry's Foods, Inc., 291 F. Supp. 2d 1021, 1035 (D. Minn. 2003) (holding that federal law

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William Chennault deposition) (A 368-69)). Accordingly, anyone is free to use the information disclosed in the patent, including the purported proprietary data antilogarithm. While A.G. Edwards' use of the Software may be the subject of viable breach of license claims, A.G. Edwards did not misappropriate any proprietary Overlap data.

[13] See L.F. 749-50 ("Overlap can establish a claim for unfair competition under Missouri law by showing that AGE has infringed on Overlap's trademark.")

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preempted common law unfair competition claim). Because Overlap has failed to plead any claim under the Lanham Act, directed verdict was appropriate.

2. Preemption Related To Overlap's Misappropriation Theory Of Unfair Competition.

Overlap's claim for misappropriation is essentially a copyright claim. Overlap filed suit because it believed that A.G. Edwards copied and distributed Overlap's property without authorization or payment. The Copyright Act provides the exclusive source of protection of "all legal and equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by Section 106." 17 U.S.C. §301(a). State law causes of action are preempted by the federal Copyright Act if (1) the property or "works" at issue are within the subject matter of copyright and (2) the state law rights are equivalent to any of the exclusive rights provided by the Copyright Act. National Car Rental Sys. Inc. v. Computer Assoc. Int'l, Inc., 991 F.2d 426, 428-429 (8th Cir.), cert. denied, 510 U.S. 861 (1993). Because all of Overlap's claims are equivalent to claims within the exclusive purview of the Copyright Act, they are preempted.

(a) The Property at Issue is Copyrightable Subject Matter.

The parties do not dispute or disagree that the two "works" at issue in this case – computer Software and Software output – are copyrightable subject matter. As universally agreed in practice and as succinctly restated by the Third Circuit, the Copyright Act "extends copyright protection to 'literary works,' and computer programs are classified as literary works for the purposes of copyright." Whelan Assocs., Inc. v.

Jaslow Dental Lab., Inc., 797 F.2d 1222, 1234 (3d Cir. 1986), cert. denied, 479 U.S. 1031 (1987). Likewise, the Third Circuit also recognized that "output" from computer Software programs is also the subject of copyright. Id. at 1244.

As further proof that both Software and Software output are copyrightable subject matter, Overlap has also sought to enforce its rights related to the Software and Software output through similar litigation against other broker-dealers – under the Copyright Act. Overlap v. Alliance Bernstein Investments, Inc., No. 07-0161-CV-W-005, 2007 WL 4373975 (W.D. Mo. Dec. 14, 2007) (claiming that defendant violated copyright by (1) copying the Software onto multiple computers and (2) reproducing copyrighted Software Output). See also Overlap v. Citigroup Global Mkts., No. 04-0025-CV-W-SOW, 2006 WL 505049 (W.D. Mo. Feb. 28, 2006). (A4, A11).

Therefore, there is no dispute that the property or "works" at issue in the case – the Software and Software output – are copyrightable subject matter under the federal Copyright Act.

(b) The State "Protection" is Equivalent to Federal Copyright Protection.

The federal Copyright Act, 17 U.S.C. § 106, states in relevant parts as follows:

Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

> (3) to **distribute copies or phonorecords of the copyrighted work** to the public by sale or other transfer of ownership, or by rental, lease, or lending;

17 U.S.C. § 106 (emphasis added).

Because the Copyright Act is the exclusive source of protection of all legal and equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright under 17 U.S.C. §301(a), a plaintiff who wants to protect against copying or distribution of copyrightable subject matter (Software and Software output) must use the Copyright Act. State law claims that address mere **copying** or **distribution** are not available and are necessarily preempted.

Overlap attempts to plead and prove a case under various causes of action, including Missouri common law unfair competition. With respect to its unfair competition claims, the underlying "protection" claimed by Plaintiff is the equivalent of a federal Copyright Act protection. MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 518-19 (9th Cir. 1993), cert. denied, 510 U.S. 1033 (1994) (copyright infringement claim against a defendant who purchased one license to use software and loaded software onto more than one computer) and Clarity Software, LLC v. Allianz Life Ins. Co. of North America, No. 2:04-cv-1441, 2006 WL 2346292, at * 7 (W.D. Pa. Aug. 11, 2006) (recognizing copyright infringement claim for alleged copying of software output). There is no dispute that claims for protection against copying or distribution of the Software or the number is a claim reserved for copyright infringement under the Copyright Act. Plaintiff's unfair competition claim relies entirely on evidence of reproduction or distribution of the Software and/or Software number. Again, protection against copying and distribution of copyrightable subject matter like Software output is the exclusive domain of the Copyright Act.

