

IN THE SUPREME COURT OF MISSOURI

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Case No. SC90329

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OVERLAP, INC.,  
Plaintiff/Respondent,

v.

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

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APPEAL FROM THE CIRCUIT COURT  
OF JACKSON COUNTY, MISSOURI

The Honorable Roger Prokes  
Visiting Circuit Judge

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**RESPONDENT OVERLAP, INC.'S SUBSTITUTE BRIEF**

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## INTRODUCTION

Overlap is a unique and groundbreaking software that compares all the stock holdings of two or more mutual funds and then generates a proprietary percentage that indicates the commonly-owned stock of the various funds being compared. This unique software made it possible for financial consultants to quickly and easily compare several mutual funds owned by a client or prospective client to determine whether or not their mutual fund holdings were truly diversified. This case is about Defendant A.G. Edwards' ("AGE") unlicensed enterprise-wide use of Overlap, and its cover-up and concealment of its unlicensed and widespread usage of Overlap.

From 1998 through 2001, AGE purchased four *single user* licenses for the use of Overlap at its St. Louis home office. AGE subsequently loaded the \$165 software on over 50 computers located in the department at AGE where financial consultants were instructed to call for assistance in marketing mutual funds. From these 50+ unlicensed computers, AGE made the proprietary Overlap reports available to all its approximately 7,000 financial consultants across the country who were not licensed to use Overlap ("unlicensed financial consultants"). AGE did so knowing that it did not have an enterprise-wide license. Instead of purchasing a multi-user or enterprise-wide license for its 7,000 financial consultants, AGE purchased only four quarterly single user licenses, and circumvented the license by making the proprietary Overlap analyses available to its entire unlicensed sales force.

AGE also misled Overlap's president into believing that AGE was not making Overlap analyses available to its unlicensed financial consultants but wanted to do so in

the future. In fact, for over a year after confirming with Overlap that it could not distribute Overlap reports to unlicensed financial consultants, AGE disingenuously negotiated for the ability to do so in the future. The evidence at trial demonstrated that in fact, AGE had been making Overlap available on a company-wide basis for several years, all the while leading Overlap to believe that AGE was considering future use of Overlap on a network wide basis. As a result of this deception, Overlap was fraudulently induced every quarter to continue providing Overlap to AGE while AGE reaped the lucrative benefits of its widespread and unlicensed usage of Overlap.

After losing at trial, AGE argued eleven points on appeal to the Court of Appeals. The only point on appeal the Court of Appeals sustained was the juror nondisclosure point. While Overlap sought transfer to the Court regarding that issue, AGE did not seek transfer on any issue. Because the Court of Appeals found that Overlap made a submissible case for fraud and punitive damages, if this Court affirms the trial court's denial of a new trial based on juror misconduct, then this Court may affirm the trial court's judgment and end this long pending case.

The trial court properly exercised its discretion in denying AGE a new trial based on juror nondisclosure. Requiring a new trial under the circumstances of this case would be a gross miscarriage of justice. Juror Hillerman was a defendant in a prior personal injury lawsuit where judgment was entered against him. His nondisclosure can only be material and presumed prejudicial to AGE if it indicates a predisposition against AGE. Here, if there were any predisposition, it is clearly against Overlap. The trial court's

denial of a new trial is consistent with every Missouri Supreme court case that has applied the *per se* rule in an intentional nondisclosure case.

Even if a material and intentional nondisclosure were found in this case, because AGE was privy to the Case.Net information indicating a nondisclosure long before the close of the evidence, the trial court did not abuse its discretion in finding that AGE waived its juror nondisclosure challenge by waiting to look at this easily accessible information until after it learned that it lost the trial. To conclude otherwise would simply open the floodgate to every losing litigant to strategically wait until after trial and then run the easily accessible Case.Net search to uncover the inevitable nondisclosure from any one of the 12 jurors on the panel.

AGE's scatter-shot appeal raises several other points of purported error. The record is replete with evidence sufficient to support Overlap's fraud and punitive damages claims as the Court of Appeals found. AGE's statute of limitations defense should be summarily rejected under well-established Missouri law just like the two trial court judges and the Court of Appeals did below after hearing the same arguments. If the Court affirms the judgment for fraud or negligent misrepresentation, it need not address the points of error related to the breach of contract claim because the fraud claim is distinct and independent of the contract claim. In any event, AGE argued below that the license agreement at issue was unambiguous and thus no parol evidence should be allowed. But after the trial court did not agree with AGE's post-litigation interpretation of the license, AGE changed course during trial and argued the license was ambiguous. Even if this Court finds the license language is somehow ambiguous, however, Missouri

law makes clear that the trial court properly precluded parol evidence for several reasons, any one of which is sufficient to affirm the trial court. For all of these reasons and the reasons stated below, this Court should affirm the trial court's judgment.

### **STATEMENT OF FACTS**

#### **A. The Overlap Software**

Bill Chennault, a longtime Kansas City Kansas Community College math and computer professor and Dean of Information Services, invented the Overlap software and began selling it out of his own home in 1993. Trial Transcript ("TR") 399-402, 426-27. Mr. Chennault spent years developing and perfecting the Overlap product. *Id.* at 403-415. The Overlap software had the unique capability of comparing all of the stock holdings of two or more mutual funds and determining the precise percentage of the same stock held in these funds. *Id.* at 418-19, 507; Trial Ex. 233A (A116). The proprietary percentages of common stock holdings generated by the Overlap analysis allowed a licensed user to quickly and easily determine whether the several mutual funds being compared were truly diversified. *Id.* at 418-19. If the Overlap analysis reflected common holdings of 20% or higher, then the mutual funds potentially lacked sufficient diversity. TR 419. Since many mutual funds have a high percentage of common holdings, the Overlap analysis was a highly effective sales tool that a broker could use to explain to a client or prospective client why they should buy or sell mutual funds and

thereby eliminate the lack of diversified stock holdings. *See, e.g.*, Trial Ex. 106 (SA 259).<sup>1</sup>

Mr. Chennault named the product “Overlap” because it was suggestive of what the product could do. TR 419. Mr. Chennault obtained a trademark for the term “Overlap” used in connection with financial software in 1996, and Overlap was well recognized in the mutual fund community by 2000. *Id.* at 436-37, 474, 507. He also wrote the first license, which was in effect until 2000. *Id.* at 437-38. That license is not at issue on appeal.

Overlap rolled out a second license with its CD-ROM version of the software in 2000. *Id.* at 438-440, 508. The software was updated quarterly. TR 503. The license accompanying the software read:

A. LICENSE: Overlap®, Inc. . . . provides you with storage media containing a computer program (the “Program”) which may also include “online” or electronic documentation, License (“the License”), and other printed materials (together called the “Product”) and grants you a license to use the Product in accordance with the terms of this License.

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<sup>1</sup> In an effort to avoid confusion with AGE’s appendix, Overlap has labeled its substitute supplemental appendix page numbers with the prefix “SA.”

B. YOU MAY:

1. Install and use one copy of the product on a single computer. This copy is to be used by only a single user and will be used to the benefit of said single user. If you wish to use this Product for more users you will need an additional license for each user.

\* \* \*

C. YOU MAY NOT:

1. Use this Product or make copies of it except as permitted in this License.
2. Rent, lease, assign, or transfer the Product except as set out above.
3. Modify the Product or merge all or any part of the Product with another program.
4. Use the Product for the benefit of more than one licensed user...

Trial Ex. 229 (A 113). This is the license that is at issue on appeal.

**B. AGE'S Widespread Use of Overlap and Fraudulent Conduct**

AGE purchased four single user licenses and never purchased a multi-user or enterprise-wide license. TR 508-09. Instead, AGE loaded the Overlap software on 51 computers and made the proprietary Overlap analysis available to its 7,000 brokers who were not licensed to use Overlap. *See, e.g.*, Trial Exs. 1 (SA 67-79), 11 (SA 80-87), 23

(SA 89-104), 275 (SA 485-496), 1000-1099 (SA 497-799), 1200-1352 (SA 800-1275). AGE understood that such use would require a system-wide license. TR 512-13; Trial Exs. 34 (SA 109), 53 (A 135). Overlap routinely negotiated multi-user licenses based on the number of financial advisors who would have access to the Overlap analysis. *Id.* at 509-10.

In August of 2000, Overlap's CEO, Kevin Fryer, received an email from one of AGE's home office employees named Anne Rauch purportedly seeking guidance with regard to future usage of the Overlap software. TR 510; Trial Ex. 48 (A 110). The communication stated:

We . . . would like to be able to provide an Overlap analysis for our Financial Consultant's to use in conjunction with a Mutual Fund Portfolio Analysis we already provide. This is a formal personalized presentation for clients/prospects. I was not sure if your licensing agreement allows this or not.

Please let me know what we need to do.

Trial Ex. 48 (A 110).

After receiving the email, Mr. Fryer called Ms. Rauch and expressly informed Ms. Rauch that such usage was *not* permitted under the single user license, but that he was willing to negotiate a multi-user license. TR 511-13; Trial Ex. 536 (A 135). Mr. Fryer arranged an in-person meeting with AGE in St. Louis. TR 512-13. At that meeting, Mr. Fryer and several AGE representatives discussed different options for providing Overlap reports to all of AGE's financial consultants. TR 513-14; Trial Ex.

256, Anne Rauch Testimony at 128-30 (SA 436-438). AGE told Mr. Fryer that it was using Overlap for internal research purposes (TR 603-04) but that it wanted in the *future* to make the Overlap analysis available to its thousands of unlicensed financial consultants. TR 520; *see also* Trial Ex. 256, Anne Rauch Testimony at 130 (SA 438) (Ms. Rauch admitting that she does not recall telling Mr. Fryer about A.G. Edwards' current use); Trial Ex. 255, John Meiners Testimony at 110 (SA 422) (Mr. Meiners admitting that AGE represented it wanted to provide Overlap analyses to financial consultants in the *future*, but recalling nothing else). When asked whether AGE told Mr. Fryer that AGE was already sharing the Overlap reports with financial consultants, Mr. Fryer testified: "No, absolutely not. In fact, they told me the opposite. They told me it was something they wanted to do in the future." TR 520.

After the fall 2000 meeting, Mr. Fryer followed up several times with AGE about a multi-user proposal. These discussions dragged on well into 2001. TR 521; Trial Exs. 143 (SA 260), 144 (SA 261), 146 (SA 262), 24 (SA 105), 27 (SA 106). Each of these communications involved AGE's request for multi-user licensure based on the number of individuals with access to the product. *Id.* Mr. Fryer sent several multi-user license proposals with pricing based on the number of AGE financial consultants who would have access to the Overlap analysis. Trial Exs. 143-44 (SA 260-261), 146 (SA 262); TR at 523-33. Not once during those lengthy discussions did AGE disclose that it had in fact been providing Overlap to its unlicensed financial consultants for years. TR 520, 528.

In late 2000, Greg Ellston of AGE sent an email to Kevin Fryer again expressing AGE's desire to make Overlap available in written reports to financial consultants. *See*

Trial Exs. 66 (SA 115); 143 (SA 260). In this email to Mr. Fryer, Mr. Ellston stated: “As we discussed, attached please find the program for the MF Overview that I hope Overlap can become a part.” *Id.* Mr. Ellston admitted that the MF Overview program attached to his email did *not*, however, contain an Overlap analysis. TR 1143-45; Trial Ex. 66 (SA 115). Nor did Mr. Ellston inform Mr. Fryer that AGE was in fact already providing Overlap analyses to its financial consultants. TR 528. The trial testimony revealed:

Q: Now did he [Greg Ellston] volunteer during this conversation with you that A.G. Edwards is already providing Overlap analyses through mutual fund reviews to financial consultants?

A: No, he did not. In fact, if he had said they were already providing the reports to the financial advisors, I would have asked him to pay me for the previous usage and pay for them going forward.

*Id.*

Despite the fact that Kevin Fryer told AGE that its four single user licenses would not permit such use (TR 511-12), Overlap uncovered evidence during the discovery process showing that AGE provided Overlap analyses to its unlicensed financial consultants long before Ms. Rauch’s August 2000 inquiry and continued to do so through 2001. *See, e.g.:*

- Trial Ex. 250, Hadley Greer Testimony at 2, 8 (SA 288, 294) (received Overlap requests via telephone while in Mutual Funds Sales Team from 1998 through 2000);
- *Id.* at 8, 42 (testifying that AGE relayed Overlap results over the phone and through mutual fund reviews);
- *Id.* at 41 (all of AGE's mutual fund reviews included an Overlap analysis);
- *Id.* at 49 (admitting that AGE's Managed Products Group trained financial consultants and told them Managed Products could run Overlap analyses);
- Trial Ex. 251, Matt Embleton Testimony at 3 (SA 341) (performing Overlap analyses going back to September 1998);
- *Id.* at 6-7 (promoting the ability to run Overlap analyses for financial consultants dating back to January 1999);
- *Id.* at 14-16 (making presentations that included Overlap analysis to financial consultants and high net worth clients);
- Trial Exs. 84 (SA 181-182), 163-64 (SA 263-267), 167 (SA 268-270), 175 (SA 271-274), 180-81 (SA 275-279) (demonstrating Mutual Fund Reviews were easily requested via AGE's intranet);
- Trial Ex. 84 (SA 181-182) (placing Overlap analysis on company intranet);  
and

- Trial Exs. 91 (SA 183-210), 92 (SA 211-212), 96 (SA 220-229), 97 (SA 230-258), 195 (SA 281-285) (AGE's training and advertising about the availability of Overlap for financial consultants dating back to 1998).

AGE's unlicensed financial consultants from across the country were instructed when they started at AGE that the home office was willing and able to run Overlap analyses for them. Trial Ex. 251, Matt Embleton Testimony at 2, 6-8 (SA 340, 344-346); Trial Ex. 250, Hadley Greer Testimony at 48-49 (SA 333-334); Trial Ex. 252, Terry Peterson Testimony at 5-6 (SA 362-363); *see also* Trial Exs. 91 (SA 183-210), 92 (SA 211-212), 80 (SA 142-180); TR 540. AGE's financial consultants were able to obtain Overlap reports from a multitude of AGE sources even though they did not have licenses for Overlap. Trial Ex. 251, Matt Embleton Testimony at 12 (SA 350); Trial Ex. 252, Terry Peterson Testimony at 7-8 (SA 364-365). Many of the requests for Overlap reports were relayed over the phone or by fax machine. Trial Ex. 250, Hadley Greer Testimony at 42-43 (SA 327-328); Trial Ex. 251, Matt Embleton Testimony at 4 (SA 342). Other Overlap requests were sent via email and were contained in reports called MF Review, Mutual Fund Review, Mutual Fund Overview or Overlap Analysis. Trial Exs. 84 (SA 181-182), 93 (SA 213-214), 94 (SA 215-217), 1000-1099 (SA 497-799), 1200-1352 (SA 800-1275), Trial Ex. 251 Matt Embleton Testimony at 15 (SA 353).

The demand for Overlap reports was so great that AGE put restrictions on how a financial consultant could receive the information. *See*:

- Trial Exs. 59 (SA 114), 75 (SA 118) (Overlap results only provided over phone unless the client was a "high net worth" client);

- Trial Ex. 254, Greg Ellston Testimony at 14 (SA 381) (noting that the Mutual Fund Sales Team alone would receive 2,000-3,000 phone calls a week and that Overlap should only be provided over the phone and not in writing in order to keep up with call volume).

This demand for Overlap was so high because in the words of one AGE representative, “the overlap analysis was truly something that the FC [financial consultant] and client could not get on their own, which further helps set us apart from the competition.” Trial Ex. 106 (SA 259).

After extensive discovery, Overlap also uncovered that Anne Rauch, before she sent her August 9, 2000 email to Overlap concerning *future* enterprise-wide use of the Overlap analysis, was personally aware that AGE was already providing the Overlap analysis to all of its financial consultants upon request. *See, e.g.*, Trial Ex. 49 (SA 110-113) (email to Anne Rauch dated July 27, 2000 forwarding mutual fund review containing Overlap analysis); Trial Ex. 95 (SA 218-219) (containing Overlap analysis run on August 9, 2000 which was identical to the Overlap analyses commonly merged into Mutual Fund Portfolio Analyses such as Trial Exhibit 96 at AGE 003395). In fact, on August 3, 2000, less than a week before Ms. Rauch’s inquiry to Overlap, she forwarded an email attaching a mutual fund review that prominently featured an Overlap analysis. *See* Trial Ex. 1009 (SA 523-526).

Even though AGE had already included the Overlap analyses in many written reports, it continued to deceive Mr. Fryer by claiming it was only contemplating such use in the future. *E.g.* TR 532. As a result, Mr. Fryer was duped into continuing to provide

the software to AGE on a quarterly basis at the same single user price of \$165. TR 528. While AGE misleadingly continued to negotiate a price to use Overlap on an enterprise-wide basis, it continued using Overlap on an enterprise-wide basis without paying for the additional licensure. *See, e.g.*, Trial Exs. 1000-1099 (SA 497-799), 1200-1352 (SA 800-1275). During that time period, AGE specifically knew that it was not permitted to make Overlap available to all its financial consultants, and knew it needed a multi-user license. *See, e.g.*, TR 511-13 (Fryer testifying that he told AGE that it needed a multi-user license to make Overlap reports available to financial consultants); Trial Ex. 34 (SA 109) (“we need to confirm we have an enterprise wide, or multi-user license”). Not once during this entire period (August 2000 to December 2001) did AGE ever disclose its enterprise-wide use to Overlap. *See, e.g.*, Trial Ex. 256, Anne Rauch Testimony at 130 (SA 438) (Ms. Rauch admitting that she does not recall telling Mr. Fryer about A.G. Edwards’ current use); TR 532 (Fryer testifying that during all of his contact with AGE, it never disclosed that it was already providing Overlap to its unlicensed financial consultants throughout the country); TR 528, 603-04.

### **C. AGE’s Continued Cover-up**

In August of 2001 — nearly one year after the multi-user license negotiations began — Mr. Fryer was contacted by Jose Lovato, an AGE IT technician. TR 533. Mr. Lovato inadvertently informed Mr. Fryer that AGE had loaded Overlap software on 40 computers. TR 534. Thereafter, with evidence that AGE had loaded Overlap software on unlicensed computers, Mr. Fryer directed his lawyer to send a cease-and-desist letter to AGE. TR 535; Trial Ex. 21 (A 108). The cease-and-desist letter

mentioned the issue of software being loaded on unlicensed computers and demanded that AGE stop using Overlap and pay for its unlicensed usage. *Id.*

In response to the cease-and-desist letter, Mr. Meiners, an executive at AGE in the mutual fund marketing and sales department, contacted Overlap's counsel and denied that AGE had loaded the Overlap software on more than four computers. TR 730-31. He did not disclose that his department in 2000 and early 2001 had inventoried all software on the over 50 computers in his department and repeatedly confirmed these computers were loaded with Overlap. Trial Ex. 1 (SA 67-79), 11 (SA 80-87), 23 (SA 89-104), 275 (SA 485-496). Nor did he disclose the enterprise-wide use of the software and the internal directive AGE issued in November 2001 (only after being caught) to stop all future enterprise-wide use of the software; "Do not create an overlap analysis for anyone. There are no exceptions!!!" Trial Ex. 22, 106 (SA 88, 259). Instead, AGE categorically denied any misuse of the license. TR 731.

