IN THE MISSOURI SUPREME COURT

Appeal No. SC96280

SUN AVIATION, INC.,
Plaintiff - Respondent

v.

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

Appeal from the Circuit Court of Jackson County, Missouri
The Honorable James F. Kanatzar
Circuit Court No. 1316-CV00187

SUBSTITUTE BRIEF OF RESPONDENT SUN AVIATION, INC.

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Sun Aviation was a distributor of L-3 "power equipment used in the aircraft industry." *SOF* ¶*3* (LF 668) (A-25).[1] Sun Aviation sold A.I.M. and J.E.T. brand product lines, and "a couple other power conditioning type product lines." *TT 195-96.* L-3 was Sun Aviation's largest supplier, representing 30% of its' business. *TT 14.* Sun Aviation was L-3's largest distributor of aftermarket products. *TT 153*. Sun Aviation was required to and did *continuously* invest its time, money and resources to create and maintain a market for L-3 products, *SOF* ¶*21, 46-48,* (LF 671, 674) (A-28, 31-32), so the "partnership" between the two companies would prosper. *TT 154, 181*. L-3 knew Sun represented its products with "passion and devotion." *SOF* ¶*91* (LF 683) (A-40).

L-3 required Sun Aviation to continuously (a) maintain adequate facilities, (b) train and maintain knowledgeable sales people, (c) use L-3 brand names, trademarks and logos, (d) refer leads to L-3, and (e) meet the L-3 annual stocking requirements." *SOF* ¶*46* (LF 674) (A-31). More importantly, "Sun Aviation was required to and did market, advertise and sell L-3 products, ... [using] L-3 logos, brands and trademarks." *SOF* ¶48 (LF 675) (A-32). "Sun Aviation associated its good will with the L-3 brand." *SOF* ¶*60* (LF 677) (A-34).

L-3 thought Sun Aviation was a good dealer who was an important part of its route to market. *TT 142, 158, 175, 181, 206*. There were never any complaints about Sun Aviation,

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[1] "LF" cites refer to the Legal File. "A-xx" cites refer to Respondent'S Substitute Appendix. "TT" cites refer to the trial transcript. "SOF" cites refer to Defendant L-3's Response to Plaintiff's Motion for Summary Judgment (LF 667 and A-24).

or claims that it breached any contract, agreement, program, policy or anything else. *TT 149; SOF 89, 100* (LF 682, 685) (A-39, 42). "L-3 had trust and confidence in Sun Aviation, and knew that Sun Aviation placed trust and confidence in L-3." *SOF* ¶*15* (LF 670) (A-27). L-3 controlled many aspects of Sun Aviation's franchise. *SOF* ¶46-48 (LF 674-75) (A-31-32); *Buckley* 79-84 (LF 852-57).

"L-3 was promoted as the main product Sun Aviation sold."*SOF* ¶60 (LF 677) (A-34). "Sun Aviation associated its good will with the L-3 brand."*Id*."Sun Aviation represented to actual and potential customers that L-3 products were the best." *Id.* At the trade shows Sun Aviation featured L-3 as its main product line. *Id*. Sun Aviation also ran ads in the AEA magazine stating Sun had the worlds largest inventory of L-3 AIM/JET products in stock. *Id*. Sun Aviation sent out email advertisements. *SOF* ¶62 (LF 678)(A-35).

L-3's parent company is a $15 billion a year global conglomerate (*TT 56*) who decided to consolidate some of its various subsidiaries, including L-3. *SOF* ¶*34* (LF 673) (A-30). The consolidation took several years, during which Sun Aviation's written distributor agreement was not renewed. *TT 143, 193.* Fearing that Sun Aviation might be terminated as part of the consolidation, L-3 employees Buckley and Stephenson discussed and then warned L-3's their bosses (the "Sector") that terminating Sun Aviation "may not be in L-3's best interest." *TT 145-46.* The Sector did not give L-3 any indication it would hold off terminating Sun Aviation and, instead, said no decision had yet been made. *Id*. L-3 concealed this information from Sun Aviation, who thought it was business as usual. *TT 52-52, 193.*

L-3 terminated Sun Aviation August 2, 2012. *Exhibit 208*. It was a "complete shock" to Sun Aviation. *TT 32*. However, L-3 was "not surprised." *Buckley at 27-28* (LF 800-801). Sun Aviation begged for reinstatement, and to return inventory but L-3 refused both. *TT 34-35, 114; SOF ¶89* (LF 682). L-3 did not agree with the decision of its parent to terminate Sun Aviation, because it would, and subsequently did, have a negative effect on aftermarket sales. *TT 206-07.*

L-3 Vice President Larry Riddle testified that L-3 has been looking for a replacement distributor ("We have distributor applications in process") and the distributor function "would be the same as it's always been." *Riddle* at 23-25 (LF 948-50).

Both parties asked the trial Court to provide findings of fact and conclusions of law, which the trial Court did. Sun Aviation refers this Court thereto for more factual detail. *Amended Judgment (4/8/16)* (A58).

ARGUMENT

POINT I

L-3'S EQUIPMENT IS POWER EQUIPMENT USED IN AIRCRAFT INDUSTRY APPLICATIONS

Standard of Review - Summary Judgment

"[T]he non-movant must support denials with specific references to discovery, exhibits, or affidavits demonstrating a genuine factual issue for trial." *Cent. Tr. & Inv. Co. v. Signalpoint Asset Mgmt., LLC*, 422 S.W.3d 312, 320 (Mo. 2014). "Facts not properly supported under Rule 74.04(c)(2) or (c)(4) are deemed admitted." *Id*. Appellate Courts "will affirm the grant of summary judgment on any basis supported by the record, whether or not relied upon by the trial court." *Doe v. Ratigan*, 481 S.W.3d 36, 41 (Mo. App. 2015).

A. The Holdings of the Trial Court and Court of Appeals Were Correct

Sun Aviation moved for partial summary judgment on Counts II (termination without good cause in violation of §407.753) and III (refusal to return inventory in violation of §407.860), asserting there was no dispute the statutes had been violated. L-3 opposed summary judgment arguing: "none of the aircraft instruments sold by L-3 to Sun were items that had 'engines' which produce power and operate under their own internal power source to do work, nor were they large machinery which operates under its own source of power, such as an internal combustion engine, to propel itself and/or do work." *Def. Resp. Mot. Sum. Jud.* at 24-25 (LF 667) (A-24) (*internal cite omitted*).

The Trial Court correctly noted "the conflict specifically surrounds the use of the term ... power equipment used for industrial, maintenance and construction applications and repair parts therefor,...'" and held that "[i]n interpreting statutes, the Court is required to give meaning to all the terms used in a statute," "courts apply the ordinary meaning of the [undefined] term as found in the dictionary," and "Chapter 407 is to be broadly construed in order to protect those deemed by the legislature in need of protection." *Judgment* 9/4/15 at 4-5 (LF 717) (A-55-56). The Trial Court applied those directives and ruled "[T]he 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," and "L-3's power supplies and gyros are 'power equipment' as the term is used in §407.753." *Id.*

L-3 appealed the partial summary judgment on Counts II and III arguing its products are "not end use machines or equipment that operated under their own internal power source to do work." *App. Br. at Point I* (A-129-30). The Court of Appeals undertook *de novo* review and unanimously affirmed.

B. Statement of Issues Preserved for Review[2]

Point I of L-3's Substitute Brief in this Court abandons the operate-under-their-own-source-of-power argument presented below and, instead, presents two claims of error for review:

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[2] Rule 84.04(e) requires the argument to "include a concise statement describing whether the error was preserved for appellate review; if so, how it was preserved."

(a) whether the Act is limited to only distributors who stock "end-use" machines or equipment, and

(b) whether the Act is limited to only distributors who stock industrial equipment used exclusively in "processing or manufacturing activities."

See App. Sub. Br. at Point I(a-b).

Point I(b) was not presented to the trial court or the Court of Appeals. Therefore, it was not preserved and should be dismissed. *See Point I (F), infra.*

C. The Purpose and History of Franchise Security Statutes Evince Strong Public Policy to Protect Distributors Like Sun Aviation from Surprise, Without-Cause Termination

The purpose of Chapter 407 is to protect "the security of business franchises [and] the prohibition of cancellation or termination of such franchise agreements without cause and notice." *Brown-Forman Distillers Corp. v. McHenry*, 566 S.W.2d 194, 197 (Mo. 1978); *Bishop v. Shelter Mut. Ins. Co.*, 129 S.W.3d 500, 505 (Mo. App. 2004) ("Missouri policy, both at common law and by statute, is to protect franchisees and those operating under distributorship agreements from the onerous effects of bad faith at-will termination.") (*citations omitted*).

"[T]he Legislature has sought to remedy iniquitous merchandising practices by Chapter 407, which is for the protection of property and conducive to the public good, ..." *State ex rel. Ashcroft v. Wahl*, 600 S.W.2d 175, 180-181 (Mo. App. 1980). "Chapter 407 is

designed to regulate the marketplace to the advantage of those traditionally thought to have unequal bargaining power as well as those who may fall victim to unfair business practices." *High Life Sales Co. v. Brown-Forman Corp.*, 823 S.W.2d 493, 498 (Mo. 1992). The statutes in Chapter 407 "carry heightened public policy considerations," and reflect a "strong public policy" of protecting franchisees, and are "fundamental policy." *Id.*

"The Missouri Legislature created a legislative presumption that franchisees are in an inferior bargaining position with respect to franchisors and thus are entitled to protection from the oppressive use of the franchisor's superiority." *Armstrong Bus. Servs. v. H & R Block*, 96 S.W.3d 867, 878 (Mo. App. 2002); *Electrical and Magneto Service Co., Inc. v. AMBAC International Corp.*, 941 F.2d 660, 663-64 (8th Cir. 1991). "Missouri policy, both at common law and by statute, is to protect franchisees and those operating under distributorship agreements from the onerous effects of bad faith at-will termination." *Bishop v. Shelter Mut. Ins. Co.*, 129 S.W.3d 500, 505 (Mo. App. 2004) (*citations omitted*).

1. The History of Continual Expansion of the Notice and Good Cause Protections Shows Broad Legislative Intent

Over the last five decades the Missouri legislature has recognized the benefits of this job-saving, pro-small/medium-sized-business legislation and has consistently expanded franchise security statutes and the good cause requirement in particular. Not once in half a century has the legislature narrowed the notice and good cause protections, and this Court should not either.

The good cause requirement is time-tested policy consistently expanded by the legislature.[3] Missouri enacted its first "franchise security" statutes in 1967. *Brown-Forman Distillers Corp. v. McHenry*, 566 S.W.2d 194, 195 (Mo. 1978) (discussing history). In 1974, the legislature expanded the protections to prohibit cancellation without good cause, and made violation of certain protections a felony. *Id*.[4] These statutes "had for [their] general purpose the security of business franchises: the prohibition of cancellation or termination of such franchise agreements without cause and notice." *Brown-Forman*, 566 S.W.2d at 197.

In 1980 the legislature expanded the franchise security protections for motor vehicle distributors to prohibit a multitude of unlawful acts. *See §407.825*[5] (listing unlawful practices by motor vehicle franchisors). This included "To terminate, cancel, refuse to continue, or refuse to renew any franchise without good cause..." *§407.825(5)*. These protections were in addition to those in passed in 1975. *See Maude v. Gen. Motors Corp.*, 626 F. Supp. 1081,

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[3] The expansion of protections other than good cause (e.g., coercion to buy equipment, refusal to return inventory, refusal to allow transfer of ownership, etc.) are not discussed, because the continuous, consistent expansion of the good cause protection singlehandedly proves the broad and growing legislative intent in the field of franchise security.

[4] In 1975 the legislature, apparently in the wake of uncertainty, the legislature made it clear that distributors in the "liquor industry" were included. See *Maude v. Gen. Motors Corp.*, 626 F. Supp. 1081, 1085 (W.D. Mo. 1986).

[5] All statutory references are to R.S.Mo. (2017) unless otherwise indicated.

1085 (W.D. Mo. 1986).

In 1987 the legislature again expanded the good cause protection to distributors of farm equipment. *§407.840*. "Farm equipment" was broadly defined. *§407.838(1)*. Section 407.840 provides that a farm equipment manufacturer may not "terminate, cancel or fail to renew a dealership agreement or substantially change the competitive circumstances of a farm equipment dealership without good cause." It is noteworthy that the broad phrase "change in competitive circumstances" is listed as a prohibited act. In the last 30 years there are only four reported cases under §407.740, and all of them turned on the issue of whether there was good cause for termination.[6]

In 1989 the good cause requirement was extended to distributors who stock "outdoor

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[6] *See J.I. Case Co. v. Early's, Inc.*, 721 F. Supp. 1082, 1085 (E.D. Mo. 1989) ("failure to satisfy Case's computer installation requirement constituted good cause for termination."); *Heck Implement v. Deere & Co.*, 926 F. Supp. 138, 139 (W.D. Mo. 1996) (supplier claimed it had good cause for termination because distributor "failed to meet the manufacturer's requirements for reasonable market penetration."); *Heisel v. John Deere Constr. & Forestry Co.*, 2008 U.S. Dist. LEXIS 174 (E.D. Mo. Jan. 2, 2008) (death of owner was good cause for termination); *Tri State Hdwe. Inc. v. John Deere Co.*, 561 F. Supp. 2d 1064, 1074 (W.D. Mo. 2008) ("The Court finds that Tri-State consistently failed to meet an essential and reasonable term of the dealership agreement which constituted good cause for John Deere's termination of Tri-State's dealership.").

power equipment used for lawn, garden, golf course, landscaping or grounds maintenance." *§407.895*. There are no reported cases claiming violation of this statute.

