SC 96280

IN THE MISSOURI SURPEME COURT

SUN AVIATION, INC.,
Plaintiff-Respondent,

v.

L-3COMMUNICATIONS AVIONICS SYSTEMS, INC.,
Defendant-Appellant.

On Appeal From the Circuit Court of Jackson County, Missouri
The Honorable James F. Kanatzar

BRIEF OF THE ASSOCIATED INDUSTRIES OF MISSOURI AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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JURISDICTIONAL STATEMENT

AIM as *amicus curiae* adopts the Jurisdictional Statement set forth in Appellant's brief.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Associated Industries of Missouri ("AIM") is a Missouri not-for-profit corporation in good standing. AIM represents hundreds of small and large businesses and manufacturers in Missouri. AIM seeks to ensure that businesses in Missouri are able to conduct their business relationships in reliance upon the reasonable and logical interpretation of Missouri statutes and case law. Missouri statutes should not be enforced in such a way as to mandate widespread perpetual obligations that deny Missouri businesses the freedom to contract in accordance with each entity's reasonable business needs. Nor should Missouri statutes be enforced in a way that mandates that ordinary distribution strategies be frozen in time so that businesses cannot adapt to future changes, resulting in perpetual, ineffective and inefficient business relationships.

STATEMENT CONCERNING CONSENT OF THE PARTIES

AIM contacted counsel for Appellant and Respondent to request consent to file this brief. Appellant consents to the filling of this brief, but AIM has not received consent from Respondent. Accordingly, AIM is contemporaneously filing a motion for leave to file this brief.

STATEMENT OF FACTS

AIM as *amicus curiae* adopts the Statement of Facts as set forth in Appellant's brief.

POINTS RELIED ON

I. SECTIONS 407.753 AND 407.860 WERE INTENDED TO PROTECT DEALERS OF LARGE, EXPENSIVE MACHINES, NOT SELLERS OF ANY DEVICE THAT USES ELECTRICITY.

§ 407.753, RSMo.

§ 407.860, RSMo.

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

McBud of Missouri, Inc. v. Siemens Energy & Automation, Inc., 68 F. Supp. 2d 1076 (E.D. Mo. 199)

II. SECTION 407.753 MUST BE CONSTRUED NARROWLY TO AVOID CREATING SWATHS OF PERPETUAL DISTRIBUTION AGREEMENTS.

Paisley v. Lucas, 143 S.W.2d 262 (Mo. banc. 1940)

Zartman-Thalman Carriage Co. v. Reid, 73 S.W. 942 (Mo. banc. 1903)

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

III. PARTIES TO A DISTRIBUTION AGREEMENT ARE NOT IN A FIDUCIARY RELATIONSHIP AND STATUTORY CLAIMS FOR TERMINATION WITHOUT NOTICE CANNOT BE REPACKAGED AS FRAUD CLAIMS.

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

Chmieleski v. City Prods. Corp., 660 S.W.2d 275 (Mo. App. 1983)

Osterberger v. Hites Constr. Co., 599 S.W.2d 221 (Mo. App. 1980)

ARGUMENT

The trial court erred in interpreting the Construction Power Equipment Act, § 407.860, RSMo., and the Farm Dealers Buy-Back Act, § 407.860, RSMo., to cover any distributorship involving the sale or repair of any item that uses or supplies energy in any manner. Those statutes impose onerous conditions on the distribution agreements to which they apply, and make it virtually impossible for manufacturers to terminate them for lawful and legitimate reasons. Their reach should be limited to distributorships involving the sale of large, expensive machinery, as clearly intended by the legislature.

The trial court also erred in holding that Appellant had a duty to disclose information concerning its corporate reorganization to Respondent simply because they were in a manufacturer-distributor relationship. Upholding that ruling will effectively require sophisticated companies engaged in arm's length business transactions to disclose any contemplated change in circumstances that might conceivably bear on their continuing relationship. This would vastly and improperly expand the law of fraudulent concealment, and would have disastrous consequences for business dealings in Missouri.