Through the depositions of several AGE witnesses, Overlap was able to confirm that the documents entitled "spread sheet of users" and "software inventory" identifying 51 computers loaded with the Overlap software were what they purported to be — inventories reflecting the actual number of computers on which Overlap had been loaded. TR 932-34. Trial Ex. 263, Jose Lovato Testimony at 11 (SA 470); Trial Ex. 250, Hadley Greer Testimony at 15-16 (SA 301-302); Trial Exs. 1 (SA 67-79), 11 (SA 80-87), 23 (SA 89-104), 275 (SA 485-496). AGE continued to deny that it installed Overlap on the 51 computers at its home office even at trial. TR 905-07, 912, 929 (characterizing the document that is labeled as an "inventory" as a "wish list" and not an inventory). Indeed,

AGE even continued to deny such a massive installation of the software at trial until its corporate representative was severely impeached, *see* TR 932-37, and then only during closing argument. TR at 1400-01.

Similarly, throughout discovery and through trial, AGE vehemently denied its widespread running of Overlap reports and making them available to over 7,000 unlicensed financial consultants from 1998 through at least the end of 2001, despite a record replete with contradictory evidence. *See, e.g.*, TR 1036 (minimizing use of Overlap); *cf.* Trial Ex. 250, Hadley Greer Testimony at 15, 22 (SA 301, 307); Trial Ex. 263, Jose Lovato Testimony at 11-12 (SA 470-471); Trial Exs. 1 (SA 67-79); 11 (SA 80-87); 23 (SA 89-104); 275 (SA 485-496); 1000-1099 (SA 497-799), 1200-1352 (SA 800-1275) (demonstrating widespread usage and distribution of Overlap).

Overlap's efforts to discredit AGE's bald denials of any license violations and to uncover AGE's fraudulent actions were hampered because AGE destroyed many of the potentially responsive documents from the relevant time period. Trial Ex. 250, Hadley Greer Testimony at 36 (SA 321) (AGE corporate representative testifying that he was aware of no efforts to retain potentially responsive documents); Trial Ex. 258, John Nickerson Testimony at 119-20 (SA 454-455) (noting that AGE destroyed all emails pre-dating October 1999); Trial Ex. 259, Jim Meece Testimony at 95 (SA 457) (discussing destruction of backup tapes containing potentially responsive documents). Adding to the delay, AGE failed to produce many responsive *electronic* documents until late in the litigation and by then had destroyed all potentially responsive emails and other

documents from October 1999 and earlier. *See, e.g.*, September 10, 2007 Order Granting Plaintiff's Motion For Enforcement of Discovery (SA 1-3).

**D. A.G. Edwards & Sons Defended the Case From the Outset of the Litigation**

Overlap filed its Petition claiming breach of contract and unfair competition on January 21, 2003. Legal File ("LF") 31-57 (A 196-222). The record is undisputed that: (1) Overlap mistakenly sued A.G. Edwards Capital, Inc. instead of A.G. Edwards & Sons, Inc.; (2) that A.G. Edwards & Sons was on notice of the lawsuit; and (3) A.G. Edwards & Sons was fully aware of the mistake. *See, e.g.*, TR 736 (Overlap's original counsel testifying that he sued A.G. Edwards Capital, Inc. because of "information suggesting that that was the proper entity to be sued"); LF 191 (A 245), 194 (A 248) (AGE acknowledging that the naming of AGE Capital was an "error").

A.G. Edwards & Sons, Inc., represented by the same counsel as A.G. Edwards Capital, Inc., expressly agreed to respond to discovery as if it had been correctly named as a defendant because it understood it had been incorrectly named from the beginning of the case. *See, e.g.*, LF 191 (A 245) ("defendant will answer these discovery requests as though they were directed to A.G. Edwards & Sons, Inc."), 194 (A 248) (same). A.G. Edwards & Sons fully participated in discovery as if correctly named, producing all responsive documents, answering all discovery responses, and producing all fact witnesses responsive to Overlap's discovery requests. *See, e.g.*, LF 191-226 (responding on behalf of A.G. Edwards & Sons to Plaintiff's First Request for Entry Upon Property, Plaintiff's First Request For Tangible Things, Plaintiff's First Request for Production of Documents, and Plaintiff's First Interrogatories on July 16, 2003); LF 234

(supplementing interrogatory responses on behalf of A.G. Edwards & Sons); Trial Exs. 255, 263 (SA 410-428, 460-482) (producing A.G. Edwards & Sons witnesses without objection in September of 2006). In the title of each of its discovery responses, AGE referred to itself simply as “A.G. Edwards.” LF 191-226. Further, when A.G. Edwards & Sons, Inc. was correctly named in the November 20, 2006 Amended Petition – an amendment based on the identical conduct raised in the original Petition – AGE did not oppose that amendment. *See* Order Granting Plaintiff’s Motion to Amend Petition, LF 92. After Overlap added A.G. Edwards & Sons, Inc. as a defendant, AGE did not amend or supplement its discovery responses based on the amendment. *See* SA 1286-1291 (supplementing discovery for unrelated purposes). The same attorneys continued to represent AGE and the same corporate representative answered the discovery responses. *See* LF 93-103 (Answer to Amended Petition signed by same counsel). AGE never proffered any evidence of prejudice as a result of the amendment.

**E. The Juror Misconduct Issue**

After a two-week trial, the jury found in favor of Overlap for a total post-merger judgment of \$4,100,000 in compensatory and punitive damages, plus post-judgment interest.<sup>2</sup> Shortly after the trial court entered its judgment, AGE identified several individuals from a Case.Net search who potentially did not reveal prior litigation history during voir dire. It is undisputed that AGE could have run the Case.Net search during

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<sup>2</sup> The verdict was in favor of Overlap on all four counts. Count I was unanimous, Count II was 11-1, Count III was 10-2, and Count IV was 10-2.

trial. *See, e.g.*, April 10, 2008 Post-Trial Hearing at 33-34 (A99). Instead, AGE strategically chose to wait until after the adverse jury verdict to run this simple internet search in hopes of finding a basis to reverse the outcome of the trial. The trial court held an evidentiary hearing and found Juror Hillerman intentionally failed to disclose a previous lawsuit. Juror Hillerman was a defendant in a personal injury action arising out of an accident that occurred while Hillerman was operating a company-owned truck. May 12, 2008 Hearing on Juror Misconduct at 6 (A102). The case resulted in a judgment *against* Hillerman. *Id.* at 8-9 (A102).

The trial court found that Hillerman did not answer the prior litigation question because of embarrassment. May 14, 2008 Order Denying Defendant's Motion for Judgment Notwithstanding the Verdict, For a New Trial, and for Remittitur ("Trial Court's May 14 Order"), LF at 1878 (A 304). There was no evidence that Juror Hillerman intended to deceive anyone, that he was biased against AGE or that his nondisclosure prejudiced the proceedings in any way. The trial court denied AGE's motion for a new trial because it found AGE easily could have, and should have, run its Case.Net search before the case was submitted to the jury. Trial Court's May 14 Order, LF at 1880-81 (A 306-307).

## ARGUMENT

### **I. RESPONDING TO A.G. EDWARDS' FIRST POINT RELIED ON, THE PLAIN LANGUAGE OF THE CONTRACT SUPPORTS OVERLAP'S THEORY FOR BREACH OF CONTRACT.**

As an initial matter, if this Court affirms Overlap's fraud claim or its negligent misrepresentation claim as the Court of Appeals did, then it need not reach this point on appeal because the contract damages are less than the damages awarded for tort – and, as discussed below, the fraud claim stands independent of the contract claim.

In challenging the jury's breach of contract verdict, AGE attempts to twist and distort the language of the license and apply it to facts and hypotheticals not at issue in this case to argue that the license cannot reasonably be construed to prohibit AGE's conduct. The question before the jury was whether the plain language of the four single user licenses allowed AGE to do the following: (1) load four single user discs onto 51 computers; (2) disseminate Overlap analyses to all unlicensed financial consultants; and (3) copy and merge the proprietary Overlap analyses requested by the financial consultants into formal "mutual fund reviews," or fax, e-mail or communicate over the phone the proprietary Overlap analyses. A review of the single user license makes clear that such an enterprise-wide use of Overlap would be a violation of the single user license. And the evidence at trial specifically demonstrated that AGE knew it needed a

license to do what it did. TR 511-13; Trial Ex. 536 (A 135). As the jury's verdict confirmed, there is nothing unreasonable about Overlap's interpretation of the license.<sup>3</sup>

AGE would have this Court believe that whether a *licensed broker* may share Overlap analyses with his or her clients is a relevant question in this case. This case, however, has nothing to do with whether *licensed brokers* may use run Overlap analyses for clients and then make a recommendation or a sale (they can). In stark contrast, this case is about whether AGE's enterprise-wide use of the product – disseminating Overlap analyses to thousands of *unlicensed* brokers – violates the license. It clearly does — such a construction is not unconscionable, is not unreasonable and does not lead to an absurd result.

The license states, in relevant part:

B. YOU MAY:

1. Install and use one copy of the product on a single computer. This copy is to be used by only a single user and will be used to the benefit of said single user. If you wish to use this Product for more users you will need an additional license for each user.

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<sup>3</sup> Just because AGE says the contract is absurd does not make it so. AGE cites absolutely 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.

C. YOU MAY NOT:

1. Use this Product or make copies of it except as permitted in this License.
2. Rent, lease, assign, or transfer the Product except as set out above.
3. Modify the Product or merge all or any part of the Product with another program.
4. Use the Product for the benefit of more than one licensed user . . .

Trial Ex. 229 (A 113).

Plain-language definitions make crystal clear that this single user<sup>4</sup> license cannot

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<sup>4</sup> “Single” means just what it says: “Consisting of one alone; individual.” Black’s Law Dictionary (8th ed. 2004). Contrary to what AGE might desire, “one” is not the same as “thousands.” A “user” is “one that uses.” Am. Heritage Dictionary 1966 (3d ed. 1992). It is undisputed that AGE’s unlicensed brokers used Overlap — and they used it frequently to make sales. AGE claims the term “use” is unclear, yet the record reflects that even AGE chose this term when discussing Overlap. *See, e.g.,* Woody Testimony at 921-22 (noting that Mutual Fund Reviews containing Overlap “were for brokers to *use*”) (emphasis added). Anne Rauch asked Overlap whether it would be permissible to “provide an overlap analysis for our Financial Consultant’s [sic] to *use* in conjunction

be fairly construed to allow AGE to run thousands of Overlap analyses through a single computer, at the request of *unlicensed* brokers for their clients, and then copy, merge and redistribute the analyses to these unlicensed brokers for their use in sales pitches to their clients. If any party's interpretation is unreasonable, it is AGE's interpretation. There can be no credible argument that AGE interpreted Overlap's single user license to mean that it could pay \$165 for a license, load the software on as many computers it wanted and then make the proprietary Overlap analysis available to thousands of unlicensed brokers; the jury agreed that AGE's interpretation of the license was not plausible.

AGE's argument that the license language clearly permitted its enterprise-wide use also ignores several license provisions that make it crystal clear that the \$165 single user license could not be used on an enterprise-wide basis. For example, the license agreement does not allow a licensee to "merge all or any part of the Product with another program." "Product" is defined as including the "printed materials" which contained the proprietary Overlap analysis. But that is precisely what AGE did. Unlicensed brokers would call into the home office and have AGE run Overlap reports on their clients' portfolios, and then AGE would merge the Overlap reports into reports for the financial consultants to use with their clients. The record evidence is clear that AGE routinely merged the Overlap data into its own Mutual Fund Review and Mutual Fund Portfolio review programs. *See, e.g.*, Trial Exs. 1000-1099 (SA 497-799), 1200-1352 (SA 800-  

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with a Mutual Fund Portfolio Analysis we already provide." Trial Ex. 48 (A110) (emphasis added).

1275). Further, the license makes clear that the “product” is more than just the tangible disc containing the Overlap software, but also “electronic documentation” and “printed materials” related to the software — which includes the proprietary analysis. Trial Ex. 229 (A 113). If there were any confusion remaining, the license states that “[i]f you wish to use this Product for more users you will need an additional license for each user.”

The reasonableness of Overlap’s interpretation of the contract is also directly supported by AGE’s pre-litigation actions. *See* Statement of Facts ¶ B. The record is undisputed that AGE never found the contract absurd or unreasonable when it asked whether it could provide the reports on an enterprise-wide basis. In fact, when Mr. Fryer told AGE that it could not, AGE negotiated for permission to provide Overlap reports to all its financial consultants by purchasing a multi-user license. If AGE truly believed it could use a single user license on an enterprise-wide basis (or that the contract was unreasonable), there would have been no need for AGE to seek permission or to engage in the year-long negotiations for such use or to otherwise conceal its usage. Further, if AGE believed it could do whatever it wanted with a single license, it would have never purchased four licenses (as opposed to one) per quarter.

AGE cites to *Overlap, Inc. v. Alliance Bernstein Invs.*, No. 07-0161, 2007 WL 4373975 (W.D. Mo. Dec. 14, 2007) for the proposition that Overlap’s interpretation is unreasonable. First, in *Alliance*, the court was concerned with any interpretation of the license that would not allow a *licensed* broker to share the Overlap information with his or her client. *Id.* at \*3 n.2. That is not what is at issue in this case. Indeed, AGE’s block quotation in its brief (pages 23-24) solely focuses on whether a *licensed* broker may share

his reports with a client – which again is not at issue here. Second, and tellingly, AGE has long argued that other license cases brought by Overlap are completely unrelated. In fact, this case is one of six cases brought initially in Jackson County. AGE and the other defendants argued that the cases must be severed because they are so different. LF 58-59. The trial court agreed and severed the cases. LF 61. Finally, the cited opinion was at the motion to dismiss stage and Alliance’s motion simply mischaracterized the nature of Plaintiff’s license violation claim in that case. Thus, AGE’s reliance on *Alliance* is misplaced.

Simply put, AGE’s post-litigation claim that the single user license allowed its enterprise-wide use is a grossly unreasonable construction of the single user license, directly contradicts its plain language, and is in stark contrast to AGE’s very own pre-litigation conduct. The trial court correctly rejected AGE’s construction of the license, and so did the jury. AGE’s lawyer-driven argument should not trump the collective wisdom, reason and common sense of the jurors who found that AGE breached the second license.

## **II. RESPONDING TO A.G. EDWARDS’ SECOND POINT RELIED ON, THE TRIAL COURT PROPERLY SUBMITTED OVERLAP’S TORT CLAIMS TO THE JURY AND PROPERLY DENIED AGE’S POST-TRIAL MOTIONS.**

### **A. LEGAL STANDARD**

A challenge to a party’s jury verdict on the grounds of “insufficient evidence” must be narrowly construed and all inferences drawn in favor of the Respondent:

In determining whether the trial court should have directed a verdict [for the moving party] or granted a judgment notwithstanding the verdict, this court must view the evidence in the light most favorable to [the adverse party] giving it the benefit of all reasonable inferences, and ignoring [the moving party's] contrary evidence except to the extent it aids [the adverse party]. Withdrawing a case from the jury is a drastic measure which should not be taken unless there is no room for reasonable minds to differ on the issues, in the exercise of a fair and impartial judgment. A jury's verdict must not be set aside unless there is a complete absence of probative facts to support the jury's verdict.

*Sheehan v. Northwestern Mut. Life Ins. Co.*, 103 S.W.3d 121, 131 (Mo. App. E.D. 2002).

**B. OVERLAP'S FRAUD AND NEGLIGENT MISREPRESENTATION CLAIMS ARE SUPPORTED BY MORE THAN SUFFICIENT EVIDENCE AND WERE PROPERLY SUBMITTED TO THE JURY ALONG WITH ITS CONTRACT CLAIMS**

**1. Overlap Made a Submissible Case For Fraud and Negligent Misrepresentation.**

As discussed above in the statement of facts, AGE specifically misrepresented and concealed its current use of Overlap in an attempt to use Overlap on an enterprise-wide basis but only pay for four single user licenses. *See* Statement of Facts at Sections B and

C. Through this scheme AGE fraudulently induced Overlap to continue providing Overlap on a quarterly basis at the single user price. The record is clear that if Mr. Fryer would have been told the truth, he would have demanded that A.G. Edwards stop its system-wide use of Overlap or pay for the expanded usage. TR 528. Indeed, once Mr. Fryer learned even a small portion of the truth (that AGE had loaded the software on multiple computers), he sent a cease-and-desist letter to AGE demanding that AGE stop using the product or pay for the increased usage. Trial Ex. 21 (A 108); TR 535. AGE's deceit allowed it to benefit by using Overlap on a system-wide basis without paying for the system-wide use. The factual record before the Court (including Mr. Fryer's uncontroverted testimony about AGE's fraud and Overlap's resulting reliance and damages) fully supports the jury's fraud and \$1.8 million negligent misrepresentation verdicts. The Court of Appeals concurred with the jury – ruling that “Overlap proved a submissible fraud claim.” Court of Appeals Order at 15, n.10.

**a. Overlap Presented Compelling Evidence of False Representation and Concealment of Material Facts.**

As discussed in the Statement of Facts, the record is replete with evidence of a false representation and concealment of material facts. *See* Statement of Facts at Sections B and C. AGE's objection appears to be that there was insufficient evidence for the jury to be able to find that AGE represented that it was: (1) using Overlap for internal research only; and (2) desired to make the Overlap analyses available to all financial consultants in the future. AGE's Brief at 51. This is wholly contrary to the record. At trial, Mr. Fryer testified to both of these facts and his testimony was not contradicted by any other

evidence. First, Mr. Fryer testified that AGE misrepresented that it was using Overlap for internal research purposes. See TR 603-04 (“they said they currently used it for internal research”). Second, Mr. Fryer testified that AGE represented that it wanted to make Overlap available to its financial consultants on a network-wide basis in the future. TR 600 (testifying that AGE was inquiring about being able to use Overlap in the future). Based on this uncontroverted testimony and the documentary evidence demonstrating AGE’s misrepresentations that it wanted to use Overlap in the future while widely disseminating it in the meantime, the trial court was well within its discretion when it accepted the jury’s verdict. And contrary to AGE’s representation to this Court, the facts hypothesized were explicitly supported by record evidence.

AGE also appears to challenge the jury instructions because they hypothesized more than one representation in a single verdict director. While AGE fails to cite *any* authority that a fraud claim must be based on a single representation, the case law to the contrary demonstrates that fraud claims are often made up from a tapestry of deception including multiple representations and even circumstantial evidence. See, e.g., *Kansas City v. Keene Corp.*, 855 S.W.2d 360, 369 (Mo. 1993) (“some instructions will still have several *elements* which must be submitted in the conjunctive, but these will be in support of a *single theory of recovery or defense*”) (emphasis in original); *Byers Bros. Real Estate & Ins. Agency, Inc. v. Campbell*, 353 S.W.2d 102, 106-107 (Mo. App. W.D. 1961) (permitting plaintiff to instruct the jury on fraud by conjoining several independent representations and noting that “[f]raud and fraudulent motive are sometimes difficult to prove for fraud is seldom perpetrated openly or disclosed to witnesses.”); *Wion v. Carl I.*

*Brown & Co.*, 808 S.W.2d 950, 954 (Mo. App. W.D. 1991) (“It is the governing principle that the misrepresentations that amount to fraud may be shown by circumstantial evidence, and may be accomplished by conduct or artifice, as well as by words calculated to mislead another.”).

**b. A.G. Edwards’ Representations and Omissions Were Material.**

AGE’s argument that Overlap’s fraud claim is predicated on Overlap’s breach of contract claim is a gross misstatement of the facts in this case and applicable law. Missouri law is clear that “[a] party who fraudulently induces another to contract and then also refuses to perform the contract commits two separate wrongs, so that the same transaction gives rise to distinct claims.” *Davis v. Cleary Building Corp.*, 143 S.W.3d 659, 669 (Mo. App. W.D. 2004) (quoting *Kincaid Enters., Inc. v. Porter*, 812 S.W.2d 892, 900 (Mo. App. W.D. 1991)); *Kincaid*, 812 S.W.2d at 900 (ruling that claims for breach of contract and fraudulent misrepresentation “are not inconsistent,” can encompass “two separate wrongs,” and “may be joined in one pleading and submitted for verdicts in the same action”).

Here, even if the jury had found that AGE had not breached the first or second license, Overlap’s claim that it was fraudulently induced by AGE into continuing to license the software to AGE is a separate wrong actionable under long standing Missouri precedent. Missouri law clearly permits a plaintiff to seek damages for fraudulent inducement into a contract and then for breach of the same contract. *Id.*; see also *Trimble v. Pracna*, 167 S.W.3d 706, 711 (Mo. 2005) (“A party who fraudulently induces another

to contract and then also refuses to perform the contract commits two separate wrongs, so that the same transaction gives rise to distinct claims that may be pursued to satisfaction consecutively.”); *Hess*, 220 S.W. 3d at 767 (distinguishing between claims for fraudulent inducement to contract and claims for fraud in the terms of the contract); *Forklifts of St. Louis, Inc. v. Komatsu Forklift, USA, Inc.*, 178 F.3d 1030, 1033 (8th Cir. 1998) (“it is well-settled that post-contract-formation misrepresentations ... will support an action for fraud”); *MEMC Elec. Materials, Inc. v. Sunlight Group, Inc.*, No. 08CV00535, 2008 WL 4642866, at \*3 (E.D. Mo. Oct. 17, 2008) (“the submissibility of a misrepresentation claim depends not upon the contract but upon the establishment of all the elements of the misrepresentation”). As a result, AGE’s argument that the submissibility of Overlap’s fraud claims is predicated upon its contract claim is flawed as matter of fact and law and must fail.<sup>5</sup>

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<sup>5</sup> AGE’s materiality argument is a repackaged claim that the jury’s breach of contract verdict is somehow internally inconsistent with its fraud verdict. AGE has waived any such argument by not raising the issue before the jury was dismissed. *See Douglass v. Safire*, 712 S.W.2d 373, 374 (Mo. banc 1986) (noting that claims of inconsistent verdicts must be raised before the jury is dismissed so the inconsistency can be corrected, and stating that “in our present procedural climate, which encourages the trial of multi-faceted cases together, it is all the more important that claims of infirmity in the verdict be presented at a time when something can be done to correct the fault”).

The facts in the record demonstrate that AGE's fraudulent conduct was material. For example, Mr. Fryer testified that had he known the truth about AGE's use of Overlap he would have demanded payment for the past unlicensed use and for payment going forward. TR 528 ("if he had said they were already providing the reports to financial advisors, I would have asked him to pay me for the previous usage and pay for them going forward"). When asked if Overlap's single user license would allow for distribution of the Overlap analysis to unlicensed financial consultants, Mr. Fryer expressly advised no, but that AGE could negotiate for such enterprise-wide use. TR 511-12. If AGE's representation concerning its use were immaterial, he would have done nothing. Instead, he told AGE such use was not permitted and immediately began negotiating a multi-user license. Finally, materiality of the fraud is further confirmed by the fact that when Mr. Fryer learned that AGE had loaded Overlap software on 40 computers (even before Overlap learned of the widespread distribution of Overlap reports) he immediately retained counsel and issued a cease-and-desist letter to AGE. Trial Ex. 21 (A 108). AGE's action following receipt of the cease-and-desist letter further confirms that it understood its misrepresentations and accompanying concealment were material to Overlap. After receipt of the letter, AGE immediately directed its employees to "not create an overlap analysis for anyone. There are no exceptions!!!" Trial Ex. 22, 106 (SA 88, 259).

**c. A.G. Edwards Had a Legal Duty to Disclose.**

AGE's argument that it had no duty to disclose its fraud is extremely revealing. AGE states that it had no duty because parties should be able to breach a contract in

secret – even when fair play would dictate otherwise. Brief at 31. In Missouri, however, a party has a duty to disclose facts when “one party has superior knowledge or information that is not reasonably available to the other . . . . Silence can be an act of fraud where matters are not what they appear to be and the true state of affairs is not discoverable by ordinary diligence.” *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 765 (Mo. 2007) (internal and other citations omitted);<sup>6</sup> *see also VanBooven v. Smull*, 938 S.W.2d 324, 328 (Mo. App. W.D. 1997) (stating that a duty to disclose may arise from “a relation of trust, from confidence, inequality of condition, or superior knowledge which is not within the fair and reasonable reach of the other party”). Those are the facts here – even AGE admitted at trial that a duty to speak arises when it is necessary to assure “fair conduct in the marketplace.” Appellant’s Brief at 54.

AGE had a duty to disclose because it deceived Mr. Fryer about its current usage and then conducted misleading negotiations for nearly a year for the enterprise-wide use. As AGE’s own witness admitted at trial, it is “almost axiomatic” that “A.G. Edwards was in a much better position than Mr. Fryer to know how A.G. Edwards was using the Overlap software.” TR 1128.

Mr. Fryer had no reason to believe AGE was already providing the Overlap software to all of its unlicensed financial consultants — in fact AGE repeatedly told Mr. Fryer the opposite. AGE compounded its failure to disclose how it was using the

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<sup>6</sup> AGE’s failure to even reference this Court’s important and recent *Hess v. Chase Manhattan Bank, USA, N.A.*, decision is also telling.

Overlap software by repeatedly discussing a *future* enterprise-wide license of the software with Overlap. This conduct further concealed AGE's current and past enterprise-wide use which AGE knew was a violation of the existing single user license.

In any event, it was a fact question for the jury to decide whether AGE had improperly concealed material facts. *See Bayne v. Jenkins*, 593 S.W.2d 519, 529-530 (Mo. banc 1980) (noting fraudulent concealment is a jury question); *Williams v. Hall*, 261 S.W. 938, 940 (Mo. App. 1924) (in action for fraudulent concealment of material facts relating to land sold by defendant to plaintiff, question of fraud held for jury). The jury properly answered that fact question in the affirmative.<sup>7</sup>

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<sup>7</sup> AGE also claims that the trial court improperly allowed a fraudulent concealment instruction. AGE erroneously attempts to dissect Overlap's fraud claim into two distinct legal claims of "fraudulent misrepresentation" and "fraudulent concealment." A similar argument was made in *Pelster v. Ray*, 987 F.2d 514, 522 (8th Cir. 1993). In that case, the trial court instructed the jury regarding the liability of one of the defendants on a fraudulent concealment theory. On appeal, the defendant argued that the plaintiffs' common law fraud claim pled only a positive misrepresentation, which would not support an instruction or a jury finding of fraudulent concealment. *Id.* The Eighth Circuit disagreed, noting that "all pleadings shall be so construed as to do substantial justice." *Id.* at 521. With that in mind, the court found sufficient allegations in the plaintiffs' complaint to put the defendant on notice that it would be required to defend against a charge of fraudulent concealment. *Id.* at 523-24. The *Pelster* court instructs that there is

**d. A.G. Edwards' Conduct Caused Damage to Overlap.**

AGE's failure to pay Overlap for its expanded, albeit unlicensed, usage damaged Overlap because Overlap would never have provided Overlap to AGE for use on a corporate-wide basis for the mere cost of the four single user licenses. *See, e.g.*, TR 528; Trial Ex. 21 (A 108). AGE argues that Overlap was not harmed because AGE would not have agreed to a contract for expanded usage. This argument is frivolous. AGE *in fact* used the Overlap product on an enterprise-wide basis knowing such use was not permitted by Overlap without paying for it. Because AGE benefited from its fraud for over a year, the jury properly made AGE pay for its usage, and the issue of whether AGE would have agreed to pay for such usage is irrelevant.

Simply put, instead of paying for its system-wide usage, AGE lied about the nature and extent of its use of Overlap. As a result, Overlap unwittingly provided \$1.8

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no requirement to identify a fraudulent concealment theory as a separate count — a count for “fraud” is sufficient. Here, Overlap’s concealment theory of fraud has been at issue since Overlap amended its Petition in 2006. *See, e.g.*, Plaintiff’s Amended Petition, LF 86-89 (A 236-39) (outlining the alleged affirmative acts of concealment); TR 366, Opening Statement (noting that AGE “attempted to hide or diminish the extent of their use”). In any event, the Missouri Supreme Court recently made clear that concealment is simply another way of proving affirmative fraud and is not a separate and distinct tort. *Hess*, 220 S.W.3d at 765. Finally, if there were any question as to whether concealment was an appropriate theory, Rule 55.33(b) applies here.

million worth of Overlap “licensure” without AGE paying for it. Further, Overlap lost its ability to market Overlap licenses to thousands of AGE brokers because AGE was already providing reports to its unlicensed financial consultants for free – eliminating the need for financial consultants to purchase their own licenses from Overlap.

AGE mistakenly relies on *MProve v. KLT Telecom, Inc.*, 135 S.W.3d 481 (Mo. App. W.D. 2004) to support its argument that Overlap was somehow not harmed by AGE’s fraud. In *MProve*, the defendant did not actually benefit from the use of the plaintiff’s assets, as AGE did here, and the plaintiff was not harmed because its assets were returned, which is impossible here. *Id.* at 487. In contrast, AGE derived a significant benefit from its unlicensed use of Overlap which AGE can only rectify by paying for its unlicensed use. Unlike *MProve*, AGE cannot simply return the product, nor did AGE use the product in accordance with the terms of the contract. Further, the plaintiff in *MProve* actually received payment for the time period in which the defendant wrongfully used the plaintiff’s assets. *Id.* at 490. Here, that is precisely what Overlap seeks — payment for the time that AGE actually used Overlap on an enterprise-wide basis from the time of the fraud until the end of 2001 when it was caught by Overlap. Finally, the plaintiff in *MProve* entered into a contract for the purchase of assets that expressly permitted the buyer to cancel the contract and return the assets without owing additional damages. *Id.* at 487-490. Here, no such agreement existed.

Finally, AGE’s argument that Overlap was a small business incapable of entering into a contract for 7,000 licenses ignores the fact that AGE actually used Overlap as if it had purchased 7,000 licenses – on a system-wide basis. AGE simply flouted its duty to

pay for this enterprise-wide usage. As Mr. Fryer testified at trial, a client such as AGE would have taken Overlap from the minor leagues to the big leagues. TR619; *see also* TR1426 (“This would have been a significant account for Overlap. But that’s how small companies, folks that are in the minor leagues, make it to the major leagues, unless the folks on the other side are misleading them and committing the kind of conduct that occurred here.”). There is no question here that AGE benefitted from its unlicensed enterprise-wide usage of Overlap and the jury properly made AGE pay for it.

**III. RESPONDING TO A.G. EDWARDS’ THIRD POINT RELIED ON, THE TRIAL COURT PROPERLY SUBMITTED OVERLAP’S PUNITIVE DAMAGES INSTRUCTION BECAUSE OVERLAP MADE A SUBMISSIBLE CASE FOR PUNITIVE DAMAGES.**

An “award of punitive damages is peculiarly a function of the jury and absent an abuse of discretion [a court] is not justified in interfering with the assessment.” *Wolf v. Goodyear Tire & Rubber Co.*, 808 S.W.2d 868, 874 (Mo. App. W.D. 1991). “[T]he abuse of discretion referred to has been defined as meaning so out of all proper proportion to the factors involved as to reveal improper motives or a clear absence of the honest exercise of judgment.” *Id.* In reviewing the submissibility of a claim for punitive damages, the court views the evidence and all reasonable inferences drawn therefrom in the light most favorable to the plaintiff and disregards all contrary inferences. *See Ryburn v. Gen. Heating & Cooling, Co.*, 887 S.W.2d 604, 606 (Mo. App. W.D. 1994). A plaintiff presents a submissible claim for punitive damages by showing “conduct that is outrageous, because of the defendant’s evil motive or reckless indifference to the rights

of others.” *Burnett v. Griffith*, 769 S.W.2d 780, 787 (Mo. 1989). “In evaluating the reprehensibility of Appellants’ actions, we defer to the factual findings of the jury and the trial court and are limited to a consideration of the evidence which supports the verdict excluding that which disaffirms it.” *Krysa v. Payne*, 176 S.W.3d 150, 157 (Mo. App. W.D. 2005) (internal quotations omitted).

In a case involving fraudulent conduct such as here, the fraudulent conduct is itself often evidence supporting a punitive damages award. *See Downey v. McKee*, 218 S.W.3d 492, 497 (Mo. App. W.D. 2007) (finding facts used to prove the plaintiff’s intentional tort claim also make out a submissible punitive damages claim); *Burnett v. Thrifty Imports, Inc.*, 773 S.W.2d 508, 511 (Mo. App. S.D. 1989) (evidence of fraud and fraudulent intent also established submissible case for punitive damages); *Refrigeration Industries, Inc. v. Nemmers*, 880 S.W.2d 912, 919 (Mo. App. 1994) (noting that it was permissible to infer bad motive or reckless indifference when the defendant purposefully concealed material information for his own gain and to the detriment of the plaintiff). Here, the jury found that AGE had intentionally and fraudulently concealed its usage of Overlap in order to avoid paying for a multi-user license. The evidence presented at trial in support of Overlap’s fraud claim clearly demonstrated that AGE’s conduct was outrageous because of its evil motive and reckless indifference to the rights of others. *See* Statement of Facts at Section B-C. The Court of Appeals agreed in finding that Overlap made a submissible case for punitive damages. Court of Appeals Order at 15, n.10. In addition to its intentionally fraudulent conduct, sham negotiations for over a year, and overall concealment of the truth, the record also demonstrates that AGE ignored

its own internal software compliance policy and made no efforts to ensure it was compliant with the Overlap license. Trial Ex. 257, David Fischer-Lodike Testimony at 59-60 (SA 446-447) (AGE's compliance officer testifying that AGE did not follow its own internal policy and procedures for ensuring third party software licenses are complied with); Trial Ex. 250, Hadley Greer Testimony at 21 (SA 306) (no corporate control or oversight); *Id.* at 23 (no efforts to contact IT or legal or otherwise to ensure compliance with license).

The evidence introduced at trial further demonstrated AGE's reckless disregard. AGE's own IT compliance personnel actually noted "we need to confirm we have an enterprise wide, or multi-user license." Trial Ex. 34 (SA 109). But no confirmation was ever made and no efforts at compliance resulted. Instead, a year after the Anne Rauch email and Mr. Fryer's visit to St. Louis, Dee Wind, AGE's lead witness at trial, wrote an email suggesting that instead of purchasing a multi-user license, as AGE was negotiating at the time, that AGE should just continue to distribute Overlap in violation of the license. Trial Ex. 33 (SA 107-108). This disregard for Overlap's rights was met with a simple response from another of AGE's witnesses: "**let's go for it.**" *Id.* (emphasis added).

Even in the sworn depositions and at trial, AGE's credibility was strained as it continued its cover up during the litigation process. The deposition designations and cross examinations at trial demonstrated to the jury AGE's incredible unwillingness to tell the truth even when presented with directly contradicting documentation. *See, e.g.*, TR 928-955 (AGE's lead witness denying that Overlap was loaded on 51 computers

even after three contrary computer inventories were admitted into evidence). Even after it was caught, AGE continued to disregard Overlap's rights. Such defense tactics are yet another reason the punitive damages award was appropriate. *See Kaplan v. U.S. Bank, N.A.*, 166 S.W.3d 60, 73 (Mo. App. E.D. 2003) (“[A] defendant’s aggressive defense at trial on either the issue of breach of duty or causation may supply, in the jurors’ minds, the ‘complete indifference’ or ‘conscious disregard’ element.”). These tactics and the trial witnesses’ lack of remorse and inability to tell the truth even under oath was something that the jury was uniquely positioned to evaluate at trial.

Ultimately, AGE’s arguments against punitive damages rest on the factual arguments that it made – and lost – at trial. AGE’s attempts to claim that it was somehow acting in good faith cannot be considered on appeal because the jury rejected these identical attempts at trial. *See Ryburn*, 887 S.W.2d at 606 (noting the court must disregard the losing party’s evidence). The jury did not find AGE’s representations credible and this Court may not swap out its own credibility judgment for the jury’s.

AGE cites two cases that offer no support for its position. First, AGE cites *Misischia v. St. John’s Mercy Med. Ctr.*, 30 S.W.3d 848 (Mo. App. 2000). *Misischia* only stands for the unremarkable proposition that when a plaintiff makes out a case for an intentional tort, but does not submit evidence of reckless indifference or evil motive, then punitive damages are unavailable. In contrast here, the record is replete with evidence of evil motive and reckless indifference and the jury was properly instructed on these matters. AGE’s other case is *State Farm v. Campbell*, 538 U.S. 408, 419 (2003), which dealt with the *amount* of a punitive damages award. AGE’s argument is about the

submissibility of punitive damages and, therefore *Campbell* is inapposite.<sup>8</sup> In any event, the *Campbell* factors also favor a finding of punitive damages where, as here, the ratio of punitive damages to compensatory damages is low, Overlap was financially inferior to AGE, where record evidence demonstrates that AGE had disregarded other software licensure and where there was ample evidence of intentional malice, trickery and deceit. And the trial court and Court of Appeals so found.