In 1991 the good cause requirement was extended to distributors who stock and sell "industrial, maintenance and construction power equipment." *§407.753*. In the 26 years since this statute was passed, four claims have been reported.[7]

In 1998 the legislature passed a franchise security statute aimed at helping distributors transfer their distributorship. If a distributor requests such a transfer and the supplier claims the transfer is not acceptable, the supplier is required to "provide the dealer/retailer with a written notice of its determination with the stated reasons for nonacceptance." *§407.307*.

Also in 1998 the legislature passed additional franchise security provisions for ATV and motorcycle distributors, which included a "good cause" requirement. *§407.1025*. A

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[7] *McBud of Mo., Inc. v. Siemens Energy & Automation, Inc.*, 68 F. Supp. 2d 1076 (E.D. Mo. 1999) (switch and wiring held not to be power equipment.); *Heisel v. John Deere Constr. & Forestry Co.*, 2008 U.S. Dist. LEXIS 174 (E.D. Mo. Jan. 2, 2008) (death of owner was good cause for termination); *Mach. Maint., Inc. v. Generac Power Sys.*, 2013 U.S. Dist. LEXIS 145275 (E.D. Mo. Oct. 8, 2013) (portable generators were power equipment but jury found no good cause for termination); *Lift Truck Lease & Serv., Inc. v. Nissan Forklift Corp.*, 2013 U.S. Dist. LEXIS 85183 (E.D. Mo. June 18, 2013) (supplier claimed it had good cause for termination of distributor of "lift trucks and other industrial transportation equipment" and jury agreed).

"good cause" requirement for motor vehicle distributors was also added in 1998. *§407.825(5)*. There are no reported cases under this statute.

In 2001 the "good cause" requirement was extended to recreational vehicles. *§407.1323(4)* These included any "vehicle primarily designed as temporary living quarters for recreational, camping, travel or seasonal use that either has its own motive power or is mounted on, or towed by, another vehicle. The product types are: travel trailer, fifth-wheel trailer, camping trailer, truck camper and motor home." *§407.1320(13)*. There are no reported claims under this statute. In 2001 the legislature also passed a franchise security statute aimed at helping distributors who perform warranty work to be reimbursed by the suppliers for that work at a normal rate. *§407.857*.

In 2002 the inventory repurchase requirements ("buy-back" law) of various distributors were consolidated in §407.860. In so doing, the legislature repealed three of the exceptions to the inventory buy-back requirements upon termination of a power equipment distributor which had the effect of expanding the scope of inventory that could be returned by a distributor.[8]

In 2004 the "good cause" requirement was extended to boat, marine, vessel, and

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[8] Section §407.750 (7, 9 and 12) were repealed. They had excluded "implements, machinery, and attachments," and "any part that has been removed from an engine or short block ...or piece of equipment or any part that has been mounted or installed on an engine or on equipment" from being returned under the Power Equipment Act.

personal watercraft manufacturers. *§407.1362*. There has been one claim in the last 13 years. *See*, *Lake Regions Partners, LLC v. Crest Marine, LLC*, 2015 U.S. Dist. LEXIS 107815 (W.D. Mo. Aug. 17, 2015).

The legislature's broad intent is exemplified by the fact that the "good cause" requirement applies not just to cancellation, but also to "failure to renew." See *§407.825(5) (motor vehicles); §407.840* (farm equipment - also prohibits "substantially change competitive circumstances"); *§407.895* (outdoor power equipment); §407.753 (power equipment); §407.1025 (ATV and motorcycle); *§407.1362* (water craft); *see also §407.405* (notice applies to failure to renew).

2. The Limitations on Good Cause Are So Broad That Only the Most Egregious Offenders Will Have Civil Liability

Despite the expansive scope of franchise security laws, the definition of good cause has remained very broad. It is so broad that only the most egregious conduct will trigger liability. This may explain why there are so few claims under these statutes. Using §407.753 as an example (most the franchise security statutes have similar language), good cause for termination includes "failure by the retailer to substantially comply with essential and reasonable requirements imposed upon the retailer by the contract..." (§407.753).[9] Good

[9] Distributor agreements often require distributors to perform many specific tasks, and grant the supplier control over various aspects of the distributor's business. Such was the case here. *See SOF* ¶*46* (LF 674) (A-31) (marketing requirements and customer/territory

cause also includes a laundry list of other conduct: (1) transferring an interest, withdrawal of a principle or manager, or even transferring shares of stock, (2) bankruptcy, (3) change in location, (4) default under any security agreement, (5) failure to operate for seven consecutive days, (6) felony conviction, (7) conduct which is injurious or detrimental to customers or the public, and (8) failure to meet the manufacturer's sales requirements. *See §407.753.1(1-8)*.

D. The Applicable Rules Statutory Construction

1. The Plain and Ordinary Meaning of the Words Used in the Statute Must be Applied

"The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider words used in the statute in their plain and ordinary meaning." *Dieser v. St. Anthony's Med. Ctr.*, 498 S.W.3d 419, 430 (Mo. 2016) *citing Howard v. City of Kansas City*, 332 S.W.3d 772, 779 (Mo. *banc* 2011). The Court's "responsibility is to 'determine the legislative intent from what the legislature said and not from what we think the legislature intended to say or inadvertently failed to say.'" *Andres v. Alpha Kappa Lambda Fraternity (Nat'l Fraternity)*, 730 S.W.2d 547, 552 (Mo. 1987) *quoting Gray v. Wallace*, 319 S.W.2d 582, 585 (Mo. 1958). "If a statute's language is unambiguous, this Court must give effect to the legislature's chosen

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limitations); *SOF* ¶48 (LF 675) (A-32) (trademark/brand requirement); *SOF* ¶*20-21* (LF 671) (A-28) (stock requirements).

language." *Greer v. Sysco Food Servs.*, 475 S.W.3d 655, 666 (Mo. 2015) (*internal quotes and cites omitted*). "Only when the language is ambiguous will the Court resort to other rules of statutory construction." *Id.* "There is no need to resort to statutory construction to create an ambiguity where none exists." *Id.*; *State v Bazell*, 497 S.W.3d 263, 266 (Mo. *banc* 2016) ("[I]n determining legislative intent, if the meaning of the statutory language is plain and clear, the Court should not employ canons of construction to achieve a desired result.").

"In determining whether the language is clear and unambiguous, the standard is whether the state's terms are plain and clear to one of ordinary intelligence" *Wolff Shoe Co. v. Dir. of Revenue*, 762 S.W.2d 29, 31 (Mo. 1988). Here, four Judges (the Trial Court and a Division of the Missouri Court of Appeals) all independently reviewed the Act and unanimously agreed it applies to the L-3 equipment.

2. Where, as Here, a Term Is Not Defined, Courts Apply the Meaning from the Dictionary

"When a statutory term is not defined, courts apply the ordinary meaning of the term as found in the dictionary." *Great Southern Bank v. Director of Revenue,* 269 S.W. 3d 22, 24-25 (Mo. 2008); *State v. Jones*, 479 S.W.3d 100, 107 (Mo. 2016) ("In the absence of a statutory definition, words will be given their plain and ordinary meaning as derived from the dictionary."); *State ex rel. Richardson v. Green*, 465 S.W.3d 60, 64 (Mo. 2015) ("Absent a statutory definition, words used in statutes are given their plain and ordinary meaning with help, as needed, from the dictionary."); *Circuit City Stores, Inc. v. Dir. of Revenue*, 438

S.W.3d 397, 400 (Mo. banc 2014) ("The plain and ordinary meaning of words used in a statute can be derived from the dictionary.").

The Trial Court applied this directive to the term power equipment. The Court of Appeals applied the same. Both Courts reached the same conclusion. The Court of Appeals also applied the dictionary rule to the term "industrial" and held "it is not disputed that these products are used in the avionics industry.... Therefore we see a direct relationship between these products and the statutes used to protect their distributors." *Opinion at 9 n.4* (A-186).

3. The Act must Be Broadly Construed to Achieve its Intended Purpose, and All Doubts Resolved in Favor of Applying the Statute

Remedial statutes "are to be 'construed so they provide the public protection intended by the legislature.'" *Frye v. Levy*, 440 S.W.3d 405, 412 (Mo. banc 2014) *quoting Ross v. Dir. of Revenue*, 311 S.W.3d 732, 735 (Mo. banc 2010). "Remedial statutes, like the MMWL[10], are construed broadly to effectuate the statute's purpose." *Tolentino v. Starwood Hotels &*

[10] Just as Missouri franchise security laws are remedial statutes whose purpose is to "regulate the marketplace to the advantage of those traditionally thought to have unequal bargaining power...," *High Life Sales,* 823 S.W.2d at 498, so too is the MMWL "a remedial statute with the purpose of ameliorating the 'unequal bargaining power as between employer and employee.'"*Tolentino v. Starwood Hotels & Resorts Worldwide, Inc.*, 437 S.W.3d 754, 761 (Mo. 2014).

Resorts Worldwide, Inc., 437 S.W.3d 754, 761 (Mo. 2014) *citing Util. Serv. Co., Inc. v. Dep't of Labor and Indus. Relations*, 331 S.W.3d 654, 658 (Mo. banc 2011) (*citing State ex rel. LeFevre v. Stubbs*, 642 S.W.2d 103, 106 (Mo. banc 1982)). "Doubts about the applicability of a remedial statute are resolved in favor of applying the statute." *Id*.

"Where the statute is remedial, it should be construed so as to meet the cases that are clearly within the spirit or reason of the law, or within the evil which it was designed to remedy, provided such interpretation is not inconsistent with the language used, resolving all reasonable doubts in favor of applicability of the statute to the particular case." *Holtcamp v. State*, 259 S.W.3d 537, 540 (Mo. 2008)

"Statutes enacted for the protection of life and property, or which introduce some new regulation conducive to the public good, are considered remedial in nature and are generally given a liberal construction." *State ex rel. Dresser Indus., Inc. v. Ruddy*, 592 S.W.2d 789, 794 (Mo. 1980); *Mayfield v. Dir. of Revenue*, 335 S.W.3d 572, 573-74 (Mo. App. 2011) *citing Appleby v. Director of Revenue*, 851 S.W.2d 540, 541 (Mo. App. 1993) ("This court must not interpret a statute narrowly if such an interpretation would defeat the purpose of the statute.").

Sun Aviation is exactly the kind of Missouri business the legislature sought to protect, and surprise without-cause termination is the exact evil sought to be avoided. Therefore, this Court must give the statute a liberal construction. *State ex rel. Ashcroft*, 600 S.W.2d 175, 180-81 (Mo. App. 1980) (applying liberal construction to §407.100) *citing St. Louis v.*

Carpenter, 341 S.W.2d 786, 788 (Mo. 1961); *State ex rel. Webster v. Myers*, 779 S.W.2d 286, 290 (Mo. App. 1989) (same).

4. Section Headings are Not Relevant

L-3 argues section headings should be considered. Although some Acts within Chapter 407 have titles provided by the legislature,[11] Sections 407.750 to 407.756 do not. The official statutes maintained by the Missouri Revisor of Statutes shows a heading of "Industrial Maintenance and Construction Power Equipment, Repurchase on Cancellation of Contract." *http://revisor.mo.gov.* "This legend, however, is merely an arbitrary indicium of statutory content inserted by the revisor for convenience of reference, and because a revisor is without legislative authority, the language of the heading does not affect the sense of the enactment and may not be considered in construing the statute." *Snow v. Hicks Bros.*

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[11] Section 407.810 provides "Sections 407.810 to 407.835 shall be known and may be cited as the 'Motor Vehicle Franchise Practices Act' or the 'MVFP Act.'" Section 407.430 provides "Sections 407.430 to 407.436 shall be known and may be cited as the 'Credit User Protection Law.'" Section 407.660 provides "Sections 407.660 to 407.665 shall be known and may be cited as the 'Rental-Purchase Agreement Law.'" Section 407.670 provides "Sections 407.670 to 407.679 shall be known and may be cited as the 'Buyers Club Law.'" These headings are part of the "original act as passed by the legislature are considered as part of that act and are weighed when construing the act." *Sisney v. Clay*, 829 S.W.2d 9, 12 (Mo. App. 1992).

Chevrolet, Inc., 480 S.W.2d 97, 101 (Mo. App. 1972) *citing State ex rel. Agard v. Riederer*, 448 S.W.2d 577, 581 (Mo. 1969); *see also Dorris v. Kohl*, 337 S.W.3d 107, 113 n.6 (Mo. App. 2011) *citing Nat'l Educ. Ass'n v. Independence. Sch. Dist.*, 223 S.W.3d 131, 138 n.5 (Mo. banc 2007).

5. The Amicus' Argument that Statutory Remedies Derogate the Common Law and, Therefore, Compel a Narrow / Strict Construction of the Chapter 407 is Wrong

The Amicus argues this Court should change Missouri law from broad construction for franchise security statutes to strict construction, because "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.'" *Amicus Br.* at 17 *citing Zartman-Thalman Carriage Co. v. Reid*, 73 S.W. 942, 943 (Mo. banc. 1903). The Amicus claims the damages remedy provided in most franchise security statutes derogates the common law remedy.

For almost half a century franchise security statutes have provided a remedy for violation of the statutes. Most remedy clauses have three characteristics: (1) they allow recovery of "damages sustained,"[12] (2) the remedies "shall not be deemed exclusive and shall

[12] Franchise security statutes permitting distributors to recover "damages sustained": §407.410(2) (all distributors); §407.413(3) (liquor distributors); §407.755 (power equipment distributors); §407.835(1, 2) (motor vehicles); §407.848 (farm equipment); §407.898 (outdoor power equipment); §407.1049 (ATV and motorcycle).

be in addition to any other remedies permitted by law,"[13] and (3) they only apply to agreements entered or renewed after the statute was enforced.[14] The non-exclusive language ensures the statutory remedy does not displace the common law remedy. It just adds an additional remedy. Such was the case in *Hamid v. Kan. City Club*, 293 S.W.3d 123, 126-27 (Mo. App. 2009), where the statutory remedy for wrongful discharge did not displace the common law remedy. Moreover, neither *Zartman* nor its strict construction rational have been cited for 100 years. If *Zartman* was good law, it was overruled by the cases cited in Point I(C) and (D)(3) *supra*.

E. Appellant's Claim that Power Equipment is limited to only "End-Use" Machines is Unsupported and Incorrect

Point I(a) of Appellant's Substitute Brief claims the Act only protects distributors who stock "end-use machines or equipment that operate and perform work" and that L-3's

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[13] Franchise security statues providing statutory remedy is in addition to those at law: §407.755 (power equipment distributors); §407.835(1, 2) (motor vehicles); §407.848 (farm equipment); §407.898 (outdoor power equipment); §407.1049 (ATV and motorcycle).

[14] Franchise security statutes typically have non-interference clauses to avoid constitutional contract clause claims; *see, e.g.*, §407.413(6) (liquor distributors); §407.756 (power equipment distributors); §407.812 (motor vehicles); §407.846 (farm equipment); §407.897(2) (outdoor power equipment); §407.1049 (ATV and motorcycle).

equipment fails the "end-use" aspect of that definition *App. Sub. Br. at Point I(a) (emphasis added).* This claim of error is unsupported and incorrect.

1. The Power Supplies and Gyros are Self-Contained, Stand-Alone, Whole Pieces of Power Equipment

"The power supplies are *self-contained equipment* which deliver their own power" to the aircraft when needed. *SOF ¶73* (LF 679-80) (A-36-37) (*emphasis added*). They have automatically controlled internal heaters, short circuit protection, self-test capability, cell monitoring technology, and LED readouts. *L-3 Brochures* (LF 574-76, 580-81) (A-219-21, 225-26). They have an internal battery pack, which is compact and lightweight (12.4 lbs max.). *Id*. They use power to keep themselves warm, to monitor, display and report their status, and to supply electricity. *Id*. They can "withstand[] severe performance requirements, including thermal shock and high charge discharge rates." *Id.*

The L-3 Gyros "use electric power to calculate and display attitude (whether the aircraft is traveling up or down and left or right) ... and displays aircraft direction."*SOF #72* (LF 679) (A-36). "The gyros are TSO'd which means the FAA has approved them as certified equipment that are eligible to be used in certain aircraft." *SOF #74* (LF 680) (A-37). L-3 admits "They are not repair parts like a switch, but are a *whole piece* of *stand-alone equipment*."*SOF #74* (LF 680) (A-37). "Gyros are usually inserted into the aircraft instrument panel but could be placed anywhere they could receive power." *SOF #71* (LF 679) (A-36). L-3's A.I.M. branded gyros are "*self-contained*" and have "enhanced reliability for

dynamic flight conditions." *L-3 Brochures* (LF 578) (A-223). They have "a rugged design - making it ideal for helicopters and high-cycle aircraft." *Id*. L-3's J.E.T. branded gyros are "used on fixed and rotary wing aircraft in both military and commercial applications." (LF 579) (A-224). They are "*self contained* [and] eliminate the need for electronic components associated with remote systems." (LF 579) (A224). Both brands have internal lighting, power-off warnings and the "military version" is "night goggle compatible." "Their rugged design makes them the ideal choice for a variety of categories - from helicopters and fixed wing aircraft to military and air transport platforms." (LF 581) (A-226).

"Sun Aviation sold L-3 equipment and repair parts to aircraft owners as well as repair shops." *SOF #64* (LF 678)(A-35). "Sun Aviation customers include aircraft owners such as fleet operators, general aviation owners, and foreign military." *SOF #4* (LF A-25).[15] Sun Aviation also sold to a few original aircraft manufacturers. *Id. at SOF 24* (LF 672) (A-29). "Approximately 25 to 30 percent of the L-3 business was repair parts." *SOF #67* (LF 372).

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[15] L-3's response to this statement of fact says that L-3 has insufficient information to admit or deny the fact and, therefore, it is controverted. No reference is made to any part of the record. Therefore, this statement of fact – and all other statements of fact with similar responses – are deemed admitted. *See Rule 74.04(c)(2)* ("[T]he response shall support each denial with specific references to the discovery, exhibits or affidavits that demonstrate specific facts showing that there is a genuine issue for trial.")

2. The Court of Appeals Rejected the "End-Use" Argument

The Court of Appeals considered L-3's end-use claim *de novo* and unanimously ruled it did not apply:

> Gyros "are *stand-alone equipment* that use electric power (electricity)" that "are usually inserted into the aircraft instrument panel but *could be placed anywhere they could receive power*." "The L-3 power supplies are *like small generators* that deliver power to aircraft instruments like the gyros. The power supplies are *self-contained equipment* that deliver their own power." Because these pieces of equipment are either an electricity source or use energy in their operation, they *qualify as power equipment* and are protected under the Missouri Construction Power Equipment Act and the Missouri Farm Dealers Buy-Back Act.

Opinion at 10, 11 (A-187-88).

This Court should likewise reject L-3's invitation to create an end-use requirement where the legislature did not.

3. There is no Textual Support for Appellant's End-Use Claim

L-3 does not claim the dictionary definitions used by the trial and appellate courts are incorrect, or that a different dictionary should used or even a different definition in the same dictionary. In fact, L-3 does not link its end-use requirement to any verbiage in the statute whatsoever. Instead, L-3 bases its claim of error solely on its belief that "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." *App. Sub. Br. at 37*. "Conjuring" is not yet recognized as a means of statutory interpretation.

The legislature did not include any size requirement, self-propelled requirement, or manufacturing requirement. The legislature used the term "equipment" which has the plain meaning stated and applied by the Trial Court and Court of Appeals: "the set of articles or physical resources serving to equip a person or thing: as the implements used in an operation or activity." *Judgment 9/4/15 at 4* (LF 720) (A-55);*Opinion at 9* (A-186); *see also* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002) at 768 (same).

L-3 premises its argument on the term equipment being ambiguous, which would permit statutory construction (as distinguished from conjuring).[16] However, a term in a statute is not ambiguous if it is plain and clear "to a person of ordinary intelligence." *St. Louis Christian Home v. Mo. Comm'n on Human Rights*, 634 S.W.2d 508, 512 (Mo. App. 1982). *State v. Brookside Nursing Ctr.*, 50 S.W.3d 273, 276 (Mo. 2001) *citing Wolff Shoe Co. v. Dir.*

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[16] "If a statute's language is unambiguous, this Court must give effect to the legislature's chosen language." *Greer v. Sysco Food Servs.*, 475 S.W.3d 655, 666 (Mo. 2015) (*internal quotes and cites omitted*). "Only when the language is ambiguous will the Court resort to other rules of statutory construction." *Id.* "There is no need to resort to statutory construction to create an ambiguity where none exists." *Id.*

of Revenue, 762 S.W.2d 29, 31 (Mo. banc 1988). Four each independently reviewed the statute and unanimously agreed what it means and how it applies to this case. It is not ambiguous.

4. L-3 Judicially Admitted that Sun Aviation Distributes "Power Equipment" for the "Aircraft Industry" and that its Products are "Certified," "Stand-alone," "Self-Contained" "Whole Goods"

The summary judgment record contains the express admission of L-3 that "Sun Aviation is a dealer /distributor of *power equipment* used in the *aircraft industry*, and repair parts for that equipment." *SOF ¶3* (LF 668) (A-25)(*emphasis added*). L-3 also admitted that "The gyros are TSO'd which means the FAA has approved them as *certified equipment* that are eligible to be used in certain aircraft," and "are *not repair parts like a switch*, but are a *whole piece* of *stand-alone equipment*." *SOF #74* (LF 680). L-3 admitted "The power supplies are *self-contained equipment* which deliver their own power" to the aircraft when needed. *SOF ¶73* (LF 667) (A-24) (*emphasis added*). L-3 admitted that it "has annual sales of about $100 million [which] includes *whole goods* and repair parts."*SOF ¶13* (LF 670) (A-27).

L-3 never sought to withdraw or amend these admissions. A party may, and L-3 did, admit "any disputed issue, whether evidentiary or elements of the burden of proof, as well as to any propositions not in genuine dispute, whether a matter of application of fact to law

or opinion." *Dynamic Comput. Sols. v. Midwest Mktg. Ins. Agency*, 91 S.W.3d 708, 715 (Mo. App. 2002) (*discussing Rule 59.01 admissions*). These admissions were made in the summary judgment Response without objection and with full knowledge and understanding of the facts and issues. Both the Trial Court and the Court of Appeals were entitled to, and indeed required to, rely on these admissions.

5. There is No Size, Weight or Cost Requirement for Power Equipment That Could Be Morphed into an End-Use Requirement

L-3 argues that "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." *App. Sub. Br. at 41.* Amicus AIM also advocated for a "large, expensive machine" *Assoc. Ind. Amicus Br. at p. 10*.

Point I does not claim power equipment must be "large" or "expensive" machinery. Arguments raised in the body of a brief but not stated in the Point Relied On are not preserved for review. *Rule 84.04*(*e*) ("The argument shall be limited to those errors included in the "Points Relied On."); *State v. Lammers*, 479 S.W.3d 624, 636 n.13 (Mo. 2016) ("Errors raised in the argument portion of a brief but not raised in the points relied on need not be considered by this Court."); *Piatt v. Ind. Lumbermen's Mut. Ins. Co.*, 461 S.W.3d 788, 794 n.4 (Mo. 2015). Because Point I of Appellant's Substitute Brief does not raise a size, weight

or price requirement, neither can the Amicus.[17]

There is no statutory text supporting a size, weight or cost requirement. Just the opposite. It is clear that §407.753 is intended to apply to small dealers who would not be expected to have large capital investments (at least not large by L-3 standards). Specifically, §407.753 was apparently modeled after the Outdoor Power Equipment statute (§407.898), enacted two years earlier. Comparing the good cause requirement in the two statutes shows nearly identical text. However, §407.753 omits the requirement of employing five or more employees contained in §407.897(2) (the outdoor power equipment statute does not apply to distributors employing less then five employees). This shows the Legislature intended/anticipated protection for small power equipment distributors.

Regardless, Sun Aviation made a significant capital outlay to become an L-3 dealer. and made ongoing investment in stock, advertising, employee training, brand promotion, etc.,

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[17] An amicus "takes the case as it finds it" and cannot raise nor inject new issues into the appeal. *Dierkes v. Banahan*, 1992 Mo. App. LEXIS 575, at *4 n.2 (Mar. 31, 1992) ("Not only were those issues not preserved but we are bound by the rule that an amicus takes the case as it finds it and cannot inject issues into the case not raised by the parties.") *citing In re: Additional Magistrates for St. Louis County*, 580 S.W.2d 288 (Mo. *banc* 1979), and *Robert Williams & Co., Inc. v. State Tax Commission of Missouri*, 498 S.W.2d 527 (Mo. 1973); *see also Ensor v. Dir. of Revenue*, 998 S.W.2d 782, 786 (Mo. 1999) (refusing to consider issue argued by amicus but not properly presented by appellant).

which grew every year. *SOF* ¶20-21, 46-48, (LF 671, 674) (A-28, 31-32), and *SOF* ¶60 (LF 677) (A-34). The legislature clearly appreciated that a "significant capital outlay" for a billion-dollar behemoth like L-3 is very different than for a family owned and operated Missouri distributor.

Further, §407.895 protects distributors of outdoor power equipment used for "lawn and garden" purposes. This includes hedge clippers, leaf blowers, and line trimmers, all of which are small and inexpensive compared to the L-3 Gyros and Power Supplies. The same is true with beer, wine and liquor distributors. *§407.413*. There is no public policy reason to protect lawn, garden and liquor distributors from surprise, without cause termination but not distributors of power equipment used in the aviation industry, and L-3 has not suggested any such reason.

The legislature included size and weight restrictions for equipment in other parts of Chapter 407, but not in §407.753.[18] This proves the legislature purposefully rejected any

[18] Examples of franchise security statutes that define equipment by reference to size and/or weight are: §407.566(2)(1) (Any motor vehicle having a gross vehicle *weight rating* of more than sixteen thousand pounds); §407.815(2) and §407.1025(2) (All-terrain vehicle, any motorized vehicle manufactured and used exclusively for off-highway use which is *fifty inches or less* in width, with an unladen dry *weight of six hundred pounds* or less, ...); §407.815(15) (Motor vehicle, ... with a gross vehicle weight rating of more than *sixteen thousand pounds* .."); §407.1360(11) (Personal watercraft", a class of vessel,

size/weight requirement for power equipment. "It is well settled, in interpreting a statute, that the legislature is presumed to have acted intentionally when it includes language in one section of a statute, but omits it from another." *State v. Meeks*, 427 S.W.3d 876, 878-79 (Mo. App. 2014) *quoting State v. Bass*, 81 S.W.3d 595, 604 (Mo. App. 2002). "A disparate inclusion or exclusion of particular language in another section of the same act is powerful evidence of legislative intent." *Id*.

Moreover, small equipment is often more expensive than large equipment. For example, a $10,000 L-3 gyro is much more expensive than a portable generator, power saw or hedge trimmer. Further, a distributor may stock lots of inexpensive equipment instead of only a few expensive items. "At the time L-3 terminated Sun Aviation, Sun Aviation had inventory for which Sun had paid L-3 about $254,000." *SOF* ¶*58* (LF 677) (A-34). This may be peanuts to L-3, but is significant to family-owned Sun Aviation.

As this Court noted in *Lincoln Indus. v. Dir. of Revenue*, 51 S.W.3d 462 (Mo. 2001), "the dictionary definitions [of machinery and equipment] do not distinguish between machinery that is valuable or quite inexpensive," and "[t]he legislature made no distinction between more or less expensive, or between complex and simple machinery, and neither should the Court." *Lincoln Indus.,* 51 S.W.3d at 466.

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which is less than *sixteen feet in length*, propelled by machinery); §407.1360(12) ("Vessel", every motorboat ...more than *twelve feet in length* which is powered by sail alone or by a combination of sail and machinery, ...)

6. There is no Self-Propelled or Motorized Requirement for Power Equipment That Could Be Morphed into an End-Use Requirement

L-3 argues power equipment "conjure large, self-propelled equipment and machines..." *App. Sub. Br. at 37.*[19] As with L-3's size, weight and expense argument, the legislature's inclusion of a self-propelled / motorized requirement in other statutes but not §407.753 proves no such requirement applies.[20] The omission of any such limitations from §407.753 despite mentioning them in other parts of Chapter 407 "is powerful evidence" the legislature did not intend for such limitations to apply. *Denbow*, 309 S.W.3d at 835; *Bass*,

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[19] This claim is not stated in Point I and, therefore, should be disregarded. *Rule 84.04*(*e*); *State v. Lammers*, 479 S.W.3d 624, 636 n.13 (Mo. 2016).

[20] Section 407.585 defines farm machinery as any "*self-propelled* equipment... propelled by power other than muscular power, ..."; §407.815(2) defines "all terrain vehicle" as including any "*motorized* vehicle"; §407.815(15) defines "motor vehicle" to include "any engine, transmission, or rear axel, ... manufactured for the installation in any *motor-driven* vehicle..."; §407.838(1) defines "farm equipment" to exclude "*.... self-propelled* machines..."; §407.1025 defines "all terrain vehicle" to include "any *motorized* vehicle..."; §407.1320(13) defines "recreation vehicle" as a vehicle that has "... its own *motive power...*"*; See also* §301.101(60) defining "Trailer" as "any vehicle without *motive power* ... being drawn by a *self-propelled* vehicle, ..."

81 S.W.3d at 604; *Whitelaw*, 73 S.W.3d at 735; *Anani*, 406 S.W.3d at 482.

7. There is No "Complete or Whole Machine" Requirement

The legislature expanded the good cause protection to distributors of "industrial, maintenance and construction power equipment" where the distributor agreed to "maintain a stock of parts or complete or whole machines or attachments." *§407.753*. The legislature could have, but did not, limit the good cause protection to distributors of "*complete or whole machines* used for industrial, maintenance and construction applications." This is powerful evidence of legislative intent. *State v. Meeks*, 427 S.W.3d at 878-79. Even if there were such a requirement, L-3 admitted its gyros and power supplies "are not repair parts like a switch, but are a *whole piece* of stand-alone equipment." *SOF #74* (LF 680) (A37), and that it "has annual sales of about $100 million [which] includes **whole goods** and repair parts." *SOF ¶13* (LF 670) (A-27).

8. Tax Court Definitions of Machinery and Equipment Undercut Appellant's End-Use Requirement Claim and Support the Trial Court Judgment and Unanimous Court of Appeals *de novo* Review

Section 144.030.2(4) provides a sales and use tax exemption for "machinery and equipment . . .used directly for manufacturing or fabricating a product which is intended to be sold ultimately for final use or consumption." *Lincoln Indus. v. Dir. of Revenue*, 51 S.W.3d 462, 464 (Mo. 2001). In *Lincoln Industries* a taxpayer claimed that purchases of

certain components he used to repair manufacturing machines qualified for the tax exemption applicable to "machinery and equipment." *Id*. at 464. The director of revenue disputed the claim arguing the components "are parts and not 'machinery and equipment' so as to qualify for a use tax exemption." *Id.* at 463.[21]

The components which Lincoln claimed were tax exempt "varied and highly specialized" (like the L-3 equipment here) and used to "refurbish eleven different pieces of equipment."*Id*. 463. Some of the parts were "individual parts, such as belts, hex nuts, set screws, and the like." *Id*. at 463. However, others were "not individual parts, instead appearing to be a combination of components that perform a function in the manufacturing process." *Id*. at 463. One such part was a "pickoff spindle" which is made up of individual parts like "pin cam levers and hex nuts." *Id*. Another is the "control box" which "has an outer housing, two switches or lights, two dials, and cables or wires that connect the control box to the vibrating machine." *Id*. at 464. After due consideration, the Court held:

The Court holds that replacement "machinery" includes those items that are

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[21] Any ambiguity in the definition of machinery and equipment was "to be strictly construed against the taxpayer [meaning a narrow definition]." *Lincoln Indus.*, 51 S.W.3d at 465. This is the exact opposite of how remedial, public policy statues like §407.753 are construed, and so analogizing the case *sub judice* to a tax exemption ruling is too harsh. However, the *Lincoln Industries* holding is instructive, because it shows that even under strict construction, the meaning of "machinery and equipment" includes components.

> combinations of parts that work together as a functioning unit. *These components are machinery even though they are subordinate elements of more complex machinery that is part of the "integrated plant."* In contrast, "machinery" does not include the replacement of an individual part, even if that part becomes an element of a functioning machine. In common usage *"machinery" includes not just a complex machinery, but also simple machinery*. Also the dictionary definitions do not distinguish between machinery that is valuable or quite inexpensive. These distinctions, implied by the parties, are irrelevant. The legislature made no distinction between more or less expensive, or between complex and simple machinery, and neither should the Court.

Lincoln Indus., 51 S.W.3d at 466.

The *Lincoln Industries* Court remanded the case "to determine whether a particular item is merely a part or a combination of parts..." *Id*. at 466-67. Lincoln's next claim was that "the individual parts[22] are 'equipment' and, thus, are exempt under the same statute." *Id.* at

[22] The "individual parts" were such as belts, hex nuts, set screws, and the like. *Id*. at 463. However, others were "not individual parts" instead appearing to be a combination of components that perform a function in the manufacturing process. *Id*. at 463. For some reason, Lincoln only sought an "equipment" exemption for the belts, hex nuts, set screws, and the like. *Id*. at 463.

466. Despite that the terms "machinery" and "equipment" were similar, the *Lincoln* court held the individual parts (nuts, belts, screws) were not equipment because "Lincoln did not capitalize the items as equipment on its books by depreciating the items over a number of years. Rather, it expensed the items as deductions from current income." *Id. citing Walsworth Publ'g Co. v. Dir. of Revenue*, 935 S.W.2d 39 (Mo. 1996).

In *Walsworth Publ'g Co. v. Dir. of Revenue*, 935 S.W.2d 39 (Mo. 1996), the Court held that consumables like phototypesetting paper used to produce yearbooks was not "equipment" that qualified for a tax exemption. The phototypesetting paper is used once and then discarded. The court applied the dictionary definition of "equipment" used in a business setting which was "all the fixed assets other than land and buildings of a business enterprise," and held:

> Under this definition, equipment must have a degree of permanence to the business. Items consumed in one processing are not "fixed" in any sense. Phototypesetting paper is not equipment because it benefits only one production cycle. In order to qualify for the §144.030.2(4) exemption, equipment must contribute to multiple processing cycles over time.

Walsworth Publ'g Co., 935 S.W.2d at 40.

The *Walsworth* Court noted that "In fact, the dictionary definition [of "equipment"] is broad." *Id.* at 41. However, under strict construction, the consumable nature of the paper was found not to qualify for the "machinery and equipment" tax exemption. *See also AAA*

Laundry & Linen Supply Co. v. Dir. of Revenue, 425 S.W.3d 126, 132 (Mo. 2014) (Holding consumable laundry chemicals not exempt machinery or equipment: "*Walsworth* declares that 'equipment' — and, by necessary extension, 'machinery' — refers only to fixed assets or items that have some degree of permanence and, specifically, that neither term includes consumables.).

Lincoln and *Walsworth* show that under strict construction equipment includes component parts (parts made up of other parts) that perform some function/work, but does not include "independent parts" like belts, hex nuts, set screws, and the like." *Id*. at 463. Equipment also does not include consumable items like photo paper and laundry chemicals. This strict construction is much more narrow than the liberal definition required by §407.753, because §407.753 is a remedial statute rather than a tax exemption statute. Even if there were an "end-use" requirement in §407.753, it would not be more strict than the equipment and machines in *Lincoln* and *Walsworth*.

The L-3 Gyros and Power Supplies do not require any other part or equipment to operate and perform their function. They each "are a *whole piece* of *stand-alone equipment*," *SOF #74* (LF 680), that is "*self-contained.*" *SOF* ¶*73* (LF 667) (A-24). They are highly sophisticated, complex equipment constructed from many parts. They are not consumables but, rather, have "a rugged design - making it ideal for helicopters and high-cycle aircraft." *L-3 Brochure* (LF 578) (A-223). They easily surpass even the strict construction criteria in *Lincoln* and *Walsworth*.

9. The *McBud* Decision Did Not Invent an Unexpressed End-Use Requirement as Appellant Claims

L-3 claims *McBud of Missouri, Inc. v. Siemens Energy & Automation, Inc.*, 68 F. Supp. 2d 1076 (E.D. Mo. 1999), created a mandatory, albeit undefined, end-use requirement. "Federal appellate opinions interpreting Missouri law are not binding on Missouri courts," and Missouri Appellate Courts have repeatedly rejected not only federal trial-level decisions but 8th Circuit decisions too. *Lapponese v. Carts of Colo., Inc.*, 422 S.W.3d 396, 404 (Mo. App. 2013) (declining to follow 8th Circuit's narrow interpretation of §407.913) *citing Russell v. Healthmont of Missouri, LLC*, 348 S.W.3d 784, 787 (Mo. App. W.D. 2011) (rejecting 8th Circuit's interpretation of §513.427); *Scott v. Blue Springs Ford Sales, Inc.*, 215 S.W.3d 145, 167 (Mo. App. 2006) (rejecting 8th Circuit's interpretation of §407.025.1 as not following statute's "plain and ordinary meaning.").

a. The Mcbud Holding Hinged on the Fact the Switch Involved Did Not "Operate or Perform Work Using Some Power Source" and Not on Any End Use Requirement

The *McBud* opinion contains two sections, section "A" and section "B." Section A contains the holding. Section A concluded that "the scope of the statute is discernable without resort to extrinsic evidence [meaning it is not ambiguous]." *McBud*, 68 F.Supp. at

1081. The *McBud* products were switches[23] that did not use power to operate and did not perform work. Instead, electricity passed through them on its way to another place where it would "enable machines to perform work." *Id*. at 1081 (analogizing the switches to "electrical outlets or electrical wiring" because they do not use power to operate). The meaning applied by the Trial Court here and the meaning the *McBud* Court invented are indistinguishable in the context of this case, to wit:

Trial Court Meaning	***McBud* Court Meaning**
"The Court finds 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*." *Judgment* at 4 (LF 721) (A-56) (*emp. added*).	"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." *McBud, supra., at* 1081-82 (*emp. added*).

[23] The *McBud* products were circuit breakers, switches, bus plugs (fuse box), unassembled panelboards and similar parts. *McBud,* 68 F. Supp.2d at 1079. "[T]he function of this subject equipment as working with and controlling various 'end use' machines and equipment which perform work, by regulating, distributing and controlling electrical power used by the machines and equipment." *Id.* at 1081.

The end-use machine language was the *McBud* Court's way of saying that power equipment must operate and perform work rather than being merely a conduit. The Trial Court *sub judice* applied the same reasoning - both definitions require the equipment to independently perform some function. Whether described as an "operation or activity," or "performing work" makes no difference.

The L-3 gyros and power supplies indisputably use energy to operate, perform work, and perform an activity. They are power equipment regardless of which definition is applied. The switch in *McBud* would likewise be treated consistently under both definitions. Indeed, the Missouri Court of Appeals specifically held that: "[T]he holdings of *McBud []* and *Machine Maintenance []* do not contradict the trial court's decision." *Opinion at 10* (A-187).

In *Mach. Maint., Inc. v. Generac Power Sys., Inc.*, 2013 U.S. Dist. LEXIS 145275 (E.D. Mo. Oct. 8, 2013), the same federal court as *McBud* considered whether "stand-by," "portable" generators that supply "backup power" are power equipment.[24] Defendant Generac cited *McBud* and argued backup generators are not end use machines because their purpose is to supply power to another machine which is the ultimate end-use machine. The court rejected that argument holding:

The Court finds unpersuasive Generac's reliance on *McBud*, 688 F. Supp.2d

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[24] *See Generac Brochure* (LF 582-97) (A-203-18). "Generac manufactures standby power generators." *Generac's SOF #2* (LF 621)."Generac's products supply backup power, and Generac is part of the power generation industry." *Id*. #5 (LF 622).

> at 1081-82, for the argument that because generators assist or control "end use" machines, they do not perform work as contemplated by the Act. The equipment in *McBud*, which the court found not covered by the Act, regulated electricity and assisted and controlled end use machines; rather, Generac's generators actually produce power, and thus do work."

Mach. Maint., Inc., at *12.

The linchpin for *Machine Maintenance* was the same as for *McBud* - power equipment must use power to perform work. This interpretation is consistent with the Trial Court and the Court of Appeals *sub judice*, the Missouri tax exemption cases and, more importantly, the purpose of §407.753.

There is no dispute the L-3 power supplies and gyros use power to operate and perform work, and Point I does not claim otherwise. The gyros and power supplies are "are *not repair parts like a switch*, but are a *whole piece* of *stand-alone equipment*." *SOF #74* (LF 680). They are "*self-contained equipment*." *SOF* ¶*73* (LF 667) (A-24); *Brochure* (574-81) (A219-26) (repeatedly stating "self-contained"). They are substantially more complex that the portable generators in *Machine Maintenance* and satisfy the plain meaning of the language in §407.753 and its purpose.

b. The *McBud* Section B "Alternative" Theory Does Not Apply

The *McBud* Court concluded its Section A holding by stating that "Having concluded

that the subject equipment in this case is not covered by the statute, *the Court need not determine whether the statute covers only equipment which operates with its own power source*, as contended by defendant," *McBud*, 68 F.Supp. at 1081 (*emp. added*). Despite that specific ruling, the *McBud* Court drafted a Section B "alternative" theory opining that power equipment "mean[s] large machinery which operates under its own source of power, such as an internal combustion engine, to propel itself and/or do work." *McBud* at 1085.

Section I(E)(5) above explains there is no size, weight or cost requirement, so *McBud's* alternative basis theory does not even clear the starting gate.

Moreover, *McBud*'s alternative basis theory is *obiter dicta*. "Statements are *obiter dicta* if they are not essential to the court's decision of the issue before it." *Nat'l Info. Sols., Inc. v. Cord Moving & Storage Co.*, 475 S.W.3d 690, 694 (Mo. App. 2015), *citing Brooks v. State*, 128 S.W.3d 844, 855 (Mo. *banc* 2004) ("A judicial opinion should be read in light of the facts pertinent to that case, it being improper to give permanent and controlling effect to statements outside the scope of the real inquiry of the case."). The *McBud* Court squarely held that the Court "need not determine whether the statute covers only equipment which operates with its own power source..." *McBud*, 68 F.Supp. at 1081. Therefore, the Section B alternative basis theory is not essential to the holding and is *obiter dicta* which should be disregarded.

i. §407.753 is Not Ambiguous so Statutory Construction is Inappropriate

"Only when the language is ambiguous will the Court resort to other rules of statutory construction." *Greer v. Sysco Food Servs*., 475 S.W.3d 655, 666 (Mo. 2015) *citing Goerlitz v. City of Maryville*, 333 S.W.3d 450, 455 (Mo. *banc* 2011). "There is no need to resort to statutory construction to create an ambiguity where none exists." *Id*.; *State v Bazell*, 497 S.W.3d 263, 266 (Mo. *banc* 2016) ("[I]n determining legislative intent, if the meaning of the statutory language is plain and clear, the Court should not employ canons of construction to achieve a desired result.").

McBud's Section B alternative assumes "power equipment" is ambiguous without explaining why, and appears to have invented ambiguity for the sake of the alternative discussion. *Schudy v. Cooper*, 824 S.W.2d 899, 901 (Mo. *banc* 1992) ("We are not in the business of creating ambiguities to reach a result contrary to the clear statutory language."). The Section B alternative is based on an improper assumption of ambiguity.

ii. The Section B Alternative Theory Fails to Apply a Liberal Construction

"Statutes enacted for the protection of life and property, or which introduce some new regulation conducive to the public good, are considered remedial in nature and are generally

given a liberal construction. . . . the Legislature has sought to remedy iniquitous merchandising practices by Chapter 407, which is for the protection of property and conducive to the public good, ..." *State ex rel. Ashcroft*, 600 S.W.2d at 180-81 *citing St. Louis v. Carpenter*, 341 S.W.2d 786, 788 (Mo. 1961).

When deciding whether the L-3 Power Supplies and Gyros are power equipment, Courts must give the term power equipment a liberal construction. *State ex rel. Ashcroft*, 600 S.W.2d at 180-81. If there are two equally plausible interpretations, the one which more liberally promotes the remedial purpose of the statute must be applied. *Id*. In *McBud*, the Section A "perform work using some power source" meaning more accurately, promotes the remedial purpose of the statute. Sun Aviation is precisely the sort of business the Legislature sought to protect, and arbitrary termination is exactly the sort of evil sought to be ameliorated. *Bachtel*, 110 S.W.3d at 803. The section B alternative basis theory must be disregarded.

iii. *McBud's* Section B Alternative Theory Improperly Considered Affidavits from One Legislator and Several Lobbyists and Lawyers

The sole basis of *McBud's* Section B alternative theory is the affidavit of one former legislator and several lobbyists and their lawyers. The *McBud* opinion does not quote from

the affidavits nor identify which affiant made which comment. Even if it had, it was improper for *McBud* to rely on any affidavits, so the Section B alternative theory ought to be disregarded.

In *Pipe Fabricators, Inc. v. Dir. of Revenue*, 654 S.W.2d 74 (Mo. 1983), this Court rejected consideration of a legislator's affidavit holding "the Court is bound by the express written law, not what may have been intended by an enactment." *Id.* at 76 *citing Missourians for Honest Elections v. Missouri Elections Commission*, 536 S.W.2d 766, 774-75 (Mo. *banc* 1976) ("we must look to the express language of the Act irrespective of what was intended. The rational meaning of the express language of the Act must be given effect."). Eight years after *McBud* this Court reaffirmed, holding "...affidavits of legislators are not admissible to discern legislative intent because an affidavit from a legislator only reflects the intent of one legislator out of 197 that voted on a particular bill." *State ex rel. Lute v. Mo. Bd. of Prob. & Parole*, 218 S.W.3d 431, 436 n.5 (Mo. 2007).

The only Missouri case to consider a legislator's affidavit is *Commerce Bank of Kan. City, N.A. v. Mo. Div. of Fin.*, 762 S.W.2d 431 (Mo. App. 1988), where the Court acknowledged the Supreme Court admonition in *Pipe Fabricators* but held "Statements of representatives concerning the intention of the statute, although entitled to some weight where they are consistent with the statute and other legislative history, are not controlling in determining legislative intent." *Id*. The Court gave no weight to the affidavit, and did not adopt the meaning stated in the affidavit.

In fact, no Missouri case has ever followed a legislator's affidavit. *See Gershman Inv. Corp. v. Duckett Creek Sewer Dist.*, 851 S.W.2d 765 (Mo. App. 1993)(rejected testimony of two legislators because they did not know the intent of the other legislators); *Hastings v. Van Black*, 831 S.W.2d 214, 216 (Mo. App. 1992) (rejected the statement of the representative because it was "not consistent with the language of the statute."); *Guy v. St. Louis*, 829 S.W.2d 66, 69 n.4 (Mo. App. 1992); *Risk Control Assoc., Inc. v. Melahn*, 822 S.W.2d 531 (Mo. App. 1991) (rejected affidavit holding "The statements in the affidavits are not consistent with the language of the statute and are therefore disregarded."); *Von Ruecker v. Holiday Inns, Inc.*, 775 S.W.2d 295, 298 n. 1 (Mo. App. 1989) ("we are bound by what the statute says, not by what one legislator meant for it to say.").

The *McBud* Court should not have considered the legislator's affidavit, let alone affidavits of lobbyists and lawyers. The fact it did undermines *McBud's* Section B alternative theory even though it is *obiter dicta*.

iv. *McBud*'s Reliance on the Doctrine of *In Pari Materia* Was Undercut When the Statutes Were Repealed

The *McBud* alternative basis discussion construed §407.753 *in pari materia* with §407.750 (7, 9 and 12) to create its Section B alternative. *McBud*, 68 F.Supp. at 1082. Section 407.750 limited inventory buy-back requirements upon termination of a dealership.

Subsections 7, 9 and 12 excluded "implements, machinery, and attachments," and "any part that has been removed from an engine or short block ...or piece of equipment or any part that has been mounted or installed on an engine or on equipment." *Id*. *McBud* relied on these exclusions for its' Section B alternative theory.

Three years after *McBud* was decided, §470.750 was repealed and "Industrial, maintenance and construction power equipment" was added to the definition of "Retailer" in §407.850, which had the effect of moving the inventory return limitations of §470.750 to §407.850. In so doing the Legislature decided not to include subsections (9) through (12) which are the subsections *McBud* relied on. This *expanded* the scope of items a distributor could return. The Legislature is presumed to know of *McBud's* reliance on those sections[25] and, in any event, their repeal invalidates *McBud's in pari materia* reasoning.[26] Indeed, the legislature may have removed those sections in response to *McBud's* narrow reading of §407.753.

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[25] "We are mindful that the legislature is presumed to know the existing law when enacting a new piece of legislation." *Mansfield v. Horner*, 443 S.W.3d 627, 661 (Mo. App. 2014) *citing State ex rel. Nothum v. Walsh*, 380 S.W.3d 557, 567 (Mo. banc 2012).

[26] "An amended statute ... should be construed on the theory that the legislature intended to accomplish a substantive change in the law." *Sermchief v. Gonzales*, 660 S.W.2d 683, 689 (Mo. banc 1983) (*citations omitted*).

v. McBud's Section B Alternative Theory Fails to Recognize the Legislature Intentionally Omitted Any Language Requiring Power Equipment to "Operate under its Own Source of Power"

If the Legislature had intended to limit power equipment to only equipment that "operates under its own source of power to propel itself and/or do work" as *McBud's* Section B alternative theory suggests, the Legislature knew how to, and would have, included such limitations in the statute. The Legislature has included similar limitations in other parts of Chapter 407. *See §I(E)(6), infra. (referring to motorized, motor-driven and self-propelled*). The omission of any such limitations from §407.753 despite mentioning them in other parts of Chapter 407 "is powerful evidence" the legislature did not intend for such limitations to apply. *Denbow*, 309 S.W.3d at 835; *Bass*, 81 S.W.3d at 604; *Whitelaw*, 73 S.W.3d at 735; *Anani*, 406 S.W.3d at 482. *McBud's* Section B alternative overlooked this.

F. Appellant's Claim that §407.753 and §407.860 are Limited to Only Distributors Who Stock Power Equipment used for "Processing or Manufacturing Activities" Was Not Preserved and is Incorrect

1. L-3's New Argument Was Not Preserved

Point I(b) claims the trial court erred by failing to hold that "the products are not

'industrial' because in the context of the Acts, 'industrial' connotes processing or manufacturing activities." *App. Sub. Br.* at Point I(b), *p. 42-45*. L-3 did not present this "processing or manufacturing" claim to the Trial Court or the Court of Appeals and, therefore, it is not preserved for review by this Court.

a. L-3's Summary Judgment Response Did Not Mention any Processing or Manufacturing Requirement

"[A] party against whom summary judgment has been entered cannot challenge the grant of summary judgment with facts, arguments, or theories that were not presented to the trial court." *Doe v. Ratigan*, 481 S.W.3d 36, 41 (Mo. App. 2015) *citing Walden v. Smith*, 427 S.W.3d 269, 284 (Mo. App. 2014) and *Sheedy v. Missouri Highways & Transp. Comm'n*, 180 S.W.3d 66, 70-71 (Mo. App. 2005).The *Sheedy* Court explained:

> Appellate review of a decision to grant summary judgment is limited to the issues put before the trial court. An issue not presented to the trial court is not preserved for appellate review. Thus, a party is bound by the position he or she took in the trial court, and we can review the case only upon those theories. On review, an appellate court will not convict a trial court of error based on an issue which was not put before it to decide.

Sheedy v. Mo. Highways & Transp. Comm'n, 180 S.W.3d 66, 70-71 (Mo. App. 2005) (*internal cites and quotes omitted*) *citing Lincoln Credit Co. v. Peach*, 636 S.W.2d 31, 36

(Mo. banc 1982) ("these contentions were not presented to the trial court and it has long been stated that this Court will not, on review, convict a lower court of error on an issue which was not put before it to decide."); *accord Shelter Prods., Inc. v. Omni Constr. Co., Inc.*, 479 S.W.3d 189, 198 (Mo. App. 2016); *Henry v. Farmers Ins. Co.*, 444 S.W.3d 471, 480 n.7 (Mo. App. 2014) ("Because they did not raise this argument in their response to Farmers' motion for summary judgment, they cannot raise it on appeal."); *Lyon Fin. Serv, Inc. v. Harris Cab Co.*, 303 S.W.3d 589, 591 (Mo. App. 2010) ("The proper time for Appellant to raise this argument was in response to the Motion for Summary Judgment; Appellant failed to do so and cannot raise it fo the first time on appeal."); *Nigro v. St. Joseph Med. Ctr.*, 371 S.W.3d 808, 817 (Mo. App. 2012) ("Nigro next argues that the circuit court erred in granting summary judgment ... The appellant cannot raise claims for the first time on appeal."); *Schwartz v. Custom Printing Co.*, 926 S.W.2d 490, 493 (Mo. App. 1996) ("A party cannot raise an argument against a grant of summary judgment for the first time on appeal.); *D.E. Properties v. Food For Less*, 859 S.W.2d 197, 201 (Mo. App. 1993) ("Since Lessor did not raise this issue in the trial court on the motion for summary judgment, it is precluded from making this argument on appeal.").

L-3 asserted <u>one</u> basis opposing summary judgment - that L-3's equipment does not "operate under their own internal power source to do work, nor were they large machinery which operates under its own source of power..." *Def. Resp. Sum. Jud. at 24-25* (LF 690-91) (A-47-48). L-3 did not raise any other argument and even admitted that "Sun Aviation is a

dealer /distributor of power equipment *used in the aircraft industry*, and repair parts for that equipment." *SOF* ¶*3* (LF 668)(A-25).

L-3's decision not to raise its "processing and manufacturing" claim in opposition to summary judgment prohibits L-3 from raising it on appeal. This claim should be dismissed/disregarded and the appeal re-transferred to the Court of Appeals.[27]

b. L-3's Brief in the Court of Appeals Did Not Mention any "Processing or Manufacturing" Requirement

L-3 also decided not to raise its processing or manufacturing claim in the brief it filed with the Court of Appeals. *See App. Br. at Point I and p. 35-36* (A-21-21). Rule 83.08(b) mandates that a substitute brief "shall not alter the basis of any claim that was raised in the court of appeals brief..." *Rule* 83.08(b); *see also Barkley v. McKeever Enters.*, 456 S.W.3d 829, 839-40 (Mo. 2015) (new argument disregarded because "Rule 83.08(b) prohibits appellants from altering the basis of any claim that was raised in the court of appeals brief."); *State v. Bazell*, 497 S.W.3d 263, 267 n.4 (Mo. 2016) (new argument not considered because "On transfer to this Court, a party may not 'alter the basis of any claim that was raised in the

[27] Appellant's Motion to Transfer filed with this Court submitted three reasons for transfer, each of which was based on interpretation of §407.753, and the last of which makes this specific argument. Because this issue was not preserved, the reasons for transfer ring hollow and retransfer should be ordered. *Rule 83.09.*

court of appeals brief.'"); *Blackstock v. Kohn*, 994 S.W.2d 947, 953 (Mo. banc 1999) ("The Blackstocks did not raise this claim before the court of appeals. This Court, therefore, may not review the claim."); *Linzenni v. Hoffman*, 937 S.W.2d 723, 726-27 (Mo banc 1997) (claims not raised in the brief before the court of appeals were not preserved for review); *J.A.R. v. D.G.R.*, 426 S.W.3d 624, 629 (Mo. 2014) ("However, this argument is not preserved for review in this Court because Father did not present such a claim in his brief filed in the court of appeals.").

"[T]his Court's policy is to decide a case on its merits rather than on technical deficiencies in the brief." *Christeson v. State*, 131 S.W.3d 796, 799 n.5 (Mo. 2004) (*ex gratia* review granted but judgment affirmed so no prejudice to respondent). L-3 is a sophisticated litigant. A quick PACER search shows hundreds of cases. Its' inside and outside counsel have been overseeing this litigation throughout. Although this claim may be financially inconsequential to L-3, its' decision about which claims to assert and when cannot be described as anything but deliberate. If the Court excuses a sophisticated, regular litigant like L-3, it sends the message anyone can and will be excused. *Ex gratia* review should not be extended and the appeal re-transferred to the Court of Appeals. *Rule 83.09*.

2. The Trial Court Judgment and *De Novo* Review by the Court of Appeals Both Correctly Held That L-3's Equipment Was "Used for Industrial, Maintenance and Construction Applications"

L-3 admits "Sun Aviation is a dealer /distributor of power equipment used in the aircraft industry, ..." *SOF ¶3* (LF 668) (A-25). L-3 does not dispute and has not appealed the trial court's factual finding that "these products are used in the avionics industry"[28] or that the aircraft/avionics industry is, in fact, an industry. The Court of Appeals applied the plain meaning of industrial from the dictionary to these admissions and found:

> [S]ection 407.753 relates directly to "industrial, maintenance and construction power equipment used for industrial, maintenance and construction applications." Because the legislature declined to define industrial, we must turn to the dictionary to define the term. *Circuit City Stores, Inc. v. Dir. Of Revenue*, 438 S.W.3d 397, 400 (Mo. 2014) ("[A]bsent a definition in the statute, the plain and ordinary meaning is derived from the dictionary."). Thus, industrial is defined as:

[28] *Judgment 9/4/15* at 4 (LF at 721) (A-56); *see also City of Kan. City v. Hon*, 972 S.W.2d 407, 413 (Mo. App. 1998) (referring to airport related facility as "commercial industrial use.")

> of or belonging to industry: (a) being in or part of industry; (b) being or constituting an industry: (Characterized by highly developed industries or being chiefly dependent upon industry: (d) engaged in industry or in industries esp. at manual labor: (e) derived from human industry rather than natural advantages only or from profit only: (f) belonging to or aiding those engaged in industry: (g) produced by an organized industry: (h) used or designed or developed for use in industry.
>
> WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1971) at 1155.[29]

In this case, the trial court found that "it is not disputed that these products are used in the avionics industry." (LF 721) Further, L-3 admits that the products were distributed for use in the aircraft industry. (LF 668) *Therefore we see a direct relationship between these products and the statutes used to protect their distributors*.

Opinion at 9 n.4 (A-186) (*emphasis added*).

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[29] "Webster's Third New International is the Missouri Supreme Court's institutional dictionary of choice." *Caranchini v. Mo. Bd. of Law Exam'rs*, 447 S.W.3d 768, 777 n.13 (Mo. App. 2014) *citing AAA Laundry & Linen Supply Co. v. Dir. of Revenue*, 425 S.W.3d 126, 132 (Mo. banc 2014).

L-3 does not dispute and has not challenged this dictionary definition, nor has L-3 challenged the "direct relationship between these products and the statutes used to protect their distributors." *Id*. The partial summary judgment and unanimous affirmation by the Court of Appeals is consistent with the plain meaning of the unambiguous words used by the legislature as defined by the dictionary, and consistent with the purpose of §407.753 and the historical progression of franchise security statutes in general. The judgment protects a small, good-performing, non-breaching Missouri distributor who continuously invested in and depended upon its multi-billion-dollar foreign supplier from surprise termination without good cause (the very problem the statute was designed to ameliorate).

3. "Industrial" Necessarily Means "Industry," and L-3 Admitted Sun Aviation Distributes Power Equipment Used in the "Aircraft Industry"

"Industrial equipment" means equipment used in an "industry." Every dictionary uses the word "industry" to describe "industrial." You cannot have one without the other - industrial equipment will always be used in an industry; and, equipment used in an industry will always be industrial equipment. Despite this, L-3 now claims the term "industry" should be narrowed to require processing or manufacturing activities.

The answer to Point I(b) is extraordinarily simple: L-3 admitted "Sun Aviation is a dealer /distributor of power equipment *used in the aircraft industry*, and repair parts for that

equipment." *SOF ¶3* (LF 668) (A-25) (*emp. Added*).[30] This admitted fact is dispositive.

L-3 knew and understood the facts and issues when it made this admission. As one of the world's largest suppliers to the aircraft industry, L-3 is in a superior position to understand what constitutes the "aircraft industry." L-3 did not object nor seek clarification. L-3 never sought to withdraw or amend this admission.[31] L-3 never asked the trial court to re-examine the summary judgment or the judgment after trial. There is no genuine dispute the L-3 equipment was "used in an industrial application." *§407.753*.

In *Machine Maintenance, supra.*, the supplier made a similar admission: "Generac's products supply backup power, and Generac is part of the power generation industry." *Generac's SOF #5* (LF 622) (*emphasis added*). This admission apparently was dispositive in either dissuading Generac from making the illogical argument that equipment used in the power industry is not "used in an industrial application" (L-3's argument here), or the Court disposed of such an argument swiftly.

4. The Old *Keystone* Revenue Bond Case Involved an Entire Plant Instead of Pieces of "Equipment" Like this Case and is Inapplicable

L-3's new processing and manufacturing claim is based on *State ex rel. Keystone*

[30] Further, L-3 has not disputed nor appealed the trial court's factual finding that "these products are used in the avionics industry." *Judgment 9/4/15* at 4 (LF at 721) (A-56).

[31] *See, Dynamic Comput. Sols.*, 91 S.W.3d at 715.

Laundry & Dry Cleaners, Inc. v. McDonnell, 426 S.W.2d 11 (Mo. 1968). In *Keystone*, certain taxpayers in Joplin sought to prevent the City from selling $260,000 in revenue bonds to buy land and construct a building to be used as a laundry. The dispute was whether the proposed laundry was "a plant for industrial development purposes" as required by the Missouri Constitution. *Id*. at 11. The Court held "A laundry is purely a service institution," *Id*. at 18, and voided the bonds.

The *Keystone* Court specifically stated "We shall not attempt to define an 'industrial plant' in a form which would be applicable to all cases and situations." *Id*. Indeed, the *Keystone* Court only mentioned the words processing and manufacturing once and provided no analysis. No other case has adopted, applied or even mentioned its' "processing or manufacturing" comment. Additionally, interpreting *Keystone* as L-3 suggests creates a conflict with the statute authorizing revenue bonds, which defines a project for "industrial development" as including many non-manufacturing, non-processing projects.[32] Also, industrial revenue bonds have been issued for many projects that do not involve manufacturing or processing activities. *See e.g., J. E. Williams Constr. Co. v. Spradling*, 555 S.W.2d 16, 19 (Mo. 1977) (publishing company distribution center); *Wring v. Jefferson*, 413

[32] Industrial development projects include "the purchase, construction, extension and improvement of warehouses, distribution facilities, research and development facilities, office industries, agricultural processing industries, service facilities which provide interstate commerce, and industrial plants..." *§100.010(6)*.

S.W.2d 292, 294 (Mo. 1967) (shoe distribution center referred to as industrial plant).

5. Pieces of "Equipment" Directly Used for "Manufacturing" Are Not Required to Process Raw Materials under the Integrated Plant Doctrine

The *Keystone* revenue bond case involved defining whole "plant" rather than a piece of "equipment" like the case *sub judice*. The "integrated plant doctrine" would apply to individual pieces of equipment. In *Floyd Charcoal Co. v. Dir. of Revenue*, 599 S.W.2d 173 (Mo. 1980), a taxpayer produced charcoal briquettes. He purchased additional equipment to improve his capacity, and claimed the equipment was exempt from sales tax pursuant to §144.030(3 and 4) which, in pertinent part, exempts "machinery and equipment" that is "used directly in manufacturing." *Id*. The director of Revenue argued the pieces of new equipment were not "used directly in manufacturing." Courts construe exemption statutes like this one narrowly and strictly.[33] Nevertheless, *Floyd* held:

> To limit the exemption to those items of machinery or equipment which produce a change in the composition of the raw materials involved in the

[33] "Exemptions from taxation are to be strictly construed against the taxpayer, and any doubt is resolved in favor of application of the tax." *Sw. Bell Tel. Co. v. Dir. of Revenue*, 182 S.W.3d 226, 228 (Mo. 2005). "Exemptions are allowed only on 'clear and unequivocal proof,' and any doubt is resolved in favor of taxation." *Balloons Over the Rainbow, Inc. v. Dir. of Revenue*, 427 S.W.3d 815, 825 (Mo. 2014).

manufacturing process would ignore the essential contribution of the devices required for such operation."

Floyd, 599 S.W.2d at 178.

In *Noranda Aluminum, Inc.*, 599 S.W.2d 1, (Mo. 1980), this Court stated the equipment at issue was "used in steps or operations that are essential to and comprise an integral part of [the] manufacturing process, and was, therefore, used directly for manufacturing or fabricating a product." *Id*. at 4 (*internal citations omitted*).

In *Concord Publishing House, Inc. v. Director of Revenue*, 916 S.W.2d 186 (Mo. banc 1996), two companies claimed an exemption for computer equipment the companies purchased and used to implement changes in the production process of a newspaper. The Court held that printing a newspaper was "manufacturing," and the computer equipment was "directly used" in manufacturing even though it did not produce a final product. The *Concord* Court further held the "integrated plant" doctrine can apply where two distinct corporations are cooperatively involved in manufacturing, because it can "span two corporate entities as long as both businesses work together to manufacture a single product" and the "exchange between [the two corporations] occurs as a coordinated and necessary step in the manufacturing process." *Id*. at 192-93; *see also*, *DST Systems, Inc.*, 43 S.W.3d 799, 803 (Mo. banc 2001) (computer components used in producing printed statements *via* a subsidiary, was directly used in manufacturing even though the printing and computing occurred at different sites.); *Bridge Data Co.*, 794 S.W.2d 204 (Mo. banc 1990) (hardware in the taxpayer's

computer system, used to collect raw financial data and transmit the data to customers, qualified for an exemption even though the final product was intangible.).

In *Southwestern Bell Telephone Company v. Director of Revenue*, 182 S.W.3d 226 (Mo. banc 2005), the court rejected the claim that manufacturing is limited to transforming voice to electronic signals, instead holding that "the product that Bell manufactures is the ability to hear a reproduction of the human voice over appreciable distances." 182 S.W.3d at 232. The court also rejected the claim that "Bell's middle-of-the-system components are not a part of the manufacture of telephone services," and further held "the AHC did not wrongly extend the doctrine's reach to 'unrelated persons' (customers who owned part of the phone equipment needed for "manufacturing" a voice signal)." 182 S.W.3d at 232.

These cases demonstrate that individual pieces of equipment used to *manufacture* (which L-3 claims should be the new definition of industrial) a product need not "process" raw goods or anything at all. Manufacturing equipment does not have to process or transform anything. *See Bell*, 182 S.W.3d at 232. Equipment must merely be "used in steps or operations that are essential to and comprise an integral part of [the] manufacturing process." *Noranda*, 599 S.W.2d at 4.

These cases counsel against inventing a processing and manufacturing requirement for industrial equipment. It would be a *non sequitur* to require industrial equipment to process raw materials when manufacturing equipment has no such requirement.

6. Appellant's Tax Exemption Cases Holding That Restaurants "Serve" Food Rather than "Process" Food as Defined in the Tax Exemption Statute Are Not Applicable

L-3 cites *Aquila Foreign Qualifications Corp.*, 362 S.W.3d 1 (Mo. 2012), and *Union Electric Co. v. Director of Revenue*, 425 S.W.3d 118 (Mo. 2014), for the proposition that stores which heat and/or cook food do not satisfy the definition of "processing" used in certain tax exemption statutes. L-3 claims that despite the absence of a similar definition in §407.753 and despite that tax exemption statutes are strictly construed instead of broadly construed like franchise security statutes, this Court should apply the same "processing" requirement used in the tax exemption statutes to §407.753. As discussed above, however, there is no processing requirement for "manufacturing" even when that term is strictly construed, and so imposing one on industrial equipment would be illogical.

In *Aquila*, a convenience store (Casey's General Store) sought a sales tax exemption for electricity it used for heating and cooking food. The exemption statute applied if the electricity was used for "manufacturing, processing, compounding, mining, or producing." *Id. at* 5. Applying strict construction, the court denied the exemption because that statute did not include "serving" food but, instead, used "industrial-type terms, such as manufacturing, processing, compounding, mining, or producing." *Id.* (*internal quotes omitted*). The most *Aquila* can stand for is that the terms "manufacturing, processing, compounding, mining, or producing" may be considered a subset of "industrial-type terms." That does not mean

"industrial applications" as used in §407.753 are limited to "manufacturing, processing, compounding, mining, or producing" applications. Section §407.753 does not mention any of those terms, and including them in the tax exemption statute but not in §407.753 shows the legislature could have, but elected not to, require those terms or activities. *Denbow v. State*, 309 S.W.3d 831, 835 (Mo. App. 2010) *quoting State v. Bass*, 81 S.W.3d 595, 604 (Mo. App. 2002).

Union Electric Co. v. Director of Revenue, 425 S.W.3d 118 (Mo. 2014), is the same as *Aquila* in that under strict construction, a store that heats/cooks food does not meet the definition of "processing" stated by the tax exemption statutes. Analogizing food service to power equipment used in the aircraft industry is not particularly helpful. However, it is clear that the L-3 equipment would qualify for the sales/use tax exemption.[34]

[34] Section 144.030.2(3) provides an exemption for "Materials, replacement parts and equipment purchased for use directly upon, and for the repair and maintenance or manufacture of, motor vehicles, watercraft, railroad rolling stock, or aircraft engaged as common carriers of persons or property . . . *See Balloons Over the Rainbow, Inc. v. Dir. of Revenue*, 427 S.W.3d 815, 825 (Mo. 2014) (the "purchase of a hot air balloon and an inflator fan undisputedly qualify as either 'aircraft' or 'material, replacement parts and equipment purchased for use directly upon aircraft.'").

7. Applying the Dictionary Definition of "Industrial" Does Not Reduce the Construction and Maintenance Terms to Meaningless Surplusage

In its next one-paragraph argument L-3 claims that "Interpreting 'industrial' broadly to refer to 'industry' is not what the legislature intended, because that would subsume the construction and maintenance industries." *App. Sub. Br.* at 43. L-3 is presuming that all construction equipment and all maintenance equipment is used in an identifiable industry. There is no evidence of that. It is also illogical.

The majority of power equipment used for construction and maintenance applications is used by individual homeowners building new parts to their homes or maintaining their property.[35] Construction and maintenance equipment like that are not "used for industrial applications." *§407.753*. Power equipment used for these purposes have no connection to any "industry."[36] There are likely other examples too. The "construction applications" and

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[35] Protecting distributors of power saws, power drills, portable generators, etc., under §407.753 is analogous to protecting distributors of hedge clippers, weed trimmers, and lawn mowers under §407.898 (outdoor power equipment).

[36] Here, the L-3 gyros and power supplies "could be placed anywhere they could receive power," *SOF* 71 (LF 679) (A-36), so, technically, a homeowner could put them in his house or car. However, they are designed for use in aircraft and there is no evidence of use outside the aircraft industry.

"maintenance applications" verbiage has significant meaning above and beyond industrial equipment. They are not meaningless surplusage.

L-3's argument that "industrial" is limited to processing or manufacturing activities seeks to make "industrial" a subset of "construction."[37] By requiring all industrial equipment to process or fabricate things, and giving "construction" a broad scope as L-3's argument suggests, all industrial equipment would be construction equipment; construction would subsume industrial.[38] L-3's entire processing and manufacturing argument is exactly backwards. L-3 is trying to merge the definitions rather than isolate them so they each have independent meaning.

8. L-3's Power Equipment is "Used for Industrial, Maintenance and Construction Applications"

The legislature did not require power equipment to be self-propelled, expensive, large, heavy, motorized, or licensed. It has required all these things of other equipment in Chapter 407, but not §407.753. L-3 admits that its power equipment is used in the "aircraft industry." L-3 does not dispute and has not appealed the trial court's factual finding that "these products

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[37] "Construction" is defined as "the act of putting parts together to form a complete, integrated object: Fabrication." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002) at 489.

[38] The "processing" definition L-3 argues in *Aquila* refers to fabricating. *Aquila Foreign Qualifications Corp. v. Dir. of Revenue*, 362 S.W.3d 1, 4 (Mo. 2012) ("restaurants do not "fabricate," "manufacture," or "mine" products.").

are used in the avionics industry." (LF 721) (A-56). L-3 admits Sun Aviation sold to original equipment manufacturers, *SOF* 24 (LF 672) (A-29), and to aircraft owners and operators. *SOF 23* (LF 671). L-3 admits Sun Aviation sold repair parts for the L-3 power supplies and gyros so they could be maintained when needed. *SOF 3 and 64* (LF 668 and 678) (A-25, 35).

Based on these admissions, it is an easy call to determine that L-3's power equipment is "used for industrial, maintenance and construction applications." There is a "direct relationship between these products and the statutes used to protect their distributors."[39]

This application applies the plain meaning of the terms as provided in the dictionary, and is consistent with the purpose of the statute which is to protect a small, good-performing, non-breaching Missouri distributor who continuously invested in and depended upon its much-larger foreign supplier from surprise termination without good cause (the exact problem the statute was designed to ameliorate).

G. Applying the Plain Meaning of §407.753 Will Not Change Anything Except Compensating Sun Aviation for its Damages Sustained

Like the "clock striking 13," Appellant's *ipse dixit* argument that affirming the Trial Court and unanimous Court of Appeals will wreak havoc on free enterprise calls into question everything else L-3 has said. L-3 baldly claims affirming this case will suddenly protect distributors of appliances, irons, telephones, and alarm clocks, which will threaten the competitiveness of Missouri manufacturers and distributors. *App. Sub Br. 45.* The

[39] *Opinion at 9 n.4* (A-186).

Amicus makes similar claims. The fallacy of these claims should be apparent but can be summarized in a few points.

First, unlike L-3, Sun Aviation is not asking this Court to change the law to include unwritten terms. Sun Aviation has spent five years attempting to have the words of the statute enforced and nothing more.

Second, it is improper to consider the impact of future, hypothetical claims in deciding this case. These are fact-intensive cases and each must be decided on its own facts. The admissions in this case make it clear.

Third, the good cause requirement is so broad that only the most egregious terminations will trigger liability. It rarely happens. In the entire history of good cause statutes there have been 13 lawsuits (about one every four years). *See Point I (C)(1), supra*.

Fourth, the history and design of franchise security laws – covering everything from beer, to tent campers, to hedge trimmers – is that if a distributor invests in the supplier's brand and fully complies a typically onerous distribution and the supplier terminates that good-performing, non-breaching distributor for no cause whatsoever, then that dealer ought to be protected. As Appellant's Substitute Brief states: "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." *App. Sub. Br. At 41 quoting FMS, Inc. v. Volvo Constr. Equip. N. Am., Inc.,* 557

F.3d 758, 761 (7th Cir. 2009).

Last, it is good for Missouri's economy to protect good-performing, non-breaching distributors from arbitrary termination. This is inferred from the growth of the good cause statutes.

The Trial Court recognized that Sun aviation is exactly the type of business the legislature intended to protect from surprise, without-cause termination. The plain meaning of power equipment applied by the Trial Court is consistent with the purpose of the statute. It protects a small, good-performing, non-breaching Missouri distributor who continuously invested in and depended upon its multi-billion-dollar foreign supplier from surprise termination without good cause. Sun Aviation did everything L-3 required it to do and was a "good dealer"[40] who did nothing to deserve termination.[41] Excluding Sun Aviation from the protection of the statute by artificially narrowing its plain meaning would reward L-3 for prohibited business practices, ignore the policy and purpose of Chapter 407, and cripple Sun Aviation.

[40] *SOF* ¶¶83-85, ¶90 (LF 681, 683) (A-38, 40).

[41] *SOF* ¶80 (LF 681) (A-38).

POINT II

THE TRIAL COURT CORRECTLY DECLARED AND APPLIED THE LAW IN HOLDING THAT L-3 HAD A DUTY TO DISCLOSE SUN AVIATION MIGHT BE TERMINATED

Standard of Review - Misapplication of Law Challenge

Point II claims "trial court erroneously declared and/or misapplied the law in determining that L-3 had a duty to disclose..." *App. Br. at 47.* "Where a misapplication of the law is asserted, [the Court's] review is de novo." *Jackson v. Mills*, 142 S.W.3d 237, 240 (Mo. App. 2004). "The trial court's judgment is presumed correct, and the burden is on an appellant to demonstrate its incorrectness." *Sauvain v. Acceptance Indem. Ins. Co.*, 437 S.W.3d 296, 303 (Mo. App. 2014) *citing Houston v. Crider*, 317 S.W.3d 178, 186 (Mo. App. 2010).

In misapplication of law challenges "Appellate courts accept as true the evidence and inferences . . . favorable to the trial court's decree and disregard all contrary evidence." *Ivie v. Smith*, 439 S.W.3d 189, 200 (Mo. 2014). In addition, Rule 73.01 provides that 'all fact issues which no specific findings are made shall be considered as having been found in accordance with the result reached." *Rule 73.01; Ivie v. Smith*, 439 S.W.3d 189, 200 (Mo. 2014).

"[A]ppellate courts are primarily concerned with the correctness of the trial court's result, not the route taken by the trial court to reach that result." *Rouner v. Wise*, 446 S.W.3d 242, 249 (Mo. *banc* 2014) *citing Business Men's Assur. Co. of Am. v. Graham*, 984 S.W.2d 501, 506 (Mo. *banc* 1999). "To that end, the judgment must be affirmed if cognizable under any theory, regardless of whether the reasons advanced by the trial court are wrong or not sufficient." *Rouner v. Wise*, 446 S.W.3d 242, 249 (Mo. *banc* 2014) *citing American Eagle Waste Indus., LLC v. St. Louis County*, 379 S.W.3d 813, 829 (Mo. *banc* 2012).

A. Procedural Background and Holding Below

Plaintiff filed its Petition and Amended Petition and served both. L-3 defaulted and an order of default was entered. (LF 25). On the day of the damages hearing L-3 filed a motion to set aside the default. (LF 26). Ultimately, the default was set aside. (LF 101). Plaintiff filed a Second Amended Petition (LF 232) which L-3 answered. (LF 242).

Trial commenced September 21, 2015. L-3 waived opening statement and closing argument, and called one witness. L-3 did not object to any evidence as not relevant. L-3 did not object to Sun Aviation's opening statement or its closing argument. Both parties requested and the Court entered findings of fact and conclusions of law. L-3 did not file any post-judgment motions or otherwise object to or complain about the trial or judgment. Plaintiff filed a request for attorney fees asking for a contingency fee and L-3 objected saying the fee should be limited to $900,000 lodestar and the Trial Court agreed.

Point II of L-3's brief in the Court of Appeals claimed for the first time that "the trial

court's determination that L-3 had a duty to disclose ... was an erroneous application of the law *and* unsupported by substantial evidence..." *App. Br. at Point II.*

The Court of Appeals agreed with the Trial Court that the duty to disclose "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." *Opinion* at 13 (A-190) *quoting Andes v. Albano*, 853 S.W.2d 936, 943 (Mo. *banc* 1993). The Court of Appeals applied that law to the undisputed facts found by the Trial Court and ruled "Because the duty to disclose exists where there is a relationship of trust and confidence between the parties and the testimony relied on by the trial court specifically supports the existence of this relationship, the judgment of the trial court is supported by substantial evidence." *Id.* at 14 (A-191). The Court of Appeals additionally held that "Because it is unchallenged that L-3 failed to tell Sun about the consolidation plan or potential termination and that Sun would not be able to discover this plan through the exercise of ordinary diligence it is clear that the duty of disclose was also evoked by superior knowledge." *Id.* at 15 (A-192).

Appellant's Substitute Brief abandons any substantial evidence challenge and instead claims the Trial Court misapplied the law in determining there was a duty to disclose.[42] L-3

[42] No substantial evidence or against the weight of the evidence challenge is stated, and L-3 not follow the "mandatory framework" for such challenges. *First Midwest Bank of Poplar Bluff v. Boyer*, 488 S.W.3d 259, 262 (Mo. App. 2016); *Sauvain v. Acceptance*

also argues Missouri law should be changed in several respects. L-3 does not claim either the Trial Court or the Court of Appeals misstated *existing* law.

B. Pertinent Uncontested Facts

"L-3 Avionics had trust and confidence in Sun Aviation, and knew that Sun Aviation placed trust and confidence in L-3 Avionics." *Amended Judgement* at ¶32 (LF 1364) (A-64); *see also SOF #15* (LF 670) (A-27) ("L-3 ... knew that Sun Aviation placed trust and confidence in L-3."); *Buckley TT 154* ("Sun Aviation had confidence and trust in L-3."). L-3 characterized its relationship with Sun Aviation as a "*partnership*." *TT 154* (*Buckley*) and 181 (*Stephenson*); *Tr. Ex.* 208. "It was one of the best relationships." TT 16 (*Gregg*).

Sun Aviation demonstrated "passion and devotion" in representing the L-3 product line, *SOF #91* (LF 683) (A-40), and, L-3 appreciated the "passion and devotion" Sun Aviation used to represent the L-3 product line. *TT 154* (*Buckley*); *TT 181* (*Stephenson*). A condition of being the Primary Dealer was that Sun Aviation was required to purchase an initial stock of inventory, and additionally, L-3 required "annual stock requirements" of around $50,000 or $100,000. *SOF #20-21* (LF 670) (A-27). L-3 had the right to and did control various aspects of Sun Aviation's business. *SOF* ¶46-48 (LF 674-75) (A-31-32); *Buckley Depo*. at 79-84 (LF 852-57). Sun Aviation's "extensive knowledge of the L-3 product lines" and "Their commitment and investment in stocking extensive L-3 inventory

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Indem. Ins. Co., 437 S.W.3d 296, 303 (Mo. App. 2014) *citing Houston v. Crider*, 317 S.W.3d 178, 187 (Mo. App. 2010).

[was] a significant benefit to [L-3] customers..." *Amended Judgment* ¶13 (LF 1362) (A-62); *Tr. Ex. 6*. The L-3 equipment line was "at least 30%" of the business of Sun Aviation. *TT 14* (*Gregg*). "Sun Aviation was L-3's largest seller of aftermarket products." *Amended Judgment at* ¶45 (LF 1366) (A-66).

L-3 knew that Sun Aviation was a Missouri small family business. *TT 142* (*Buckley*); *SOF #15* (LF 670) (A-27) ("L-3 knew and understood that Sun Aviation was a family business."). Buckley had met Werner Gregg who founded Sun Aviation in 1975 and his wife Rose; Buckley knew Werner's son Jeff who is now President and his wife Marcy; Buckley "met everyone in the family except maybe the children." *Buckley* (LF 801). Like many other small Missouri business owners, Jeff Gregg was hoping to pass this business to his son like his father before him. *TT 37 (Gregg)*. L-3 knew it was Sun Aviation's largest supplier and would visit Sun Aviation more than any other distributor. *TT 153* (*Buckley*); (LF 873).

L-3's knowledge that it was dealing with a small family business which was vulnerable to the might and wealth of L-3 and who had reposed trust and confidence in L-3 heightens the duty to disclose. L-3's use of words like "partnership" and "passion" and "devotion" to describe its relationship with Sun Aviation are words indicating a more personal, intimate and trusting relationship. When L-3 testified that Sun Aviation represented L-3's equipment with "passion and devotion," it was the passion and devotion of a three-generation Missouri family and not a giant corporate automaton.

There is no fact more important to Sun Aviation than the potential termination of its largest supplier. Sun Aviation promoted L-3 "as the main product Sun Aviation sold" and "associated its good will with the L-3 brand."*SOF* ¶60 (LF 677) (A-34). "Sun Aviation represented to actual and potential customers that L-3 products were the best." *Id*. "At the trade shows Sun Aviation featured L-3 as its main product line." *Id*. A surprise termination not only crushes the revenue stream from sales of L-3 equipment but sends a message to the marketplace that there is something wrong with Sun Aviation. Good suppliers do not terminate good distributors. Of all the things L-3 could conceal, nothing would or could financially devastate this family business more than termination.

C. L-3 Had the Duty to Disclose the Potential for Termination Even if L-3 was Not Certain Sun Would Be Terminated

Point II(C)(1)(a) argues L-3 did not have a duty to disclose the potential for termination because L-3 was not 100% certain Sun would be terminated. L-3 claims the potential for termination cannot be "material" unless termination is certain. L-3 does not deny nor appeal the trial court's factual findings that "defendant did not tell plaintiff about the consolidation plan or any potential termination or non-renewal of Sun Aviation's distributorship," or that "Sun Aviation did not know of the consolidation plan and knowledge of it was not within Sun Aviation's reach." *Amended Judgment* p. 33 (LF 1390) (A-90).

1. The Trial Court was Correct that the Potential for Termination was a "Material" Fact Which L-3 Had the Duty to Disclose

The Trial Court held "The concealment was material to plaintiff who did not take any action to stop, avoid or prepare for termination. Plaintiff relied on the business as usual status in not taking such actions." *Amended Judgment at 33* (LF 1390) (A-90). The Trial Court's holding is supported by this Court's ruling in *Hess v. Chase Manhattan Bank, U.S.A, N.A.*, 220 S.W.3d 758 (Mo. banc 2007). In *Hess*, Chase Bank sold property to Hess without disclosing that the EPA was concerned it was possible there were improperly disposed paint cans on the property:

> Hess presented evidence that Chase learned that the EPA was investigating the property before Chase completed its foreclosure of the mortgage and that Chase informed the property appraiser that the EPA was scheduled to inspect the site and it was *possible* that remediation requirements would be imposed. These facts provided a basis for the jury to find that Chase had superior knowledge of the EPA investigation of the property.").
>
> * * * * *
>
> It is the EPA investigation into hazardous waste dumping on the property that is the material fact that Hess asserts Chase had a duty to disclose, not the presence (or absence) of paint cans.

Hess v. Chase Manhattan Bank, U.S.A, N.A., 220 S.W.3d 758, 765-66 (Mo. *banc* 2007).

Hess clearly provides that the "possibility" of an adverse impact is enough to trigger a duty to disclose. L-3 did not have to be certain Sun would be terminated to have a duty to disclose that potential to Sun.

2. The Undisputed Evidence Proves that L-3 Knew Sun Aviation Would Probably Be Terminated

L-3 makes a fact-based claim arguing that "The duty to disclose cannot rest on L-3's superior knowledge because L-3 had none. ... Buckley... had no reason to believe Sun would be terminated." *App. Sub. Br. at 52.* Whether Buckley or anyone else at L-3 knew of the potential for termination is a pure question of fact which is improper and fatal to the argument stated in Point II.[43]

"Appellate courts accept as true the evidence and inferences . . . favorable to the trial court's decree and disregard all contrary evidence." *Ivie*, 439 S.W.3d at 200. Rule 73.01

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[43] *Ivie v. Smith*, 439 S.W.3d 189, 199 n. 11 (Mo. 2014) ("a substantial-evidence challenge, a misapplication-of-law challenge, . . . are distinct claims[, and] must appear in separate points relied on in the appellant's brief to be preserved for appellate review."); *First Midwest Bank of Poplar Bluff v. Boyer*, 488 S.W.3d 259, 262 (Mo. App. 2016) (setting out "mandatory framework" for evidence disputes) *accord*, *Sauvain v. Acceptance Indem. Ins. Co.*, 437 S.W.3d 296, 303 (Mo. App. 2014) *citing Houston v. Crider*, 317 S.W.3d 178, 187 (Mo. App. 2010).

provides that 'all fact issues which no specific findings are made shall be considered as having been found in accordance with the result reached." *Id.*

Around August of 2010 the consolidation planning began.[44] It "stalled a lot of efforts "including "renewals of agreements" which were "put on hold." *TT 143 (Buckley)*. In December of 2010 Sun Aviation's written Distributor Agreement was allowed to expire without renewal, although the parties operated under the same key terms and conducted business as usual. *TT 193 (Buckley)*. When that happened, L-3 manager Kim Stephenson and Director Shelly Buckley were so concerned that Sun Aviation might be terminated that they decided Stephenson would warn both their bosses that "Sun Aviation has been a good dealer and I'm not sure it's in our best interest to terminate Sun Aviation." *TT 146 (Buckley)*. Buckley explained this process:

> Q. All right. So, so, did you tell them that hey, you know, Sun Aviation has been a good dealer for us or a good distributor for us and, you know, terminating them is, is probably not going to be in our best interest or anything like that?
>
> A. I did not get involved in that as Kim was running that, but yes, my understanding from Kim is that is the approach she had taken.
>
> Q. And the response from the sector level was what?

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[44] The process went on for "a couple of years" (*TT 145-46*) and August 2010 is two years before the 8/2/2012 termination letter.

A. Was we, the divisions, the divisions cannot run their own agreements. It has to come at the sector level, and there was a lot of turmoil and process procedure stuff being developed and those divisions had to wait, so there was no decision.

Q. Okay. And --

A. And no indication of a decision.

Q. *And that went on for a couple of years*?

A. *Roughly*.

TT 145 (Buckley) (emphasis added).

The bosses did not agree with or consider Stephenson's warning, nor did they state or infer that Sun Aviation would not or even might not be terminated. Instead, they said there is "no decision" and L-3 would have to wait. *TT 145 (Buckley)*. On August 2, 2012, Sun Aviation received the termination letter. *Exhibit 208*. Buckley was "*not surprised*" by the termination. (*LF 800-801*). Kim Stephenson was "not surprised" that Sun Aviation had a quarter-million dollars worth of inventory to return when it was terminated. (*TT 178*).

This evidence, "when considered with the reasonable inferences drawn therefrom," is sufficient for the trier of fact to "reasonably believe the proposition" that L-3 knew Sun Aviation would probably be terminated. *Sauvain*, 437 S.W.3d 296, 303.

D. Appellant's Claim that Sun Could Not Have Avoided Termination and, so there is No Duty to Disclose the Probable Termination is Improper and Incorrect

Point II(C)(1)(b) argues the "trial court erroneously declared and/or misapplied the law in determining that L-3 had a duty to disclose..." and, specifically, that potential termination "was not a material fact because Sun did not establish that it could have avoided termination..." *App. Sub. Br. at 47, 53.* The Trial Court found just the opposite: "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." *Amended Judgment* at 34 (LF 1391) (A-91).

1. This Argument Violates Rule 83.08(b)

Rule 83.08(b) mandates that a substitute brief "shall not alter the basis of any claim that was raised in the court of appeals brief..." *Rule* 83.08(b); *see also Barkley v. McKeever Enters.*, 456 S.W.3d 829, 839-40 (Mo. 2015); *State v. Bazell*, 497 S.W.3d 263, 267 n.4 (Mo. 2016); *Blackstock v. Kohn*, 994 S.W.2d 947, 953 (Mo. *banc* 1999); *Linzenni v. Hoffman*, 937 S.W.2d 723, 726-27 (Mo banc 1997); *J.A.R. v. D.G.R.*, 426 S.W.3d 624, 629 (Mo. 2014). Appellant's brief in the Court of Appeals did not assert any "materiality" defense. It did not contain any argument premised on any claim that Sun could not have avoided termination. It did not mention let alone attack the Trial Court's finding that Sun could have avoided termination. It is raised for the first time in this Court. Rule 83.08(b) has unquestionably been

violated. The Court should not grant *ex gratia* review to the prejudice of Respondent.

2. The Potential for Termination was a Material Fact Because Sun Could Have Avoided Termination Had it Been Disclosed

Because this is a misapplication-of-law challenge[45] resolution turns on whether the Trial Court applied the undisputed facts to the law correctly. The precise issue on appeal is "whether the fact L-3 probably would terminate Sun Aviation is a material fact." That question is answered succinctly and affirmatively by Trial Court's finding that "Sun Aviation could have convinced L-3 parent company not to terminate Sun Aviation, if the consolidation plan had not been concealed." *Amended Judgment* at 34 (LF 1391) (A-91). Because knowledge of the material fact (that L-3 probably would terminate Sun) would have allowed Sun to avoid termination, it is "material." This Point should be denied.

3. L-3's Claim the Trial Court Finding that Sun Could Have Avoided Termination is Speculative is Improper and Incorrect

The body of L-3's brief shifts to a fact-based claim arguing there was not enough evidence to support the Court's finding that Sun could have avoided termination. This substantial-evidence challenge is wholly distinct from the misapplication of law claim stated in Point II. *Ivie*, 439 S.W.3d at 199 n. 11. ("a substantial-evidence challenge, a

[45] L-3 does not claim the Trial Court erroneously declared the law.

misapplication-of-law challenge, . . . are distinct claims."). Arguments raised in the body of a brief but not stated in the Point Relied On are not preserved for review. *Rule 84.04*(*e*) ("The argument shall be limited to those errors included in the "Points Relied On."); *State v. Lammers*, 479 S.W.3d 624, 636 n.13 (Mo. 2016). Further, L-3 does not provide the mandatory framework for such challenges.[46] Sun provides the following out of an abundance of caution.

The undisputed evidence and inferences drawn therefrom support the Trial Court's finding. Specifically, the uncontested fact that Sun Aviation had successfully done the exact same thing before proves Sun could do it again. *See Amended Judgment at ¶11* (*LF 1362*) (A-62). This is especially true because nobody testified nor inferred Sun could not have repeated its success in avoiding termination by talking to the decision-makers. There was zero evidence contradicting the Trial Court finding.

L-3 claims there is an inconsistency between the Trial Court's finding on page 34 of its Amended Judgment that "Sun Aviation could have convinced L-3 parent company not to terminate Sun Aviation,"[47] and the finding on page 9 (¶52) that "there was nothing Sun Aviation could or should have done to avoid termination." *Amended Judgment* at 9 (LF 1366)

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[46] *See, First Midwest Bank of Poplar Bluff v. Boyer*, 488 S.W.3d 259, 262 (Mo. App. 2016); *Sauvain v. Acceptance Indem. Ins. Co.*, 437 S.W.3d 296, 303 (Mo. App. 2014) *citing Houston v. