IN THE
MISSOURI SUPREME COURT

No. SC96280

SUN AVIATION, INC.

Plaintiff/Respondent,

v.

L-3 COMMUNICATIONS AVIONICS SYSTEMS, INC.

Defendant/Appellant.

Appeal from the Circuit Court of Jackson County
Hon. James F. Kanatzar

SUBSTITUTE BRIEF FOR APPELLANT L-3 COMMUNICATIONS AVIONICS SYSTEMS, INC.

BRYAN CAVE LLP

Edward F. Downey, #28866
Riverview Office Center
221 Bolivar Street
Jefferson City, MO 65101
Tel: (573) 556-6622
Fax: (573) 556-7442

Thomas C. Walsh, #18605
Elizabeth C. Carver, #34328
One Metropolitan Square
211 North Broadway, Suite 3600
St. Louis, Missouri 63102
Tel: (314) 259-2000
Fax: (314) 259-2020

Caleb Phillips, #66148
1200 Main Street, Suite 3500
Kansas City, MO 64105
Tel: (816) 374-3200
Fax: (816) 374-3300

Attorneys for Defendant/Appellant
L-3 Communications Avionics Systems, Inc.

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JURISDICTIONAL STATEMENT

Defendant-appellant L-3 Communications Avionics Systems, Inc. ("L-3") appeals from an amended judgment entered in a court-tried case on April 8, 2016 (Apdx-A7-47).[1/] The trial court granted the motion of plaintiff-respondent Sun Aviation, Inc. ("Sun") for partial summary judgment on September 4, 2015, entering judgment for liability in favor of Sun and against L-3 on Count I (improper notice of termination in violation of §407.405, RSMo.),[2/] Count II (termination without good cause in violation of §407.753), and Count III (refusal to repurchase inventory in violation of §407.860) of Sun's second amended petition (Apdx-A1-6).

After the parties waived trial by jury, a bench trial was held September 21-22, 2015, on damages on Counts I, II, and III; on Sun's remaining claim for concealment; and on L-3's counterclaims. On January 25, 2016, the court entered judgment in favor of Sun on Count IV (concealment); awarded Sun $7,600,659 in damages on Counts I, II, and IV, which it determined to be duplicative; awarded Sun $50,000 in damages on Count III; and entered judgment for Sun and against L-3 on L-3's counterclaims (the "Judgment"). After Sun moved for attorney's fees, the court entered its Amended Order and Judgment on April 8, 2016 (the "Amended Judgment"), adding an award of $900,000 in fees and $42,332.47 in costs (Apdx-A7-47).

1/ The record on appeal in this case will be cited as follows: trial transcript ("Tr.-__"); legal file ("LF-__"); trial exhibits ("Ex.-__); substitute appendix ("Apdx-__").

2/ All statutes referenced herein are Missouri Revised Statutes.

L-3 timely filed its notice of appeal from the Judgment to the Missouri Court of Appeals, Western District, on February 25, 2016 (LF-1281), and filed a second notice of appeal on May 3, 2016, after entry of the Amended Judgment (LF-1408). On January 17, 2017, the Western District affirmed the Amended Judgment under Rule 84.16(b). L-3 filed its Motion for Rehearing and its Application for Transfer on February 1, 2017, which the Western District denied on February 28, 2017. On March 15, L-3 filed the Application for Transfer in this Court that was sustained on May 2, 2017.

I. INTRODUCTION

L-3's appeal arises from the termination of its relationship with Sun, which had distributed L-3's products – aircraft component parts – from 2003 until 2012. The parties' relationship was terminable at will and unwritten, except for a contract in effect between December 2008 and December 2010, which provided that L-3 could terminate Sun without cause upon 90 days' notice.

In 2012, almost two years after the written contract expired, L-3's parent company decided that divisions in its Avionics Products Sector, including L-3, would no longer be allowed to enter into or renew distributor agreements. Instead, agreements would be managed at the Sector level and would cover all five divisions in the Sector. As a result, L-3's parent directed L-3 to terminate its division distributorships, including Sun's. Sun, which acknowledges that it has not paid L-3 for products ordered both before and after termination and sold at a profit, sued L-3 for termination without proper notice in violation of §407.405 (the "Franchise Act"); termination without good cause in violation of §407.753 (the "Power Equipment Act"); refusal to repurchase inventory in violation of §407.860 (the "Inventory Repurchase Act"); and fraudulent concealment of its parent's evolving corporate plans.[3/]

[3/] Sections 407.405, 407.753, and 407.860 are all provisions of Chapter 407, the Merchandising Practices Act. For the sake of clarity, we refer to the various statutory sections by titles that indicate their subject matter.

In entering judgment for Sun on all its claims, the trial court committed three critical errors that led to an irrational and unforeseeable result. First, the court defined "industrial, maintenance and construction power equipment" so expansively that the Power Equipment Act and the Inventory Repurchase Act will cover manufacturers of any product, used in any industry, that has a motor, an engine, a battery, or an electrical cord. The Power Equipment Act, in particular, has onerous consequences for manufacturers whose products fall within its ambit. Once a manufacturer has entered into a contract – written or parol – with a Missouri distributor, regardless of the terms of that contract, the manufacturer must continue the distributorship into perpetuity unless it can demonstrate "good cause" for the cancellation, termination, or non-renewal of the contract. The Act defines "good cause" only in terms of a deficiency or wrongdoing on the distributor's part, including non-compliance with a contractual requirement, filing for bankruptcy, and conviction of a felony. §407.753.1. If the court's absurdly broad statutory interpretation is allowed to stand, manufacturers of products no one would describe as "industrial power equipment" – lamps, electric staplers, computers – who contract with Missouri distributors will either be consigned to a perpetual arrangement or face substantial liability if they later choose to restructure their distribution systems.

Second, the court imposed on L-3 a duty to disclose to Sun L-3's parent company's evolving organizational plans, based on the highly speculative conclusion that Sun could have avoided termination had it known of the plans. It imposed the duty despite the parties' arm's-length, at-will commercial relationship, based solely on L-3's "superior knowledge" of those plans, and on L-3's acknowledgement that Sun had “confidence and trust” in L-3. Because companies commonly have trust and confidence in their business partners, the court’s ruling greatly expands the fraudulent-nondisclosure cause of action and threatens the ability of companies to evaluate their structures and processes in confidence.

Third, the court awarded Sun lost profits extending to 2030 – 18 years after termination – not only on Sun’s improper termination and concealment claims, but also on its claim that it did not receive the 90 days’ notice of termination required under both the Power Equipment Act and the Franchise Act.

II. STATEMENT OF FACTS

A. The Parties and the Products.

Headquartered in Michigan, defendant L-3 manufactures airplane instruments (Tr.-134, 157, 190-91). At all times relevant to this dispute, L-3 was a separately-incorporated, wholly-owned division of L-3 Communications, Inc. ("L-3 Communications") (Tr.-129, 157-58, 190-91).[4/] L-3 and four other divisions constitute the Avionics Products Sector of L-3 Communications (the "Sector") (Tr.-128-29, 144, 166-68). Plaintiff Sun is a Missouri-based distributor of aircraft instruments, which it purchases from various manufacturers and sells to aircraft owners (Tr.-12-14, 16-17). Sun is a private company owned by its president, Jeffrey Gregg (Tr.-12).

In 2003, L-3 entered into an oral agreement with Sun to distribute L-3's power supplies and its AIM and JET lines of gyros (the "products") (Tr.-16, 24, 43, 172). Gyros calculate and display an aircraft's "attitude" – the direction of its movement (LF-389, 404). Sun sold L-3's two-inch and three-inch electromechanical gyros with mechanical, spinning bases, which cost approximately $3,800-$4,000 (Tr.-29, 172, 193-94; LF-271). The gyros are about the size of a shoebox, do not have an internal power source, and must draw power from another source to operate (Tr.-134; LF-282). AIM is a lower-cost product line, used in lighter aircraft; JET gyros calculate the same information as AIM gyros but have a different display and are used in higher-end business jets, air transport, and military aircraft (Tr.-172, 193-94; LF-679).

4/ L-3 Communications is currently known as L-3 Technologies, Inc.

The L-3 power supplies that Sun sold are emergency back-up batteries used to power an instrument, such as a gyro, for about an hour (Tr.-24; LF-271). They do not supply power to the aircraft itself, just to instruments (LF-271, 282). The power supplies contain six batteries and weigh less than 14 pounds (LF-271, 575-76). They must be charged before installation, and are then charged by the aircraft's battery system (LF-271). Like the gyros, the power supplies are installed in an aircraft's cockpit (Tr.-134; LF-271).[5/]

B. L-3 and Sun's Relationship.

Sun distributed products for approximately 25 aircraft instrument manufacturers in addition to L-3 (Tr.-43). Sun did not sell L-3's products to aircraft manufacturers, but to the aftermarket – owners and operators of planes already in service that required maintenance (Tr.-16-17; 153). L-3 required Sun to purchase an initial stock of $50,000 in inventory, but required no subsequent minimal stocking (Tr.-16; LF-498-99). In 2003, shortly after Sun became an L-3 distributor, L-3 canceled all of its distributors, including Sun (Tr.-39). Sun's president, Jeffrey Gregg, communicated with Shelly Buckley, then a manager at L-3, advising that Sun's sales were increasing and that "we would very much like to remain a distributor" (Tr.-39, 138-39). Buckley agreed to retain Sun as a distributor (Tr.-39).

In 2005, Sun became L-3's primary distributor for the AIM and JET lines (Tr.-17-18, 42). The parties had no written contract until 2008, when they executed an

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5/ Photos of the gyros and power supplies are in the Appendix (Apdx-A56).

International Distributor Agreement (the "IDA") (Tr.-43-45; Ex.-209). The IDA became effective December 8, 2008 (Tr.-45, 50). It had a two-year term, but provided that L-3 "may terminate this Agreement at will, without any cause whatsoever, upon ninety days written notice to Distributor" (Tr.-47, 50-52; Ex.-209 at p. 9). L-3 did not exercise the termination-upon-notice provision, and the IDA's two-year term expired December 8, 2010, without renewal (Tr.-50-52, 54). The IDA was the only written agreement between the parties (Tr.-43, 52). Sun did not at any time have an exclusive arrangement with L-3; Sun acknowledged in the IDA "that its appointment hereunder is nonexclusive," and L-3 "reserve[d] the right to appoint consultants, representatives or additional distributors" to promote and sell its products (Ex.-209 at 1). L-3 in fact sold directly to some dealers (LF-859-61).

Although they were no longer operating under its terms after the IDA expired, the parties continued to do business as usual, with Sun placing orders for L-3's products and L-3 shipping them (Tr.-52-53). The parties' arrangement never had an agreed-upon duration other than as provided in the IDA, but in Gregg's viewpoint, "it was not something that was going to end" (Tr.-44, 53-54). Gregg agreed that his "hope to be a distributor forever was based on [his] hopeful expectation that [Sun] could continue being a distributor" and the "good relationship" between Sun and L-3 (Tr.-56).

C. **Termination of Sun.**

Sometime in 2010, L-3's parent's Avionics Products Sector decided to consider consolidating management of its agreements – including those with distributors, representatives, and consultants – across the Sector's five divisions, including L-3 (Tr.-

128-30, 143; LF-806-07, 966, 1035). L-3 was advised not to renew any distributor agreements while the consolidation process was pending (Tr.-143; LF-968-69, 972). Consolidation was an "ongoing process" at the Sector, "imposed upon" L-3, and it was "a couple of years" before L-3 received "clear direction on where the sector wanted to go in various areas" (Tr.-130, 143; LF-802). When the Sector's consolidation process began, L-3 had no indication it would result in termination of distributors (LF-806-09).

"At the very end of the process," when the Sector had "determined what they were going to do with the agreements, which was right at the point we had to go out and do these terminations, that was when [L-3 was] told what was going on and what the decision processes were" (LF-806). The Sector concluded that its "five divisions [had] to have common agreements, whether they be representative agreements, distributor agreements, consultant agreements, all of the agreements have to fit the five divisions, so there [were] no division specific agreements anymore" (LF-806-07; *see also* Tr.-128-29). As a consequence, individual divisions could no longer add or renew distributor agreements, and existing distributor relationships had to be terminated (Tr.-146-47, 192; LF-806). L-3 currently has no divisional distributors, and its gyros and power supplies are sold through dealer channels, not distributors (Tr.-192; LF-821, 1030, 1033).[6/]

[6/] Dealers install L-3's product in their customers' aircraft, using licensed technicians; distributors, like Sun, do not perform repairs or installations but buy products from L-3 and resell them to their customers (Tr.-191-92).

After the Sector directed L-3 to terminate Sun as a distributor, L-3's Manager of Aftermarket Programs, Kim Stephenson, informed Sun's Jeffrey Gregg of the termination in a phone call on July 19, 2012, followed by an email (Tr.-80-81, 174; LF-806, 1035-36; Ex.-207). Stephenson sent Gregg "formal notification" of termination in an August 2 letter, stating in part, "As both [L-3's] Shelly [Buckley] and I have conveyed, the consolidation of L-3 electronics divisions has changed the way distributors are selected and we (Avionics Systems) are no longer authorized as a stand-alone division to add or renew distributor agreements" (Tr.-55; Ex.-14). The decision to end the relationship with Sun was not based on any deficiency in its performance (Tr.-151-52).

According to Shelly Buckley, after L-3 was directed to terminate Sun, Kim Stephenson approached the Sector to advise it that Sun had been a good distributor and that terminating it was "probably not going to be in [L-3's] best interest" (Tr.-145-46; LF-807-09). The Sector responded that "divisions cannot run their own agreements. It has to come at the sector level" (Tr.-145). L-3 had no role in the decision to terminate Sun (Tr.-128, 129-130, 142, 150, 174, 176). There was nothing Sun could have done to avoid termination (Tr.-153, 158, 179-80). After Sun's termination, Jeff Gregg repeatedly expressed Sun's desire to remain as L-3's distributor and asked for contact information for the Sector's decisionmakers (Tr.-75, 106, 110, 112, 150; Ex.-206, 207, 210, 214). L-3 advised Gregg that the decision was "closed and final" and that contacting the Sector would do no good (Tr.-76, Ex.-206).

D. Post-Termination Disputes.

Stephenson agreed on behalf of L-3 that although L-3 could "no longer accept orders for 'stock,'" L-3 would "sell product to [Sun] at established distributor pricing for the next 30 days to fulfill any orders you have already accepted from your customers" (Tr.-59; Ex.-14). Sun ordered $204,053.13 in products from L-3 after it received notice of termination (Tr.-58-60, 61, 68; Ex.-200, 205). A dispute arose between L-3 and Sun regarding Sun's failure to pay L-3 for those products, as well as approximately $74,000 in products Sun had ordered before termination (Tr.-62-63, 68; Ex.-200). Sun acknowledges that it has not paid the $278,372.65 L-3 claims it is owed for the pre- and post-termination orders, and that Sun sold those products to customers for a profit (Tr.-62-63, 67-68; Ex.-200).

In emails between Gregg and L-3 regarding Sun's past-due amount, Gregg stated repeatedly that he wanted and intended to pay L-3 but that Sun lacked available funds. *See* Ex.-206 ("I want to clear what I owe, I just can't"; "I do want to pay you off and be done with this situation, it is not something we want to have to deal with, I simply don't have the funds"; "[w]e will continue in our endeavors to be in a position to pay the outstanding amounts due"; "[w]e are working on sorting out our credit line with our bank in order to pay the outstanding invoices"; "[w]e fully intend to pay off the outstanding invoices"). Gregg did not dispute the amount owed to L-3; the only reason he ever expressed to L-3 for not paying was a lack of funds (Tr.-67-68, 71-75, 77; Ex.-206).

A separate dispute arose over Sun's request that L-3 allow Sun to return its unsold inventory (Tr.-34). L-3 declined to accept the inventory, which Gregg valued at

$254,000 (Tr.-34-35, 178-79; Ex.-12). Sun then sold most of that inventory, with Gregg estimating that Sun still had about $50,000 in inventory on hand at the time of trial (Tr.-35, 96-98). This unsold inventory is separate from the $278,372.65 in products that Sun has sold but has not paid L-3 for (Tr.-98-100).

E. Sun's Sales and Profits.

Between 2006 and the termination of Sun's distributorship in August 2012, L-3 products constituted approximately 29 percent of Sun's sales (LF-1099, 1132-33; Ex.-55). In the last three full years that Sun sold L-3 products, those sales decreased from $3,150,671 in 2008 to $2,003,897 in 2011 (Tr.-85; LF-1135; Ex.-55). Those numbers represent a decrease of 36 percent in Sun's L-3 sales over that three-year period, an average annual decline of 12 percent (Tr.-85; LF-1135-38).

F. Proceedings Below.

Sun filed its initial petition against L-3 in Jackson County Circuit Court on January 8, 2013, followed by an amended petition on February 4, 2013 (LF-1, 17). Sun's amended petition alleged four causes of action against L-3: (1) failing to give Sun 90 days' notice of termination in violation of the Franchise Act (Count I); (2) terminating Sun's "franchise agreement" without good cause in violation of the Power Equipment Act (Count II); (3) refusing to repurchase the inventory of L-3 products Sun held as of the date of termination, in violation of the Inventory Repurchase Act (Count III); and (4) concealing its plan to terminate Sun because "[L-3] had the duty to disclose its plan to terminate [Sun] so that [Sun] could make reasoned decisions about ordering inventory for stock" (Count IV) (LF-17-22). L-3 filed four counterclaims – breach of contract, action on account, unjust enrichment, and quantum meruit – against Sun based on Sun's failure to pay for products ordered and delivered after September 4, 2012 (LF-32-40).

Shortly after L-3 moved for summary judgment, Sun sought leave to file a second amended petition adding L-3's parent, L-3 Communications Corp., as a defendant (LF-114, 226). Sun told the court that the amendments "are a direct result of taking the depositions of [L-3's] employees," who "testified that the parent company, L-3 Communications, Inc. [sic], directed it/them to terminate" Sun (LF-226). Over L-3's opposition, the court granted Sun leave to file its second amended petition (LF-228-31, 232-38). L-3 renewed its four counterclaims, recharacterizing the first as a claim for account stated (LF-242, 247).

L-3 filed its amended motion on February 5, 2015, seeking summary judgment on all of Sun's claims as well as L-3's counterclaims (LF-259). Because its parent had not been served, the motion was on L-3's behalf only; Sun later dismissed the parent (LF-259, 715). Two months later, Sun moved for partial summary judgment on Counts I-III of its petition (LF-347-48).

The court denied L-3's summary judgment motion in a one-page order on May 7, 2015 (LF-665). On September 4, the court granted Sun's motion for partial summary judgment and entered its Judgment on Counts I-III (LF-717).[7/] The court stated that its

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7/ The court held L-3 liable under the Franchise Act for failing to provide Sun 90 days' notice of termination. L-3 has not appealed that finding of liability, but Point III, *post*, asserts error in the court's award of 18 years' lost profits for that violation.

resolution of Counts II and III turned on whether L-3's products were "power equipment" as that term is used in the Power Equipment Act and in the definition of "retailer" in the Inventory Repurchase Act (LF-720-21). Because the statutes do not define the term and "[n]o superior court" had defined it, the court looked to the dictionary definitions of the words "power" and "equipment" (LF-720-21). The court then concluded that "the ordinary meaning of the term 'power equipment' is any article or implement that is a source of energy, supplies energy, or uses energy in an operation or activity. Applying this meaning to the issue at hand, the Court finds that L-3's power supplies and gyros are 'power equipment' …." (LF-721). The court ordered the case to proceed to trial on damages on Counts I-III and on all remaining claims and counterclaims (LF-722).

After the parties waived trial by jury (LF-723), a bench trial was held September 21-22, 2015. The court entered its Order and Judgment on January 25, 2016, in favor of Sun on its concealment claim (LF-1165, 1196-98). The court found Sun's "'trust and confidence'" in L-3 and Sun's lack of knowledge of "the consolidation plan" "sufficient to establish a duty to disclose" (LF-1171(¶32), 1197). Sun argued that because Gregg had persuaded Shelly Buckley to reinstate Sun as a distributor in 2003, Sun "could have convinced the L-3 parent Company to retain Sun Aviation as a distributor. …" (LF-1197). The court expressly found that "there was nothing Sun Aviation could or should have done to avoid termination" (LF-1173 (¶ 52)). It further observed that although L-3 had "told the parent company that Sun Aviation was a good dealer and terminating [it] was not in anyone's best interest[,] [t]his did not change the termination decision, and it is unclear what Sun Aviation could have said to the decisionmakers to change their minds" (LF-1198). Nonetheless, the court stated, curiously, that L-3 had offered no evidence "to rebut Sun Aviation's claim," and inexplicably determined "[t]here is sufficient evidence to conclude that Sun Aviation could have convinced L-3 parent company not to terminate Sun Aviation, if the consolidation plan had not been concealed" (LF-1198).

The court awarded Sun $7,600,659 in lost profits through 2030 – 18 years after its termination – on three separate claims: (1) failure to give 90 days' notice of termination under the Power Equipment Act and the Franchise Act (Count I); (2) termination without good cause under the Power Equipment Act (Count II); and (3) concealment (Count IV) (LF.-1182 (¶113), 1185 (¶127), 1187, 1192-93, 1198).[8/] Although L-3 argued that damages for improper notice under the Power Equipment and Franchise Acts should be limited to lost profits for the 90-day statutory notice period, the court awarded 18 years' lost profits under both statutes (LF-1186-87). According to the court, Sun's damages were not limited to 90 days under the Power Equipment Act because that statute requires

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8/ In all three iterations of its petition, Sun alleged that L-3 had violated the Franchise Act in giving insufficient notice of termination (LF-19, 234-35). But Sun moved for summary judgment on Count I arguing that L-3 had violated both §§407.405 (the Franchise Act) and 407.753.2 (the Power Equipment Act), and although the court's order granting summary judgment on Count I mentions only §407.405, the court's post-trial Amended Order and Judgment, refers to both statutes (LF-348, 718-20; Apdx-A27-29).

that a termination notice state good cause for termination and provide a dealer 60 days to cure any asserted deficiency, and L-3's notice did neither (LF-1186). On Sun's claim under the Franchise Act, which does not require good cause or a right to cure, the court stated that "it has been over three years since the notice was served and defendant has not served a proper notice nor was there any evidence of any plan or intent to do so" (LF-1187).

The court found that the damages under Counts I, II, and IV "duplicate each other such that the total combined judgment" is $7,600,659 (LF-1203). The court also awarded Sun $50,000 on Count III for L-3's refusal to accept return of inventory, and assessed prejudgment interest at 9% beginning August 2, 2012 (LF-1196, 1203).

Sun also prevailed on all of L-3's counterclaims. The court rejected L-3's account-stated claim, finding "no evidence that the parties reached an agreement as to the amount due or that Sun Aviation acknowledged the obligation or made an unconditional promise to pay" (LF-1199). L-3's claim for action on account failed, according to the court, because Gregg did not testify that the charges for the products Sun admittedly did not pay for were "reasonable" (LF-1200). The court further held that Sun's "first-to-breach affirmative defense bars the claim" (LF-1200), even though Sun did not claim – and the court did not hold – that L-3 had breached the parties' contract.

After Sun moved for attorney's fees on its claims for improper notice and wrongful termination under the Power Equipment Act and for violation of the Inventory Repurchase Act (Counts I-III), the court entered its Amended Order and Judgment ("Amended Judgment"), granting Sun $900,000 in fees under §§407.755 and 407.875, and taxing costs of $42,332.47 against L-3 (Apdx-A46-47). Post-judgment interest at 9% was assessed from the date of the Amended Judgment (Apdx-A46).

The Western District affirmed the Amended Judgment in a memorandum order entered under Rule 84.16(b) on January 17, 2017.

III. POINTS RELIED ON

I. **The trial court erred in granting summary judgment in favor of Sun, in denying L-3's motion for summary judgment, and in awarding damages on Sun's claims for improper termination and improper notice of termination under the Power Equipment Act and for refusal to accept return of inventory under the Inventory Repurchase Act because L-3's products are not "industrial, maintenance and construction power equipment used for industrial, construction and maintenance applications" and thus neither statute applies in that (a) the products are component parts that perform in an auxiliary or supplementary manner with other aircraft components and are not end-use machines or equipment that operate and perform work; and (b) the products are not "industrial" because in the context of the Acts, "industrial" connotes processing or manufacturing activities.**

McBud of Missouri, Inc. v. Siemens Energy & Automation, Inc., 68 F. Supp. 2d 1076 (E.D. Mo. 1999), *aff'd*, 210 F.3d 379 (8th Cir. 2000);

Aquila Foreign Qualifications Corp. v. Director of Revenue, 362 S.W.3d 1 (Mo. 2012);

State ex rel. Keystone Laundry & Dry Cleaners, Inc. v. McDonnell, 426 S.W.2d 11 (Mo. 1968);

§407.753;

§407.850(5)(b);

§407.855.

II. The trial court erred in entering judgment in favor of Sun on its fraudulent concealment claim against L-3 because the trial court erroneously declared and/or misapplied the law in determining that L-3 had a duty to disclose its parent corporation's consolidation process in that (a) the consolidation process was not a material fact because L-3 did not know it would lead to Sun's termination and Sun did not establish it could have prevented termination; (b) the mere acknowledgement of trust and confidence does not give rise to a duty to disclose; (c) an at-will, arm's-length commercial relationship does not give rise to a duty to disclose; and (d) a manufacturer does not have a duty to disclose strategic plans to its distributor.

Andes v. Albano, 853 S.W.2d 936 (Mo. 1993);

Blaine v. J.E. Jones Constr. Co., 841 S.W.2d 703 (Mo.App. 1992);

Devery Implement Co. v. J.I. Case Co., 944 F.2d 724 (10th Cir. 1991);

Myklatun v. Flotek Indus., Inc., 734 F.3d 1230 (10th Cir. 2013).

III. The trial court erred in awarding 18 years of lost profits as damages on Count I because the court misapplied and/or erroneously declared the law in that: (1) the common law and the Franchise Act, §407.410, together limit damages for improper notice to lost profits during the 90-day notice period, loss of goodwill, damages incurred in reliance on the 90 days' notice, costs of suit, and any lost investment made in the franchise relationship, and Sun claimed only damages for lost profits; and (2) the court erroneously

concluded that lost-profit damages were not limited to 90 days because L-3's notice of termination was not "proper" in some unexplained way.

Ridings v. Thoele, Inc., 739 S.W.2d 547 (Mo. 1987);

American Eagle Waste Indus., LLC v. St. Louis County, 379 S.W.3d 813 (Mo. 2012);

Armstrong Bus. Servs., Inc. v. H & R Block, 96 S.W.3d 867 (Mo.App. 2002);

§407.405;

§407.410.2;

§407.753.2.

IV. The trial court erred in its awards of 18 years of lost profits as damages under Count I, Count II, and Count IV because the awards are speculative, irrational, and against the weight of the evidence in that the awards (a) were based on expert testimony and calculations that (1) improperly relied on a 2014 sales projection that proved to be incorrect; and (2) improperly relied on a mischaracterization of the correlation between Sun's pre-termination sales of L-3 products and its pre-termination sales of non-L-3 products; (b) were based on projections that assumed Sun would have increased its sales of L-3 products by $358,051 each year through 2030, even though Sun's sales of L-3 products had decreased by a total of 36 percent over the last three years of Sun's distributorship; and (c) compounded the speculation inherent in Vianello's testimony by projecting the assumed annual increase in sales over an 18-year period.

Farmers' Elec. Coop., Inc. v. Missouri Dep't of Corr., 59 S.W.3d 520 (Mo. 2001);

Central Am. Health Sciences Univ. v. Norouzian, 236 S.W.3d 69 (Mo.App. 2007);

Coonis v. Rogers, 429 S.W.2d 709 (Mo. 1968);

Ameristar Jet Charter, Inc. v. Dodson Int'l Parts, Inc., 155 S.W.3d 50 (Mo. 2005).

V. The trial court erred in entering judgment against L-3 on its counterclaim for account stated on the grounds that "there was no evidence that the parties reached an agreement as to the amount due or that Sun Aviation acknowledged the obligation or made an unconditional promise to pay" because the court misapplied and/or erroneously declared the law in that the uncontested evidence at trial demonstrated L-3's right to judgment because (a) Sun acknowledged it owed L-3 on the unpaid invoices; (b) Sun acknowledged that the total amount of the unpaid invoices was $278,372.65; (c) Sun never objected to the amount L-3 stated was due; (d) Sun repeatedly stated its intention to pay the outstanding invoices; and (e) Sun admitted that it sold the products to its customers at a profit.

Ozark Mountain Timber Prods., Inc. v. Redus, 725 S.W.2d 640 (Mo.App. 1987);

Gerstner v. Lithocraft Studios, Inc., 258 S.W.2d 250 (Mo.App. 1953);

Watkins Prods., Inc. v. Peek, 461 S.W.2d 341 (Mo.App. 1970);

Chisler v. Staats, 502 S.W.2d 424 (Mo.App. 1973).

VI. The trial court erred in entering judgment against L-3 on its counterclaim for action on account on the grounds that L-3 did not carry its burden of proving that L-3's charges for the products which Sun ordered but did not pay for were reasonable and that L-3's claim was barred by Sun's first-to-breach defense because the court misapplied and/or erroneously declared the law in that (a) the reasonableness of L-3's prices is demonstrated by the uncontested evidence at trial that Sun ordered the products it has not paid for knowing the prices charged by L-3; Sun never objected to those prices; Sun sold all of the products in question at a profit; and Sun acknowledged it owed L-3 on the outstanding invoices; and (b) the first-to-breach rule does not apply because Sun did not allege and the court did not hold that L-3 breached the parties' contract.

Women's Care Specialists, LLC v. Troupin, 408 S.W.3d 310 (Mo.App. 2013);

Grothaus v. Brown, 690 S.W.2d 431 (Mo.App. 1985);

Moran v. Hubbartt, 178 S.W.3d 604 (Mo.App. 2005);

Williams Constr., Inc. v. Wehr Constr., LLC, 403 S.W.3d 660 (Mo.App. 2012).

IV. STANDARD OF REVIEW

L-3's points on appeal arise either from the trial court's grant of partial summary judgment or from aspects of the court's Amended Judgment entered after a bench trial, and therefore all were preserved for appeal. Point I asserts that the trial court erred in granting summary judgment in favor of Sun's claims that L-3 terminated it without proper notice and without cause in violation of the Power Equipment Act (Counts I and II) and that L-3's refusal to accept back Sun's inventory of L-3's products violated the Inventory Repurchase Act (Count III). Whether summary judgment is proper "is purely an issue of law which this Court reviews *de novo.*" *Hill v. Ford Motor Co.*, 277 S.W.3d 659, 664 (Mo. 2009) (citing *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. 1993)).

This Court uses the same criteria as the trial court to evaluate whether summary judgment is proper, "review[ing] the record in the light most favorable to the party against whom judgment was entered." *Hill*, 277 S.W.3d at 664. The court's ruling on Counts I-III turned on its interpretation of the same term used in both statutes: "industrial, maintenance and construction power equipment." Statutory interpretation is likewise a legal question reviewed *de novo.* *In re A.L.R.*, 511 S.W.3d 408, 412 (Mo. 2017).