The judgment should be reversed.

I. SECTIONS 407.753 AND 407.860 WERE INTENDED TO PROTECT DEALERS OF LARGE, EXPENSIVE MACHINES, NOT SELLERS OF ANY DEVICE THAT USES ELECTRICITY.

The overarching purpose of statutory interpretation is to determine the intent of the legislature. *Bateman v. Rinehart*, 391 S.W.3d 441, 446 (Mo. banc. 2013). In construing a statute, all provisions must be read together, and statutes concerning the same subject are

considered. *Veal v. City of St. Louis*, 289 S.W.2d 7, 12 (Mo. banc. 1956). Courts presume that every word in a statute has meaning, *Bateman*, 391 S.W.3d at 446, and look to the context in which words are used and the problem the legislature sought to correct, *Mayfield v. Director of Revenue*, 335 S.W.3d 572, 573 (Mo. App. 2011).

Section 407.753 refers to "industrial, maintenance and construction power equipment used for industrial, maintenance and construction applications." Section 407.860 likewise applies to "industrial, maintenance and construction power equipment." Neither statute defines "power equipment."

The trial court combined dictionary definitions of "power" and "equipment," arriving at the following definition: "any article or implement that is a source of energy, supplies energy, or uses energy in an operation or activity." LF721. While dictionary definitions may be a useful starting point, they are not the sole consideration in statutory interpretation. *State v. Payne*, 250 S.W.3d 815, 820 (Mo. App. 2008). The trial court erred by looking only to dictionary definitions, which produced an extremely broad interpretation with no connection to the statutes' purpose.

The legislature did not intend the words ***industrial, maintenance or construction*** power equipment ***used for industrial, maintenance and construction applications*** to be superfluous, and they must be given meaning. Under the canons of *ejusdem generis* and *noscitur a sociis*, those words substantially restrict the scope of the term "power equipment." *See Pollard v. Board of Police Comm'rs*, 665 S.W.2d 333, 341 & nn.12-13 (Mo. banc. 1984). Those words indicate that the legislature intended the statutes to cover

distribution agreements involving the sale or repair of large, expensive machinery used to manufacture, build or repair things.

"Construction" and "maintenance" are self-explanatory. As to "industrial," in interpreting the tax statutes, this Court has routinely applied *noscitur a sociis* and associated "industrial" with the manufacture of goods. *See Union Elec. Co. v. Director of Revenue*, 425 S.W.3d 118, 122-24 (Mo. banc. 2014); *Aquila Foreign Qualifications Corp. v. Director of Revenue*, 362 S.W.3d 1, 4-5 (Mo. banc. 2012). Here, the word "industrial" appears alongside "construction" and "maintenance," demonstrating that the legislature used it to mean manufacturing, not as a general reference to a line of business.

This is consistent with federal decisions that have interpreted section 407.753. In *McBud of Missouri, Inc. v. Siemens Energy & Automation, Inc.*, 68 F. Supp. 2d 1076, 1081-82 (E.D. Mo. 1999), the court interpreted "power equipment" to refer, at a minimum, 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 internal combustion engine." The court rejected the contention that the statute covered equipment used to distribute or control electricity. In *Machine Maintenance, Inc. v. Generac Power Systems, Inc.*, 2013 WL 5538778 (E.D. Mo. Oct. 8, 2013), the court applied the same definition to conclude that gas-powered generators were "construction power equipment."

While *McBud* did not exhaustively categorize everything that might constitute power equipment, it did reason that such equipment must at least be an end-use machine used to do work. The trial court's definition, by contrast, covers anything that "uses

energy in an operation or activity." Under that definition, all of the following would constitute power equipment: extension cords, light bulbs, batteries, electrical outlets, wiring, telephones, coffee makers, copiers, vacuum cleaners, ***or anything else that conducts or has electricity supplied to it***.[1] "[I]t strains common sense to conclude 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." *McBud*, 68 F. Supp. 2d at 1081-82.