**IV. RESPONDING TO A.G. EDWARDS & SONS' FOURTH POINT RELIED ON, THE TRIAL COURT PROPERLY RULED THAT OVERLAP'S CLAIMS ARE NOT BARRED BY THE STATUTE OF LIMITATIONS.**

AGE's statute of limitations argument was rejected twice by the trial court and by the Court of Appeals. Nonetheless, AGE continues to ignore the well-established law and policy regarding Missouri's statute of limitations and relation back doctrine. This Court should, for the fourth and final time, reject AGE's argument.

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<sup>8</sup> AGE also raises the *Campbell* arguments for the first time in its brief, and, therefore, has waived this argument.

**A. THIS IS A CLASSIC CASE OF CORPORATE MISNOMER UNDER THE FIRST SENTENCE OF RULE 55.33(C) MANDATING THAT OVERLAP’S CLAIMS AGAINST A.G. EDWARDS & SONS, INC. RELATE BACK TO THE FILING DATE OF THE ORIGINAL PETITION AGAINST A.G. EDWARDS CAPITAL, INC.**

Missouri courts have long recognized that when a plaintiff mistakenly identifies a closely related corporate entity, the amendment adding the correctly named corporate entity relates back to the filing of the original petition as long as the correct defendant had notice of the original lawsuit. *See Watson v. E.W. Bliss Co.*, 704 S.W.2d 667, 670 (Mo. 1986) (citations omitted); *Jones v. Western Mo. Mental Health Center*, 840 S.W.2d 278, 279-80 (Mo. App. W.D. 1992); *see also Goodman v. Praxair, Inc.*, 494 F.3d 458, 468 (4th Cir. 2007) (noting that relation back must be freely given “so long as the policies of statutes of limitations have been effectively served” and rejecting arguments identical to those made by AGE here); *Figuroa v. Tyson Foods, Inc.*, No. 06CV748, 2007 WL 2572441, at \*3 (D. Neb. Sept. 4, 2007) (“[w]hen a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, a liberal rule should be applied” in favor of relation back).

In *Watson*, a case directly on point, this Court considered and reaffirmed the Missouri rule that correction of a misnomer relates back to the original petition as long as

the correctly-named defendant had notice of the original lawsuit.<sup>9</sup> The Court observed that “[t]he misnomer theory . . . is still conceptually sound. Its vitality and effectiveness have served us well in the past, and we see no reason to change or discard it.” *Watson*, 704 S.W.2d at 671. In *Watson*, like here, the plaintiff mistakenly identified a closely related corporate entity in the original complaint (“E. W. Bliss Company, Gulf & Western Heavy Duty Division”) and then, as in this case, sought to add the correct defendant, which was a close corporate relative (“E. W. Bliss Division of the Gulf Western Manufacturing Company”). *Id.* at 666-69. As in this case, there was no credible dispute that the correctly named defendant — Gulf Western Manufacturing Company — received notice of the timely filed original petition. *Id.* Accordingly, the Missouri Supreme Court held that the relation back doctrine applies and found the correction related back to the original petition. *Id.* at 670.

Importantly, in *Watson*, this Court made clear that where a petition is filed mistakenly against the wrong corporate relative, but the correct party is named in an amended petition, there is no “change” in party under Rule 55.33(c) and thus the amendment is governed by the first sentence of Rule 55.33(c). *Id.* at 670. If the correct

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<sup>9</sup> Missouri’s well-established rule that notice is the *sine qua non* of relation back in the misnomer context is consistent with established federal authority. *See, e.g., Goodman*, 494 F.3d at 468 (noting that relation back in the misnomer context must be freely given so long as the defendant was on notice of the lawsuit).

party received notice, which is all that is required under the first sentence of Rule 55.33(c), the correction relates back to the filing of the original petition. *Id.*

This is a classic case of misnomer. AGE's corporate family includes numerous closely related corporate entities.<sup>10</sup> It is undisputed that Overlap mistakenly named the wrong corporate entity. *See, e.g.*, TR 736 (Overlap's original counsel testifying that he sued A.G. Edwards Capital, Inc. because "we must have had some information suggesting that that was the proper entity to be sued"); LF 191 (A 245), 194 (A 248) (AGE acknowledging that the naming of AGE Capital was an "error"). It is undisputed

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<sup>10</sup> *See, e.g.*, LF 425-27 (admitting the corporations are both subsidiaries of the same parent corporation). AGE even changed its name during the pendency of this lawsuit and was sold to two different parent corporations in 2008 alone. One need look no further than the public reports that A.G. Edwards filed with federal and state authorities just a few months after Overlap filed suit. Both A.G. Edwards Capital and A.G. Edwards & Sons are subsidiaries of holding company A.G. Edwards, Inc. LF at 426; SEC Form 10-K at 50 (SA 9-12), Ex. 21 (A 108) (May 13, 2003). Both companies have their principal place of business at One North Jefferson in St. Louis. 2003 Annual Registration Report of A.G. Edwards Capital, Inc., to Mo. Sec'y of State (Jan. 6, 2004) (SA 13-14); Letter from Mo. Sec'y of State to A.G. Edwards Capital, Inc. (Nov. 19, 2003) (SA 15); 2003 Annual Registration Report of A.G. Edwards & Sons, Inc., to Mo. Sec'y of State (June 11, 2003) (SA 16-18). A majority of A.G. Edwards Capital's directors were also directors of A.G. Edwards & Sons. *Id.*

that AGE from the outset was on notice of the lawsuit, knew of the misnomer, and defended the case from the outset in a fluid and uninterrupted manner despite not being correctly named until the Amended Petition was filed.<sup>11</sup> *Id.*; LF 210 (A 257).

The Missouri Supreme Court's decision in *Watson* makes clear that Overlap's amendment adding the correctly-named defendant A.G. Edwards & Sons, Inc. relates back to the original filing of Overlap's petition because AGE was indisputably on notice of the original petition. *Id.* at 670-71.

Both trial courts<sup>12</sup> and the Court of Appeals rejected AGE's statute of limitations argument. "Statutes of limitation . . . are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944). Because AGE defended the case as if it were correctly named and produced all documents and witnesses as if it were the named defendant from the outset, justice is served by rejecting

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<sup>11</sup> AGE's course of conduct confirms beyond a doubt that it was on notice from the beginning and that it understood the identification of AGE Capital was a misnomer. *See* Statement of Facts at Section D.

<sup>12</sup> Before this case was transferred to Judge Prokes, Judge Scheiber made several rulings, including a ruling rejecting AGE's limitations period arguments after full briefing and oral argument. *See* LF 996 Order Denying A.G. Edwards & Sons, Inc.'s Motion for Summary Judgment.

AGE's statute of limitations defense. As this Court observed in *Jones*, “[A] party who is notified of litigation concerning a given transaction or occurrence has been given all the notice that statutes of limitation are intended to afford.” 840 S.W.2d at 279-80 (quoting *Koerper & Co. v. Unitel Int’l, Inc.*, 739 S.W.2d 705, 706 (Mo. 1987)).

Similarly, the lower courts’ rulings on the statute of limitations issues are consistent with the policies underlying the relation back doctrine, which “is to be liberally applied, and is based on the concept of whether a defendant has been given notice sufficient to defend against claims relating to a particular transaction or occurrence.” *Thompson v. Brown & Williamson Tobacco Corp.*, 207 S.W.3d 76, 116 (Mo. App. W.D. 2006) (citing *Johnson v. GMAC Mortgage Corp.*, 162 S.W.3d 110, 118 (Mo. App. W.D. 2005)) (other internal citations and quotations omitted). Moreover, the relation back doctrine has its roots in equity. See *Donnelly v. Robinson*, 406 S.W.2d 595, 598 (Mo. 1966). Here, *all* the equities weigh in favor of relation back because AGE was aware of, and actively defended, the litigation from the beginning and suffered no prejudice.

Tellingly, in the Court of Appeals, AGE strenuously argued that the case of *Tyson v. Dixon*, 859 S.W.2d 758 (Mo. App. W.D. 1993) was the controlling and dispositive case. But the very court that issued the *Tyson* case – the Court of Appeals for the Western District of Missouri – expressly rejected *Tyson’s* application here. Order at 14, n.9. Unlike in *Tyson*, AGE knew and understood it had been mistakenly identified as A.G. Edwards *Capital* instead of *Sons* and proceeded to defend the case as if correctly named. Nor were the two defendants in *Tyson* closely related corporate entities. *Tyson* has no application to this case.

In sum, the application of the undisputed facts to the plain language of the first sentence of Rule 55.33(c), the liberal policy of the equitable doctrine of relation back and common sense all mandate that Overlap's Amended Petition relates back to the original filing of the Petition and is not barred by the running of the statute of limitations.

**B. EVEN IF ADDING A.G. EDWARDS & SONS SOMEHOW CONSTITUTES A CHANGE IN PARTY, OVERLAP'S AMENDED PETITION FITS SQUARELY WITHIN THE PLAIN LANGUAGE OF THE SECOND SENTENCE OF RULE 55.33(C).**

Even if the addition of AGE was treated as a *change* in party, the plain language and underlying policy of the second sentence of Rule 55.33(c) also requires a finding of relation back. The second sentence of Rule 55.33(c) (dealing with the changing of a party) sets out three elements — (1) that the newly-added party had notice of the lawsuit before the running of the limitations period, (2) that the newly-added party is not prejudiced by the amendment, and (3) that the newly-added party had knowledge that it was the proper party absent a mistake by Plaintiff. These elements are easily met in this case.

As one Missouri Appeals Court recently observed in discussing the policy underlying Rule 55.33(c):

pleadings are not an end in themselves, but are only a means to the proper presentation of a case; that at all times they are to assist, not deter, the disposition of litigation on the merits. Rule 15(c) is based on the concept that a party who is notified

of litigation concerning a given transaction or occurrence has been given all the notice that statutes of limitation are intended to afford . . . .

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The rule is to be liberally applied, and is based on the concept of whether a defendant has been given notice sufficient to defend against claims relating to a particular transaction or occurrence.

*Thompson*, 207 S.W.3d at 116 (citing *Koerper & Co., Inc. v. Unitel Int'l., Inc.*, 739 S.W.2d 705, 706 (Mo. 1987)) (other internal citations and quotations omitted).

There can be no credible challenge to the fact that AGE was on notice of the lawsuit from the beginning of the lawsuit. It is also uncontestable that AGE was not prejudiced by the naming of A.G. Edwards Capital because A.G. Edwards & Sons defended the case as if it had been correctly named. *See* Statement of Facts at Section D. Even AGE acknowledged that the naming of A.G. Edwards Capital was an “error.” *Id.* Thus, the circumstances of this case fall squarely under the plain language of the second sentence of Rule 55.33(c).

AGE again cites *Tyson* and suggests that this case somehow changes the application of the plain language of Rule 55.33(c). Unlike here, the *Tyson* Court found Rule 55.33(c) did not apply because there was no mistake in identity at the time the plaintiff filed the case. *Tyson*, 859 S.W.2d at 763. In stark contrast, here AGE admitted there was a mistake in identity when the original petition was filed and that is why it

defended the case as if it were correctly identified from the outset of the case. In *Tyson*, the newly-named defendant had been told by the plaintiff at the time the petition was filed that he had purposefully not been named — thereby admitting that there was no mistake. *Id.* at 760. Moreover, the newly-named defendant was an individual, not a related corporate entity. *Id.* In *Tyson*, there simply was no mistaken identity of a closely related entity. The holding in *Tyson*, with its unique set of facts, cannot rescue AGE from the plain language of Rule 55.33(c), the controlling case law, and the liberal policy of the relation back doctrine. The Court of Appeals agreed, finding that its own ruling in *Tyson* did not apply under the circumstances of this case and that “*Tyson*, therefore, is not instructive to this case.” Order at 14, n.9.

AGE’s contention that Overlap’s delay in substituting AGE somehow precludes the clear application of the second sentence of Rule 55.33(c) is flawed as a matter of fact and law. The plain language of the second sentence of Rule 55.33(c) sets forth three, and only three, requirements — all of which are satisfied in this case. At best, the alleged delay in adding A.G. Edwards & Sons relates to prejudice to AGE by the lapse in time in the amendment. However, AGE has not and cannot articulate any prejudice as a result of the delay because it has defended the case all along as if it were correctly named. Because any alleged delay caused no prejudice to AGE, it cannot preclude the application of the relation back doctrine under Rule 55.33(c). Moreover, any delay in adding A.G. Edwards & Sons was caused by AGE’s own dilatory efforts in responding to Overlap’s discovery. While Overlap’s discovery requests were served after the Petition in early 2003, it was not until 2006 when nearly all the documents were produced by AGE. *See*

LF 191-226; SA 19-58.<sup>13</sup> This dilatory document production delayed depositions of A.G. Edwards & Sons' witnesses until September 2006. See Trial Exs. 255, 263 (SA 410-428, 460-482). The Amended Petition followed approximately two months later.

AGE also contends that because Overlap added the correct party, but then waited to dismiss AGE Capital until it became clear that AGE Capital was not a proper defendant, the usual relation back principles should not apply. This argument is not supported by the plain language of Rule 55.33(c) as confirmed by this Court's opinion in *Watson*. In *Watson*, the correct party was added — not substituted — with the originally-named and closely-related corporate entity. *Watson*, 704 S.W.2d at 668-69. This fact had no bearing on the application of the relation back doctrine. The Court in *Watson*, following the express language of Rule 55.33(c), looked only to whether the correctly named party had notice. *Id.* at 670.

This identical argument was also recently considered and rejected by another appellate court. See *Goodman*, 494 F.3d at 469. In *Goodman*, the plaintiff filed suit against Praxair, Inc. and then amended his petition to include Praxair Services, Inc. after the running of the applicable limitations period. *Id.* at 461. As in this case, the plaintiff did not substitute the parties simultaneously, but rather added the new party while leaving

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<sup>13</sup> Overlap has included in its Substitute Supplemental Appendix correspondence between counsel responsive to AGE's argument on appeal that Overlap waited too long to add AGE. See Rule 84.04(h) ("an appendix may set forth matters pertinent to the issues discussed in the brief. . . .").

the original party in the petition. The defendant argued (as AGE argues here) that merely adding the new defendant was not a “change” or “substitution” and as a result did not fall within the relation back rule. *Id.* at 468. The Fourth Circuit rejected such a narrow and semantical view of the relation back doctrine and, citing Wright, Miller & Kane’s *Federal Practice and Procedure*, noted “the word ‘changing’ has been liberally construed by the courts, so that amendments simply adding or dropping parties, as well as amendments that actually substitute defendants, fall within the ambit of the rule.” *Id.* The court further noted: “we can discern no policy that would be served by the [] defendants’ restrictive reading of ‘changes,’ which would force the amending party to drop a defendant for each defendant he adds.” *Id.* at 469. Finally the court ruled that because the newly-added defendant had actual notice of the lawsuit during the limitations period, construing the term “change” narrowly did not further any legitimate interest. *Id.*

AGE’s authority is inapposite for several additional reasons. First, Overlap added the correct party and then waited to confirm with AGE’s interrogatory answer that AGE Capital was not a proper defendant (by deposing an AGE Capital officer) before dismissing it. Second, and importantly, the cases AGE cites all involve different circumstances where the plaintiff attempted to add an entirely new party (not correcting a corporate misnomer). For example, in *Windscheffel v. Benoit*, 646 S.W.2d 354, 357 (Mo. banc 1983), the plaintiff sought to add a wholly distinct party to the lawsuit after the limitations period ran without any claim of mistake. The court in *Windscheffel* expressly noted that the case did *not* involve a misnomer or other mistake. *Windscheffel*, 646

S.W.2d at 356-57 (“Plaintiff here made no mistake in identity nor does he argue such a mistake”).<sup>14</sup>

Like the correction in *Watson*, Overlap’s Amended Petition correctly adding A.G. Edwards & Sons, Inc. in 2006 relates back to its original petition under Missouri’s well-established misnomer doctrine and Rule 55.33(c). As the Court of Appeals noted,

Statutes of limitations were never intended to be used as swords. Rather, they are shields, primarily designed to assure fairness to defendants by prohibiting stale claims which tend to undermine the truth-finding process. The truth-finding process is not undermined by allowing the process to proceed against A.G. Edwards & Sons. A.G. Edwards & Sons suffers

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<sup>14</sup> AGE also cites *Springman v. AIG Mktg., Inc.*, 523 F.3d 685 (7th Cir. 2008). *Springman* addressed whether the federal Class Action Fairness Act permitted the defendant to remove the case to federal court. The court in *Springman* did not address Rule 55.33(c) and it did not address a misnomer. Indeed, the entire opinion is devoid of any discussion of the misnomer issue that is central to the limitations period arguments in this case. Additionally, the facts of *Springman* are highly distinguishable. For example, in its notice of removal, the defendant in *Springman* specifically stated that adding a new defendant “changed the fundamental nature of the action by materially altering the putative class.” *Springman*, Notice of Removal (SA 4-8). Moreover, unlike *Springman*, here AGE defended the case as if it had been correctly named.

no prejudice or unfair surprise as it knew from the beginning what Overlap's claims were, and it was not deprived of the opportunity to investigate and prepare its defenses.

Court of Appeals Order at 14 (citing *Thorson v. Connelly*, 248 S.W.3d 592, 596 (Mo. 2008)) (quotations omitted).

**C. A.G. EDWARDS & SONS IS ALSO ESTOPPED FROM ARGUING RELATION BACK BASED ON ITS LITIGATION CONDUCT.**

Where a defendant is not only on notice, but also actually defends the case from the outset as if correctly named, that party should be equitably estopped from later arguing that the claims do not relate back. “The Supreme Court of Missouri has articulated the rule as estopping ‘a defendant ... from setting up the statute where, his conduct, though not fraudulent, has nevertheless induced the plaintiff to delay in bringing suit until after the expiration of the statutory period.’” *McCrary v. Truman Medical Center, Inc.*, 916 S.W.2d 831, 833 (Mo. App. W.D. 1995) (quoting *Sugent v. Arnold's Estate*, 340 Mo. 603, 101 S.W.2d 715, 718 (1937)). Here, it is precisely AGE's conduct in agreeing to participate in full written and deposition discovery — as if correctly named — that should estop it from asserting that these claims should not relate back. Any other result would eviscerate the equitable principles underlying the doctrine of relation back.

**D. EVEN IF OVERLAP’S AMENDED PETITION WERE SOMEHOW FOUND NOT TO RELATE BACK UNDER RULE 55.33(C), OVERLAP’S FRAUD AND NEGLIGENCE CLAIMS AGAINST A.G. EDWARDS & SONS ARE STILL NOT BARRED BY THE STATUTE OF LIMITATIONS.**

**1. Legal Standard.**

“Whether or not the statute of limitations applies to an action is a question of law that this Court reviews *de novo*.” *Husch & Eppenberger, LLC v. Eisenberg*, 213 S.W.3d 124, 128 (Mo. App. E.D. 2006).

**2. Overlap Could Not, and Did Not, Discover Facts Necessary to Allege a Fraud Claim Until Long After A.G. Edwards & Sons Categorically Denied Doing Anything Wrong In Violation of the Overlap License in November 2001.**

**a. Overlap Could Not Allege or Pursue Its Fraud Claim Without Formal Discovery.**

The Missouri five-year statute of limitations for fraud is set forth at R.S. Mo. § 516.120(5). Under that statute, a fraud claim does not accrue “until discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud.” Thus, unlike its contract and negligence claims, Overlap’s fraud claim does not accrue when the damage is “capable of ascertainment,” but rather “when the facts constituting the fraud are discovered.” *May v. AC & S, Inc.* 812 F. Supp. 934, 946 (E.D. Mo. 1993); *see also Nerman v. Alexander Grant & Co.*, 926 F.2d 717, 721 (8th Cir. 1991) (statute of limitations for fraud does not begin to run until the plaintiff “discovered or in the exercise

of due diligence, should have discovered the fraud”) (internal citations omitted); *Albert v. Grant Thornton*, 735 F. Supp. 1443, 1447-48 (W.D. Mo. 1990) (same).

Overlap’s fraud and negligent misrepresentation claims are based on AGE’s affirmative misrepresentations made in August 2000 by Ms. Raush and Mr. Meiners, and in September 2000 by Mr. Ellston, that it only used Overlap for internal research purposes but wanted in the future to provide Overlap reports to its financial consultants. This clearly misled Overlap into believing that AGE had not and was not already making the analysis available to its entire sales force. Overlap did not discover until long after its November 2001 cease-and-desist letter the facts sufficient to establish that: (1) AGE’s representations were false at the time they were made; (2) Ms. Raush and AGE knew the representations were false at the time they were made; and (3) long before August of 2000, AGE had made the Overlap analyses available to its entire unlicensed sales force.

Simply put, Overlap did not have any facts in the possession on our about August 2001 that would have been sufficient to allow Overlap to pursue a fraud claim at that time. In fact, Mr. Meiners called Overlap on behalf of AGE in late November 2001 in response to the cease-and-desist letter and categorically denied any misuse of the Overlap software, including even loading it on more than four computers. TR 730-31. Only through extensive discovery *after* the filing of the lawsuit in January 2003 was Overlap able to uncover evidence showing that the representations made in August and September 2000 were false, that AGE knew they were false, and that AGE in fact had concealed its enterprise-wide use that occurred long before August 2000.

Overlap had reason to believe that A.G. Edwards was violating the terms of the Overlap software license in 2001. That discovery was why Overlap sent A.G. Edwards a cease-and-desist letter in November 2001. But this original knowledge that led to Overlap's original breach of license claim is different from the later discoveries that led to Overlap's subsequent fraud claim which focuses on: (1) the falsity of AGE's misrepresentations in August and September 2000; and (2) acts of concealment to induce Overlap to continue to provide AGE Overlap's software on a quarterly basis from August 2000 to the end of 2001. Overlap had no evidence in August 2001 to pursue a fraud claim at that time. Since this case was not filed until 2003, and it was the materials provided in discovery that revealed the evidence necessary for Overlap to plead a fraud claim, the limitations period would not have expired until 2008 — at the very earliest — which is long after Overlap stated its fraud claim in November 2006.

**b. A.G. Edwards & Sons Affirmatively Concealed Its Fraud and Thereby Stopped the Running of the Statute of Limitations.**

As the jury found, AGE took affirmative steps to conceal its fraud. AGE categorically denied to Overlap in November 2001 that it had done anything wrong. TR 730-31. Under these circumstances “[i]f a party takes affirmative action to conceal the fraud, the statute is tolled until the fraud is discovered.” *Misischia v. St. John's Mercy Medical Center*, 30 S.W.3d 848, 867 (Mo. App. E.D. 2000). Here, Mr. Fryer had numerous contacts with AGE after September 2000 in which he was misled to believe that AGE was not making Overlap available to its financial consultants (which AGE was

told would be a violation), but rather wanted an expanded license to do that in future. TR 521-33. Then in November 2001, after being confronted by Overlap about information it received from an AGE employee, AGE categorically denied any wrongdoing. TR 730-31. These affirmative acts tolled the running of the limitations period until Overlap could uncover concrete facts through discovery to allege and support a fraud claim with particularity. *See Green Acres Enterprises, Inc., v. Nitsche*, 636 S.W.2d 149, 153 (Mo. App. W.D. 1982) (noting fraud must be pled with particularity in Missouri).

AGE also significantly delayed the discovery in this case, which in turn continued the concealment and deception at issue. *See* Statement of Facts at Section D. AGE did not produce the vast majority of its documents until 2006 (indeed, less than 2% of the documents were produced before 2006). Overlap was unable to take depositions until the summer of 2006 after completion of the initial written discovery process. Based on those depositions and on documents produced in discovery and described at those depositions, Overlap discovered for the first time that AGE's enterprise-wide use in fact predated, and coincided with, the August and September 2000 communications and that Ms. Rauch and AGE had knowledge of the falsity of these representations. *See* Statement of Facts at Section C. Adding to the delay, AGE did not produce responsive *electronic* documents until late in the litigation and by then had destroyed all potentially responsive emails and other documents from October 1999 and earlier. *See, e.g.*, September 10, 2007 Order Granting Plaintiff's Motion For Enforcement of Discovery (SA 1-3); Trial Ex. 250 Hadley Greer Testimony at 36 (SA 321) (no efforts to retain potentially responsive documents); Trial Ex. 258, John Nickerson Testimony at 119-20 (SA 454-455) (noting

that AGE destroyed all emails pre-dating October 1999); Trial Ex. 259, Jim Meece Testimony at 95 (SA 457) (discussing destruction of backup tapes containing potentially responsive documents).

Simply put, the five year statute of limitations for fraud could not have begun to run before, at the earliest, January 2003 when the case was initially filed and Overlap had the opportunity to conduct discovery. Accordingly, AGE's fraud claim filed on November 20, 2006 is not barred by the five year statute of limitations.

**3. Plaintiff's Negligent Misrepresentation Claim Was Not Capable of Ascertainment Until 2006.**

Overlap has also asserted a claim for negligent misrepresentation, which accrues when it is capable of ascertainment. *Chicago Title Ins. Co. v. Jackson, Brouillette, Pohl & Kirley, P.C.*, 930 S.W.2d 22, 24 (Mo. App. W.D. 1996). Because the falsity of AGE's representations were not capable of ascertainment until discovery in this litigation, as discussed above, Overlap's negligent misrepresentation claim, like the fraud claim, accrued in 2006.

**V. RESPONDING TO A.G. EDWARDS' FIFTH POINT RELIED ON, THE TRIAL COURT APPROPRIATELY EXCLUDED SO-CALLED "PAROL EVIDENCE" BECAUSE IT WAS WELL WITHIN ITS DISCRETION TO EXCLUDE IRRELEVANT, UNRELIABLE AND TIME-CONSUMING TESTIMONY.**

As an initial matter, if this Court affirms Overlap's fraud claim or its negligent misrepresentation claim as the Court of Appeals did, then it need not reach this point on appeal because Overlap's tort claim is separate from its contract claim.

**A. OVERLAP'S SINGLE USER LICENSE UNAMBIGUOUSLY BARRED AGE'S ENTERPRISE-WIDE USE.**

In the trial court, AGE argued that the license language was *not* ambiguous. *See* TR 63-67 (requesting that the trial court not allow any parol evidence as to the meaning of the license). The trial court properly sustained AGE's motion that parol evidence should not be permitted. *Id.* at 70-71, 74. AGE attempted to withdraw its motion after recognizing it would not win its argument. AGE now argues that the license at issue is unambiguous in its first point on appeal, and then in its fifth point on appeal claims the license is ambiguous. Because AGE simply cannot make up its mind, AGE should be estopped from making this argument on appeal. *See, e.g., Dick v. Children's Mercy Hosp.*, 140 S.W.3d 131, 141 n.5 (Mo. App. W.D. 2004) (noting judicial estoppel exists to "prohibit parties from deliberately changing positions according to the exigencies of the moment") (internal citation omitted). In any event, the trial court properly ruled that the second license agreement was unambiguous because the license is plain and clear.

When Missouri courts examine a contract for ambiguity, they begin and end their inquiry within the four corners of the agreement; parties cannot use extrinsic evidence to create an ambiguity. *Erwin v. City of Palmyra*, 119 S.W.3d 582, 585 (Mo. App. E.D. 2003). This Court focuses its inquiry on the “plain language of the contract.” *J.R. Waymire Co. v. Antares Corp.*, 975 S.W.2d 243, 246-47 (Mo. App. W.D. 1998). AGE cannot invent ambiguity through its proffered parol evidence or creative lawyering — which is exactly what AGE is attempting to do. “An ambiguity in a contract arises only from the terms susceptible to fair and honest differences, not mere disagreements as to construction.” *CB Comm. Real Estate Group, Inc. v. Equity P’ships Corp.*, 917 S.W.2d 641, 646 (Mo. App. W.D. 1996) (citation omitted).

Here, the jury concluded that buying four single user licenses, loading the software on 51 computers, and then copying, merging and making the reports available to thousands of unlicensed financial consultants violated the terms of the Overlap license. AGE’s litigation-driven attempts to convolute a simple license cannot change the fact that both the trial court and the jury found the language of the license unambiguous. Simply because AGE disagrees about the meaning of the license does not make it ambiguous. *See Jackson County v. McClain Enters., Inc.*, 190 S.W.3d 633, 640 (Mo. App. W.D. 2006).

Importantly, AGE cannot create ambiguity in a contract simply by injecting hypothetical fact situations that are not at issue in the case. *See Thornburgh Insulation, Inc. v. J.W. Terrill, Inc.*, 236 S.W.3d 651, 656 n.3 (Mo. App. E.D. 2007) (stating that contract language “must be construed in light of the present facts, and hypothetical

situations cannot be used to create ambiguity”). Yet this is precisely what AGE attempts to do by injecting irrelevant hypotheticals about how *licensed* brokers may use Overlap reports with their clients. AGE’s parol evidence is simply not at issue in this case involving AGE’s corporate practice of providing Overlap reports to *unlicensed* brokers on a system-wide basis.

**B. EVEN IF THE SECOND LICENSE AGREEMENT WAS SOMEHOW AMBIGUOUS AS APPLIED TO A.G. EDWARDS’ ENTERPRISE-WIDE USE, A.G. EDWARDS’ CLAIMED PAROL EVIDENCE WAS PROPERLY EXCLUDED.**

In addition to the fact that the parol evidence was properly excluded because the license is unambiguous, it was also properly excluded within the trial court’s discretion because it was unreliable, irrelevant, confusing, cumulative and a waste of time.

**1. Legal Standard**

Contractual evidence must satisfy the normal rules of evidence before it may be admitted. *See Woods v. Evans Prods. Co.*, 574 S.W.2d 488, 490-91 (Mo. App. W.D. 1978) (assuming *arguendo* that parol evidence rule did not bar testimony and ruling that testimony was still inadmissible due to immateriality). “In a civil proceeding, the trial judge has great discretion as to the extent and scope of cross-examination . . . . The ruling of the trial judge will not be disturbed unless there has been an abuse of discretion.” *City of Kansas City v. Habelitz*, 857 S.W.2d 299, 301 (Mo. App. W.D. 1993). An appellant must show not just that the trial court made the wrong decision, but that it committed an “act which is untenable and clearly against reason and which works an injustice.” *Adams*

*v. Borello*, 975 S.W.2d 188, 191 (Mo. App. W.D. 1998) (citing *Egelhoff v. Holt*, 875 S.W.2d 543, 549-50 (Mo. 1994)). The trial court’s ruling must be affirmed if it is supported by any tenable grounds — “[c]orrect trial court rulings on the admission or exclusion of evidence will not constitute grounds for reversal even though based on erroneous reasons.” *Habelitz*, 857 S.W.2d at 302 (citation omitted).

At trial, “the primary criterion in the admission of evidence is relevancy.” *Whelan v. Mo. Pub. Serv., Energy One*, 163 S.W.3d 459, 462 (Mo. App. W.D. 2005) (citing *Guess v. Escobar*, 26 S.W.3d 235, 242 (Mo. App. W.D. 2000)). Evidence must be both legally and logically relevant. *Id.* The logical relevance standard asks if the proffered evidence “tends to prove or disprove a fact in issue or corroborate[] other evidence.” *Id.* The legal relevance test weighs the “the probative value of the evidence (its usefulness) . . . against the dangers of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time or needless presentation of cumulative evidence (the cost of evidence).” *Id.* (internal citations and quotation marks omitted).

**2. The Trial Court Properly Excluded Parol Evidence Because it Was Irrelevant, Unreliable, Confusing and a Waste of Time.**

As in any case involving the construction of a contract, the analysis focuses on the intent of the parties. *E.g., Muilenburg, Inc. v. Cherokee Rose Design and Build, L.L.C.*, 250 S.W.3d 848, 854 (Mo. App. S.D. 2008). Here, AGE does not point to a single piece of excluded evidence that could legitimately, reliably, or credibly have been probative of its intent or understanding of the license because the record is clear that **AGE did not read the license or attempt to understand the license**. See Trial Ex. 250, Hadley Greer

Testimony at 12 (SA 298); Trial Ex. 257, David Fischer-Lodike Testimony at 59-60 (SA 446-447) (AGE's compliance officer testifying that AGE did not follow its own internal policy and procedures for ensuring third party software licenses are complied with); Trial Ex. 250 Hadley Greer Testimony at 23 (SA 308) (AGE made no efforts to contact IT or legal or otherwise to ensure compliance with license). It is undisputed, therefore, that AGE did not have any understanding as to the meaning of the license at least until Ms. Rauch contacted Mr. Fryer, who told AGE that it could not use Overlap on an enterprise-wide basis. The only understanding AGE ever had of the license, therefore, was that it was not allowed to disseminate Overlap to unlicensed brokers. Because AGE's proffered parol evidence is not probative of AGE's pre-litigation understanding as to the meaning of the license, it was properly excluded.

AGE's evidence is not probative for an even more important reason — it does not go to the allegations in this case. The proffered evidence revolves around the concept that a licensed broker may use Overlap with his or her *clients*. Again, these are not the facts at issue in this case, and, thus, the evidence is unhelpful and irrelevant. Overlap never claimed in this case that AGE's *licensed brokers* improperly shared information with their clients. This case is about the unlicensed usage of Overlap by *unlicensed* financial consultants. As a result, AGE's evidence focusing on client usage was properly excluded not only because it is not parol evidence, but also because it is irrelevant. Further, to the extent there is *any* marginal probative value behind the proffered evidence, it is outweighed by the resulting confusion it brings to the actual claims at issue.

In its brief, AGE identifies three categories of evidence that were excluded at trial as irrelevant or unhelpful: (1) expert testimony about the meaning of the license; (2) testimony and exhibits relating to Overlap’s marketing materials; and (3) testimony about whether licensed users may provide Overlap reports to clients and supervisors. None of this evidence was probative and the trial court properly excluded it. *See* TR 103 (ruling extrinsic evidence from Fryer and Chennault on meaning of license irrelevant); TR 488 (sustaining objection to questioning of Al Eidson about restrictions on use of Overlap as irrelevant); TR 493 (sustaining objection to admission of marketing materials on grounds of irrelevancy/lack of probative value).

**a. Testimony From A.G. Edwards’ Expert Witness Was Properly Excluded.**

AGE’s expert’s testimony would have proven immaterial at best. AGE claims that it was harmed because it did not have the opportunity to proffer an “expert witness” on the meaning of the license. But AGE’s expert, Paul Carmichael, admitted on multiple occasions that he had “never seen [license] language like this.” TR 707, 712. Further, he testified that the license language in the first license: did not “have any common meaning in the software industry.” TR 707. Importantly, when asked what the license language meant, he testified “I don’t know what it means.” TR 712. AGE’s expert was proffered to testify regarding the meaning of the license, but the record demonstrates he could not assist the jury in any way. For the same reason, Mr. Carmichael adds no insight to any particular custom, trade usage, or term of art in the industry that would be unknown by a layperson. AGE’s expert further conceded that he was aware of other

software license agreements that restrict the use of data output, and that one of those contracts was with regard to a similar piece of financial software called Morningstar. TR 710. Mr. Carmichael's testimony, therefore, suggests that proprietary financial software is a subset of the market in which restrictions on use of output are indeed recognized. Regardless, Carmichael's testimony does not lend any credence to AGE's post-litigation interpretation of the license, and it was irrelevant to the purpose for which it was offered. His testimony demonstrated that he could add no value to the discussion because he has no expertise with regard to the license language.

Even if Mr. Carmichael's testimony was somehow helpful in determining the meaning of the license, it would have been confusing and added a significant amount of additional time to an already lengthy trial. The trial court was well within its discretion in excluding the irrelevant, unreliable and unhelpful testimony of an expert witness who had already admitted he had no experience with similar license language and that many software licenses place restrictions on output.

**b. Testimony from Overlap's Marketing Manager and Marketing Materials Were Properly Excluded.**

Testimony from Overlap's marketing witness does nothing to prove the meaning of the license whatsoever and was properly excluded. Similarly, Trial Exhibits 524 (A 129), 525 (A 133), and 528 (A 159) are not probative of the meaning of the license — they are advertising materials that are not intended to define the contours of the license agreement. Inherent in the representations is the concept that a licensee must abide by the license. Marketing materials cannot change the meaning of an express contract. *See*

*Freeman Contracting Co. v. Lefferdink*, 419 S.W.2d 266, 274 (Mo. App. 1967) (holding that an advertisement placed in the yellow pages could not change the terms of a contract). Indeed, the Overlap license states that “This license is the entire agreement between us . . . and may not be changed except by a signed agreement.” Trial Ex. 229 (A 113). Nor is there record evidence about when the marketing materials were used or with whom. Similarly, there is no record evidence that AGE ever received, saw, read or relied upon the exhibits in question, and, therefore, there is no evidence that they impacted AGE’s understanding of the license whatsoever. At most, the trial court’s exclusion of these materials amounts to harmless error. Even if the marketing evidence was somehow relevant, it would have caused additional juror confusion and added to the length and complexity of the trial. The trial court was well within its discretion in excluding the irrelevant, unreliable and unhelpful marketing materials.