3. Plaintiff's Misplaced Reliance On The "Extra Element" To Save Its Claims.

Overlap attempts to save its preempted unfair competition claim by arguing that its unfair competition claim involves different issues, different elements and different proof than claims under the Copyright Act. Although it fails to identify the different issues, elements and proof, Overlap generically claims that "[i]t is not the copying of the Software, but rather the widespread usage of the proprietary Overlap data that creates the basis for the misappropriation claim." (Resp. Sub. Br. 93). See National Car Rental, 991 F.2d at 431 ("If an extra element is required . . . there is no preemption.") (citation omitted).

As an initial matter, by so arguing, Overlap practically admits that its tort claim of unfair competition is actually a claim for breach of contract. Nonetheless, labeling an otherwise preempted claim as an unfair competition count does not immunize the claim from preemption. If an unfair competition claim is based upon acts that would otherwise be copyright infringement, it is preempted by the Copyright Act. Zimmerman Group v. Fairmont Foods, 882 F. Supp. 892, 895 (D. Minn. 1994).

Moreover, Overlap cannot ignore its own pleadings. In its Amended Petition, Overlap's unfair competition claim, as well as all of its other claims, relates to A.G. Edwards copying and distribution of the Software and Software number. (L.F. 80-91).

But, because (1) the Software number is copyright subject matter and (2) remedies against reproduction or distribution of the Software number are exclusively available under the Copyright Act, the state unfair competition claim must necessarily be preempted. 17 U.S.C. § 106 and 17 U.S.C. § 301(a).

In Fred Wehrenberg Circuit of Theatres, Inc. v. Moviefone, Inc., 73 F. Supp. 2d. 1044 (E.D. Mo. 1999), Judge Perry of the United States District Court of the Eastern District of Missouri addresses copyright preemption of Missouri common law claims for unfair competition based on a misappropriation theory. In that case, Moviefone compiled movie information from various theatres, including Wehrenberg Theatres, and made it available to the public. Wehrenberg Theatres, like Overlap in this case, argued that Moviefone's unauthorized use of its movie times and information constituted "free-riding" on its costly efforts. Id. at 1047. The court held that "the doctrine of misappropriation in Missouri is preempted to the extent that it is equivalent to federal copyright law." Id. at 1048.[14] Because Overlap's claims of misappropriation are similar to those asserted by Wehrenberg Theaters – *i.e.* "free riding" – those claims are equivalent to federal copyright claims and are preempted.

[14] The court allowed Wehrenberg's claims to survive based on an exception to its general rule. It held that the misappropriation of "hot news" are not preempted based on the United Stated Supreme Court's decision in Int'l News Serv., 248 U.S. at 215. Hot news is not an issue in this case. The Overlap information is not time sensitive.

Overlap relies on National Car Rental, 991 F.2d at 432-33, to argue that its claims are not preempted because Overlap's misappropriation claim is not equivalent to federal copyright laws. National Car Rental does not support Overlap's argument. The court acknowledged that claims alleging nothing more than an act of infringement, like Overlap's claims here, are preempted by the Copyright Act. However, the court found that National Car's breach of contract claim was not preempted because it related to the processing of data. Id. at 430. The court concluded the processing of data was not one of the acts set forth in the Copyright Act, 17 U.S.C. § 106. Overlap's claims have nothing to do with the processing of data.[15] Overlap's claims specifically relate to copying and distributing – claims that are within the purview of the Copyright Act. 17 U.S.C. §106.

The Copyright Act offers the exclusive vehicle to address claims of reproduction or distribution of copyright subject matter. Any causes of action under state laws that merely request protection against reproduction or distribution of copyright subject matter are preempted by the federal law.

H. The Nominative Fair Use Doctrine Defeats Overlap's Claims.

Overlap's unfair competition claim is barred by the nominative fair use doctrine. There are two types of fair uses of another's trademark: 1) classic fair use and 2) nominative fair use. New Kids on the Block v. News America Pub., Inc., 971 F.2d 302, 308 (9th Cir. 1992). Although these two doctrines are quite different, both allow for the

[15] In any event, public data and/or exact numbers cannot be misappropriated. C.B.C. Distrib., 505 F. 3d at 823.

non-infringing use of another's mark. See Brother Records Inc. v. Jardine, 318 F.3d 900, 903-04 (9th Cir.), cert. denied, 540 U.S. 824 (2003).

Nominative fair use occurs when a "defendant uses a trademark to describe the plaintiff's product, rather than its own." New Kids on the Block, 971 F.2d at 308; Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc., 166 F.3d 65, 73 (2d Cir. 1999). This type of use is allowed because it accurately describes the source of the product and is therefore not likely confuse consumers. See Playboy Enters., Inc. v. Welles, 279 F.3d 796, 801 (9th Cir. 2002); WCVB-TV v. Boston Athletic Ass'n, 926 F.2d 42, 44-45 (1st Cir. 1991).

Whenever nominative fair use is asserted by a defendant, the Court looks at three factors to determine when consumer confusion will exist. New Kids on the Block, 971 F.2d at 308. First, "the product or service in question must be one not readily identifiable without use of the trademark." Playboy Enterprises, Inc., 926 F.2d at 801. Second, "only so much of the mark . . . may be used as is reasonably necessary to identify the service." Id. Third, "the user must do nothing that would, in conjunction of the mark, suggest sponsorship or endorsement by the trademark holder." Id. As always in a trademark case, the plaintiff bears the burden of proving the likelihood of confusion. KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc., 543 U.S. 111, 121 (2004).

Here, A.G. Edwards' use of the term "Overlap" was reasonably necessary to identify Overlap's product. The Overlap number would make absolutely no sense without reference to "Overlap." Thus, A.G. Edwards' use of "Overlap" was necessary to describe Overlap's product.

Second, A.G. Edwards did not use any more of Overlap's mark than was reasonably necessary to identify Overlap's product. Indeed, since the only mark that Overlap is asserting is the "Overlap" mark, it would be impossible for A.G. Edwards to use more of that mark than is reasonably necessary to identify the service.

Lastly, there is nothing in the reports that suggest sponsorship or endorsement by Overlap. The reports merely indicate – correctly – that the information comes from Overlap. There is no additional statement that Overlap is sponsoring the report or that A.G. Edwards has received some sort of endorsement from Overlap for its mutual fund reviews.

Therefore, under the nominative use analysis, A.G. Edwards permissibly used the term "Overlap" to describe Overlap's product. This is analogous to the "Pepsi Challenge" commercials, where Pepsi used the Coke mark as part of the challenge and in describing the results. While Coke certainly did not authorize the use of its trademark, it was nominative fair use because Pepsi was using the Coke trademark to describe the Coke product, rather than its own. See New Kids on the Block, 971 F.2d at 308. Here, while Overlap claims that use of its mark was unauthorized, the fact remains that the Overlap mark was used to refer to the Overlap product. While Overlap is certainly entitled to bring a breach of contract claim, the unfair competition claim does not apply to these facts.

I. Overlap's License Is A Naked License, Which Invalidates Overlap's Mark.

Uncontrolled licensing of a mark whereby the licensee can place the mark on any quality or type of goods or services may cause the mark to lose any significance it may have. Such uncontrolled use by a licensee raises a grave danger that the public will be deceived by such a usage. Broeg v. Duchaine, 67 N.E.2d 466, 468 (Mass. 1946) (uncontrolled licensing may result in trademark ceasing to have any meaning and be a fraud on the public); see also Heaton Distrib. Co. v. Union Tank Car Co., 387 F.2d 477, 485 (8th Cir. 1967), citing Dawn Donut Co. v. Hart's Food Stores, Inc., 267 F.2d 358, 367 (2d Cir. 1959). Here, the evidence established there was no evidence that Overlap controlled the use of its licenses. (See Tr. 562-65, 569-70, 583, 585-6; Trial Ex. 524, 525).

Uncontrolled or "naked" licensing may result in the trademark ceasing to function as a symbol of quality and controlled source. This effect has often been characterized as an "abandonment" of the trademark. See Robinson Co. v. Plastics Research & Dev. Corp., 264 F. Supp. 852, 863 (W.D. Ark. 1967).

J. Overlap Did Not Establish Damages Related To Its Unfair Competition Claims.

Overlap failed to establish that it was damaged by A.G. Edwards' unfair competition. Generally, the law of unfair competition allows a plaintiff to recover profits lost as a result of the actions of infringer. Had A.G. Edwards copied the Software and sold it, Overlap would be able to recover the profits made by A.G. Edwards on the sale of the Software. But there was no evidence of that here. The only lost profit evidence presented by Overlap related to A.G. Edwards' profits attributable to its mutual fund sales. (Trial Ex. 68A) (SA 117). The fundamental problem with this theory of damages is that Overlap does not sell mutual funds. It did not lose any mutual fund sales as a result of A.G. Edwards' purported unfair competition. Victor G. Reiling Assocs. v. Fisher-Price, Inc., No. 3:03CV222 (JBA), 2006 WL 1102754, at *2 (D. Conn. April 25, 2006) (in claims for misappropriation and unfair competition, disgorgement of profits is only available where "a misappropriating defendant diverted sales and reaped profits that the plaintiff itself would otherwise have received, and thus the defendant's profits are a reasonable measure, or proxy, for plaintiff's lost profits.").

For one or all of the reasons set forth above, the trial court appropriately directed the verdict for A.G. Edwards on Overlap's unfair competition claim.

II. The Trial Court Correctly Denied Overlap's Request For Prejudgment Interest.

Overlap waived this issue for appeal when it failed to raise it in a motion for new trial as required by Supreme Court Rule 78.07(a) ("allegations of error must be included in a motion for new trial in order to be preserved for appellate review"). See also, Modine Mfg. Co. v. Carlock, 510 S.W.2d 462, 472 (Mo. 1974) ("Under Missouri law complaints as to the allowance of interest, not raised in the motion for new trial, are not reviewable on appeal.").[16] Even if Overlap had not waived the argument, the trial court's denial of prejudgment interest was proper.

A. Standard Of Review.

When an issue has not been properly preserved on appeal, it is precluded from consideration by the Court. Nonetheless, Supreme Court Rule 84.13 allows the Court, in its discretion, to review an unpreserved issue for plain error. Mo. S. Ct. R. 84.13(c). Plain error review is rarely granted in civil cases, and is not warranted here. See Angeles v. Larson, 249 S.W.3d 278, 281 (Mo. Ct. App. 2008); Morrow v. Fisher, 51 S.W.3d 468, 473 (Mo. Ct. App. 2001); Reese v. Brooks, 43 S.W.3d 415, 419 (Mo. Ct. App. 2001). In any event, plain error will result in reversal only when the Court finds a manifest injustice or miscarriage of justice, which is not present here. Mo. S. Ct. R. 84.13(c).[17]

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[16] The parties briefed the prejudgment interest issue for the trial court. (L.F. 1371, 1396, 1407, 1418). To the extent that Overlap argues that those briefs somehow properly preserved the issue on appeal, it is wrong. Judgment was entered after those briefs were submitted. (L.F. 1431).

[17] When a party properly preserves its claim that the trial court improperly denied an award of prejudgment interest, the standard of review for the denial of prejudgment interest is de novo. Layton v. Baris, 43 S.W.3d 390, 397 (Mo. Ct. App. 2001).

B. Overlap Is Not Entitled To An Award Of Prejudgment Interest.

The law does not permit Overlap to recover pre-judgment interest. A party has no right to prejudgment interest under the common law. A.G. Edwards & Sons, Inc. v. Drew, 978 S.W.2d 386, 396 (Mo. Ct. App. 1998). "Any allowance of interest, therefore, must be based upon either a statute or a contract . . ." Id. Here, it is undisputed that the Software licenses have no provision for prejudgment interest.

Overlap argues that it is entitled to prejudgment interest on its tort and breach of contract claims pursuant to Mo. Rev. Stat. § 408.020. As an initial matter, Plaintiff ignores that § 408.040.2 governs prejudgment interest on its tort claims. Moreover, § 408.020 does not permit an award of prejudgment interest to Overlap because the damages were unliquidated and Overlap never made any demand as required by the statute.

1. Mo Rev. Stat. § 408.040.2 Precludes An Award Of Prejudgment Interest On Damages Associated With Overlap's Tort Claims.

The availability of prejudgment interest on tort claims is governed exclusively by Mo. Rev. Stat. § 408.040.2. Overlap does not meet the requirements of the statute and thus cannot recover interest on its fraud and negligent misrepresentation claims.

Under § 408.040.2, interest can be awarded only where the plaintiff makes a settlement demand that is rejected and then receives a judgment that exceeds the demand.

Id. The demand must be in writing, sent by certified mail, and left open for sixty days.[18] Id.; Emery v. Wal-Mart Stores, Inc., 976 S.W.2d 439, 448-49 (Mo. 1998). Specifically, § 408.040.2 provides:

> In tort actions, if a claimant has made a demand for payment of a claim or an offer of settlement of a claim, to the party, parties or their representatives and the amount of the judgment or order exceeds the demand for payment or offer of settlement, prejudgment interest . . . shall be calculated from a date sixty days after the demand or offer was made, or from the date the demand or offer was rejected without counter offer, whichever is earlier. Any such demand or offer shall be made in writing and sent by certified mail and shall be left open for sixty days unless rejected earlier.

Accordingly, "the right to pre-judgment interest in a tort case does not arise from the tort, but rather arises from rejection by the tortfeasor of a demand or offer of settlement lower than the eventual judgment." Union Pacific R.R. Co. v. Carrier

[18] This statute was amended in 2005. The amendments impose additional burdens on the plaintiff, including extending the 60 day period to 90 days and the obligation to provide an affidavit describing the nature of the claims and the computation of damages. It is unclear whether the original or the revised statute applies to this case. However, because Overlap did not satisfy the original statute, there is no need to address the more demanding revised statute.

Consultants, Inc., 973 S.W.2d 500, 503 (Mo. Ct. App. 1998). See Chambers v. Rice, 858 S.W.2d 230, 233 (Mo. Ct. App. 1993) (right to prejudgment interest in tort case arises solely from defendant's rejection of settlement offer).

Overlap made no such demand in this case. Nor did it receive a judgment that exceeded the non-existent demand. That is fatal to its claim. The only correspondence that might be considered a "demand" is the November 19, 2001, letter, which is insufficient because it did not contain (1) a specific settlement demand or (1) a 60 day period for acceptance. (Trial Ex. 21) (A 108). The Missouri Supreme Court has instructed that trial courts "should regard the statute as meaning what it says." Emery, 976 S.W.2d at 449. Therefore, if the plaintiff does not make a demand ascertainable in dollars, or does not send it by certified mail, or does not leave it open for 60 days, a trial court cannot award prejudgment interest. Id. at 449-50. See Brown v. Donham, 900 S.W.2d 630, 634 (Mo. 1995) (statute not met where no amount ascertainable in dollars is demanded); Boehm v. Reed, 14 S.W.3d 149, 151-52 (Mo. Ct. App. 2000) (statute not met where offer left open for 30 days instead of 60).

There is no other avenue available to Overlap. The demand requirement of the statute "represents the only available procedure for obtaining pre-judgment interest in a tort claim." Union Pacific R.R. Co., 973 S.W.2d at 503. For these reasons, Overlap cannot recover prejudgment interest on its tort claims.

2. Contrary to Overlap's Argument, It Cannot Recover Prejudgment Interest on Damages Associated With its Tort Claims Under Mo. Rev. Stat. § 408.020.

Conceding, as it must, that it does not meet the requirements of the tort prejudgment interest statute, § 408.040.2, Overlap argues that it is entitled to prejudgment interest on its tort claims under the non-tort prejudgment interest statute, Mo. Rev. Stat. § 408.020, because the conduct resulted in a benefit to Defendant. That argument has been explicitly rejected. *See* Sequa Corp. v. Cooper, 128 S.W.3d 69, 77 (Mo. Ct. App. 2003) (§ 408.020 does not apply to tort claims); Union Pacific R.R., 973 S.W.2d at 503.

Moreover, the language of the tort statute forecloses such an argument:

> Nothing contained herein shall limit the right of a claimant, **in actions other than tort actions**, to recover prejudgment interest as otherwise provided by law or contract.

§ 408.040.2 (emphasis added). Thus, for tort claims, a plaintiff can recover prejudgment interest only by meeting the requirements of the tort statute. Union Pacific, 973 S.W.2d at 503 ("the demand procedure in section 408.040.2 R.S.Mo. 1994 represents the only available procedure for obtaining pre-judgment interest in a tort claim.").

Plaintiff cites Vogel v. A.G. Edwards & Sons, Inc., 801 S.W.2d 746 (Mo. Ct. App. 1990), for the pecuniary benefit exception. Vogel, however, was a case filed in 1986, one year before § 408.040.2 was enacted. Vogel thus does not mention § 408.040.2. The other cases cited by Plaintiff similarly do not address the exclusivity language of the statute.

Moreover, the exception, if available, would not apply under the facts here. The cases under this exception involve situations where the defendant receives money it is not otherwise entitled to receive. Here, by contrast, Defendant received no money, rather the argument is that it benefited by avoiding paying money to Plaintiff. If that were enough, the exception would apply in every case involving a tort because in every case the defendant avoids paying money to the plaintiff until the jury returns a verdict. Such a result is wholly illogical.

Interest cannot be awarded on Overlap's contract claims because (1) interest is not available on unliquidated claims, and (2) Overlap did not make any demand for any specific dollar amount as required by statute.

(a) A Claim for Lost Profits is an Unliquidated Claim.

Missouri law provides that prejudgment interest begins accruing "on written contracts, and on accounts after they become due and demand of payment is made." Mo. Rev. Stat. § 408.020. In applying § 408.020, courts have always required that the claim be liquidated before interest can be recovered. Hernandez v. Westoak Realty & Inv., Inc., 771 S.W.2d 876, 882 (Mo. Ct. App. 1989). "In order to be liquidated as to bear interest, a claim must be fixed and determined or readily determinable, but it is sufficient if it is ascertainable by computation or by a recognized standard." Investors Title Co. v. Chicago Title Ins. Co., 983 S.W.2d 533, 538 (Mo. Ct. App. 1998). The liquidated claim requirement is grounded on the premise that "where the person liable does not know the amount he owes, he should not be considered in default because of failure to pay." *Id.*

Therefore, "interest has been allowed where the trial court found an amount that was indisputably due under the contract." Scullin Steel Co. v. Paccar, Inc., 708 S.W.2d 756, 766 (Mo. Ct. App. 1986). This occurs, for instance, where the defendant contests liability, but not the amount of damages. Ohlendorf v. Feinstein, 670 S.W.2d 930, 935 (Mo. Ct. App. 1984). Conversely, where the amount of damages is uncertain prior to the jury reaching its verdict, prejudgment interest cannot be not awarded. H&B Masonry Co., Inc. v. Davis, 32 S.W.3d 120, 125 (Mo. Ct. App. 2000) (prejudgment interest not available when "parties hotly dispute the correct amount of damages").

Even Overlap's cited cases require liquidated or certain damages for a court to award prejudgment interest. *See* Call v. Heard, 925 S.W.2d 840, 853-54 (Mo. 1996), cert. denied, 519 U.S. 1093 (1997) (awarding prejudgment interest when demand letter requested a certain amount: $10 million); Rois v. H.C. Sharp Co., 203 S.W.3d 761, 766 (Mo. Ct. App. 2006) (holding that, to recover prejudgment interest, damages must be "readily ascertainable," in contrast to the instant matter); Lundstrom v. Flavan, 965 S.W.2d 861, 866 (Mo. Ct. App. 1998) (awarding prejudgment interest on oral contract when damages were "readily ascertainable": 10% of boat's purchase price).

This issue is easily resolved in this case. The measure of damages for Overlap's breach of contract claim was Overlap's lost profits. Missouri Courts do not permit an award of prejudgment interest on lost profits because a claim for lost profits is, by definition, unliquidated. Scullin Steel, 708 S.W.2d at 766 (trial court erred by awarding prejudgment interest for lost profits because Missouri courts do not allow interest where measure of damages is lost profits); Investors Title, 983 S.W.2d at 538-39 ("In a suit for breach of contract, no interest is allowable where the measure of damages sought and awarded is lost profits."); American Laminates, Inc. v. J.S. Latta Co., 980 S.W.2d 12, 25 (Mo. Ct. App. 1998) (reversing interest award because "[p]rejudgment interest is not allowed on damages for lost profits"). A claim for lost profits is unliquidated because it is not fixed or readily determinable until the trier of fact hears the evidence, including evidence of costs and profit margin, and determines the amount of profits that would have been realized by the plaintiff. Id.

The decisions in Scullin Steel, Investors Title and American Laminates control. Moreover, even in the absence of these decisions, the fact remains that the claim was not liquidated because the amount of Overlap's lost profits was not certain or readily determinable, but was a contested issue at trial. For instance, Overlap argued that all 7,000 brokers should have been licensed regardless of whether they ever received Overlap number. A.G. Edwards argued that a fee was owed only for the number of computers onto which the Software was loaded over and above the four for which A.G. Edwards paid. (Tr. 1400-01). The jury was required to resolve that dispute. The proper amount of the additional fee was also contested. Overlap sought the list price of $165 per person, while the evidence was undisputed that Overlap routinely offered volume discounts and had offered discounts to A.G. Edwards on several occasions. (Tr. 506, 619, Trial Exs. 144, 146, 525) (App. 134)(SA 261, 262). None of those discounted offers – including one at $40 per person – was accepted by A.G. Edwards. (Tr. 1221). The jury was thus left to resolve the dispute over the price at which the additional licenses would have been sold. The damages for breach of the licenses were therefore uncertain – and hence unliquidated – until the jury returned its verdicts.

(b) No Demand for Payment was Made.

In Missouri, creditors can receive prejudgment interest at a rate of nine percent on liquidated contract claims after demand for payment has been made. Mo. Rev. Stat. § 408.020. Interest begins to accrue on the date of the demand. Drew, 978 S.W.2d at 397. Demand for payment may be made any time after the debt becomes due, and while a demand need be in no certain form, it must be definite as to amount and time. Transamerica Ins. Co. v. Penn. Nat'l Ins. Cos., 908 S.W.2d 173, 177 (Mo. Ct. App. 1995); Rois, 203 S.W.3d at 767.

If demand is not made prior to filing suit, the filing itself constitutes the requisite demand. Rois, 203 S.W.3d at 767. However, where neither the demand nor the pleadings are definite as to the dollar amount owed, the statute is not satisfied. Id. This prerequisite exists because the statute does not provide for the payment of interest unless the debtor is told the amount owed. Children Int'l v. Ammon Painting Co., 215 S.W.3d 194, 204 (Mo. Ct. App. 2006) ("The demand for payment must leave no doubt as to when and how much payment is due.").

Plaintiff made no demand for payment of a definite amount. Neither the November 19, 2001 letter nor the Amended Petition made a demand that contained a specific dollar amount. Overlap argues that it made a specific demand in its original Petition, which sought damages "greatly in excess of $25,000." However, such demands are insufficient. Transamerica, 908 S.W.2d at 177 (statement in petition that damages are "more than $100,000" held insufficient to satisfy demand requirement).

Overlap claims that its damages are similar to those in Vogel, 801 S.W.2d at 746, in which the measure of damages was based on commissions earned on churned trades. Id. at 757-58. In Vogel, damages were readily ascertainable once liability was determined in that the calculation involved merely adding up the commissions earned on the churned trades. Overlap's claimed damages, however, differ dramatically. Even once liability was determined, the numbers to be entered into the damages calculation – the license fees multiplied by the number of licenses that should have been purchased – were still both unknown and needed to be resolved by the jury. This dispute over the amount of damages renders them unliquidated and precludes the possibility of prejudgment interest on Overlap's contract claim. Children Int'l, 215 S.W.3d at 204 ("A bona fide dispute as to the amount of damages owed will result in the damages being classified as unliquidated").

Because Overlap failed to satisfy the requirements of § 408.040 and because its damages are not liquidated, Overlap is not entitled to prejudgment interest on its tort claims.

III. The Trial Court Properly Excluded The Testimony Of A Former A.G. Edwards' Employee.

Again, Plaintiff waived this issue for appeal when it failed to raise it in a motion for new trial as required by Mo. S. Ct. R. 78.07(a). See also Woods v. Friendly Ford, Inc., 248 S.W.3d 699, 711 (Mo. Ct. App. 2008) (explaining that to preserve alleged evidentiary error, appellant must object at trial and raise issue in motion for new trial).

A. Standard Of Review.

Because the issue was not preserved for appeal, this point is reviewed for plain error as set forth in Point II above.[19]

B. Mr. Lovato's Testimony Was Properly Excluded.

The issues in this case related to whether A.G. Edwards violated the license agreements associated with the Overlap Software. Whether A.G. Edwards violated other unrelated license agreements has no bearing on any issue in this case, would have unduly prejudiced A.G. Edwards, and would have confused the jury with collateral issues. Nonetheless, this is exactly the type of evidence that Overlap now claims the trial court improperly excluded.

Overlap claims that Mr. Lovato's testimony establishes that A.G. Edwards failed to comply with other licenses, and is therefore relevant.[20] (Resp. Sub. Br. 100-01). Mr. Lovato's testimony was that he was aware of instances where A.G. Edwards loaded the

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[19] When a party properly preserves its claim that the trial court improperly ruled on an evidentiary issue, the standard of review is abuse of discretion. Bohrn v. Klick, No. WD 69192, 2009 WL 111666, at *2 (Mo. Ct. App. Jan. 20, 2009); Arrington v. Goodrich Quality Theaters, Inc., 266 S.W.3d 856, 864 (Mo. Ct. App. 2008).

[20] Overlap made an offer of proof of the testimony of Jose Lovato. (Tr. 820-21; Trial Ex. 266) (SA 483).

software on more computer than it had licenses. (Trial Ex. 266) (SA 483). Mr. Lovato did not identify the specific licenses about which he testified, who the licenses were with, when the loading occurred, the nature and extent of the licenses or whether the licenses allowed for the installation on more than one computer. His testimony simply did not establish that A.G. Edwards violated other Software licenses. See, L.F. 1276 (Judge's Trial Minutes, noting that Motion in Limine regarding Jose Lovato's testimony was sustained "without further foundation shown in Lovato Deposition.").[21]

1. Any Testimony Of Purported License Violations Were Improper Conclusions Of Law.

To the extent that Mr. Lovato's testimony can be read to be that Mr. Lovato believed that A.G. Edwards was violating software licenses, such testimony is an improper conclusion of law and was properly excluded. Hartwig-Dischinger Realty Co. v. Unemployment Compensation Comm'n, 350 Mo. 690, 696 (Mo. 1943) (lay witness's legal conclusions may be given no weight); Howell v. Autobody Color Co., Inc., 710 S.W.2d 902, 905 (Mo. Ct. App. 1986) (same).

[21] To the extent that the lack of foundation problem was able to be corrected, Overlap could have easily corrected the problem by calling Mr. Lovato as a live witness at trial. It did not do so.

2. Mr. Lovato's Testimony Is Irrelevant.

Mr. Lovato's testimony was irrelevant to the issues before the Court – whether A.G. Edwards violated the Software licenses with Overlap. It has long been the rule in Missouri that evidence of transactions with third parties is inadmissible:

> The rule is that evidence of prior transactions of one of the parties to the action with other persons, even through similar. . . [T]he transaction involved in the case before the court, is generally inadmissible, since there would be no such logical or necessary relation between the several transactions that anything done in connection with the one could be relied on to prove or disprove anything in issue in connection with the other.

Castigliola v. Lippicolo, 229 S.W.2d 266, 269 (Mo. Ct. App. 1950).

This is exactly the case here – especially since Mr. Lovato's testimony was bereft of evidence regarding the terms of the licenses about which he testified, the time those licenses were in effect, the departments within A.G. Edwards that used the software, the extent of the use of the software, the type of software, A.G. Edwards relationship or other agreements with the software vendors. The court properly excluded this evidence, which was not specific enough to conclude that the purported license violations (if any) about which Mr. Lovato testified was in any way similar to the violations about which Overlap complained.

Overlap argues that Mr. Lovato's testimony was relevant to its fraud claims because it related to A.G. Edwards' state of mind and motive to deceive. It claims that evidence of similar bad acts is routinely admitted in cases involving fraud and punitive damages. However, Overlap's failure to establish any similarities between the licenses about which Mr. Lovato testified and Overlap's licenses make both of the case on which Overlap relies easily distinguishable. In Rinehart v. Shelter Gen. Ins. Co., 261 S.W.3d 583 (Mo. Ct. App. 2008), the evidence involved another transaction in which the defendant refused to settle and was almost identical to the plaintiff's situation – the collisions occurred in the same year, the insureds were intoxicated in the collisions, the policies had similar limits / terms, the claims were handled by the same claims person and law firm. Id. See also Davies v. Vories, 42 S.W. 707, 709 (Mo. 1897) ("[I]t has always been deemed allowable . . . to introduce evidence of other acts and doings of the party **of a kindred character**, in order to . . . establish his intent or motive in the particular act, directly in judgment.") (emphasis added). Overlap failed to establish any such similarities here, and, without such foundation, cannot establish that Mr. Lovato's testimony was relevant to any of its claims, including fraud and punitive damages.[22]

[22] The trial court did not permit evidence of punitive damages until Overlap made a submissible case. After the trial court determined that a submissible case was made, Overlap never attempted to enter Jose Lovato's testimony into evidence to support its punitive damages claim. (Tr. 839, 888).

3. Even If The Evidence Was Relevant, The Court Properly Excluded Mr. Lovato's Testimony.

Relevant evidence must be excluded if its probative value is outweighed by the danger of "unfair prejudice, confusion of the issues, misleading the jury," or waste of time. State v. Anderson, 76 S.W.3d 275, 276 (Mo. 2002). "If evidence pertaining to collateral matters brings into a case new controversial matters which would result in confusion of issues . . . or cause prejudice wholly disproportionate to the value and usefulness of the offered evidence, is should be excluded." Edgell v. Leighty, 825 S.W.2d 325, 327 (Mo. Ct. App. 1992).

As already discussed, the excluded evidence had little probative value because of its vague nature. The possible prejudicial effect, on the other hand, is great in that the jury would hear that A.G. Edwards had violated numerous software agreements and assume that A.G. Edwards had also done so with respect to the Overlap Software even though each software agreement likely differs.

Also, the chance of jury confusion is great in that A.G. Edwards would present evidence to rebut Mr. Lovato's testimony, resulting in a mini-trial on whether A.G. Edwards has violated other license agreements, not whether it violated the Overlap agreement. Evidence should be excluded if it "diverts the attention of the jury from the question to be decided." Destin v. Sears, Roebuck & Co., 803 S.W.2d 113, 116 (Mo. Ct. App. 1990).

For the above stated reasons, the trial court properly excluded Mr. Lovato's testimony.

Conclusion

The trial court properly granted A.G. Edwards' Motion for Directed Verdict on Overlap's claim for common law unfair competition. Moreover, Overlap failed to properly preserve the issues related to prejudgment interest and the testimony of Jose Lovato for appeal. In any event, the trial court did not err in denying prejudgment interest and excluding the testimony of Jose Lovato. Accordingly, Overlap's cross appeal should be denied.

Respectfully Submitted,

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Certificate Of Service And
Compliance With Court Rules

Pursuant to Missouri Supreme Court Rules 84.05 through 84.07, the undersigned hereby certifies that on the 4th day of January, 2010, the original and 9 copies of the Substitute Reply Brief of Cross-Respondent/Appellant ("Brief") and a CD containing the Brief were hand delivered to the Court for filing and that on this same date two copies of the Brief and one copy of the CD containing the Brief were served on counsel for the Respondent by overnight mail at the address shown below:

Patrick Stueve
Stueve Siegel Hanson
460 Nichols Road, Suite 200
Kansas City, MO 64112

The undersigned further certifies that:

(1) Pursuant to Rule 84.06(c), the original and all copies of the Substitute Brief of Appellant include the information required by Rule 55.03, the Brief complies with the limitations contained in Rule 84.06(b), and the Brief contains 20,280 words calculated in accordance with Rule 84.06(b), as reflected in the word count of the Microsoft Word word-processing system used to prepare the Brief.

(2) Pursuant to Rule 84.06(g), the undersigned further certifies that the CD containing the Brief of Appellant filed with the Court and served on opposing counsel have been scanned for viruses and are virus-free.

Respectfully submitted,

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