Points II through VI seek review of various aspects of the court's Amended Judgment. The judgment in a court-tried case may not be upheld if there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Ivie v. Smith*, 439 S.W.3d 189, 198-99 (Mo. 2014) (citing *Murphy v.*

Carron, 536 S.W.2d 30, 32 (Mo. banc 1976)). This Court reviews *de novo* "both the trial court's legal conclusions and its application of law to the facts." *Zweig v. Metropolitan St. Louis Sewer Dist.*, 412 S.W.3d 223, 231 (Mo. 2013).

Point II asserts that the court erred in holding that L-3 had a duty to disclose the consolidation plan to Sun. Whether a duty exists is a question of law. *Zubres Radiology v. Providers Ins. Consultants*, 276 S.W.3d 335, 340-41 (Mo.App. 2009).

Point III addresses the proper measure of damages on Sun's statutory claims for improper notice of termination, which is a question of law that this Court reviews *de novo*. *Comens v. SSM St. Charles Clinic Med. Grp., Inc.*, 335 S.W.3d 76, 81 (Mo.App. 2011). Point IV deals with the amount of damages the court awarded, which is a factual issue. *See, e.g., Penzel Constr. Co. v. Jackson R-2 Sch. Dist.*, ___ S.W.3d ___, 2017 WL 582663, at *12 (Mo.App. Feb. 14, 2017).

Points V and VI challenge the court's entry of judgment for Sun on L-3's counterclaims. L-3 asserts in Point V that the court misapplied or erroneously declared the law in denying L-3's account-stated counterclaim on the ground that Sun did not expressly promise to pay L-3 $278,372.65 on the unpaid invoices. Point VI similarly argues that the court erroneously declared or applied the law in rejecting L-3's action on account counterclaim for the reason that L-3 did not offer testimony expressly stating that its prices were reasonable, and in holding in the alternative that the claim was barred by the first-to-breach rule. The court's rulings on these counterclaims did not turn on any credibility rulings or contested evidence, and therefore raise issues of law, reviewed *de novo*. *See, e.g., White v. Director of Revenue*, 321 S.W.3d 298, 308 (Mo. 2010).

ARGUMENT

I. **The trial court erred in granting summary judgment in favor of Sun, in denying L-3's motion for summary judgment, and in awarding damages on Sun's claims for improper termination and improper notice of termination under the Power Equipment Act and for refusal to accept return of inventory under the Inventory Repurchase Act because L-3's products are not "industrial, maintenance and construction power equipment used for industrial, construction and maintenance applications" and thus neither statute applies in that (a) the products are component parts that perform in an auxiliary or supplementary manner with other aircraft components and are not end-use machines or equipment that operate and perform work; and (b) the products are not "industrial" because in the context of the Acts, "industrial" connotes processing or manufacturing activities.**

The Power Equipment Act, §407.753.1, provides that a manufacturer of "industrial, maintenance and construction power equipment used for industrial, maintenance and construction applications" cannot "terminate, cancel, or fail to renew" a written or parol contract with a distributor "without good cause," as defined in the Act. Section 407.753.2 requires a supplier to give "ninety-days' prior written notice of termination," and to provide sixty days "to cure any claimed deficiency." Similarly, the Inventory Repurchase Act defines "retailer" to include "any person, firm or corporation engaged in the business of selling, repairing and retailing … [i]ndustrial, maintenance and construction power equipment," and allows a "retailer" to require a manufacturer to repurchase inventory upon termination. §§407.850(5)(b), 407.855.

In determining that the L-3 products sold by Sun were covered by the Power Equipment and Inventory Repurchase Acts, the trial court erred in two significant respects. First, the court went astray in parsing the term "power equipment," looking to the separate dictionary definitions of each word, and concluding that "the ordinary meaning of the term 'power equipment' is any article or implement that is a source of energy, supplies energy, or uses energy in an operation or activity" (Apdx-A5).

Second, the court virtually ignored the phrase "industrial, maintenance and construction" that precedes the term "power equipment" in both statutes, and disregarded the limitation that the Power Equipment Act applies only to products used for industrial, maintenance and construction applications. The result is a definition so broad that few manufacturer-distributor arrangements will escape its reach. Given that a manufacturer of products covered by the Power Equipment Act cannot, without good cause, terminate or even choose not to renew a written or parol contract with any Missouri distributor, the trial court's sweeping definition exposes legions of unsuspecting manufacturers to substantial liability far beyond the legislative intent.

A. The court's definition of "power equipment" is overly broad.

In interpreting the phrase that defines the Power Equipment Act's scope – "industrial, maintenance and construction power equipment used for industrial, maintenance and construction applications" – the court got off on the wrong foot. It focused only on the term "power equipment," disregarding a settled maxim of statutory interpretation. As this Court has directed, "[i]n determining legislative intent, no portion of a statute is read in isolation, but rather is read in context to the entire statute, harmonizing all provisions." *Aquila Foreign Qualifications Corp. v. Director of Revenue*, 362 S.W.3d 1, 4 (Mo. 2012). The United States Supreme Court has similarly instructed:

> "The definition of words in isolation … is not necessarily controlling in statutory construction. *A word in a statute may or may not extend to the outer limits of its definitional possibilities.* Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) (emphasis added).

Neither the Power Equipment Act nor the Inventory Repurchase Act applies simply to "power equipment"; the references to "industrial," "maintenance," and "construction" inform the meaning of the term. "Industrial power equipment," "maintenance power equipment," and "construction power equipment" conjure large, self-propelled equipment and machines that transform raw materials into finished goods, move earth, or tear down or help build structures. *See, e.g.*, Webster's Third New Int'l Dictionary at 1779 (defining "power duster" as "a motor-driven agricultural machine for spreading insecticidal dusts"; "power mower" as "a motor-driven lawn mower"; and "power shovel" as "a power-operated shovel consisting of a boom or crane that supports a dipper handle with a dipper at the end of it and used principally for excavation and removal of debris”).

Although L-3 argued that *McBud of Missouri, Inc. v. Siemens Energy & Automation, Inc.*, 68 F. Supp. 2d 1076 (E.D. Mo. 1999), *aff’d*, 210 F.3d 379 (8th Cir. 2000), supported its interpretation of the Power Equipment Act (LF-332-34), the trial court ignored *McBud* (Apdx-A4-5). But *McBud*’s reasoning is highly persuasive here, and not merely because it is the only published opinion to have interpreted the term “power equipment” within the meaning of the Power Equipment Act. Rather, the federal district court there determined the legislative intent in a manner that comports with the common understanding of the statutory language and purpose.

The equipment at issue in *McBud* – circuit breakers, switches, bus plugs, transformers, and panelboards – was “used to distribute electrical power through a series of interrelated machines and equipment in order to allow [them] to work in a coordinated fashion.” 68 F. Supp. 2d at 1079. The plaintiff, McBud, characterized the equipment as “components [that] are an integral part of many automation systems in industrial, construction and maintenance uses,” and the court assumed that the equipment was used in such applications. *Id.*

The district court rejected McBud’s contention, based on “the broad definitions of the words ‘power’ and ‘equipment,’” that the components it distributed constituted “power equipment” under the Act. *Id. at* 1080-81.

> “The Court finds it strains common sense to conclude that the Missouri legislature intended the term ‘power equipment’ to include items of

> equipment or component parts which work in an auxiliary or supplementary manner with other machines or equipment. If plaintiff's contention were taken to its logical extreme, a distributor of electrical outlets or electrical wiring, whose products were utilized in an industrial, maintenance or construction setting, would fall within the scope of the statute because those are devices which can conduct power to enable machines to perform work. This would be an absurd result …. Rather, the language of the statute indicates that, at minimum, 'power equipment' must refer to end use machines and equipment which operate and perform work using some power source, whether electrical, gas, steam, or other, or their own internal power source, such as an internal combustion engine." *Id. at* 1081-82.

See also Machine Maint., Inc. v. Generac Power Sys., Inc., No. 4:12CV793 JCH, 2013 WL 5538778, at *4 (E.D. Mo. Oct. 8, 2013) (applying same definition).

The trial court's interpretation of the Act is flatly at odds with *McBud*, which was summarily affirmed by the Eighth Circuit. *McBud* squarely rejected the notion that "component parts which work in an auxiliary or supplementary manner with other machines or equipment" or "devices which can conduct power to enable machines to perform work" could constitute power equipment. 68 F. Supp. 2d at 1081. L-3's products are component parts that work in an auxiliary manner – the gyros by displaying the aircraft's position, and the power supplies by conducting back-up power to instruments such as the gyros. Indeed, Sun's Gregg agreed that the products were components (LF-271, 496). Neither product is an "end use machine[] … which operate[s] and perform[s] work," which *McBud* required "at minimum" to constitute power equipment. *Id.* at 1081-82. The aircraft itself is the end-use machine; the gyros and power supplies are only two of many, many components.

Although it held the meaning of "power equipment" could be determined without extrinsic evidence, the federal court in *McBud* concluded, "[i]n the alternative," that the Act's language was ambiguous as to the products covered by "industrial, maintenance and construction power equipment." *Id.* at 1082. The court thus deemed it appropriate to consider extrinsic evidence to divine the legislative intent. To that end, it examined several affidavits submitted by the former state senator who sponsored the bill that was adopted as the Act; the chief executive officer of the trade association that "spearheaded" the drafting and passage of the Act; an attorney for that association who was the "primary author" of the Act's language; and an employee of Deere & Co., who was involved in negotiating the language of the Act and similar state statutes. *Id.*

According to those affidavits, the trade association sought to obtain statutory rights for dealers of major industrial, maintenance, and construction equipment, similar to the existing protections for dealers of agricultural equipment (§407.838, *et seq.*) and grounds-care equipment (§407.895, *et seq.*). *Id.* All four affiants understood "power equipment" to "operate[] with its own power source, such as an internal combustion engine, and use[] that power to propel itself and/or to do work." *Id. at* 1083-84. The trade association's CEO and attorney gave examples such as backhoes, tractors, forklifts, excavators, and similar heavy equipment. *Id.* at 1083.

The *McBud* court found that the affidavits were "persuasive evidence" of the Act's meaning, and that they "serve to explain the purposes behind the Act and the meaning of the term 'power equipment.'" *Id.* at 1085. "These affidavits establish that the Missouri legislature intended the term 'power equipment' to mean large machinery which operates under its own source of power, such as an internal combustion engine, to propel itself and/or do work." *Id.*

That characterization of the legislature's intent is consistent with the effect of both the Power Equipment and Inventory Repurchase Acts. Limiting a manufacturer's ability to terminate a distributor, and requiring it to buy back inventory after termination makes sense when the products at issue are large equipment that require significant capital outlay to purchase and display. *See, e.g., Terex Corp. v. Southern Track & Pump, Inc.*, 117 A.3d 537, 541 (Del. 2015) (noting that the common supplier practice of imposing a minimum purchase obligation "puts dealers in a tough position: in an unfavorable business climate it can be difficult to move the equipment off their showroom floor") (citation omitted); *FMS, Inc. v. Volvo Constr. Equip. N. Am., Inc.*, 557 F.3d 758, 761 (7th Cir. 2009) ("Once a dealer sinks time and money into developing a brand's reputation in its territory, there is an opportunity for the manufacturer to free ride off this investment by terminating the franchise agreement, opening its own stores, and then earning an unfair profit from the local product loyalty developed by the dealer.").

Here, though, Sun, which sold equipment for 25 other manufacturers, had already recouped its initial investment in L-3 products; it was selling to owners-operators of aircraft that already used L-3 parts; it did not need new facilities or staff when it began distributing for L-3; and it could have sold three or four times as much L-3 product without expanding facilities or workforce "because they are easy sales" (Tr.-36). This Court should adopt *McBud*'s persuasive interpretation of "power equipment."

B. L-3's products are not "industrial."

After defining "power equipment" as expansively as possible, the trial court added, "the Court finds it is not disputed these products are used in the avionics industry" (Apdx-A5). As the court did not otherwise address whether L-3's products were "industrial, maintenance and construction" power equipment or whether they were used in "industrial, maintenance and construction applications," the comment was apparently intended as a finding that L-3's products are "industrial" power equipment used for "industrial" applications. Such a determination disregards prior decisions from this Court as well as an important maxim of statutory construction, and improperly expands the reach of both the Power Equipment Act and the Inventory Repurchase Act.

In *State ex rel. Keystone Laundry & Dry Cleaners, Inc. v. McDonnell*, 426 S.W.2d 11 (Mo. 1968), this Court addressed whether a commercial laundry was an "industrial plant" for purposes of a constitutional provision authorizing cities to lease plants for "manufacturing and industrial development purposes." The Court rejected a definition of "industrial establishment" from an earlier case, noting that in "generalized references to the 'sugar industry' or the 'steel industry,' etc., the word 'industry' is used as a classification of a total line of business endeavor which includes plants, offices and all the accessories of a major element of our business world. Definitions from this point of view are of little value here." *Id. at* 15-16. *See also id.* at 17 (agreeing with

Pennsylvania court that "references to a widespread type of business as an 'industry' are of no consequence" in determining the meaning of "industrial plant").

This Court ultimately concluded that a commercial laundry is "a service institution," not an industrial plant, because it "*neither manufactures anything nor does it process anything by changing its characteristics or nature*; it is not a plant for large-scale storage or assembly; it merely washes garments." *Id. at* 18 (emphasis added). The United States Supreme Court has also recognized that "industrial" can be defined broadly or narrowly. *See Decker v. Northwest Envtl. Defense Ctr.*, 133 S. Ct. 1326, 1336 (2013) (recognizing that "multiple definitions of the terms 'industrial' and 'industry'" exist; "[t]hese words can refer to business activity in general, yet so too can they be limited to 'economic activity concerned with the processing of raw materials and manufacture of goods in factories'") (citing New Oxford American Dictionary 887 (3d ed. 2010)). *See also* Garner's Modern American Usage 448 (2d ed. 2003) ("*Industrial* corresponds to *industry* in the narrow sense of manufacturing goods.").

By implicitly interpreting "industrial" as used in the Power Equipment and Inventory Repurchase Acts to refer to any line of business, the trial court ignored another fundamental principle of statutory interpretation. As this Court has repeatedly instructed, each term in a statute "should be given its own individual meaning" to avoid rendering any term redundant. *Albanna v. State Bd. of Registration for Healing Arts*, 293 S.W.3d 423, 431 (Mo. 2009). Interpreting "industrial" broadly to refer to any business activity would read "construction" and maintenance" out of both Acts; so defined, "industrial" would subsume the construction and maintenance industries.

In addition, defining "industrial" as used in both Acts to refer only to manufacturing and processing activity would be consistent with this Court's use of "industrial" in *Aquila Foreign Qualifications Corp.*, 362 S.W.3d 1 (Mo. 2012), and its progeny. In *Aquila*, the Court rejected the taxpayer's contention that its preparation of food for retail consumption constituted "processing" within the meaning of a statutory sales tax exemption. The Court's conclusion was "guided by the statutory maxim of *noscitur a sociis*—a word is known by the company it keeps." 362 S.W.3d at 5. Noting the other words used in the statutory exemption – manufacturing, compounding, mining, and producing – the Court determined that "[t]he *industrial connotations* of those terms … indicate that the legislature did not intend 'processing' to include food preparation for retail consumption." *Id.* (emphasis added).[9]

Applying the maxim of *noscitur a sociis* here and considering the words accompanying "industrial" – maintenance and construction – avoids giving both Acts "unintended breadth." Maintenance and construction equipment used for maintenance and construction applications "chang[e] the characteristics or nature" of something – for example, backhoes and tractors that clear and level construction sites, or machines that

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[9] As the Court observed in *Union Electric Co. v. Director of Revenue*, 425 S.W.3d 118, 124 (Mo. 2014), "One does not speak of a grocery store bakery department as 'processing' baked goods any more than one speaks of it as manufacturing, compounding or producing such goods." Similarly, one would not refer to a gyro or back-up battery as "industrial power equipment."

change the nature of gravel, concrete, and asphalt in performing maintenance on roads and highways. Thus, defining "industrial" to refer to processing and manufacturing activities is consistent with "the company it keeps" in both statutes. Gauges and back-up batteries installed in aircraft cockpits do not fit the bill. The trial court failed to consider the multiple meanings of "industrial," let alone that only the narrower definition avoids redundancy and fits within the context of the Act.

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Combining its interpretations of "power equipment" and "industrial," the trial court effectively held that any equipment that uses or supplies power and is used in any "industry" is covered by the Power Equipment and Inventory Repurchase Acts. Under that expansive reading, the Acts would cover a myriad of products not commonly considered to be "industrial power equipment," including commercial kitchen appliances distributed to the restaurant industry; steam irons distributed to the garment industry; digital telephone systems distributed to the legal industry; and alarm clocks distributed to the hotel industry. Such an absurdly broad interpretation threatens the competitiveness of Missouri manufacturers and distributors.

Because L-3's products are not industrial, maintenance and construction power equipment used for industrial, maintenance and construction applications, the judgment in favor of Sun on Counts I (to the extent it is based on the Power Equipment Act, §407.753.2), II, and III should be reversed. And since the court's denial of L-3's motion for summary judgment was "intertwined completely" with the grant of summary judgment to Sun on Counts I-III in that both motions hinged on the interpretation of "industrial power equipment," the Court should enter judgment for L-3 on those claims. *See City of DeSoto v. Nixon*, 476 S.W.3d 282, 290 (Mo. 2016). In addition, because Sun was awarded attorney's fees under the Power Equipment and Inventory Repurchase Acts, the fee award should be reversed in its entirety, and the case should be remanded for the trial court to award fees to L-3 as the prevailing party under those statutes.

II. The trial court erred in entering judgment in favor of Sun on its fraudulent concealment claim against L-3 because the trial court erroneously declared and/or misapplied the law in determining that L-3 had a duty to disclose its parent corporation's consolidation process in that (a) the consolidation process was not a material fact because L-3 did not know it would lead to Sun's termination and Sun did not establish it could have prevented termination; (b) the mere acknowledgement of trust and confidence does not give rise to a duty to disclose; (c) an at-will, arm's-length commercial relationship does not give rise to a duty to disclose; and (d) a manufacturer does not have a duty to disclose strategic plans to its distributor.

In her deposition, Shelly Buckley, L-3's Director of Commercial Sales, was asked, "To the best of your knowledge, would it be fair to say that … Sun Aviation had confidence and trust in you?," to which she responded, "Yes." (Tr.-133, 154). Based on that generic acknowledgement of trust and confidence and L-3's "superior knowledge," the trial court concluded that L-3 was obliged to disclose to Sun L-3's parent's consolidation plans, and awarded Sun $7,600,659 in damages for L-3's nondisclosure about those plans (Apdx-A38-39). In imposing on a manufacturer a duty to its distributor to disclose its parent corporation's strategic planning that might lead to the termination of their arm's-length, at-will relationship, the court erroneously declared and/or misapplied Missouri law. *See, e.g., Zubres Radiology*, 276 S.W.3d at 340-41 (whether duty exists is question of law).

A. Sun's concealment claim.

Sun's fraudulent concealment claim (Count IV) was a moving target. Its second amended petition (against L-3 and its parent, L-3 Communications, which was later dismissed as a defendant) alleged in relevant part as follows:

> "28. Defendants concealed its [sic] plan to terminate Plaintiff even though defendants had the duty to disclose its [sic] plan to terminate Plaintiff so that Plaintiff could make reasoned decisions about ordering inventory for stock. Defendants knew plaintiff would want to know that information and was relying on the defendants to disclose any such information in a timely manner."
>
> "29. Defendants told Plaintiff that it [sic] did not have the authority to reorganize its [sic] dealer network and the Plaintiff's termination was out of its [sic] control and could not be helped when, in truth, Defendants appointed a replacement distributer [sic]. Defendants knew Plaintiff would relay this information to customers who would already know about the replacement dealer and suspect Plaintiff was not being honest." (LF-236-37).

At trial, however, Sun took a much different tack. It argued not that L-3 concealed "its plan to terminate" Sun, but that L-3 failed to disclose its parent's plan to consolidate the divisions of the Avionics Products Sector. Sun did not contend that the nondisclosure prevented it from making "reasoned decisions" about ordering stock, but asserted that the supposed concealment precluded it from "taking any action to stop or avoid the termination or to prepare for it" (Tr.-241). Nor did Sun offer evidence that L-3 had appointed a "replacement distributor" or that Sun's customers suspected Sun was being dishonest. On the contrary, the evidence was undisputed that after the Sector's consolidation L-3 no longer had distributors or the authority to appoint them at the divisional level (Tr.-55, 152, 192; LF-821, 1030, 1033; Ex.-14).

The court entered judgment on Sun's unpleaded theory, holding that L-3 had improperly concealed "the consolidation plan or any potential termination" of Sun (ApdxA-39). Astonishingly, it held L-3 liable despite finding that "there was nothing Sun Aviation could or should have done to avoid termination," and that "it is unclear what Sun Aviation could have said to the decisionmakers to change their minds" (Apdx-A15 (¶52), A40).

B. The duty to disclose under Missouri law.

This Court has recognized that

> "silence or nondisclosure of a material fact, when used as an inducement to another, can be an act of fraud. However, before silence can amount to a representation upon which another party may rely, there must be a duty to speak. This duty arises either where there is a relation of trust and confidence between the parties or where one party has superior knowledge or information not within the fair and reasonable reach of the other party."

Andes v. Albano, 853 S.W.2d 936, 943 (Mo. 1993) (citations omitted).

"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." *Bayne v. Jenkins*, 593 S.W.2d 519, 529 (Mo. 1980).

In the few cases in which this Court has found a duty to disclose, the duty has arisen in a contractual context – typically when the plaintiff has alleged that the defendant's nondisclosure of a material fact induced the plaintiff to enter into a contract. *See Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 765-68 (Mo. 2007) (imposing on seller duty to disclose that property was under EPA investigation where seller's silence had induced plaintiff to purchase property); *Bayne*, 593 S.W.2d at 529-30 (silence induced defendant to purchase securities and execute promissory notes); *Miller v. Higgins*, 452 S.W.2d 121, 124 (Mo. 1970) (silence on matters affecting apartment complex's rental income induced plaintiffs' decedent to enter into property-exchange contract).

Indeed, Restatement (Second) of Contracts §161 (cited in *State ex rel. PaineWebbber, Inc. v. Voorhees*, 891 S.W.2d 126, 129 (Mo. 1995)), and Restatement (Second) of Torts §551 (*see, e.g.*, *Kesselring v. St. Louis Grp., Inc.*, 74 S.W.3d 809, 814 (Mo.App. 2002)), both address the duty to disclose exclusively in a transactional context. Section 551(2), for example, states that "[o]ne party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated, (a) matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them …."

Here, however, the trial court imposed upon L-3 a standing duty – unrelated to any pending or existing transaction – to disclose not just "material facts" but any information, including its corporate parent's inchoate organizational planning, that might possibly impact Sun at some point. L-3 owed that duty, according to the court, because Sun "placed 'trust and confidence' in" L-3, and because Sun "did not know of the consolidation plan and knowledge of it was not within" its reach (Apdx-A39). Imposing that broad, amorphous duty was legal error for a multitude of reasons.

C. The court erred in holding that L-3 had a duty to disclose.

1. The Sector's consolidation process was not a material fact.

As an initial point, L-3 had no duty to disclose the Sector's "consolidation plan or any potential termination" of Sun (Apdx-A39) because that plan and its possible outcomes were not "material facts," subject to disclosure. *Andes*, 853 S.W.2d at 943. *See also* Restatement (Second) of Torts §551(e) and cmt. *j* (duty to disclose extends only to facts that are "basic to the transaction" and "assumed by the parties as a basis for the transaction itself"). L-3 could not disclose what it did not know, and, in any event, such "disclosure" would have availed Sun nothing.

a. L-3 did not know that ongoing discussions by its parent about consolidation would lead to Sun's termination.

There was no evidence – and the court did not find – that L-3 knew that the consolidation process was likely to result in Sun's termination. The two L-3 employees who managed the relationship with Sun in fact testified to the contrary. Shelly Buckley explained that it was "right at the point we had to go out and do these terminations, that was when we were told what was going on and what the decision processes were" (LF-806). When the consolidation analysis began, the Sector did not communicate that the process might lead to terminations (LF-808-09). Buckley did not learn that termination was in play until "[p]robably towards the end of the process, because we were pretty low on the totem pole as far as getting a lot of information flowed [sic] from, you know, the higher ups that were doing this. So, we really weren't in the loop" (LF-809). Buckley agreed that "there would have been no reason to go to management" to "make the play to save Sun Aviation until the end of the process, because there wasn't any worry that they were going to be terminated until the end of the process" (LF-809).

Kim Stephenson, who in 2008 succeeded Buckley in managing L-3's relationship with Sun, "learned about the consolidation process and then [was] instructed to terminate Sun Aviation all within … a very short time period" (Tr.-139-41, 170-71; LF-1030-31, 1035). "I recall it being already kind of done by the time I knew about it" (LF-1035). Once she was directed to terminate Sun, she did so promptly (*Id.*).

The duty to disclose cannot rest on L-3's "superior knowledge" because L-3 had none. Moreover, "one is expected to disclose only such facts as he knows or has reason to know will influence the other in determining his course of action." Restatement (Second) of Contracts §161 cmt. *b.* Buckley's vague awareness that consolidation was in the works cannot support a duty to disclose because she had no reason to believe Sun would be terminated. Sun is not complaining about concealment of the consolidation process itself, but of the possibility that it might lead to its termination at some later date. But the duty to disclose covers only "material facts," not mere possibilities. Sun's unpleaded theory that L-3 should have disclosed its parent's consolidation process founders because L-3 neither knew nor had reason to know that the information would influence Sun in determining its course of action.

b. Sun could not have avoided termination.

Further, the consolidation process was not a material fact because Sun did not establish that it could have avoided termination if it had known in advance that termination was a possibility. The only support Sun offered for its unpleaded theory was Gregg's testimony that in 2003, when L-3 had canceled all its distributors, he advised Buckley that Sun's sales were increasing and that it "would very much like to remain a distributor," and she had agreed to keep Sun on (Tr.-39; Apdx-A39).

In concluding that Sun might have persuaded L-3's parent to retain it, the court contradicted its own findings. After determining that "there was nothing Sun Aviation could or should have done to avoid termination" (Apdx-A15, ¶52), the court stated:

> "L-3 Avionics told the parent company that Sun Aviation was a good dealer and terminating Sun Aviation was not in anyone's best interest. This did not change the termination decision, and *it is unclear what Sun Aviation could have said to the decision-makers to change their minds*. Nevertheless, L-3 Avionics did not offer any evidence to rebut Sun Aviation's claim. There is sufficient evidence to conclude that Sun Aviation could have convinced L-3 parent company not to terminate Sun Aviation, if the consolidation plan had not been concealed." Apdx-A40 (emphasis added).

The court's conclusion that Sun "could have convinced" L-3's parent to retain Sun is groundless speculation and squarely contradicts its finding that there was "nothing" Sun could have done to stay on. Sun presented no evidence from L-3's parent, relying instead on Gregg's 2003 anecdote. That Gregg persuaded Buckley to retain Sun under different circumstances nine years earlier has no bearing on whether unidentified decisionmakers at L-3's parent would have even given Sun an audience during the consolidation process, let alone agreed to create an exception to its comprehensive reorganization plan. Given that L-3 unsuccessfully tried to sway its parent to retain Sun, and that individual divisions – including L-3 – could no longer contract with their own distributors after consolidation, Gregg's successful persuasion of Buckley in 2003 is too slim a reed to support a conclusion that he could have "changed the minds" of L-3's parent, which was installing broad-based structural changes. *See Central Am. Health Sciences Univ. v. Norouzian*, 236 S.W.3d 69, 85-86 (Mo.App. 2007) (reversing damages award for lost salary because student's argument that school's withholding of his medical school diploma prohibited him from taking licensing boards and being hired as a doctor was too speculative, as plaintiff offered no evidence "to establish the occurrence of [the] contingencies" that he would pass the exams, become licensed, and "be hired into the medical profession").

On the heels of acknowledging that "it is unclear what Sun Aviation could have said to the decision-makers to change their minds," the court's contrary conclusion that "sufficient evidence" existed that Sun could have persuaded L-3's parent to retain Sun is a non sequitur. "[T]he finding of an essential fact may not rest upon guesswork, conjecture or speculation beyond inferences reasonably to be drawn from the evidence." *Linneman v. Freese*, 362 S.W.2d 585, 587 (Mo. 1962) (citation and internal quotation marks omitted); *see also Wagner v. Bondex Int'l, Inc.*, 368 S.W.3d 340, 352 (Mo.App. 2012) (court cannot "give the plaintiff the benefit of unreasonable, speculative, or forced inferences") (citation omitted). The court's statement that L-3 offered no evidence to rebut Sun's claim not only improperly shifted the burden of proof but also ignored the uniform testimony that *nothing* Sun could have done would have prevented termination (Tr.-153, 158, 180). Because Sun did not establish that disclosure would have allowed it to remain as L-3's distributor, the court erred in ruling for Sun on its nondisclosure claim.

2. "Confidence and trust" do not alone create a duty to disclose.

Apart from the immateriality of the supposed "nondisclosure," Buckley's vague acknowledgement that Sun had "confidence and trust" in L-3 cannot suffice to trigger a fixed duty to disclose on L-3's part. L-3 was only one of 26 manufacturers whose products Sun sold, and Sun offered no evidence that the parties manifested any special trust and confidence between them beyond what would be expected in a manufacturer-distributor relationship. *See, e.g., Blaine v. J.E. Jones Constr. Co.*, 841 S.W.2d 703, 705 (Mo.App. 1992) (duty to disclose is imposed "where a classical fiduciary relationship exists, or, in an extension of that relationship, where one party … places a special confidence in the other"); Restatement (Second) of Torts §551(2)(a) (finding duty to disclose when parties to transaction have relation of trust and confidence "similar" to fiduciary relationship).

It is well established that the mere existence of trust and confidence between parties in a commercial setting does not establish a confidential or fiduciary relationship that would give rise to a duty to disclose. *See, e.g., Williams v. Dresser Indus., Inc.*, 120 F.3d 1163, 1168 (11th Cir. 1997) ("The mere fact that one [business] reposes trust and confidence in another's integrity does not create a confidential relationship") (Georgia law); *New England Surfaces v. E.I. Du Pont de Nemours & Co.*, 517 F. Supp. 2d 466, 489 (D. Me. 2007) ("[m]ere recitations and references to trust … are insufficient to give rise to fiduciary duties"), *rev'd on other grounds*, 546 F.3d 1 (1st Cir. 2008); *Lee v. LPP Mortg. Ltd.*, 74 P.3d 152, 162 (Wyo. 2003) ("[T]he express reposing of trust and confidence by one party is not enough to create a fiduciary type duty. The duty arises from the conduct of the purported fiduciary. … Trust alone does not convert an ordinary arm's length transaction into a fiduciary or other similar relationship of trust and confidence."); *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 177 (Tex. 1997) ("fact that the parties to a transaction trust one another will not, in and of itself, [demonstrate] a finding of a confidential relationship").

Because "most contracts involve a degree of the factors indicative of reposed trust and confidence," *Devery Implement Co. v. J.I. Case Co.*, 944 F.2d 724, 730 (10th Cir. 1991), upholding the trial court's ruling would inject a duty to disclose tangential and collateral matters into nearly every commercial relationship. In a manufacturer-distributor scenario, for example, the supplier trusts and has confidence that the manufacturer will timely ship well-made products, and the manufacturer trusts that its invoices will be paid promptly. Because mutual trust and confidence are characteristic of almost any business relationship, a greater showing is required to "ensure[] that common commercial dealings are not subject to heightened fiduciary responsibilities." *Id.* Buckley's unadorned acknowledgement of Sun's trust and confidence did not warrant the imposition of a duty to disclose.

3. An at-will, arm's-length commercial relationship does not give rise to a duty to disclose.

Both Restatement (Second) of Contracts §161 and Restatement (Second) of Torts §551 address the types of confidential relationships that give rise to a duty to disclose. Neither mentions commercial relationships. Section 161 cmt. *f*, for example, states that a relation of trust and confidence "normally exists between members of the same family," and observes that it may also arise "between physician and patient," and in "some types of contracts, such as those of suretyship or guaranty, marine insurance and joint adventure." Section 551 cmt. *f* identifies those same relationships as well as "the executor of an estate and its beneficiary, a bank and an investing depositor, … attorney and client, priest and parishioner, partners, tenants in common and guardian and ward." The nature of these relationships is markedly different from Sun and L-3's run-of-the-mill manufacturer-distributor arrangement, in which each was motivated by its respective economic interests.

L-3 and Sun were in an arm's-length commercial relationship, which does not trigger any elevated duties. In *Myklatun v. Flotek Industries, Inc.*, 734 F.3d 1230, 1235 (10th Cir. 2013), for instance, the court affirmed judgment as a matter of law for the defendant, stating that all of the evidence at trial "indicated that the parties had an armslength commercial relationship, not a fiduciary relationship or other type of special relationship that would give rise to a duty to disclose." *See also Andes*, 853 S.W.2d at 943 (rejecting the plaintiff's claim that her former husband's lawyers had fraudulently induced her to enter into a release agreement based in part on the fact that the parties had negotiated at arm's length); *Blaine*, 841 S.W.2d at 708 (arm's-length transaction less likely to give rise to duty to disclose).

Similarly, in *Coburn Supply Co. v. Kohler Co.*, 342 F.3d 372, 377-78 (5th Cir. 2003), the court held that "[a]s a matter of law, the at-will, non-exclusive distributor relationship between Coburn and Kohler is not the kind of confidential or fiduciary relationship" that would impose a duty to disclose. *See also W.K.T. Distrib. Co. v. Sharp Elecs. Corp.*, 746 F.2d 1333, 1336 (8th Cir. 1984) (reversing district court's conclusion that parties were in a fiduciary relationship because "the parties, as a result of arm's length negotiations, entered into an ordinary supplier-distributor relationship"); *Brass Metal Prods., Inc. v. E-J Enters., Inc.*, 984 A.2d 361, 388 (Md. Ct. Spec. App. 2009) ("Where businesses are engaged in an 'arm's length' transaction, a confidential relationship does not exist.").

The at-will nature of L-3 and Sun's arrangement should also foreclose Sun's claim that L-3's supposed concealment prevented Sun from remaining as a distributor. With the exception of the 90-day notice provision in effect during the IDA's two-year term, at no point during its tenure did Sun have a reasonable expectation that it would remain as L-3's distributor for any particular duration. Missouri courts have rightfully been reluctant to engraft extra-contractual duties on at-will relationships. *See, e.g., Kelly v.*

State Farm Mut. Auto. Ins. Co., 218 S.W.3d 517, 524 (Mo.App. 2007) (implied covenant of good faith and fair dealing cannot override insurer's right to terminate agents at will); *Stehno v. Sprint Spectrum, L.P.*, 186 S.W.3d 247, 251-52 (Mo. 2006) (at-will employee lacks the reasonable expectation of continued employment required to sue for tortious interference).

Because L-3 was entitled to terminate its arrangement with Sun at any time, it cannot be liable for not providing Sun advance notice of its potential termination so that Sun could try to talk its way into being retained. As this court said in *Bayne,* "silence can be an act of fraud where matters are not what they appear to be." 853 S.W.2d at 529. Even assuming L-3 had known that the Sector's consolidation process could lead to Sun's termination, matters were exactly "what they appear[ed] to be": Sun was subject to termination at any time, consolidation or not.

4. A manufacturer has no duty to disclose its strategic plans to distributors.

Finally, courts have specifically rejected the notion that a manufacturer or other supplier – such as L-3 here – has a duty to disclose its strategic plans to its at-will distributor, even when those plans may someday impact the distributor. In *Cloverdale Equipment Co. v. Simon Aerials, Inc.*, 869 F.2d 934 (6th Cir. 1989), the parties' contract gave the plaintiff exclusive rights to distribute the defendant's equipment, but was terminable by either party on 60 days' notice. The manufacturer agreed to a distribution arrangement with a third party that would encompass the plaintiff's territory, and gave the plaintiff the required notice of termination. The plaintiff sued on several theories, including that the manufacturer had breached its "duty to disclose discussions of a master distributorship" with the third party. The court disagreed, noting that the plaintiff had cited no cases "indicating, even by analogy, that a manufacturer has a duty to disclose its long range marketing plans to distributors." *Id. at* 941.

Similarly, in *OKI Distributing, Inc. v. Amana Refrigeration, Inc.*, 850 F. Supp. 637 (S.D. Ohio 1994), the plaintiff distributor sued over the termination of its contract, which provided that either party could terminate at any time and without cause. The manufacturer wanted to restructure its distribution process by eliminating distributors and selling directly to its retail dealers. *Id.* at 639-40. The district court granted summary judgment on the distributor's concealment claim, holding that it had "failed to persuade the Court that there was any duty on the part of the Defendants to disclose to their distributors that they were planning to make a structural change in the way the company operates." *Id.* at 646. *See also Myklatun*, 734 F.3d at 1235 ("In essence, Plaintiffs are contending that a manufacturer has a generalized duty to disclose all planning and development activities that could potentially affect a current distributor. However, we conclude that neither the contract between the parties nor Oklahoma law imposes such an obligation."); *CDS, Inc. v. Karndean Int'l, LLC,* No. 15-148M, 2017 WL 1379603, at *6 (D.R.I. Mar. 17, 2017) (granting summary judgment and stating "there is no evidence to establish that Karndean had a duty to apprise CDS that it was considering a nationwide or New England-specific change in its strategy for product distribution, even if that strategy might adversely affect CDS").

In each of these cases, the manufacturer's "superior knowledge" regarding its plans did not suffice to establish a duty to disclose. Every enterprise has greater insight into its own strategies, but imposing a duty to lay bare the planning process, including all possible outcomes, would impermissibly hinder a company's right to consider its options in confidence, without interference or second-guessing. *See, e.g.*, *Blaine*, 841 S.W.2d at 709 ("To saddle a developer with an affirmative duty to disclose [decisions about developing property] as they vary would act as a straight jacket that the marketplace does not need."). Sun's concealment claim is even more attenuated because the consolidation process that L-3 allegedly should have disclosed was undertaken not by L-3, but by its parent. L-3 had no role in the process, which was "imposed" on L-3 (Tr.-130-31; Apdx-A16, ¶55). Even putting aside L-3's lack of knowledge that consolidation might result in Sun's termination, imposing a legal duty on L-3 to share the strategic planning of a separate corporate entity is an unwarranted expansion of the limited duty to disclose.

The trial court erred in holding L-3 liable for not disclosing its corporate parent's strategic planning to its at-will, arm's-length distributor, based on nothing more than L-3's supposed superior knowledge of those plans and its acknowledgement of trust and confidence. Sun's concealment claim is flawed from top to bottom, and the judgment on that claim should be reversed.

III. The trial court erred in awarding 18 years of lost profits as damages on Count I because the court misapplied and/or erroneously declared the law in that: (1) the common law and the Franchise Act, §407.410, together limit damages for improper notice to lost profits during the 90-day notice period, loss of goodwill, damages incurred in reliance on the 90 days' notice, costs of suit, and any lost investment made in the franchise relationship, and Sun claimed only damages for lost profits; and (2) the court erroneously concluded that lost-profit damages were not limited to 90 days because L-3's notice of termination was not "proper" in some unexplained way.

In awarding the same damages on both statutory claims, the trial court conflated Sun's Count I, which alleged insufficient notice of termination under the Franchise Act, and Count II, which alleged improper termination without good cause in violation of the Power Equipment Act. The court's award of 18 years of lost profits on Count I ignored the proper measure of damages for insufficient notice of termination under the Franchise Act, §407.410.2.[10/] Section 407.410.2 limits damages for failure to give the 90 days'

10/ As explained in note 8, *ante*, the trial court entered judgment for Sun on Count I under both the Franchise Act and the Power Equipment Act, even though Sun did not plead a violation of the latter statute's notice provision, §407.753.2 (*see* LF-234-35). As set forth above in Point I, the court erred in interpreting the Power Equipment Act to cover L-3's products. The judgment on Count I under the Power Equipment Act should therefore be reversed. This Point III focuses on the court's damage award for improper written notice required by §407.405 to "recovery of damages sustained to include loss of goodwill, costs of the suit, and any equitable relief that the court deems proper." The case law limits damages under §407.410.2 to loss of any profits that would have been realized during the 90-day notice period, any loss of goodwill, any damages sustained due to reliance on expectation that the relationship would continue for at least the 90 days' notice period, and the costs of suit. The common law additionally allows for the franchisee to recover its investment in the franchise.

Here, Sun, through its expert, Marc Vianello, disclaimed any damages other than lost profits (LF-1153, 1159-60). Gregg acknowledged that Sun had recovered its original investment in becoming an L-3 distributor (Tr.-101-02). Accordingly, had the court followed well-established precedent identifying the statutory and common-law remedies available to a franchisee that receives insufficient notice of termination, the damage award on Count I on this record should have been limited to the costs of suit and $19,134.75, Sun's lost profits during the 90-day notice period, based on Vianello's own testimony and exhibits (LF-1127-28; Ex.-52).

The court rejected L-3's argument that Sun's lost profits should be limited to the 90-day period, stating "it has been over three years since the notice was served and defendant has not served a proper notice nor was there any evidence of any plan or intent

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notice under the Franchise Act. Point IV will discuss the damages assessed under the Power Equipment Act and on the concealment claim, which will be relevant only if the court rejects our Points I and II.

to do so. The damages sustained are not limited to 90 days as defendant argues" (Apdx-A29). But the court found as fact that "[w]ritten notice of termination was sent August 2, 2012" (Apdx-A15, ¶51). The court's assertion that L-3's written notice of termination was somehow not "proper" ignores the plain language of §407.405, which requires only that notice of termination be given "in writing at least ninety days in advance of the … termination." L-3 was held liable for failing to give notice 90 days in advance of termination; the Franchise Act does not allow for an exponentially more severe damage award because the court found the notice that was given lacking in some other, unspecified regard.

A. Sun's damages for inadequate notice of termination under the Franchise Act are limited to 90 days' lost profits of $19,134.75.

Section 407.410.2 sets out the remedies available to a franchisee that has not received the 90 days' notice required by §407.405:

> "A franchisee suffering damage as a result of the failure to give notice as required of the cancellation or termination of a franchise, may institute legal proceedings under the provisions of sections 407.400 to 407.420 against the franchisor who cancelled or terminated his franchise …. When the franchisee prevails in any such action in the circuit court, he may be awarded a recovery of damages sustained to include loss of goodwill, costs of the suit, and any equitable relief that the court deems proper."

This Court has previously determined the scope of damages available to franchisees for termination without notice. In *Ridings v. Thoele, Inc.*, 739 S.W.2d 547, 549 (Mo. 1987), the Court construed §407.410.2 in the context of deciding whether to uphold a punitive damage award to a terminated franchisee. Noting that terminated franchisees had a limited remedy at common law for termination without notice, the Court concluded that the statute did not expand those common-law remedies. Because punitive damages were not allowed under common law and are not specified in §407.410.2, the Court reversed the punitive award. *Id.* at 549.

The Court described a terminated franchisee's pre-statutory remedies as follows:

> "Missouri common law is clear that the provisions of the contract govern the right, vel non, of a franchisor to terminate a franchise relationship with the important qualification that *if the franchisee has in good faith incurred expense and devoted time in building his business he is entitled to a continuation of the relationship for a reasonable time to enable him to recover his investment.*" *Id.* (quoting *Bain v. Champlin Petroleum Co.*, 692 F.2d 43, 48 (8th Cir. 1982)).

The Court concluded that the legislature had "codified the limited remedy under Missouri common law espoused in early cases such as *Beebe [v. Columbia Axle Co.*, 117 S.W.2d 624, 629 (Mo.App. 1938)]," in which a franchisee who did not receive notice required under its agreement was entitled to recoup its capital investment. 739 S.W.3d at 549. A franchisee's entitlement to recoup its investment, as recognized at common law and codified by §407.410.2, is frequently referred to as the "recoupment doctrine." *See Armstrong Bus. Servs., Inc. v. H & R Block,* 96 S.W.3d 867, 878 (Mo.App. 2002). The Court explained that its interpretation was consistent with the language of §407.410.2:

> "Further supporting this conclusion is the premise that statutory language, where possible, should be interpreted with internal consistency to avoid 'unintended breadth.' '[L]oss of goodwill, costs of the suit, and any equitable relief that the court deems proper' evince a compensatory purpose, to make whole a plaintiff whose expectations have been frustrated. This remedial language does not, on the other hand, suggest an intent to punish or make example of a recalcitrant franchisor." *Ridings*, 739 S.W.2d at 549 n.4 (citation omitted).

Although it arose under a different statute, this Court's decision in *American Eagle Waste Industries, LLC v. St. Louis County*, 379 S.W.3d 813 (Mo. 2012), mandates the conclusion that lost profits from the failure to receive the 90 days' notice required by the Franchise Act are confined to the profits that would have been realized had the relationship continued for the 90-day notice period, and no longer. *American Eagle* addressed St. Louis County's violation of the Missouri Solid Waste Law, §260.247, by terminating trash-hauling contracts without adhering to the two-year waiting period – in effect, without providing the statutorily-required notice. This Court affirmed the trial court's conclusion "that Haulers' damages are what would have been their *net profit* during the two-year waiting period." *Id.* at 833.

Similarly, *Asamoah-Boadu v. State*, 328 S.W.3d 790 (Mo.App. 2010), limited lost-profit damages for an inadequate notice claim to profits lost during the notice period. There, the State terminated a series of janitorial contracts before their expiration dates but without providing the 30 days' prior notice required under the contracts. The trial court calculated lost profits through the expiration date of each contract, which resulted in lost profit awards that exceeded 30 days. The Court of Appeals reversed, concluding that lost-profit damages should be restricted to profits that would have been realized during the 30-day notice period:

> "Sam's Janitorial was entitled to recover damages naturally or proximately resulting from the breach, which under the facts of the case was not the termination itself but rather the failure to provide thirty-days' notice required by the terms of the contracts. The lost profit damages should have been limited, therefore, to the contractual notice period of thirty days. … Awarding lost profits for a period longer than thirty days elevated Sam's Janitorial to a better position than it would have been in had the [State] given the required amount of notice of termination." *Id. at* 796-97.

In the present case, Sun admitted it had recouped its initial investment and, with the exception of the post-judgment award of costs, it claimed damages only for lost profits. As its expert, Vianello, testified: "It is my opinion that … Sun is not entitled to a diminution of value type of damage, that it is only entitled to lost profit damages and perhaps there's some other element of damage that might pertain to any yet unsold inventory. Beyond that, it's my opinion that there aren't damages that I am aware of" (LF-1160). *See also* Tr.-101-02 (Gregg agreeing Sun was "not seeking to recoup what [it] spent for that initial stock because it's already been sold"); LF-1153 (Vianello disclaiming any opinion "as to damages in terms of loss of goodwill"); LF-1159 (Vianello stating that "the available damages are lost profits").

Lost profits from failing to receive 90 days' notice of termination are measured by comparing a franchisee's economic position had it received 90 days' notice with its position having received the actual notice given. As noted in *Asamoah-Boadu,* awarding lost profits over a longer period would elevate a franchisee to "a better position than it would have been in had the [franchisor] given the required amount of notice of termination." 328 S.W.3d at 797.

The trial court's assessment of 18 years' worth of lost profits not only ignored these principles but conferred a substantial windfall on Sun that was totally disproportionate to the claimed "breach." Sun's own evidence provided the computation needed to properly calculate its lost profits for the 90-day notice period mandated under the Franchise Act. Exhibit 52, prepared by Vianello, shows his calculation of $25,513 in lost profits for the four-month period from September through December 2012 (Ex.-52, first line, last column). He explained that to reduce that figure to cover a 90-day period, "all [t]he Court would have to do would be to divide that number by four and multiply times three and there you have 90 days, more or less, give or take a day" (LF-1128). That computation ($25,513 x 3/4) produces a damages amount of $19,134.75.

B. The court's award of lost profits was fatally flawed and grossly excessive.

The trial court nevertheless awarded Sun 18 years of lost profits as damages on Sun's Franchise Act claim, based on its assertion that "it has been over three years since the notice was served and defendant has not served a proper notice nor was there any evidence of any plan or intent to do so. The damages sustained are not limited to 90 days as defendant argues" (Apdx-A29). Here, instead of less than $20,000, the court gave Sun $7,600,659.

The court did not explain in what way L-3's notice was not "proper" other than its failure to comply with the 90-day requirement, and in fact §407.405 imposes no conditions on a written notice of termination other than that it be sent 90 days before the effective date of the termination.[11/] Nor did the court offer any legal support for awarding 18 years of lost profits.

The court found as fact that L-3 unquestionably sent Sun written notice of termination on August 2, 2012 (Apdx-A15, ¶51). Sun did not plead or offer any evidence of any infirmity in that notice other than the effective date. There is no support in the Franchise Act or Missouri common law for the court's damage award, which effectively converts Sun's inadequate notice claim into one for improper termination. As the Court stated in *Ridings*, the Act was intended to codify the "limited remedy" at common law

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11/ The court may have confused §407.405 with the Power Equipment Act's notice provision, §405.753.2, which states that a "notice shall state all reasons constituting good cause for termination, … and shall provide that the dealer has sixty days in which to cure any claimed deficiency." The court erroneously concluded that because L-3 "violated" those good-cause and right-to-cure provisions, "[t]he damages sustained as a consequence of violating the notice requirements are not limited to 90 days" (Apdx-A28). That conclusion is flatly wrong but is ultimately irrelevant to Sun's claim under the Franchise Act.

allowing a franchisee to continue the relationship for a reasonable time to enable it to recover its investment. 739 S.W.2d at 549. And in *Ridings*, the court pointed out that §407.410.2 "evince[s] a compensatory purpose," and does not "suggest an intent to punish or make example of a recalcitrant franchisor." *Id.* at n.4.

"Any further protection of franchisees at termination of the franchise relationship is for the Missouri General Assembly to provide." *Armstrong Bus. Svcs.*, 96 S.W.3d at 879. The trial court's damage award, which is more than 390 times greater than what would be appropriate under the law and the evidence, takes the Act's "limited remedy" to an unimaginable extreme and is severely punitive and confiscatory. In sum, because Sun disclaimed and offered no evidence of any damages other than lost profits, this Court should reduce the damages awarded to L-3 for inadequate notice under the Franchise Act to 90 days' lost profits, $19,134.75, plus a proportional award of costs.

IV. The trial court erred in its awards of 18 years of lost profits as damages under Count I, Count II, and Count IV because the awards are speculative, irrational, and against the weight of the evidence in that the awards (a) were based on expert testimony and calculations that (1) improperly relied on a 2014 sales projection that proved to be incorrect; and (2) improperly relied on a mischaracterization of the correlation between Sun's pre-termination sales of L-3 products and its pre-termination sales of non-L-3 products; (b) were based on projections that assumed Sun would have increased its sales of L-3 products by $358,051 each year through 2030, even though Sun's sales of L-3 products had decreased by a total of 36 percent over the last three years of Sun's distributorship; and (c) compounded the speculation inherent in Vianello's testimony by projecting the assumed annual increase in sales over an 18-year period.

Lost profits are recoverable only when they are "ascertainable with reasonable certainty," and are "not speculative or conjectural." *Farmers' Elec. Coop., Inc. v. Missouri Dep't of Corr.*, 59 S.W.3d 520, 522 (Mo. 2001); *see also Central Am. Health Sciences Univ.*, 236 S.W.3d at 85 (appellate court will reverse a damage award "*if* the record shows an absence of proof of actual facts that present a basis for a rational estimate of damages without resort to speculation") (citation omitted). In the event that this Court does not reverse the judgment for Sun on Counts I, II, and IV for the reasons stated in Points I and II, and does not reduce the damages awarded on Count I under the Franchise Act for the reasons stated in Point III, the Court should reverse the trial court's awards of 18 years of lost profits as damages on Counts I, II, and IV because they are based on Marc Vianello's impermissibly speculative and flawed testimony.

The trial court relied on Vianello's testimony and supporting exhibits in awarding damages under all three counts in the amount of $7,600,659 (Apdx-A21-23, 25-26, 29, 34-35, 40). That award represents the present value of 18 years of Sun's lost profits projected using what Vianello labeled a "Crystal Ball double moving average computer model," based on Sun's L-3 sales, which he calculated as the present value of lost profits from September 2012 through the end of 2030 (*see* Apdx-A24; LF-1082-84; Exs.-51, 52 (last column)). Vianello's testimony and his Exhibit 52 disclose a series of significant assumptions he made in projecting Sun's lost profits:

- that Sun and L-3 would each remain in business for an extended period (even through 2035) (Ex.-52; LF-1123-24);
- that Sun would have remained a distributor of L-3's products for that extended period (Ex.-52; LF-1123-24);
- that Sun's sales of L-3 products would increase in the range of $352,241 to $358,051 each year through 2035 (representing an approximate 18 percent increase in Sun's L-3 sales from 2012 to 2013) (Exs.-51, 52, 55; LF-1083-84);
- that half of the eight lost-profit projections he performed should be discarded because he viewed them as inconsistent with a 2014 forecast by L-3's Larry Riddle that L-3's sales of aftermarket products would increase by a double-digit percentage annually (LF-1080-82); and

- that a close correlation existed between Sun's actual pre-termination sales of L-3 products and its sales of non-L-3 products, and that Sun's increased sales of non-L-3 products after termination were therefore representative of what Sun's sales of L-3 products would have been had it not been terminated (LF-1083-84, 1087-89; Ex.-53).

As explained below, several of Vianello's key assumptions are either erroneous or too mired in speculation to sustain the calculations adopted by the court. The damage awards under Counts I, II, and IV embody Vianello's wishful thinking and are against the weight of the evidence and should be reversed.

A. Vianello's methodology.

Vianello ran eight different projections purporting to calculate the present value of Sun's lost future profits from sales of L-3 products (LF-1076-77). Exhibit 51 summarizes the present value (using multiple discount rates) of his eight calculations for lost sales through 2035, five years further into the future than the trial court accepted (LF-1076-77; Ex.-51). He then relied primarily on two factors to assess his various projections. First, Vianello put blind faith in Riddle's forecast in his June 2014 deposition that L-3's overall sales were expected to increase ten percent per year for five years and that aftermarket sales would see "double-digit" growth (Tr.-163; LF-1077). Riddle himself acknowledged the ephemeral nature of his "long-term" projection. Asked in his deposition for L-3's most recent long-term sales projection, he explained that those projections are updated "every quarter, it could be every six months, depending on what big changes we've seen in the marketplace. So, typically, on a quarterly basis they get looked at to make sure it's [sic] on track" (Tr.-162-63).

Second, Vianello described what he saw as a "remarkably stable" correlation between Sun's sales of L-3 products and its sales of non-L-3 products (from the other 25 manufacturers whose products Sun sold) over the 2003-2012 period (LF-1083). Based on that supposed correlation, Vianello opined that Sun's sales of non-L-3 products could serve as a proxy for how Sun's L-3 product sales would have increased had Sun remained a distributor (LF-1083-84).

Based upon Riddle's 2014 forecast, Vianello's first two analyses assumed first a 10 percent annual increase in sales through 2035 and, alternatively, a 20 percent annual increase in sales (LF-1077-78). He rejected the 20 percent assumption as "too high" and "unrealistic" (LF-1078; Ex.-51), but did not further comment on the projection assuming the 10 percent annual increase.

Vianello then used five different computer models to forecast the growth (or decline) in Sun's sales of L-3 products based on Sun's actual past sales of L-3 products from 2003 through 2012 and one computer regression model to forecast the growth (or decline) in Sun's sales of L-3 products based on Sun's actual past sales of non-L-3 products from 2003 through 2012 (LF-1072, 1078-84). Two of those models showed no growth or "flat" growth (LF-1079-81; Ex.-51).[12/] Vianello rejected those analyses because they showed "no growth" or declining sales, and thus "were inconsistent with Mr. Riddle's testimony" (LF-1079-81).

Vianello's next two computer models employed two forms of linear regression (LF-1081). One of these models showed future sales declines and the other showed future sales increases of $212,594 per year (an increase below 10 percent) (LF-1081-82; Ex.-51). Vianello rejected these results as well, because they were inconsistent with both Riddle's projection and with Sun's actual post-termination sales of non-L-3 products (LF-1081-82; Ex.-51). He labeled the model showing the $212,594 increase "reasonable," but because it projected less than the 10 percent increase forecasted by Riddle, Vianello deemed it a "lesser-than-desirable [sic] result," and "rejected it on that basis" (LF-1082).

Finally, Vianello ran two forms of a "double moving average technique," a technique that he didn't bother to explain (LF-1083). One was based upon Sun's sales of L-3 products, presumably over the same 2003-2012 period, although that is not clear. That analysis resulted in a projected annual sales increase of $358,051 (LF-1083). The second was based not on Sun's past L-3 sales, but on Sun's post-termination sales of non-L-3 products (LF-1083). Although Vianello claimed to have "about 3-1/2 years of post-

[12/] These models used exponential regression, a non-linear regression that has some level of curve to it, and the "ARIMA" analysis, "a modeling tool within Crystal Ball," an Oracle modeling software program (LF-1079-81).

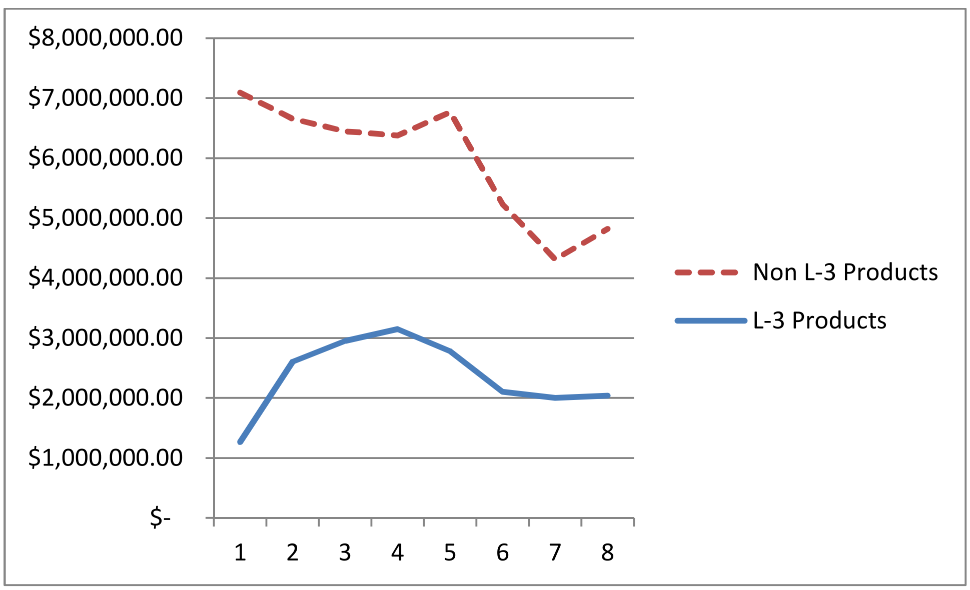
termination sales history," he testified on September 18, 2015, only three years and one month after Sun's termination (LF-1083). So Vianello used about three years of Sun's actual post-termination sales of non-L-3 products to forecast sales of non-L-3 products and "then appl[ied] the proportionate relationship … to those sales and ma[d]e a projection of lost L-3 sales based on the non-L-3 sales" (LF-1083). He posited that the results of the two double-moving-average analyses were consistent, yielding projected annual increases of $358,051 and $352,241, respectively (LF-1084; Ex.-51). Vianello recommended both of those results as "perfectly acceptable estimation of damages." *Id.*

B. Vianello's two criteria for embracing or rejecting his lost-profit models were critically flawed.

Vianello's eight lost-profit calculations varied widely, from forecasting declining sales at one extreme to 20 percent sales growth at the other (Ex.-51). His two yardsticks for assessing those calculations were flawed, thinly-disguised excuses for accepting the models that produced the highest projections.

First, even by the time of trial, Riddle's forecast had been proven wrong, as Buckley testified that L-3's overall sales declined from $135 million in 2011 to $95 million in 2014 (Tr.-196-97). The 2014 sales figure represented a 10 percent decline from the previous year, rather than the 10 percent increase that Riddle had projected – rendering his projection off by 200 percent (Tr.-196-97). As Buckley explained, "I think the actuals prove his forecast was incorrect" (Tr.-210). Vianello admitted that he didn't know what Riddle based his projection on (LF-1141-42), and he characterized it as an "expectation" (LF-1140-42). Vianello's reliance on a mere expectation that did not come to pass renders his methodology "speculative and conjectural," not founded on "reasonable certainty." *Farmers' Elec. Coop., Inc.*, 59 S.W.3d at 522.

Second, Vianello's statement that Sun's past sales of L-3 and non-L-3 products are "remarkably stable" (meaning well-correlated) is belied by his own exhibit (Ex.-55). There, he shows Sun's actual sales of L-3 and non-L-3 products from March 2005 through August 2012. Extrapolating out for a full year the 2005 sales (12/10ths of the sales for the 10 months reported) and the 2012 sales (12/8ths of the sales for the 8 months reported), the following graph shows the sales from Exhibit 55, with year 1 representing 2005 and year 8 representing 2012:



The graph depicts that from year 1 to year 2 (2005-2006), Sun's L-3 product sales increased while its non-L-3 product sales declined. That inverse relationship continued for years 2 to 3 (2006-2007) and for years 3 through 4 (2007-2008) as well. The graph then shows a different inverse relationship between years 4 and 5 (2008-2009), with Sun's L-3 product sales declining while its non-L-3 product sales increased. Between years 5 and 6 (2009-2010) and years 6 and 7 (2010-2011) sales of both product lines decreased, but non-L-3 sales declined at a steeper rate. Finally, between years 7 and 8 (2011-2012), sales of both product lines increased, although Sun's L-3 sales increased a minimal 1.8%, while its non-L-3 sales increased by more than 11%. *See* Exhibit 55 (using projected full-year sales for 2005 and 2012).

Thus, a comparison of Sun's sales of L-3 and non-L-3 products from 2005 through 2012 shows that sales moved in opposite directions in four of the seven years, and in a fifth year (2011 to 2012) the sales moved in the same direction, but L-3 sales were practically flat while non-L-3 sales increased significantly. The varying paths of the L-3 sales and non-L-3 sales is hardly surprising, as Sun's non-L-3 sales include many different products manufactured by 25 different companies (Tr.-12 ("We're a stock and dealer of various aviation parts, like instruments, ELTs [emergency locator transmitters], antennas, accessories"), 43).

Sun's undisputed historical sales squarely contradict Vianello's statement that L-3 and non-L-3 sales were "remarkably stable." The poor correlation undermines his rejection of those projections that showed declining, flat, or modest growth in Sun's L-3 sales on the basis that those projections were inconsistent with Sun's non-L-3 sales after termination. Sun's historical sales also belie Gregg's statement that Sun's L-3 and non-L-3 sales follow each other (Tr. 113-14).

Vianello did not opine that either of the two "moving double average" computer models whose results he favored had any inherent advantages in forecasting lost profits. His flawed bases for selecting the projections they produced – which were the most favorable projections other than the 20 percent increase projection he rightly rejected as "unrealistic" – demonstrate that his testimony was fatally speculative. Because Riddle's projection was disproven by L-3's actual 2014 sales, and the supposed "remarkable stabil[ity]" between Sun's L-3 and non-L-3 sales is illusory, neither criterion employed by Vianello was an appropriate yardstick to assess his calculations. At bottom, Vianello had eight greatly differing projections of Sun's supposed lost profits and no rational basis for promoting the two that he did. The court's acceptance of those speculative projections is against the weight of the evidence.

C. A comparison of Vianello's projection assuming an annual increase of $358,051 in Sun's L-3 sales through 2030 with Sun's actual sales of L-3 products demonstrates that the court's acceptance of that projection is against the weight of the evidence.

The speculative and irrational nature of the court's award based on Vianello's testimony is further demonstrated by comparing Vianello's projection with Sun's actual sales of L-3 products from 2003 to 2012. Exhibit 55 shows that Sun's L-3 sales increased year-to-year only three times during Sun's tenure as an L-3 distributor, and decreased an average of 12% per year for the last three years (Tr.-85-86; LF-1135-36; Ex.-55). Yet Vianello's projection adopted by the court assumes that Sun's L-3 sales would have increased by $358,051 each and every year between 2012 and 2030 (Exs.-51, 52; LF-1083-84, 1136). In 2013, the first year of the projected sales increase, the $358,051 represented an approximate 18 percent sales increase (from $2,041,513 in 2012 to $2,433,112 in projected sales in 2013) (Exs.-52, 55). In 2014, the $358,051 projected sales increase reflects almost a 15 percent increase in sales (Ex.-54).

As a result, Vianello projected that Sun's annual L-3 sales would have increased from about $2 million in 2011 and 2012 to almost $8 million by year 2030, even excluding AIM product line sales from projected sales after July 2014 because L-3 sold the AIM line in 2014 (Tr.-200; LF-1073-75; Exs. 52, 55). Although there was evidence that the aftermarket demand for L-3's products would still exist in 20 or more years, the record does not support a 400 percent increase in demand by 2030 (Tr.-24-26, 30; LF-1124-25). Sun's actual L-3 sales demonstrate the "irrational exuberance" of Vianello's projection.

D. The court's award of lost profits is impermissibly speculative because the court accepted Vianello's projection of Sun's lost profits through 2030.

The trial court greatly compounded the effect of the speculation and faulty assumptions inherent in Vianello's calculations by accepting his projection of lost profits through the year 2030. An award of 18 years of lost profits in a commercial setting is inherently speculative given the number of factors that affect the sales landscape – the economy; the stability of a company's workforce, internal processes, and customers; and technological changes, to name only a few. Indeed, Sun's Gregg acknowledged a number of variables affecting Sun's sales, and attributed Sun's decrease in sales between 2010 and 2012 to the economy and a flaw in Sun's online inventory listing that took it two years to discover (Tr.-20-22, 106-08 ("The economy has a lot to do with sales. If the economy is down, people aren't buying as much"); Ex.-214 at 2). The court's award here is impermissibly speculative because it assumes an annual increase in sales over that extended period, despite Sun's spotty sales record over the nine years of its L-3 distributorship.

Moreover, an award of 18 years' lost profits for the termination of a distributorship is an undisguised windfall, particularly in light of Gregg's concession that Sun had recouped its initial investment. *See Lift Truck Lease & Serv., Inc. v. Nissan Forklift Corp., N. Am.*, 4:12-CV-153 CAS, 2013 WL 3092115, at *4, 6-7 (E.D. Mo. June 18, 2013) (plaintiff's expert calculated damages for alleged violation of Power Equipment Act based on a 24-month recoupment period in which plaintiff could "re-establish itself as a dealer for a new line of forklifts"; court expressed its "preliminary view" that the 24-month period "appears rather speculative," and "would overcompensate" plaintiff for damages resulting from termination "and result in a windfall"). Awarding 18 years of lost profits provides a powerful disincentive to Sun to re-tool its business to adjust to its changed circumstances.

The award of 18 years of lost profits is even more speculative with regard to Sun's concealment claim. Even if L-3 can be held liable for concealing its parent's consolidation plans, Sun remained subject to termination for any reason upon the 90 days' notice required by the Franchise Act. The assumption that an at-will distributor would remain in place for another 18 years is unwarranted conjecture.

Future profits may be recovered when they are "made reasonably certain by proof of actual facts, with present data for a rational estimate of their amount." *Coonis v.*

Rogers, 429 S.W.2d 709, 714 (Mo. 1968) (citation omitted); *see also Ameristar Jet Charter, Inc. v. Dodson Int'l Parts, Inc.*, 155 S.W.3d 50, 54 (Mo. 2005) ("[A] party must produce evidence that provides an adequate basis for estimating the lost profits with reasonable certainty."). Here, Vianello's opinion of lost profits could hardly be more speculative or conjectural.

Under the against-the-weight-of-the-evidence standard, this Court will reverse a judgment "when it has a firm belief that the decree or judgment is wrong." *Ivie*, 439 S.W.3d at 206. In light of Vianello's lack of reasoned basis for opining that Sun's lost profits should be based on his double-moving-average projections, the marked contrast between Sun's actual L-3 sales in the nine years of its distributorship and Vianello's rosy forecast of 18 years of increased sales, and the inherently speculative damage period selected by the court, this Court should be of the firm belief that the damage awards are wrong. In the event that the Court does not reverse the judgment against L-3 on Counts II and IV outright and enter judgment in Sun's favor in the amount of $19,134.75 on Count I, the Court should reverse the damage awards against L-3 on Counts I, II, and IV.

V. The trial court erred in entering judgment against L-3 on its counterclaim for account stated on the grounds that "there was no evidence that the parties reached an agreement as to the amount due or that Sun Aviation acknowledged the obligation or made an unconditional promise to pay" because the court misapplied and/or erroneously declared the law in that the uncontested evidence at trial demonstrated L-3's right to judgment because (a) Sun acknowledged it owed L-3 on the unpaid invoices; (b) Sun acknowledged that the total amount of the unpaid invoices was $278,372.65; (c) Sun never objected to the amount L-3 stated was due; (d) Sun repeatedly stated its intention to pay the outstanding invoices; and (e) Sun admitted that it sold the products to its customers at a profit.

L-3's counterclaims against Sun were based on Sun's failure to pay L-3 $278,372.65 on outstanding invoices. Approximately $204,000 worth of the products for which Sun did not pay were ordered after Sun received formal written notice of termination (Tr.-58, 59-61, 62-63, 67-68; Ex.-200). The trial court entered judgment against L-3 on its first counterclaim for account stated because it found there was "no evidence … that Sun Aviation acknowledged the obligation or made an unconditional promise to pay" and that Sun "never settled on an amount" (Apdx-A41). In fact, Sun's Gregg repeatedly recognized in emails sent to L-3 that Sun owed L-3 for "outstanding … open due invoices," he indicated his intent to pay the debt and "recognized that [he] owed it," and he admitted at trial that these invoices totaled $278,372.65 (Tr.-62-63, 67, 72-73;

Ex.-206). Gregg's acknowledgements established L-3's right to recover on its account-stated counterclaim as a matter of law.

A. The "account stated" cause of action.

An account stated is "an agreement between parties, having had previous financial transactions, that a balance struck is correct and due between them, and a promise by the debtor, *either express or implied*, to pay the balance." *Ozark Mountain Timber Prods., Inc. v. Redus*, 725 S.W.2d 640, 648 (Mo.App. 1987) (emphasis added); *Perbal v. Dazor Mfg. Corp.*, 436 S.W.2d 677, 684-86 (Mo. 1968). "[I]f a definite sum has been acknowledged to be due on an account, the law implies a promise on the part of the debtor to pay." *Gerstner v. Lithocraft Studios, Inc.*, 258 S.W.2d 250, 254 (Mo.App. 1953).

Contrary to the court's ruling, a plaintiff bringing suit on account stated need not prove the defendant's "express acknowledgment that there is a fixed sum owing and a definite promise to pay that amount." *Watkins Prods., Inc. v. Peek*, 461 S.W.2d 341, 344 (Mo.App. 1970). On the contrary, in some circumstances a debtor's silence may suffice to establish "acknowledgment of the account as stated." *Id.* (quoting *Gerstner*, 258 S.W.2d at 253); *see also Wiggins v. Weston*, 339 S.W.2d 781, 782-33 (Mo. 1960).

B. Sun repeatedly acknowledged that it owed L-3 on the open invoices, which it admitted totaled $278,372.65, and stated its intent to pay.

During Gregg's cross-examination, the trial court received into evidence 38 invoices L-3 sent documenting Sun's orders (Tr.-65-66; Ex.-201), and 38 "receiver invoices" that Sun generated which "exactly correlate" to L-3's invoices (Tr. 68-70; Ex.-

203). L-3 also submitted into evidence a statement it sent to Sun, dated April 24, 2013, listing those 38 transactions and showing the unpaid balance of $278,372.65 (Tr.-62-63; Ex.-200). Gregg confirmed that he received this statement and the individual invoices for Sun's 38 orders identified on the statement; that the statement listed "products that were purchased by Sun from L-3 for which L-3 [was] claiming [Sun] owe[d] them"; that "the 38 orders" were "reflected on Exhibit 200"; and "that Sun Aviation ha[d] not paid the $278,372.65 reflected on this statement" (Tr.-62-65; Ex.-200).

In a series of emails between October 26 and December 5, 2012, Gregg repeatedly expressed Sun's desire and intent to pay the "outstanding invoices" (Tr.-72; Ex.-206). On October 26, 2012, four days after the date of the final invoice listed on Exhibit 200, Gregg sent L-3 an email stating, "We fully intend to pay off the outstanding invoices" (Tr.-71-73; Ex.-206 at 7-8; Ex.-200 at 2; Ex.-203 at 1-2). In the same email, Gregg referred to "our open due invoices" (Ex.-206 at 7).

On November 29, Gregg wrote: "I do want to pay you off and be done with this situation, … I simply don't have the funds," and discussed his plan to "pay off what I owe L-3," and to "continue in our endeavors to do everything we can to be in a position to pay the outstanding amounts due" (Tr.-77; Ex.-206 at 3). And on December 5, 2012, Gregg explained that even if Sun were to return part of the inventory, Sun "still [wouldn't] have enough money to clear the account…. My plan is to pay as I sell inventory, and when I can pay more towards the debt I will …." (Ex.-206 at 1). At no point during this email exchange did Gregg ever dispute the amount due.

At trial, Gregg again confirmed that at the time of these emails, Sun intended to pay the account. When he sent the first email to L-3 on October 26, 2012, he "[r]ecognized that [he] owed" the debt and that "it was … [his] intent to fully pay it off" (Tr.-72-73; *see also* Tr.-114 (agreeing that "Sun did receive some products from L-3 for which it has not paid")). He also reiterated that the only reason Sun did not pay was because it "just didn't have the money at the time" (Tr.-68). Gregg agreed that L-3 was claiming that Sun owed $278,372.65 for products Sun purchased, and that Sun had sold all $278,372.65 worth of those products to its customers "for a profit" (Tr.-67-68).

Given that (a) Sun's receiver invoices correlate "exactly" to L-3's invoices; (b) Gregg repeatedly referred to "the outstanding invoices," "the outstanding amounts due," "the account," and "the debt," and expressed Sun's intent and desire to pay; and (c) Gregg never disputed or questioned the amount due, there can be no ambiguity that he was acknowledging that Sun owed L-3 the $278,372.65 owed on those invoices.

Gregg's admissions at trial sufficed to prove L-3's account-stated claim. *See Ayers Plastics Co. v. Packaging Prods. Corp.*, 597 S.W.2d 177, 180 (Mo.App. 1979) (holding that an admission during trial acknowledging the debt was sufficient evidence to support a claim). Although this uncontested evidence compels the conclusion that "a definite sum [was] acknowledged to be due on an account," *Gerstner*, 258 S.W.2d at 254, the trial court ignored it, apparently on the erroneous belief that L-3 was required to offer a specific, express promise by Sun to pay L-3 $278,372.65. *Gerstner* and *Wiggins* refute that requirement. *Gerstner*, 258 S.W.2d at 254; *Wiggins*, 339 S.W.2d at 782-83.

Moreover, a promise to pay may be inferred from a debtor's "retention of the account rendered for a reasonable time without objection." *Chisler v. Staats*, 502 S.W.2d 424, 426, 427 (Mo.App. 1973) ("Under the circumstances of this case, six months is a more than reasonable time for respondents to have objected to the account."); *Ozark Mountain Timber Prods.*, 725 S.W.2d at 648 ("If the debtor makes no express promise to pay, the retention of the account rendered for a reasonable time without objection admits to the account and implies a promise to pay."). Here, Sun's failure to ever voice any specific objection to the account implied its promise to pay.

"[W]hen the evidence is *uncontested*[,] … no deference is given to the trial court's findings." *White v. Director of Revenue*, 321 S.W.3d 298, 308 (Mo. 2010). "Evidence … is uncontested when a party 'has admitted in its pleadings, by counsel, or through the [party's] individual testimony the basic facts of [other party's] case.'" *Id.* (citation omitted). "In such cases, the issue is legal, and there is no finding of fact to which to defer." *Id.* Sun admitted the elements of L-3's claim at trial—that "a definite sum [was] acknowledged to be due on an account," *Gerstner*, 258 S.W.2d at 254. The trial court thus erred as a matter of law in concluding that the uncontested evidence did not establish L-3's right to recovery.

The trial court quoted at length from *Scheck Industrial Corp. v. Tarlton Corp.*, 435 S.W.3d 705, 722 (Mo.App. 2014), as support for its conclusion that L-3's evidence was insufficient (Apdx-A40, A41 n.20). *Scheck*, a construction dispute, is off the mark. The plaintiff subcontractor performed repairs on a project, the defendant general contractor refused to pay, and the plaintiff sued for account stated. *Id.* at 716. The subcontractor argued that the general contractor acknowledged the debt in emails and in a claim submitted to the property owner seeking payment for the subcontractor's work, but those documents stated that the debt would be paid only if the owner paid the general. *Id.* at 721-23 & n.12. The court held the evidence showed that "the Defendant's obligation to pay Plaintiff was contingent on the successful resolution" of the claim. *Id.* at 722.

Here, in contrast to *Scheck*, there was no contingency. Gregg did not equivocate when he acknowledged that the "outstanding invoices" were "open and due," or when he referred to the "account" and the "debt" Sun owed. (Ex.-206 at 1, 7-8). Rather, he "[r]ecognized that [he] owed" the debt, and "it was … [his] intent to fully pay it off" (Tr.-73). Although he also stated that "to do so we have to work this out with our bank and our line of credit," he made clear, "this is in [the] works now but this will take a while as it has to go through committee which only takes place once a month" (Ex.-206 at 8).

The only reason asserted by Sun for not paying was that it "simply d[id]n't have the funds" (Ex.-206 at 3; Tr.-71-72)—not that some contingency existed. An acknowledgment of debt is not "contingent" just because the debtor also claims an inability to pay or a need to obtain funds. In *Gerstner*, for example, the debtor responded to the plaintiff's demand letter with partial payments and a response letter stating as follows: "Like yourself we have encountered considerable trouble in our collections. Please be assured, however, that it is our earnest desire to pay this account at the earliest possible date, and all of our efforts are directed in that direction." 258 S.W.2d at 252-53.

The court held that the debtor's acknowledgment of the debt was not contingent on obtaining funds because the phrase "'[t]his account' could refer to no other than the one for which payment had been requested in a fixed amount." *Id.* at 253. The acknowledgment of the debt alone carried the plaintiff's claim. *See also Ayers*, 597 S.W.2d at 180 (upholding a judgment for account stated based on the debtor's testimony that it was his "intention" that "the total amount of the invoices" would have been satisfied "if it had been … possible … to pay the total sum"); *Watkins Prods., Inc.*, 461 S.W.2d at 344 (reversing judgment for the debtor because she acknowledged the debt by signing and returning an account statement, even though she made no express promise to pay); *Niehaus v. Gillanders*, 184 S.W. 949, 951 (Mo.App. 1916) (reversing judgment for the debtor because the jury instructions required an express agreement, and the record contained evidence that the debtor did not object to a bill but stated only that she was unable to pay it).

The trial court appeared to give weight to Sun's denial at trial that "it owes L-3 Avionics any money" (Apdx-A41). But Sun's pre-litigation admission that it owed the debt was conclusive proof of L-3's account-stated claim. *See Gerstner*, 258 S.W.2d at 253; *Wiggins*, 339 S.W.2d at 782-83; *Ozark Mountain Timber Prods.*, 725 S.W.2d at 648 (rejecting a challenge to an account-stated claim because "it was only after the litigation commenced that [the debtors] disputed the amount due"). Sun did not object until after consulting with counsel (*see* Tr.-75, 115-16), but at that point, it had already acknowledged the debt was owed. *See Chisler*, 502 S.W.2d at 427 (reversing the trial court's judgment because the debtor did not object for six months until after his counsel advised him not to pay the full amount of the debt).

Sun expressly acknowledged "the outstanding invoices," "the account," and "the debt" in Gregg's emails to L-3, and Gregg admitted at trial that the outstanding invoices totaled $278,372.65 (Tr.-62-63; Ex.-200; Ex.-206). This was uncontested, conclusive proof of L-3's account-stated claim, and the trial court's judgment should be reversed. Because L-3 proved its claim for account stated, the court should enter judgment in L-3's favor for $278,372.65. *See* Mo. Sup. Ct. R. 84.14 ("The appellate court shall … give such judgment as the court ought to give.").

VI. The trial court erred in entering judgment against L-3 on its counterclaim for action on account on the grounds that L-3 did not carry its burden of proving that L-3's charges for the products which Sun ordered but did not pay for were reasonable and that L-3's claim was barred by Sun's first-to-breach defense because the court misapplied and/or erroneously declared the law in that (a) the reasonableness of L-3's prices is demonstrated by the uncontested evidence at trial that Sun ordered the products it has not paid for knowing the prices charged by L-3; Sun never objected to those prices; Sun sold all of the products in question at a profit; and Sun acknowledged it owed L-3 on the outstanding invoices; and (b) the first-to-breach rule does not apply because Sun did not allege and the court did not hold that L-3 breached the parties' contract.

The trial court likewise erred in entering judgment against L-3 on its second counterclaim, action on account, because L-3 "failed to carry its burden of proof on the third element of this claim," that its charges for its products were reasonable.[13/] The court ruled against L-3 on this claim because it imposed a requirement on L-3 not required in the caselaw – that the plaintiff must offer testimony expressly stating that the prices it charged were reasonable. Further, the court erred in holding in the alternative that L-3's

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[13/] Of course, this Point becomes moot if the Court orders judgment for L-3 on its claim for Account Stated (Point V).

claim was barred by Sun's first-to-breach affirmative defense. Because L-3 did not violate any contractual provision, that defense is inapposite.

A. Action on account.

"An action on account is based on contract." *Women's Care Specialists, LLC v. Troupin*, 408 S.W.3d 310, 318 (Mo.App. 2013) (citation omitted). Specifically, the plaintiff must show that "(1) defendant requested plaintiff to furnish merchandise or services, (2) plaintiff accepted defendant's offer by furnishing such merchandise or services, and (3) the charges were reasonable." *Id.* (citation omitted); *see also Heritage Roofing, LLC v. Fischer*, 164 S.W.3d 128, 133 (Mo.App. 2005); MAI 26.03. "An open account may be proven by evidence of an account stated." *Ayers*, 597 S.W.2d at 180. The reasonableness of charges may be implied by the evidence. *See Grothaus v. Brown*, 690 S.W.2d 431 (Mo.App. 1985); *see also Moran v. Hubbartt*, 178 S.W.3d 604, 610 (Mo.App. 2005).

B. The trial court's ruling.

In rejecting L-3's counterclaim based on account, the court stated:

> "[D]efendant never asked Mr. Gregg if the amounts charged for those products were reasonable, and defendant did not offer any other evidence related to its counterclaim. Defendant's corporate representative, Shelly Buckley, did not testify about defendant's counterclaim at all. Therefore, defendant failed to carry its burden of proof on the third element of this claim.

> "Even if defendant had proved its claim, Plaintiff's first-to-breach affirmative defense bars the claim. … Here, the claims alleged by defendant were for payments due after defendant terminated Sun Aviation. The wrongful termination relieved Sun Aviation of any obligation to perform." (Apdx-A42).

The court's finding that "defendant did not offer any other evidence related to its counterclaim" flatly contradicts the record.

C. L-3's evidence demonstrated the reasonableness of its prices.

The reasonableness of L-3's prices may be inferred from Sun's failure to object to the price at the time of purchase. In *Grothaus*, a farmer sued his former business partner in an action on account to recover the cost of seed that was used to plant crops. 690 S.W.2d at 432. The defendant had paid half of the seed bill at the time of purchase without objection. *Id.* The court held that a reasonable price could be inferred from the failure to object, even though the only other evidence presented at trial was that the seed was purchased from "a certain elevator at a certain price." *Id.* at 432-33.

Here, Sun clearly knew the prices of the L-3 products it ordered, as it received a 40% discount from L-3's catalog list price for those purchases (Tr.-170, 182; LF-276, 852; Ex.-209 at 15-16). Gregg never voiced any objection to L-3's prices, either at trial or in his email exchanges with L-3 about the unpaid invoices. Nor did Sun assert that the prices were out of step from what it had previously paid during the parties' history of dealing. Gregg agreed that the reason Sun didn't pay the invoices was that it "just didn't have the money at the time" (Tr.-68). The reasonableness of the prices charged by L-3 is further established by Gregg's admission that Sun sold the entire $278,372.65 worth of products to its customers at a profit (Tr.-67-68). Sun's repeated acknowledgments that the debt was owed were also admissions of the reasonableness of the charges and proof of L-3's action on account. *See Ayers*, 597 S.W.2d at 180.

In concluding that L-3 had not met its burden of proof on the reasonableness element, the court pointed to L-3's failure to ask Gregg if the prices were reasonable, and the fact that L-3's corporate representative at trial, Shelly Buckley, did not testify about L-3's counterclaim. But because the record already contained unrefuted evidence of the reasonableness of L-3's prices, such testimony from Sun or from Ms. Buckley would have been merely cumulative.

The trial court in effect ruled that even though Sun repeatedly acknowledged its debt, knew L-3's prices when it ordered the products, and resold the products at a profit, L-3 was required to call a witness to the stand simply to recite the magic words "the charges were reasonable." The court in *Moran*, 178 S.W.3d at 610 (Breckenridge, J.), rejected as "overly restrictive" the defendants' assertion that the plaintiff did not prove the reasonableness requirement in a quantum meruit action because he did not testify that the charges were "reasonable."[14/] Observing that no requirement exists "that the term 'reasonable' must be specifically stated," *id.* at 610, the court concluded that the plaintiff had presented "evidence that fulfills the requirement of demonstrating that the value of

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14/ "An action in quantum meruit and an action on account are equivalent actions." *Classic Kitchens & Interiors v. Johnson*, 110 S.W.3d 412, 416 n.2 (Mo.App. 2003).

his excavation services was reasonable" *Id.* at 612. "The Hubbartts' conduct in accepting the charges made by Mr. Moran for his excavation services, billing their customers in that amount, and receiving payment from their customers in that amount, is sufficient evidence from which a jury could reasonably infer that $10,535 was the reasonable value of the excavation services Mr. Moran performed …." *Id.*

The same reasoning applies here. L-3 proved the reasonableness of its prices through uncontested evidence that Sun knew but never objected to the prices it was charged, ordered products from L-3 for some nine years, sold for a profit the products for which it did not pay, and repeatedly acknowledged that it owed L-3 on the "outstanding invoices." Contrary to the court's conclusion, L-3 more than carried its burden of proof. Sun offered no contrary evidence that the prices were not reasonable. Because the facts surrounding Sun's failure to pay on its account were not contested and the court's factual findings do not "depend on credibility determinations," the court's findings are not entitled to deference. *Ivie,* 439 S.W.3d at 206. The court erred as a matter of law in entering judgment against L-3 because it did not offer express testimony of the reasonableness of L-3's charges. The judgment against L-3 on its second counterclaim should be reversed.

D. The first-to-breach defense does not apply.

As an alternative ground for denying L-3's account counterclaim, the court misapplied Missouri law by improperly invoking the "first-to-breach" rule, despite the lack of any allegation or ruling that L-3 had breached the parties' agreement. The rule "holds that a party to a contract cannot claim its benefit where he is the first to violate it."

Williams Constr., Inc. v. Wehr Constr., LLC, 403 S.W.3d 660, 664 (Mo.App. 2012) (citation omitted). But "[o]nly a material breach … may excuse the other party's performance." *Id.* The first-to-breach rule does not apply because Sun did not allege, and the court did not hold, that L-3 breached any contractual provision.

The judgment against L-3 on Counts I, II, and III was based on Sun's statutory claims, and the judgment on Count IV was for fraudulent nondisclosure. For the reasons stated in Points I and II above, the court erred in holding L-3 liable on those claims, with the exception of the failure to give statutory notice of termination under the Franchise Act, §407.405. Even if this Court disagrees that the judgment in Sun's favor on those claims was in error, and assuming the first-to-breach rule could be applied to L-3's counterclaim based on L-3's alleged statutory violations and concealment, Sun's claims accuse L-3 of failing to give statutorily-required notice of termination and of improperly terminating Sun's distributorship. None of those claims asserts a deficiency in L-3's performance of its obligations under the contract – *i.e.*, shipping product ordered by Sun. L-3 did not breach any term of the contract, let alone any material term, in a manner that would excuse Sun's performance of its payment obligation.

"The essential elements of any contract … are offer, acceptance, and bargained for consideration." *Baker v. Bristol Care, Inc.*, 450 S.W.3d 770, 774 (Mo. 2014) (citation and internal quotation marks omitted). All three elements were established when Sun offered to purchase the products from L-3 at a particular price, and L-3 accepted Sun's offers by fulfilling the orders. L-3 kept up its end of the bargain by providing Sun the products, which Sun then sold to its customers for a profit.

Sun's obligation to pay for the products it ordered from L-3 and sold to its customers was independently enforceable regardless of whether the Power Equipment or Franchise Acts applied or L-3 improperly concealed its parent's consolidation plans. In fact, Gregg acknowledged that Sun placed most of these orders—totaling $204,053.13—*after* L-3 gave formal written notice on August 2, 2012, that it was terminating the distributorship (Tr.-58-61; Ex.-205).

Even if the failure to give notice were considered a "breach," it was unconnected and irrelevant to the *subsequent* purchase-and-sale transactions in issue here. The trial court misapplied the "first-to-breach" rule, and its judgment in favor of Sun on L-3's counterclaim for action on account should be reversed.

CONCLUSION

Because the trial court misinterpreted the phrase, "industrial, maintenance and construction power equipment" to include the component parts manufactured by L-3 and sold by Sun, the judgment in favor of Sun on Count I (to the extent based on the Power Equipment Act), Count II, and Count III should be reversed, and the Court should enter judgment for L-3. In addition, the Court should reverse the award of attorney's fees, and remand to the trial court to award attorney's fees to L-3 as the prevailing party under the Power Equipment Act and the Inventory Repurchase Act.

The judgment in favor of Sun on Count IV should also be reversed because the trial court erred in holding that L-3 had a duty to disclose to Sun L-3's corporate parent's consolidation plan. And because the court applied the wrong measure of damages in awarding Sun 18 years of lost profits on its claim for inadequate notice of termination under the Franchise Act, the judgment in favor of Sun on Count I should be reduced to $19,134.75.

Alternatively, if the Court does not reverse the judgment in favor of Sun on Counts II and IV and reduce the judgment on Count I to $19,134.75, the Court should either reverse the damages award outright based on Sun's failure of proof, or remand for a new trial on damages. In the event that the judgment in favor of Sun on Count IV survives, the Court should remand for entry of the proper rate of post-judgment interest under §408.040.3. The mandate should also direct the trial court to enter a proportional award of costs.

Finally, because L-3 met its burden of proof on its counterclaims for account stated and/or action on account, the Court should enter judgment in favor of L-3 in the amount of $278,372.65.

BRYAN CAVE LLP

By: /s/ Elizabeth C. Carver

Thomas C. Walsh, #18605
Elizabeth C. Carver, #34328
One Metropolitan Square
211 North Broadway, Suite 3600
St. Louis, MO 63102
(314) 259-2000
(314) 259-2020 [facsimile]

Edward F. Downey, #28866
Riverview Office Center
221 Bolivar Street
Jefferson City, MO 65101
(573) 556-6622
(573) 556-7442 [facsimile]

Caleb Phillips, #66148
1200 Main Street, Suite 3500
Kansas City, MO 64105
(816) 374-3200
(816) 374-3300 [facsimile]

Attorneys for Defendant/Appellant
L-3 Communications Avionics Systems, Inc.

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Supreme Court Rule 84.06(c), that this Substitute Brief for Appellant complies with Rule 55.03, and with the limitations contained in Rule 84.06(b). I further certify that this brief contains 23,063 words, excluding the cover, this certificate, the signature block, and the Appendix, as determined by the Microsoft Word 2010 Word-counting system.

/s/ *Elizabeth C. Carver*

CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2017, I electronically filed the foregoing Substitute Brief for Appellant and Substitute Appendix with the Clerk of the Court using the Court's electronic filing system, which will send a notice of electronic filing to all counsel of record.

/s/ *Elizabeth C. Carver*
Attorney for Appellant