**c. Testimony about Sharing Overlap With Clients Was Properly Excluded.**

AGE next argues that the trial court improperly excluded testimony about whether a *licensed* user may share Overlap reports with his client or supervisor and whether a wholesaler may share certain Overlap results with potential clients. This case does not involve whether Overlap reports may be shared with clients or a supervisor. The only alleged wrongdoing in this case is AGE’s sharing of Overlap reports with its *unlicensed* financial consultants. Thus, the proffered testimony about how Overlap may be used with a financial consultant’s client is not probative of any fact or issue in this case. In any event, even if the evidence had a shred of relevancy, it would have been outweighed

by its potential for confusion and waste of time. The trial court was well within its discretion in excluding the irrelevant, unreliable and unhelpful testimony about how a financial consultant could use Overlap with a client or supervisor.

**3. Parol Evidence is Not Relevant to Overlap's Fraud or Punitive Damages Claims.**

AGE argues that the alleged parol evidence is relevant to the fraud and punitive damages claim because it goes to AGE's motive and intent. AGE did not raise this argument in any lower court and cannot bring it here for the first time. *See, e.g.*, Rule 83.08(b). This argument fails for an independent reason – the alleged parol evidence has nothing to do with AGE's state of mind. AGE presented no evidence that it relied upon or even knew about the parol evidence at issue. There is not a shred of evidence that any alleged parol evidence impacted AGE or its state of mind in any way. AGE's argument, therefore is meritless. What an expert witness and Overlap's own witnesses may or may not say about the meaning of the license has nothing to do with AGE or its fraudulent intent or reckless indifference to the right of others. Further, AGE's state of mind argument focuses on the pre-fraud period. There is no dispute that as soon as Ms. Rauch emailed Mr. Fryer inquiring about the meaning of the license, Mr. Fryer informed AGE that enterprise use was not permitted under the single user license.

**VI. RESPONDING TO A.G. EDWARDS' SIXTH POINT RELIED ON, THE TRIAL COURT APPROPRIATELY DENIED A.G. EDWARDS' MOTION FOR A NEW TRIAL BASED ON ALLEGED JUROR NONDISCLOSURE BECAUSE AGE WAIVED ITS RIGHT TO CHALLENGE THE ALLEGED NONDISCLOSURE.**

**A. LEGAL STANDARD**

AGE correctly states the standard of review. Further, a trial court's denial of a motion for a new trial can be sustained for any reason. *See Missouri Soybean Ass'n v. Missouri Clean Water Comm.*, 102 S.W.3d 10, 22 (Mo. 2003) (appellate review "is primarily concerned with the correctness of the result, not the route taken by the trial court to reach it; the trial court's judgment will be affirmed if it is correct on any ground supported by the record, regardless of whether the trial court relied on that ground"). *See also Saint Louis University v. Geary*, --- S.W.3d ---, 2009 WL 3833827, \*12 (Mo. 2009) (noting in juror nondisclosure case that "[o]nly when the appellate court is convinced from the totality of the circumstances that the right to a fair trial and the integrity of the jury process has been impaired should the trial court be found to have abused discretion.").

**B. THE TRIAL COURT APPROPRIATELY DENIED AGE'S REQUEST FOR A NEW TRIAL.**

The trial court's order denying AGE's request for a new trial based on alleged juror nondisclosure should be affirmed. *See* LF 1877-81 (A 303-307). In Missouri, a party's claim of potential juror nondisclosure must be raised *before* the case is submitted

to the jury if the information about the alleged nondisclosure is available during trial. *Brines v. Cibis*, 882 S.W.2d 138, 140 (Mo. 1994) (observing that a party has a duty to raise information about a juror to which it is privy or waives the right to challenge the juror nondisclosure). Here, AGE – represented by one of the largest firms in the state – admitted it could have run a Case.Net search at any time during trial. Under these circumstances, the trial court did not abuse its discretion in finding that the Case.Net search was readily available to AGE, and, therefore, AGE waived its juror nondisclosure argument by intentionally waiting until after receiving an adverse verdict to look at this information and raise juror nondisclosure based on this information. After sitting on its hands through a lengthy trial that incurred significant expenses for the parties and the State, AGE asks this Court to order a new trial. AGE’s choice to wait until after an adverse verdict to look at the Case.Net information to which it was privy during trial should not be rewarded; instead, AGE’s attempt at subverting the jury’s verdict should be rejected as untimely.

The trial court ruled in favor of Overlap on the juror nondisclosure issue. In doing so, the trial court thoughtfully addressed AGE’s cited cases and distinguished this case from other cases where the alleged juror nondisclosure was not readily discoverable at trial. The court stated:

This Court is cognizant of the Supreme Court precedent and notes that the Supreme Court has not addressed the circumstances that are present in this case and that were the focus of *McBurney*.

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The concern in *Brines* -- that counsel would be required to perform burdensome investigations during trial -- simply does not exist here. See *Brines*, 882 S.W.2d at 140 (“In our view, the delays and logistical difficulties in imposing a duty to investigate every juror’s answers outweigh the benefits derived from that duty.”). As recognized in *McBurney*, with the advent and proliferation of Case.net, the undue burden concerns of *Brines* are not present in this case.

This court finds *McBurney* controlling and instructive under these circumstances and holds that Defendant’s juror non-disclosure concerns should have been raised *before* the case was submitted to the jury. Defendant’s choice to wait until after an adverse verdict before raising the non-disclosure issue should not be rewarded; instead, Defendant’s non-disclosure argument is rejected as untimely.

Trial Court’s May 14 Order, LF 1880-81 (A 306-07) (emphasis in original).

On appeal, the Court of Appeals observed that *McBurney* constituted dicta and that the issue would need to be addressed by this Court before the lower courts could follow the recommendations of *McBurney*. Order at 9. The Court of Appeals stated that the issue would need to be addressed by the Supreme Court “no matter how laudable the *McBurney* recommendations may be.” Order at 10.

This Court has never directly addressed whether a party waives a juror nondisclosure argument by choosing to wait until after an adverse jury verdict to run a Case.Net search for prior litigation involving the jurors – a search that AGE admits it could have easily run any time during the two-week trial, but chose not to until after it received the jury’s verdict.<sup>15</sup> In *Brines*, the Court recognized that parties do not need to conduct a cumbersome investigation into juror nondisclosure during trial, but it did not address the ability to easily search Case.Net because Case.Net was not yet in existence. *Brines*, 882 S.W.2d at 140. What *Brines* makes clear, however, is that a party should raise any information regarding a nondisclosure to which it is “privy” or it waives its ability to challenge the juror’s nondisclosure. *Id.* Because AGE was privy to Hillerman’s prior litigation history through Case.Net during trial, its failure to bring Hillerman’s nondisclosure to the trial court’s attention prior to deliberations should bar its claim for new trial. *Id.*; *Robbins v. Brown-Strauss Corp.*, 257 S.W.2d 643, 647-48 (Mo. 1953) (stating a party does not waive juror nondisclosure when: “the disqualification of the juror was one which he by due diligence **could not have learned sooner.**”) (emphasis added).

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<sup>15</sup> Differently, in *Johnson v. McCullough*, --- S.W.3d ---, 2009 WL 1851140, \*5 (Mo. App. W.D.), the Court of Appeals specifically found that there was nothing in the record showing that it was practicable for plaintiff’s counsel to run the Case.Net search during trial. Here, the record is undisputed that AGE could have run the Case.Net search during trial, but simply chose not to.

Here, AGE *affirmatively and strategically chose* to ignore the information readily available to AGE until *after* obtaining an adverse verdict. Our legal system cannot operate effectively without requiring attorneys to raise readily available information before the case is submitted as opposed to allowing them to obtain an automatic new trial merely by taking the calculated risk of waiting on an adverse result before opening the envelope.<sup>16</sup>

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<sup>16</sup> AGE's cited cases of *Piehler v. Kansas City Public Service Co.*, 211 S.W.2d 459 (Mo. 1948) and *Woodworth v. Kansas City Public Service Co.*, 274 S.W.2d 264 (Mo. 1955) do not apply here. In *Piehler*, the challenged juror had previously made a claim against the same defendant in the case. The court merely observed that the defendant did not check its records – of over 200,000 files and 300,000 names until after trial. Under these circumstances in 1948 and without the use of computers, such information would not be reasonably available to counsel. In any event, the Court did not rule directly on the due diligence or waiver issue. It is interesting that AGE cites *Woodworth* because that case demonstrates that this Court has not always applied a *per se* prejudice in intentional nondisclosure cases, but instead it historically focused on the prejudice resulting from the nondisclosure and also required counsel to exercise “due diligence” in raising information about jurors. *Woodworth*, 274 S.W.2d at 270. At bottom, *Woodworth* is more in-line with the federal authority requiring at least some showing of prejudice by the party seeking a new trial.

As the Court of Appeals acknowledged in *McBurney*, it is unfair to the parties, the jurors, and the taxpayers to ignore readily-available Case.Net information until after an unfavorable verdict. *McBurney*, 248 S.W.3d at 41. The *McBurney* Court recommended that counsel “send a member of his or her clerical staff to any computer, at any time of day or night, to research the civil litigation records before submission of the case, rather than waiting until after an adverse verdict to do so.” *Id.*

Other state courts have expressed similar sentiments. For example in, *Rinehart v. Shelter Insurance Co.*, No. 03CV225804, March 27, 2006 Order at 11-14 (SA 1302-05) (16th Circuit, Division II, Manners J.), Judge Manners questioned the wisdom of allowing losing parties to search Case.net post-hoc. He stated that “[t]he concerns about delay and logistics expressed by the Court in *Brines* in 1994 have been greatly ameliorated by available technology.” *Id.* at 13. He further noted “the Court would respectfully suggest that the rule in *Brines* be revisited to allow consideration of the 21st Century technology.” *Id.* at 14. Critically, it is the ease of finding this information on Case.Net that, absent a ruling in favor of Overlap, will lead to every losing party running a Case.Net search in hopes of finding a single prior lawsuit that was not disclosed by any one of the 12 jurors, and, ultimately, to an avalanche of new trials.

In fact, nearly identical circumstances occurred in a case recently tried by the same law firm representing AGE. In *Blackmun v. EBG Health Care, Inc.*, No. ED92764 (Mo. App. E.D.) partners from the same firm representing AGE recently filed an appeal brief deploring the gamesmanship of lawyers for the losing plaintiff who failed to perform a Case.Net search at trial, and arguing that such conduct resulted in the losing party

waiving its juror nondisclosure challenges. (SA 1320-21; also found at 2009 WL 4321020, at \*29). Specifically, counsel argued that absent a finding of waiver: “courts are simply creating opportunities for sandbagging – encouraging a party to sit back and reserve objections that are curable during trial in order to reverse an unfavorable verdict.” *Id.*<sup>17</sup> Embracing the *McBurney* rationale, counsel argued that in light of the recent development of Case.Net:

it is no longer true that the burdens of a due diligence requirement outweigh the benefits. The “delays and logistical difficulties” underlying the *Brines* holding no longer exist.

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<sup>17</sup> The Court of Appeals for the Eastern District has also made its distaste for such sandbagging known. In *Doyle v. Kennedy Heating and Serv., Inc.*, 33 S.W.3d 199, 201 (Mo. App. E.D. 2000), the court stated that: “[i]t does not make sense, with respect to judicial economy, to wait until after trial, to bring allegations of juror’s intentional nondisclosure of material information.” It further observed that: “A new trial subjects the courts, defendant and taxpayer to substantial cost. The egregiousness of invading a party’s potential right to exercise peremptory challenge for obscure reasons pales when compared to the substantial burdens of a new trial order when no prejudice occurred. The benefit of a new trial is de minimis in a case where neither party was at fault and the juror had not been shown to be disqualified because of a predisposition in favor of or against either of the parties. It appears this is becoming a strategy for sandbagging by losing parties.” *Id.*, 33 S.W.3d at 201 (quoting *Brines*, 882 S.W.2d at 142).

The burden and expense of a nine-day jury trial certainly justifies an hour at the computer to ascertain any objections to jurors while errors can still be cured. Under the circumstances of this case, the Plaintiff waived her objection to [the juror] by failing to raise it prior to submission of the case to the jury.

*Id.* at 30-31. If it is reasonable for AGE’s law firm to require its opponents to search Case.Net before the case is submitted, then it is certainly reasonable for it to perform its own Case.Net searches.<sup>18</sup>

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<sup>18</sup> Even this Court has recognized the harshness of its juror nondisclosure rule. *Williams by Wilford v. Barnes Hospital*, 736 S.W.2d 33, 39 (Mo. 1987). Nonetheless, the Court noted that “[u]ntil a better solution is found, we are left with no option but to deal harshly with [juror nondisclosure].” *Id.* With the recent advent of Missouri’s Case.Net system, a better solution has indeed emerged at a time when Missouri arguably has the strictest juror nondisclosure standard in the entire country and at the same time when Missouri courts are some of the busiest in the country. *See, e.g.*, Joint Interim Committee on Judicial Resources in Missouri, at 19 (noting that Missouri judges have the third-highest number of cases per judge in the country) (found at [http://www.senate.mo.gov/04info/comm/interim/judicial\\_resources\\_report.pdf](http://www.senate.mo.gov/04info/comm/interim/judicial_resources_report.pdf)). *See also Branson Hills Associates, L.P. v. First American Title Ins. Co.*, 258 S.W.3d 568, 575 (Mo. App. 2008) (“the volume of cases filed has become such that if courts do not

Finally, any concern that small or solo firms will not be able to run Case.Net searches during trial is a red herring. First, Overlap does not suggest the application of a *per se* rule requiring all lawyers to run Case.Net searches in all cases or forever waive juror misconduct challenges. Rather, the question of whether the party waives its right to challenge juror misconduct for failing to run a Case.Net search would remain within the trial court's discretion in determining whether the information was reasonably accessible during trial. Thus, one day jury trials or trials involving solo practitioners may result in a finding that Case.Net information was not reasonably accessible. But in cases like this, where there is no dispute that the Case.Net information was readily accessible during a two week trial, but that the losing party simply made a calculated risk to ignore the Case.Net information until after trial, should result in a finding of waiver. As this Court has long recognized, "whether the requirements for grant of a new trial are met in a particular case based on juror nondisclosure rests in the sound discretion of the trial court." *State v. Mayes*, 63 S.W.3d 615, 625 (Mo. 2001).

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dispose of cases with reasonable dispatch, the backlog will be such that many persons will not be able to have their cases heard within a reasonable time because of unnecessary and sometimes unreasonable and excessive delay in other cases."'). Indeed, this case was transferred to and tried by a visiting judge from another county in light of the parties' difficulty in obtaining a trial date.

**C. EVEN IF AGE DID NOT WAIVE ITS JUROR MISCONDUCT CHALLENGE, THE LAW DOES NOT APPLY A *PER SE* RULE OF PREJUDICE AND MATERIALITY UNDER THESE CIRCUMSTANCES.**

The Court of Appeals reversed the trial court’s ruling based on waiver. In doing so, it applied a *per se* prejudicial standard for intentional nondisclosure even though no prejudice from a material nondisclosure could possibly be presumed under the circumstances of this case. The Court of Appeals simply overlooked Missouri Supreme Court precedent that makes clear that intentional nondisclosure must be material to presume prejudice. As *Brines* makes clear: “[t]he fact that a prospective juror has been sued as a defendant or has prosecuted cases as a plaintiff may cause the juror to be predisposed to defendants or to plaintiffs, *as the case may be*. The possibility of *that* predisposition makes the questions and answers material.” *Brines*, 882 S.W.2d at 140 (emphasis added). Here, Juror Hillerman was a defendant in a prior personal injury lawsuit where judgment was entered against him. Hillerman’s prior lawsuit on its face establishes a presumed predisposition in *favor* of AGE and against Overlap. This Court has never applied a *per se* prejudice or materiality standard under these circumstances.<sup>19</sup>

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<sup>19</sup> AGE cites two court of appeals cases – neither of which is instructive. In *Seaton v. Toma*, 988 S.W.2d 560 (Mo. App. S.D. 1999), *per se* prejudice was not at issue and was not raised. Indeed, the court found actual prejudice. Perhaps more importantly, the juror at issue was found to have been influenced in favor of the *defendant* in a case where

In every case that this Court has applied the *per se* rule in an intentional nondisclosure case there existed prior undisclosed litigation that showed the juror may be predisposed *against* the party seeking a new trial. *See, e.g., Brines*, 882 S.W.2d at 140 (juror was defendant in eight prior cases / defendant won at trial); *Williams by Wilford v. Barnes Hospital*, 736 S.W.2d 33 (Mo. 1987) (juror was plaintiff in prior litigation / plaintiff won at trial); *Rickenbaugh v. Chicago Rock Island & Pacific R.R. Co.*, 446 S.W.2d 623 (Mo. 1969) (juror was defendant in prior litigation / defendant won at trial); *Beggs v. Universal C.I.T. Credit Corp.*, 387 S.W.2d 499 (Mo. 1965) (juror was plaintiff in prior litigation / plaintiff won at trial). In stark contrast, there is no suggestion here that the nondisclosure on its face deprived AGE of a fair and impartial jury.<sup>20</sup> The Court of Appeals misapplied *Brines* by presuming materiality and ignoring the record that establishes Hillerman's prior undisclosed lawsuit would on its face predispose him in *favor* of AGE – the losing party – not Overlap. This Court has never presumed a material nondisclosure requiring a new trial when the facial predisposition is in *favor* of the losing party.

Finally, a ruling that intentional juror nondisclosure is *always per se* prejudicial is against the weight of authority – including well-established United States Supreme Court

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the defendant won at trial. Similarly, in *Groves v. Ketcherside*, 939 S.W.2d 393 (Mo. App. W.D. 1996), the issue of *per se* prejudice was not raised or challenged.

<sup>20</sup> It should be noted that *Johnson v. McCullough* does not present this issue because in that case, Juror Mims had previously been a defendant in multiple actions and the verdict at trial was in favor of the defendant. *Johnson*, 2009 WL 1851140, at \*1.

authority. In *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548 (1984), the Supreme Court stated that juror nondisclosure should only result in a new trial when there is a showing of *actual prejudice*. Specifically, the Court stated that a new trial should only be granted when “a correct response would have provided a valid basis for a challenge for cause.” *Id.* at 556. AGE’s reading of *Brines* goes significantly beyond the well-established United States Supreme Court authority on this issue. Despite the clear contrast between *Brines* and *McDonough*, the Missouri Supreme Court has never had the opportunity to address *McDonough*. Given the rising cost of litigation, the continued burden on Missouri Courts and the unique technological advances since *Brines*, it makes sense for this Court to reconsider whether at least some minimal showing of prejudice should be required before making parties retry costly and time-consuming cases.

The *McDonough* court observed that “[t]his Court has long held that [a litigant] is entitled to a fair trial but not a perfect one, for there are no perfect trials.” *McDonough*, 464 U.S. at 553. It went on to state:

Trials are costly, not only for the parties, but also for the jurors performing their civic duty and for society which pays the judges and support personnel who manage the trials. It seems doubtful that our judicial system would have the resources to provide litigants with perfect trials, were they possible, and still keep abreast of its constantly increasing case load.

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We have also come a long way from the time when all trial error was presumed prejudicial and reviewing courts were considered “citadels of technicality.” The harmless error rules adopted by this Court and Congress embody the principle that courts should exercise judgment in preference to the automatic reversal for “error” and ignore errors that do not affect the essential fairness of the trial.

*McDonough*, 464 U.S. at 553. *See also Zerka v. Green*, 49 F.3d 1181, 1185 (6th Cir. 1995) (the “test requires a party to offer more than the mere possibility that, given the chance, counsel might have removed a prospective juror.”). Here, as in *McDonough*, if there was error at all, it was harmless to AGE. There is no record evidence that Juror Hillerman could have been stricken for cause or prejudiced the proceedings in any way (if anything, his experience as a defendant would have prejudiced Overlap). Reversal of the jury verdict in this case would elevate form over substance, technicalities over fairness, and unnecessary cost over efficiency.

**D. A RULING AFFIRMING THE TRIAL COURT DOES NOT ANNOUNCE NEW LAW AND APPLIES TO THIS CASE.**

As an initial matter, affirming the trial court’s denial of AGE’s request for a new trial is not a change in the law. This Court has never addressed the waiver issue presented because *Brines* was decided before the invention of Case.Net. The second basis for affirming the trial court’s denial of AGE’s request for a new trial – the absence

of a material nondisclosure – is also not a change in the law. Rather it is completely consistent with longstanding Missouri Supreme Court precedent.

In any event, this Court’s ruling regarding juror misconduct obviously must apply here. AGE cites no authority for the proposition that any alleged decisional change would not or could not apply to the case in which it is decided. To the contrary, decisions made by this Court apply to themselves, regardless of whether they apply retroactively or not to other cases. For example in AGE’s case, *Sumners v. Sumners*, 701 S.W.2d 720, 723 (Mo. 1985), the Court analyzed whether a prior ruling in *Hoffman v. Hoffman*, 767 S.W.2d 817 (Mo. banc 1984), applied prospectively or retroactively to other cases. But there is no dispute that the change in substantive decisional law discussed in *Hoffman* applied to itself even if an open question remained as to whether it should be retroactively applied to other cases. *Id.*<sup>21</sup>

Any other outcome would provide a chilling disincentive to parties attempting to seek review from this Court no matter how meritorious the issue. In other words, no

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<sup>21</sup> See also *State v. Biddle*, 599 S.W.2d 182, 191, 195 (Mo. banc 1980) (holding evidence of polygraph examinations inadmissible even when offered by stipulation, and applying new evidentiary rule in that case to reverse criminal conviction) and *State v. Walker*, 616 S.W.2d 48, 49 (Mo. banc 1981) (holding new rule of *Biddle* procedural and applicable only prospectively, and affirming use of polygraph evidence properly admissible at time of trial). Simply put, cases that change the law apply the new law to themselves.

party would ever spend the time and money to challenge a “procedural” ruling in a case, no matter how important, because the ruling would never apply to the party who spent the time and effort to challenge the incorrect rule. Moreover, a ruling in this case that does not apply to the parties would violate principles of justiciability and would result in an advisory opinion. *Cf. State ex rel. Chastain v. City of Kansas City*, 968 S.W. 2d 232, 237 (Mo. App. W.D. 1998) (“We do not decide questions of law disconnected from the granting of actual relief.”).<sup>22</sup>

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<sup>22</sup> With respect to non-parties, this Court has the discretion to determine whether its decisional authority will be applied prospectively or retroactively. *See, e.g., State v. Walker*, 616 S.W.2d 48, 48-49 (Mo. 1981) (“This Court has the authority to determine whether a decision changing a rule of law is to be applied retrospectively or prospectively. However, *if* the Court fails to indicate in the decision creating the new rule whether that rule is to be applied retrospectively or prospectively, then this determination hinges on whether the new rule of law is procedural or substantive”) (internal citations omitted and emphasis added).

### **OVERLAP'S CONTINGENT CROSS APPEAL**

Overlap raises three issues on appeal *only if* this Court reverses the trial court's order and remands for a new trial.<sup>23</sup> Such contingent or provisional cross appeals are looked upon favorably. In Missouri, a party at a new trial is bound by the legal rulings not appealed from the first trial. *See Norman v. Wright*, 2004 WL 1161907, at \*3 (Mo. App. S.D. 2004) *superseded on other grounds*, 153 S.W.3d 305 (Mo. 2005). As a result, a party not attacking the judgment but wishing to preserve issues in the event of a new trial has no other option but to raise a provisional cross appeal in the event the judgment is reversed and remanded for a new trial. Missouri courts, therefore, have routinely accepted provisional cross appeals seeking alternative relief in the event a judgment is reversed and a new trial is ordered. *See Nusbaum v. City of Kansas City*, 100 S.W.3d 101, 102 (Mo. 2003); *Sanders v. Hartville Milling Co.*, 14 S.W.3d 188, 215 (Mo. App. S.D. 2000).

### **POINTS RELIED ON**

- I. The trial court erred in granting AGE's motion for directed verdict on Overlap's unfair competition claims because Overlap made a submissible case for unfair competition under Missouri common law in that it met all of the requisite elements under both the misappropriation and trademark theories of recovery.

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<sup>23</sup> Plaintiff in no way attacks the trial court's judgment on appeal.

*National Broad. Co. v. Nance*, 506 S.W.2d 483, 484 (Mo. App. E.D. 1974)

*Better Bus. Bureau of Kansas City Adver. Club v. Chappell*, 307 S.W.2d 510, 514 (Mo. App. W.D. 1957)

*Cornucopia, Inc. v. Wagman*, 710 S.W.2d 882, 888 (Mo. App. E.D. 1986)

- II. The trial court erred in ruling that prejudgment interest should not be awarded to Overlap because the prejudgment interest on both the tort damages and the contract damages was appropriate in that (1) AGE received a pecuniary benefit from its tort and (2) the damages in question were liquidated.

Mo. Rev. Stat. § 408.020.

*Rois v. H.C. Sharp Co.*, 203 S.W.3d 761 (Mo. App. E.D. 2006)

*Vogel v. A.G. Edwards & Sons, Inc.*, 801 S.W.2d 746, 757 (Mo. App. E.D. 1990)

*Lundstrom v. Flavan*, 965 S.W.2d 861, 866 (Mo. App. E.D. 1998)

*Catron v. Columbia Mut., Ins. Co.*, 723 S.W.2d 5, 6-8 (Mo. 1987)

- III. The trial court erred when it excluded the testimony of a former AGE IT compliance worker that AGE routinely failed to comply with other software licenses because such evidence was relevant to Plaintiff's fraud claim and claim for punitive damages in that it established intent, willfulness, and a reckless indifference to the rights of others.

*Rinehart v. Shelter Gen. Ins. Co.*, 261 S.W.3d 583, 591 (Mo. App. W.D. 2008)

*Scott v. Blue Springs Ford Sales, Inc.*, 215 S.W.3d 145 (Mo. App. W.D. 2006).

**I. THE TRIAL COURT ERRED IN GRANTING A.G. EDWARDS' MOTION FOR DIRECTED VERDICT ON OVERLAP'S UNFAIR COMPEITION CLAIM BECAUSE OVERLAP MADE A SUBMISSIBLE CASE UNDER MISSOURI COMMON LAW IN THAT IT MET ALL OF THE REQUISITE ELEMENTS UNDER BOTH THE MISAPPROPRIATION AND TRADEMARK THEORIES OF RECOVERY.**

The trial court granted AGE's motion for directed verdict on Overlap's unfair competition claim despite the fact that Overlap presented sufficient evidence supporting a claim for unfair competition under Missouri law. Thus, in the event of a new trial, Overlap should be permitted to submit its claim for unfair competition to a jury.

**A. STANDARD OF REVIEW**

The standard of review for the trial court's grant of directed verdict is whether the plaintiff made a submissible case. *Investors Title Co., Inc. v. Hammonds*, 217 S.W.3d 288, 299 (Mo. 2007). In reviewing an order granting directed verdict:

the court must view the evidence in the light most favorable to [the adverse party] giving it the benefit of all reasonable inferences, and ignoring [the moving party's] contrary evidence except to the extent it aids [the adverse party].  
Withdrawing a case from the jury is a drastic measure which should not be taken unless there is no room for reasonable

minds to differ on the issues, in the exercise of a fair and impartial judgment.

*Sheehan v. Northwestern Mut. Life Ins. Co.*, 103 S.W.3d 121, 131 (Mo. App. E.D. 2002).

**B. THE BROAD REACH OF MISSOURI UNFAIR COMPETITION LAW ENCOMPASSES THIS CASE.**

“Unfair competition” is a broadly defined cause of action under Missouri common law. Unfair competition is “a species of commercial hitchhiking which the law finds offensive, and, therefore, prohibits.” The law of unfair competition is a “reaffirmation of the rules of fair play.” *National Broad. Co. v. Nance*, 506 S.W.2d 483, 484 (Mo. App. W.D. 1974); *Better Bus. Bureau of Kansas City Adver. Club v. Chappell*, 307 S.W.2d 510, 514 (Mo. App. W.D. 1957) (quoting *Shrout v. Times*, 260 S.W.2d 782, 788 (Mo. App. 1953)). A suit for unfair competition “gives the crop to the sower and not to the trespasser.” *Nance*, 506 S.W.2d at 484. Missouri courts have held time and again that a common law claim for unfair competition should be broadly construed based on the individual circumstances of each case. *See id.*; *Adbar v. PCAA Missouri, LLC*, No. 06-1689, 2008 WL 68858, at \*11 (Mo. App. E.D. Jan. 4, 2008) (citations omitted)). The tort of unfair competition provides a cause of action against “schemes in which the wrongdoer uses his own name but misappropriates the property of another.” *Nance*, 506 S.W.2d at 484. Indeed, one of the most flagrant types of unfair competition is where the defendant uses a plaintiff’s property for its own business purposes. *Id.* at 484-85. Thus, the first way Overlap established its claim for unfair competition was by showing that AGE used Overlap’s property (the proprietary analysis from the Overlap software) for its

own business purposes. And there was substantial evidence offered at trial that Overlap contributed to AGE's significant profits. *See, e.g.*, Trial Exs. 67-68A (SA 116-17) (2006 annual profit of \$184 million); Statement of Facts Section B.

For many decades, Missouri courts have taken an expansive view of the law of unfair competition. In *National Telephone Directory Co. v. Dawson Mfg. Co.*, 263 S.W. 483 (Mo. App. 1924), for example, the plaintiff had purchased the right to sell advertising on telephone book covers, and the defendant created false covers for the phone books and sold them for use in hotels. The court rejected the defendant's argument that unfair competition was narrow and technical, and held that, in Missouri, unfair competition, "by process of growth, [has] been greatly expanded in its scope to encompass the schemes and inventions of the modern genius bent upon reaping where he has not sown." 263 S.W. at 484-85 (citations omitted).

Similarly, in *National Broadcasting Company v. Nance*, the defendants purchased music from the plaintiffs, then re-recorded, re-packaged, and re-sold the music to make money for themselves. *Id.* at 484. The Court of Appeals, following the expansive view of unfair competition set forth in *National Telephone Directory*, held that the music-appropriation scheme was worse than the phone-book-advertising scheme in *National Telephone Directory*, because "it amounts to an actual appropriation of the plaintiff's property by the defendants to their own business purposes." *National Broad. Co. v. Nance*, 506 S.W.2d at 485.

What A.G. Edwards did here is similar to the music-appropriation scheme in *Nance*. It is difficult to imagine a clearer case of one party using the property of another for its own business purposes without paying for the use.

**C. OVERLAP ALSO MADE A SUBMISSIBLE CASE UNDER THE “TRADE NAME” PRONG OF MISSOURI’S UNFAIR COMPETITION LAW.**

Overlap also made a submissible unfair competition claim based on its trademark theory. Missouri unfair competition law prohibits, among other things, the use of another’s trade name in selling a product or passing another’s product off as one’s own. AGE ran Overlap analyses, placed them in its written reports, called them “Overlap” or “Overlap Analysis,” and provided them to financial consultants across the country. AGE did not source its “Overlap Analyses” to Overlap. Nor did AGE receive Overlap’s sponsorship or approval of its usage of the Overlap product and trademark. Nor did it pay Overlap for its usage of the Overlap trademark. By doing so, AGE violated Missouri unfair competition law. *See, e.g., Bass Buster, Inc. v. Gapen Manufacturing Co.*, 420 F.Supp. 144, 160 (W.D. Mo. 1976) (claim for unfair competition when the defendant is “passing off his product as that of another so that the public is deceived regarding the source of the goods.”); *Cornucopia, Inc. v. Wagman*, 710 S.W.2d 882, 888-89 (Mo. App. E.D. 1986) (“we must keep in mind that the law of unfair competition is designed to prevent commercial hitchhiking and attempts to trade on another’s reputation.”) (internal citations omitted); *Burger King Corp. v. Mason*, 710 F.2d 1480, 1492 (7th Cir. 1983) (false suggestion of affiliation with trademark owner constituted infringement); *Professional Golfers Ass’n of America v. Bankers Life & Casualty Co.*, 514 F.2d 665,

670 (5th Cir. 1975) (unauthorized use of trademark that is misleading with respect to sponsorship or approval can constitute infringement). Overlap made a submissible case for unfair competition based on its trademark theory.

**1. Overlap Proved the Existence of a Valid Common Law Trademark That Was Suggestive in Nature.**

In addition to proving that AGE was passing the Overlap analyses off as its own in its written reports used with financial consultants, Overlap also made out a traditional trademark claim. To establish a traditional trademark claim, a plaintiff must show: (1) that Overlap owned a mark; (2) that Overlap's trademark was "suggestive;" and (3) that AGE's use of Overlap's trademark created a reasonable likelihood of confusion regarding Overlap's sponsorship or affiliation with AGE. *See, e.g., Southwestern Bell Yellow Pages, Inc. v. Wilkins*, 920 S.W.2d 544, 548 (Mo. App. E.D. 1996) ("To state a cause of action for trademark infringement, the claimant must allege the following: (1) ownership of a distinctive mark; and (2) use of the similar mark is likely to cause confusion."); *Steak N Shake Co. v. Burger King Corp.*, 323 F. Supp. 2d 983, 991 (E.D. Mo. 2004). If a trademark is "suggestive," it is not necessary to show that the mark has obtained "secondary meaning" as a trademark. *Inf. Clearing House, Inc. v. Find Magazine*, 492 F. Supp. 147, 155 (S.D.N.Y. 1980). The evidence establishes each element.

**a. Overlap Owns a Valid Trademark.**

To show a valid common law trademark, a plaintiff must show "prior appropriation and use of the mark in connection with a particular business." *Bass Buster*, 420 F.Supp. at 157. *See also First Bank v. First Bank System, Inc.*, 84 F.3d 1040, 1044

(8th Cir. 1996) (requiring the use of the trade name in commerce to identify the product in order to establish a common law trademark). Overlap demonstrated at trial that it has used the mark “Overlap” in connection with its software licensing business since it introduced the Overlap product in July 1993, TR 419-20, 436-37, and it successfully registered a trademark on March 12, 1996. TR 436. During the time period that AGE used the Overlap software and trademark, there was no other product that performed the same function. TR 461-62; Trial Ex. 254 Greg Ellston Testimony at 11-12 (Mr. Ellston was unaware of “any other software that could provide this level of comparison of two or more mutual funds”); TR 507 (Mr. Fryer was unaware of “any other software program in the 2000 and 2001 time frame that was able to generate the proprietary Overlap percentages”). Under these circumstances, Overlap is entitled to exercise the full rights of a trademark owner.

**b. Overlap’s Mark is Suggestive.**

Second, Overlap’s mark is “suggestive,” as opposed to being merely “descriptive,” because it takes some imagination, thought, or perception to understand the connection between the mark and the product. *See In re Nett Designs, Inc.*, 236 F.3d 1339, 1341 (Fed. Cir. 2001). Upon hearing the term “Overlap,” it is impossible to know what the product is without learning more. If Overlap were named “Mutual Fund Common Holdings Percentage Software,” that name would likely be descriptive, and it would not be registrable. *See id.*; *see also* TR 419 Chennault Testimony (Overlap was so named because “it was suggestive of what we do”).

**c. Overlap Proved a Likelihood of Confusion.**

Third, AGE's use of Overlap's mark created a likelihood of confusion regarding sponsorship or affiliation among the relevant consumers. The likelihood of confusion arises from the perception that AGE's use of Overlap's mark falsely suggests sponsorship or affiliation between the two companies. *See Burger King Corp. v. Mason*, 710 F.2d 1480, 1492 (11th Cir. 1983) (false suggestion of affiliation with trademark owner constituted infringement); *Prof'l Golfers Ass'n of Am. v. Bankers Life & Cas. Co.*, 514 F.2d 665, 670 (5th Cir. 1975) (unauthorized use of trademark that is misleading with respect to sponsorship or approval can constitute infringement). Many exhibits have been admitted into evidence that show the likelihood of confusion regarding the source of Overlap analysis or with respect to Overlap's sponsorship or affiliation with AGE and its services. AGE provided Overlap's proprietary software analyses to unlicensed brokers who gave them to their clients, labeled as "Overlap Analysis," without attributing the data to Overlap or to the Overlap software. For example, AGE made presentations to high-net-worth clients that included pages or Power Point slides titled "Overlap Analysis," with no attribution to Overlap. *See, e.g.*, Trial Exs. 79 (SA 119-141), 94 (SA 215-217), 95 (SA 218-219), 97 (SA 230-258). AGE also provided "mutual fund reviews" or "mutual fund overviews" to its financial consultants, hundreds of which have been admitted into evidence. *See generally* Trial Exs. 1000-1099 (SA 497-799), 1200-1352 (SA 800-1275). These documents contain an "overlap analysis," and do not attribute the analysis to Overlap or its software. Under these circumstances, a jury could easily conclude that it is highly likely AGE financial consultants would be confused

either with respect to the source of the analysis or with respect to Overlap's sponsorship and approval of AGE's use of the Overlap software.

But if there were any doubt, one need only look to the testimony of one of AGE's own representatives who testified that he was confused as to the source or origin of the Overlap report located in an AGE Mutual Fund Review. Trial Ex. 251 Matt Embleton at 15-16 (SA 353-354) (looking at an AGE "overlap report" and stating "I'm not sure where the overlap even came from"; "It's not sourced . . . I can't tell").

## **2. Overlap's Mark Has Secondary Meaning.**

Even if the jury would have determined that the mark "Overlap" is "descriptive" and not "suggestive," Overlap stated a claim for unfair competition because it demonstrated at trial that its mark acquired "secondary meaning." *See Cornucopia, Inc. v. Wagman*, 710 S.W.2d 882, 887-88 (Mo. App. E.D. 1986); *Better Bus. Bureau of Kansas City Adver. Club v. Chappell*, 307 S.W.2d 510, 515 (Mo. App. W.D. 1957) (under Missouri common law, a trademark owner can establish unfair competition by showing that a descriptive trademark has acquired a secondary meaning and that another party's use of the mark has created a reasonable likelihood of confusion). "Secondary meaning" must be shown when the mark is not suggestive and can be established by showing use of the mark by relevant consumers. The record demonstrates that Overlap's software was widely known in the industry among financial professionals, who were Overlap's target market and therefore the relevant consumers. Trial Ex. 254 Greg Ellston Testimony at 6 (SA 373) (high-ranking AGE representative noting that the Overlap program "was widely known in the industry"); TR 474 (testimony that by 2000, Overlap

was “well recognized in the mutual fund community”); TR 472 (Overlap software discussed in wide array of newspapers and magazines, resulting in requests for interviews and phone traffic for software orders); TR 507 (based on contacts with persons in the financial industry, Overlap was “a well known name and product”).

Thus, regardless of whether Overlap’s mark is suggestive or descriptive, Overlap made out a claim for unfair competition.

**D. OVERLAP’S CLAIM IS NOT PREEMPTED.**

In addition to arguing at trial that Overlap did not make a submissible case, AGE also argued that Overlap’s unfair competition claim was preempted by federal copyright law. TR 865.<sup>24</sup> Plaintiff’s unfair competition claim is not preempted because it is not identical to a federal claim, but rather, it relies on the broad coverage of Missouri common law. Overlap does not make a claim for unlawful “copying” of the Overlap software. Instead, Overlap claims that AGE unlawfully misappropriated the proprietary Overlap analyses for benefit in its business without paying for the usage — this is not a claim for copyright infringement. Here, Overlap was required to show that AGE’s usage was unfair. That is not an element of copyright law. *See Rottlund Co. v. Pinnacle Corp.*, 452 F.3d 726, 731 (8th Cir. 2006) (claim for copyright infringement requires a

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<sup>24</sup> AGE argued on summary judgment that federal *trademark* law preempted Plaintiff’s claim. That motion was denied by the trial court. But during the argument for directed verdict, AGE argued for the first time that *copyright* law preempted Plaintiff’s claim.

showing of (1) ownership of a valid copyright and (2) copying of original elements). Simply put, Overlap's unfair competition claim is not the same as a federal copyright claim. To put any doubt to rest, the Copyright Act itself demonstrates that this case is not preempted because Overlap did not register a federal copyright. *See* 17 U.S.C. § 411(a) ("no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title").

The Missouri case law demonstrates that Missouri common law claims for unfair competition may coexist with federal law. *See Words & Data, Inc. v. GTE Comm'n Servs., Inc.*, 765 F.Supp. 570, 579 (W.D. Mo. 1991) ("Missouri common law regarding unfair competition is coextensive with federal law"). Below, AGE failed to identify a single Missouri case holding that Missouri unfair competition law is preempted. Instead, AGE cited cases that stand for the unextraordinary proposition that state law claims which mirror federal copyright claims can be preempted by the Copyright Act if the state law grants protection equivalent to that found in the Copyright Act. But it is uncontested that if a state law claim includes any additional element, it is not preempted. *See Archtectronics, Inc. v. Control Sys., Inc.*, 935 F. Supp. 425, 438 (S.D.N.Y. 1996). Unfair competition claims like the ones in this case are not preempted because they involve different issues, different elements and different methods of proof.

The case law clearly draws a line between cases where a plaintiff's state law claim is the same as a federal law claim (preempted) and those where a plaintiff's state law claim is different from a federal claim. For example, in *National Car Rental Systems*,

*Inc. v. Computer Associates International, Inc.*, 991 F.2d 426, 432-33 (8th Cir. 1993), *cert. denied*, 510 U.S. 861 (1993), the Eighth Circuit addressed the same issue and determined that a breach of contract case based on a license that restricts the “use” of a computer program with third parties is not preempted by the Copyright Act. *Id.* at 432 (ruling that the right to “use” computer program is not synonymous with the rights given to a copyright holder). The court determined that the sharing of data from the computer program with third parties was prohibited by the license, not copyright law. *Id.* at 433. That is exactly the same as the allegation here. It 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. *National Car controls. See also Nimmer on Copyright* § 1.01[B][1][f][iii], p. 1-47, n. 311 (2008) (noting that the House Report to the Computer Software Act of 1980, which addressed the copyrightability of software, “expressed the view that . . . copyright protection does not pre-empt state remedies for protection of computer software, ‘especially unfair competition and trade secret laws.’”); *Davidson & Associates v. Jung*, 422 F.3d 630 (8th Cir. 2005) (finding claim based on violation of software license agreement was not preempted by copyright law).

**II. THE TRIAL COURT ERRED IN RULING THAT PREJUDGMENT INTEREST SHOULD NOT BE AWARDED TO OVERLAP BECAUSE THE PREJUDGMENT INTEREST ON BOTH THE TORT DAMAGES AND THE CONTRACT DAMAGES WAS APPROPRIATE IN THAT (1) AGE RECEIVED A PECUNIARY BENEFIT FROM ITS TORT AND (2) THE DAMAGES IN QUESTION WERE LIQUIDATED.**

**A. STANDARD OF REVIEW**

The Court reviews a trial court's decision regarding prejudgment interest *de novo*. See *Werremeyer v. K.C. Auto Salvage, Co., Inc.*, No. WD 61179, 2003 WL 21487311, at \*15 (Mo. App. W.D. June 30, 2003), *superseded on other grounds*, 134 S.W.3d 633 (Mo. 2004).

**B. PREJUDGMENT INTEREST IS APPROPRIATE BECAUSE A.G. EDWARDS RECEIVED A PECUNIARY BENEFIT AND THE AMOUNT AT ISSUE WAS LIQUIDATED.**

When prejudgment interest is available, the trial court shall award it. See Mo. Rev. Stat. § 408.020. Prejudgment interest was compelled in this case because: (1) Defendant obtained a pecuniary benefit from its conduct; (2) the amount was sufficiently liquidated; and (3) the initial Petition was served as a “demand” under Mo. Rev. Stat. § 408.020. Plaintiff seeks prejudgment interest for the merged fraud, misrepresentation and contract claims. Thus, in the event of a new trial, Overlap seeks an award of prejudgment interest.

Prejudgment interest is generally unavailable in tort actions unless a demand is made pursuant to Mo. Rev. Stat. § 408.040. But an exception to the rule exists when the tortious conduct results in a pecuniary benefit to the defendant. *See, e.g., Rois v. H.C. Sharp Co.*, 203 S.W.3d 761, 764-765 (Mo. App. E.D. 2006); *Vogel v. A.G. Edwards & Sons, Inc.*, 801 S.W.2d 746, 757 (Mo. App. E.D. 1990); *New Style Homes, Inc. v. Fletcher*, 606 S.W.2d 510, 513 (Mo. App. W.D. 1980); *Protection Mut. Ins. Co. v. Kansas City*, 551 S.W.2d 909, 916 (Mo. App. W.D. 1977) (noting that fraud cases fall within the exception). In *Vogel v. A.G. Edwards & Sons, Inc.*, the court succinctly stated:

As a general rule, prejudgment interest is not recoverable on a tort claim. But, like all general rules in law, this rule has exceptions. Where the defendant's tortious conduct confers a benefit upon the defendant, prejudgment interest may be recovered by the plaintiff on his claim.

*Vogel*, 801 S.W.2d at 757; *see also Rois*, 203 S.W.3d at 764 (same).

Here, AGE's fraudulent conduct resulted in a pecuniary benefit to AGE. That is, by misrepresenting and covering up its widespread use of Overlap, AGE was able to save the money it would have been required to pay for its expanded use of Overlap — a direct financial savings and pecuniary benefit to AGE. Indeed, AGE's tortious conduct not only allowed it to save the costs it should have paid to Plaintiff, but AGE also earned additional profits through the unlicensed use of Overlap in its sales presentations. Unlike the typical tort action — such as a car wreck — AGE achieved a lucrative financial benefit from its fraud by using Overlap without paying for it. As such, the exception to

the general rule applies in this case and prejudgment interest is governed by § 408.020 and not by § 408.040. *Id.* This means that Plaintiff was not required to follow the demand procedures of § 408.040. Instead, the filing of the Petition itself on January 21, 2003, served as a “demand” triggering the prejudgment interest period pursuant to § 408.020. *See Rois*, 203 S.W.3d at 767 (“the filing of the suit itself is sufficient to constitute a demand”); *Call v. Heard*, 925 S.W.2d 840, 854 (Mo. 1996) (ruling that “an open-ended prayer of relief will suffice” to make prejudgment interest available); *Lundstrom v. Flavan*, 965 S.W.2d 861, 866 (Mo. App. E.D. 1998) (same). Because the filing of the Petition served as the “demand” in this case, the only other requirement for an award of prejudgment interest is that the claimed amount be sufficiently “liquidated” or fall within one of the many exceptions to the liquidated amount requirement.

The Missouri case law makes clear that the amount at issue in this case is liquidated (or at minimum, falls within the broad exceptions to the liquidation requirement). *See, e.g., Catron v. Columbia Mut. Ins. Co.*, 723 S.W.2d 5, 6-8 (Mo. 1987) (rejecting a draconian and narrow view of what constitutes a liquidated amount and instead taking a broad approach to what types of awards fall within the prejudgment interest rule).<sup>25</sup> In *Catron*, the Missouri Supreme Court noted that a wide array of cases,

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<sup>25</sup> *See also Commercial Union Assurance Co. of Australia, Ltd., Melbourne v. Hartford Fire Ins. Co.*, 86 F. Supp. 2d 921, 932 (E.D. Mo. 2000) (noting that “exact calculation is not necessary for a claim to be liquidated” and “[a] court may consider equitable principles of fairness and justice when awarding prejudgment interest”).

although not involving technically liquidated contracts, nevertheless fall under § 408.020. *Id.* at 7. These cases include cases for *quantum meruit* (where no written contract even exists) and insurance claims (where the parties had not agreed to any particular amount of damages under the policy). *Id.* The *Catron* court made clear that simply because parties disagree about the meaning of a contract or the amount or extent of damages does not mean that prejudgment interest is inappropriate. *Id.*; see also *St. Joseph Light & Power Co. v. Zurich Ins. Co.*, 698 F.2d 1351, 1355-56 (8th Cir. 1983) (“Under Missouri law, a defendant’s denial of liability or challenge to the amount claimed on a contract will not alter the fact that the amount claimed by the plaintiff is sufficiently ascertainable to require the award of prejudgment interest.”); *Lundstrom*, 965 S.W.2d at 866 (noting that a dispute regarding liability does not render a claim unliquidated); *Holtmeier v. Dayani*, 862 S.W.2d 391, 406 (Mo. App. E.D. 1993) (noting that where interest is merely a matter of mathematical computation it can be easily ascertained by the court without additional pleading requirements).

Here, the amount claimed is based on the undisputed value of a license (\$158 annually for 1998-2000 and \$165 for 2001). Because the price of the license is undisputed and liquidated, prejudgment interest is appropriate. The compensatory damages in this case boil down to the general formula of: (1) the purchase price of the software, (2) multiplied by the number of brokers to whom Overlap analyses were made available (and the number amount of unlicensed computers the software was loaded on from 1998-2000). While the *extent* of the breach was in dispute, the number of brokers and the cost per license was not. Put differently, A.G. Edwards did not dispute the

mathematical equation to be applied once the extent of the breach was determined. *See, e.g.,* A.G. Edwards Closing Argument, Feb. 6, 2008, at 1297 (recognizing the license fee of \$158 in 1998, 1999 and 2000); *id.* at 1299 (recognizing the license fee of \$165 in 2001). Simply because there was a dispute as to the extent of the breach (*i.e.*, the number of financial consultants who had access to the Overlap analyses), it does not follow that the amount due was unascertainable or unliquidated.

The court in *Vogel v. A.G. Edwards & Sons, Inc.* awarded prejudgment interest under very similar circumstances. 801 S.W.2d 746, 757-58 (Mo. App. E.D. 1990). In that case, the plaintiffs claimed that AGE had overcharged them by “churning” accounts. While AGE disputed liability and the extent of liability, the amount due was sufficiently liquidated. *Id.* The court stated that:

Here, the parties agree the measure of damages should be the commissions charged on those trades constituting churning. This dispute, thus, centers on the issue of which trades, if any, constituted churning. Therefore, once liability is established, the measure of damages, the commissions on the trades, is readily ascertainable.

*Id.* at 757-58. In this case, like in *Vogel*, once the extent of liability was determined, the amount of damages was readily ascertainable and liquidated.

Finally, in determining whether pre-judgment interest is available, “[a] court may consider equitable principles of fairness and justice when awarding prejudgment interest.” *Weinberg v. Safeco Ins. Co. of Illinois*, 913 S.W.2d 59, 62 (Mo. App. E.D.

1995); *Commercial Union*, 86 F. Supp. 2d at 932 (same). Here, in awarding punitive damages, the jury found that AGE had committed fraud and further found that AGE had exhibited reckless disregard for the rights of others. This is such a case, therefore, where the equities weigh in favor of prejudgment interest. And any argument that the precise amount of liability was unknown fails under the circumstances of this case because Overlap proved at trial that AGE had affirmatively concealed the extent of its usage from Overlap. AGE knew the widespread extent of its usage, and therefore, the exact amount of damages was knowable to AGE from the outset of the litigation. Any inability to arrive at a specific damages amount was a direct result of AGE's own concealment of the facts. Pre-judgment interest is merited pursuant to Missouri's broad interpretation of liquidated damages and because fairness, equity and common sense so dictate.

Because the verdict amounts are governed by the requirements of § 408.020 as opposed to the more stringent requirements of § 408.040, and because the amounts are liquidated, prejudgment interest should be awarded.

**III. THE TRIAL COURT ERRED WHEN IT EXCLUDED THE TESTIMONY OF A FORMER A.G. EDWARDS I.T. COMPLIANCE WORKER THAT A.G. EDWARDS ROUTINELY FAILED TO COMPLY WITH OTHER SOFTWARE LICENSES BECAUSE SUCH EVIDENCE WAS RELEVANT TO PLAINTIFF'S FRAUD CLAIM AND CLAIM FOR PUNITIVE DAMAGES IN THAT IT SHOWED INTENT, WILLFULNESS, AND A RECKLESS INDIFFERENCE TO THE RIGHTS OF OTHERS.**

**A. STANDARD OF REVIEW**

The Court reviews the exclusion of evidence for abuse of discretion. *See Whelan v. Mo. Pub. Serv., Energy One*, 163 S.W.3d 459, 461 (Mo. App. W.D. 2005).

**B. TESTIMONY ABOUT SIMILAR LICENSE VIOLATIONS WAS ADMISSIBLE.**

Plaintiff sought to present testimony from Jose Lovato, a former AGE information technology manager, that:

- There were other instances where AGE did not have sufficient licensure for its use of other software programs (Trial Ex. 266, Lovato, Offer of Proof at 1-2) (SA 483-484));
- Mr. Lovato raised concerns about insufficient licensure (*Id.*); and
- One of the reasons Mr. Lovato left AGE was its illegal use of software (*Id.*).

This evidence was relevant for several reasons. First, Defendant's state of mind is relevant to Plaintiff's fraud claim because it shows an intent and motive to deceive. Missouri courts have routinely admitted similar bad acts in cases involving fraud and

punitive damages. *See, e.g., Rinehart v. Shelter Gen. Ins. Co.*, 261 S.W.3d 583, 591 (Mo. App. W.D. 2008) (“conduct not directly related to the claim becomes admissible if the acts are sufficiently connected to show the defendant’s disposition, intention, or motive in the acts central to the current claim of damage.”); *see also Davies v. Vories*, 42 S.W. 707, 709 (Mo. App. 1897) (evidence of similar acts of party accused of fraud is admissible to establish intent). AGE’s failure to comply with other licenses is relevant to its knowledge, intent and reckless disregard for the rights of others. Further, AGE cannot argue that it mistakenly or unintentionally violated the license (or that it mistakenly misled Overlap) when it had a practice of routinely violating software licenses. For all these reasons, evidence of similar fraudulent conduct is admissible in Missouri.

## **CONCLUSION**

The trial court did not abuse its discretion in denying AGE's motion for new trial based on juror nondisclosure. Because Overlap submitted sufficient evidence supporting its fraud and punitive damages claim, this Court, like the Court of Appeals, should affirm the verdict on these counts, and therefore, affirm the judgment below and end this long-pending case. If, however, this Court remands the case for a new trial, then Overlap's points on its contingent cross appeal should be sustained.

Respectfully Submitted,

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**CERTIFICATION PURSUANT TO MO. R. CIV. P. 84.06(C)**

Pursuant to Mo. R. Civ. P. 84.06(c), the undersigned counsel hereby certifies as follows: (1) This brief complies with the limitations contained in Mo. R. Civ. P. 84.06(b); and (2) this brief was prepared using Microsoft Word as the word processing program. The word count feature of Microsoft Word was used to perform the word count. By use of that feature, the word count for the Brief of Respondents is 29,268 words, excluding the cover page, certificates and signature block.

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Attorney for Respondent

**CERTIFICATE OF CD-ROM**

Pursuant to Mo. R. Civ. P. 84.06(g), the undersigned counsel certifies that the accompanying CD-ROM contains one copy of the Substitute Brief of the Respondent. Counsel further certifies that this CD-ROM has been scanned for viruses and is free of viruses.

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Attorney for Respondent

**CERTIFICATE OF SERVICE**

I hereby certify that two true and correct copies of the Substitute Brief of Respondent in both paper copy and on a CD-ROM and two copies of the Substitute Appendix, which were sent via Federal Express for filing this date with the Clerk of the Missouri Supreme Court, have been served via Federal Express, postage prepaid, on the 14th day of December, 2009, to the following:

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