Appellant's gyros and backup power supplies are aircraft component parts. Gyros are installed in aircraft, receive electricity from another source, and display information. Backup power supplies provide power to certain aircraft instruments in case of emergency. They are charged before installation and subsequently charged by the aircraft. Neither item is self-powered. Neither is an end-use machine. And neither fits the definition of "industrial, maintenance and construction power equipment**.**"

Section 407.753 also requires that power equipment be "used for industrial, maintenance and construction applications." The Court of Appeals reasoned that this requirement was met because Appellant's gyros and power supplies "are used in the avionics industry." *Sun Aviation, Inc. v. L-3 Comms. Avionics Sys., Inc.*, No. WD 79454, 79641, at 9 n.4. This proves too much.

[1] Appellant suggested in the Court of Appeals that "power" includes "muscular power," which would extend sections 407.753 and 407.860 to items like shovels, rakes, and hoes.

The Court of Appeals relied on a dictionary definition of "industrial" meaning "being in or part of an industry." *Id.* As noted previously, dictionaries are not the final source of statutory interpretation. *Payne*, 250 S.W.3d at 820. In *State ex rel. Keystone Laundry & Dry Cleaners, Inc. v. McDonnell*, 426 S.W.2d 11 (Mo. banc. 1968), this Court considered whether a commercial laundry was an "industrial plant." It concluded that use of the word "industry" to refer generally to an entire line of business was not controlling, and that laundries were not "industrial plants" because they were service businesses that did not manufacture anything. *Id.* at 15-18. *Keystone Laundry* is consistent with the Court's holdings in *Union Electric*, 425 S.W.3d 118, and *Aquila*, 362 S.W.3d 1.

The Court should apply the same logic here. Many devices that receive electricity are used in businesses that may be called an "industry" in a general sense. Computers and copiers are commonplace in the legal services "industry." And cleaning devices powered by electricity are common in the commercial laundry or hotel "industries." But such machines are no more industrial power equipment than law firms, laundries, or hotels are industrial plants.

Related Missouri statutes bolster this conclusion. *See Veal*, 289 S.W.2d at 12. *McBud* noted that another provision of the Construction Power Equipment Act contained exclusions pertaining to "implements, machinery, and attachments," as well as engines, consistent with limiting the statute to end-use machines. 68 F. Supp. 2d at 1085-86. Respondent contends *McBud*'s reasoning was undercut when the legislature later repealed the cited provision and moved it to section 407.850, utilizing different language.

But section 407.850 defines "retailer" to include purveyors of: (a) "Farm implements, machinery, attachments or repair parts," (b) "Industrial, maintenance and construction power equipment," and (c) "Outdoor power equipment used for lawn, garden, golf course, landscaping or grounds maintenance." § 407.850(5), RSMo.; *see also* 407.838(1), RSMo. (defining "farm equipment"). The fact that sellers of "industrial, maintenance and construction power equipment" are grouped with sellers of large, expensive farming and grounds maintenance machinery strongly indicates that "power equipment" does not include component parts that draw electricity. "The official title to a statute is a portion thereof and must be considered in construing the meaning and purpose of the statute." *State v. Windmiller*, 579 S.W.2d 730, 732 (Mo. App. 1979). Had the legislature intended these statutes to govern all distributorships involving the sale of items that draw electricity, it would not have titled them the Construction Power Equipment Act and the Farm Dealers Buy-Back Act.

Missouri has long valued freedom of contract and enforcing agreements that are the product of arm's length negotiations. *See High Life Sales Co. v. Brown-Forman Corp.*, 823 S.W.2d 493, 496 (Mo. banc. 1992). And, while freedom of contract must sometimes yield to important public policies, *id.* at 497-98, such policies should be clearly expressed by the legislature. No such expression is present.

Distributors of large manufacturing, construction and maintenance equipment must make substantial capital and asset investments, warranting additional protections. Distributors of things like coffee makers, copiers, and vacuum cleaners are in a fundamentally different position, and do not require the same protections. As discussed in

Point II, Section 407.753 essentially locks manufacturers into a relationship based on business considerations at a particular point in time. Manufacturers are thus prohibited from adapting their businesses to changing circumstances and markets, and from taking advantage of new efficiencies created by economies of scale and changes in distribution technology. The trial court's broad interpretation would sacrifice many businesses' ability to contract freely, despite the lack of any public policy warranting such a result.

The fact that chapter 407 is remedial in nature does not support a different conclusion. Sections 407.753 and 407.860 were enacted to protect specific categories of distributors. The words "industrial," "construction," and "maintenance" cannot be read out of the statutes simply because chapter 407 is—as a general matter—remedial.

II. SECTION 407.753 MUST BE CONSTRUED NARROWLY TO AVOID CREATING SWATHS OF PERPETUAL DISTRIBUTION AGREEMENTS.

Under section 407.753, manufacturers cannot "terminate, cancel, or fail to renew any [covered] contract without good cause." The statute identifies circumstances that constitute good cause, all of which turn on the conduct of the distributor. *See* § 407.753.1, RSMo. Improper termination permits recovery of "damages sustained by the retailer as a consequence of the violation," as well as costs and attorney's fees. *Id.* § 407.755.

The practical effect is that a manufacturer can ***never*** end a covered distribution relationship, so long as the distributor performs adequately, without being subjected to extensive liability. Manufacturers are thus prohibited from ending distribution agreements for legitimate and lawful reasons such as: discontinuing service of the Missouri market; discontinuing a particular product line; deciding to wind up business;

or, as here, deciding to reorganize its corporate structure. Covered agreements effectively become perpetual contracts that are largely terminable only at the distributor's option.

Missouri courts "are prone to hold against the theory that a contract confers a perpetuity of right or imposes a perpetuity of obligation." *Paisley v. Lucas*, 143 S.W.2d 262, 270 (Mo. banc. 1940), *overruled in part on other grounds by Novak v. Baumann*, 329 S.W.2d 732 (Mo. banc. 1959). While Missouri courts will enforce a perpetual contract, they go to great lengths to avoid it. Even when the effect of a contract is to create a perpetual agreement, courts will not enforce it unless it unequivocally expresses an intention to run in perpetuity. *Armstrong Business Servs., Inc. v. H&R Block*, 96 S.W.3d 867, 875 (Mo. App. 2002). Otherwise, the agreement is terminable at-will. *Id.*

Under the trial court's interpretation of "power equipment," a distributorship involving the sale of virtually any item that supplies, uses or conducts electricity in any fashion would become a perpetual agreement that is practically impossible to terminate. With the proliferation of electronic components in modern products, the consequences of such an interpretation are staggering.

As explained, the plain language of § 407.753 covers only those distributorships involving the sale or repair of large, expensive equipment used in manufacturing, construction and maintenance work. Statutes in derogation of the common law should not be given force "beyond what is expressed by their words, or is necessarily implied from what is expressed." *Zartman-Thalman Carriage Co. v. Reid*, 73 S.W. 942, 943 (Mo. banc. 1903). That the trial court's interpretation would render large numbers of distribution agreements perpetual contracts, regardless of the parties' intent or actual

contract language, in derogation of the common law's general refusal to enforce such agreements, is another reason to reject it.

The trial court's damages award illustrates the consequences of affirmance. Respondent was awarded $7,600,695 allegedly attributable to lost profits until the year 2030, even though its initial investment was only $50,000. The written agreement the parties had operated under expired in 2010, they simply continued "business as usual," and the prior agreement permitted Appellant to terminate the agreement without cause. Under well-established Missouri law, such an agreement is terminable at-will by either party. *See Armstrong*, 96 S.W.3d at 878; *Ernst v. Ford Motor Co.*, 813 S.W.2d 910, 918-19 (Mo. App. 1991).

At common law, when a distribution agreement was terminable at-will, a distributor's remedy upon termination was governed by the recoupment doctrine. *Armstrong*, 96 S.W.3d at 878; *Ernst*, 813 S.W.2d at 919. That doctrine "imputes to a terminable-at-will agreement a duration equal to the length of time reasonably necessary for a dealer to recoup its investment, plus a reasonable notice period before termination." *Armstrong*, 96 S.W.3d at 878-79. The remedy pre-dates Missouri's distributorship termination statute and was incorporated therein. *See Ridings v. Thoele, Inc.*, 739 S.W.2d 547 (Mo. banc. 1987).

The lower courts concluded the parties' agreement was ***not*** terminable at-will, solely because § 407.753 does not permit covered agreements to be terminated without good cause. The Construction Power Equipment Act thus greatly expands distributors'

remedy from recovery of their investment to a bounty of potential lost profits since covered agreements cannot be terminated absent improper action by the distributor.

This scheme is a substantial departure from the limited remedy previously afforded at common law. Consequently, the term "industrial, maintenance and construction power equipment used for industrial, maintenance and construction applications" should be strictly construed, not interpreted to cover a host of distribution agreements beyond what is plainly expressed by those words, or necessarily implied by them. *Zartman-Thalman Carriage Co.*, 73 S.W. at 943.

III. PARTIES TO A DISTRIBUTION AGREEMENT ARE NOT IN A FIDUCIARY RELATIONSHIP AND STATUTORY CLAIMS FOR TERMINATION WITHOUT NOTICE CANNOT BE REPACKAGED AS FRAUD CLAIMS.

Respondent asserted a claim for fraudulent concealment on the theory that Appellant did not disclose a corporate restructuring that might end the parties' at-will distribution agreement. Sometimes "silence or nondisclosure of a material fact, when used as an inducement to another, can be an act of fraud." *Andes v. Albano*, 853 S.W.2d 936, 943 (Mo. banc. 1993). Before silence constitutes fraud, however, there must be a duty to disclose. *Id.* Generally speaking, such a duty arises where there is a relationship of "trust and confidence" between the parties, or the defendant "has superior knowledge or information not within the fair and reasonable reach" of the plaintiff. *Id.*

A relationship of "trust and confidence" means a fiduciary relationship. *Id.*; *Centerre Bank of Independence, N.A. v. Bliss*, 765 S.W.2d 276, 284 (Mo. App. 1988); *Gibson v. Gibson*, 534 S.W.2d 100, 104 (Mo. App. 1976). The elements of a fiduciary

relationship are: (1) the dominance of a subservient party by another; (2) the dominant party's management of things of value belonging to the subservient party; (3) relinquishment of independence by the subservient party; (4) the dominating party's habitual manipulation of the actions of the subservient party; and (5) the subservient party's placement of trust and confidence in the dominant party. *Chmieleski v. City Prods. Corp.*, 660 S.W.2d 275, 294 (Mo. App. 1983). A mere business relationship does not create a fiduciary relationship or a presumption of one. *Id.*

Typically, when "parties are dealing at arm's length, neither can legally complain about the mere silence of the other." *Osterberger v. Hites Constr. Co.*, 599 S.W.2d 221, 227 (Mo. App. 1980); *see also Andes*, 853 S.W.2d at 943. Superior knowledge alone does not always trigger a duty to disclose. *Andes*, 853 S.W.2d at 943. Courts usually require something more, such as inexperience of one party concerning the subject matter of the transaction or provision of partial information which is misleading. *Osterberger*, 599 S.W.2d at 227. Whether a duty to disclose exists turns on the facts of each case. *Ringstreet Northcrest, Inc. v. Bisanz*, 890 S.W.2d 713, 720 (Mo. App. 1995).

The trial court held that Appellant had a duty to disclose because Respondent "placed 'trust and confidence' in" Appellant, and because Respondent "did not know of the consolidation plan and knowledge of it was not within [Respondent's] reach." LF1390. The Court of Appeals viewed these as alternative grounds for affirmance. This was error. Neither rationale—alone or in conjunction—supports the judgment.

The sole basis for concluding a relationship of "trust and confidence" existed were statements that Respondent placed trust and confidence in Appellant. LF1364, 1390. This

is insufficient as a matter of law. A relationship of "trust and confidence" means a fiduciary relationship. And a plaintiff's placement of trust and confidence in the defendant is but one element of a fiduciary relationship. *Chmieleski*, 660 S.W.2d at 294.

Courts have flatly rejected the notion that sophisticated parties to a distribution agreement are in a fiduciary relationship. *Smith v. Goodyear Tire & Rubber Co.*, 856 F. Supp. 1347, 1353-55 (W.D. Mo. 1994); *Chmieleski*, 660 S.W.2d at 293-96. Further, the bare assertion that a fiduciary relationship existed is insufficient to establish that the elements giving rise to such a relationship actually existed. *Smith*, 856 F. Supp. at 1355. The parties' bare statements that Respondent placed trust and confidence in Appellant are likewise insufficient.

Nor did Appellant's "superior knowledge" trigger a duty to disclose. Superior knowledge alone does not automatically require disclosure, and the general rule is that sophisticated parties to an arm's length business transaction need not disclose every fact to one another. *Andes*, 853 S.W.2d at 943; *Osterberger*, 599 S.W.2d at 227. There was no evidence that Respondent was inexperienced in navigating distribution agreements, or that Appellant made a misleading partial disclosure. Furthermore, this case does not involve the sale of real estate, as in the case relied upon by the Court of Appeals.

Silence is treated as fraud where nondisclosure is used to induce another to act. *See Andes*, 853 S.W.2d at 943; *Taylor v. W. Cas. & Sur. Co.*, 523 S.W.2d 582, 586 (Mo. App. 1975). There was no evidence that Appellant used silence to induce Respondent to do anything. Appellant simply did not give Respondent advance notice of a corporate restructuring that might impact their continued relationship. Should the Court affirm,

sophisticated businesses will be required to disclose every fact concerning any ***contemplated*** change in business practices or risk being held liable for huge sums of damages. Such a rule—which would apply beyond the distribution context—is impractical, is unsupported by legal authority, and would wreak havoc on ordinary business conduct.

The Court should also reject the Court of Appeals' conclusion that Respondent's fraud claim entitled it to damages beyond limited lost profits and recoupment of its investment because concealment "is a tort with its own remedy." Section 407.753 did not apply to the parties' agreement, which was thus terminable upon 90 days' written notice. *See* § 407.405, RSMo. It is abundantly clear that Respondent's fraudulent concealment claim is nothing more than a claim that Appellant terminated the distribution agreement without advance notice. Section 407.405 supplies the cause of action for such a claim, and—as explained in Appellant's brief—limits a distributor's remedy to lost profits during the 90-day notice period, recoupment of its investment, and certain other damages. Distributors should not be permitted to obtain additional remedies through the simple expedient of artfully pleading a termination-without-notice claim as one for fraud.

CONCLUSION

The trial court erred in interpreting the Construction Power Equipment Act and the Farm Dealers Buy-Back Act. It further erred in permitting Respondent to recover extensive lost profits by artfully pleading a termination-without-notice claim as one for fraudulent concealment, despite there being no basis for concluding Appellant had a duty

to disclose. The effect of those erroneous rulings will have extensive implications for business dealings in Missouri and should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned hereby certifies:

1. The attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 4,288 words, excluding the cover, this certificate, and the signature block, as counted by Microsoft Word software; and

2. The attached brief includes all of the information required by Supreme Court rule 55.03; and

3. The attached brief was served by means of the electronic filing system on June 21, 2017, upon Counsel of Record.

/s/ William Ray Price, Jr.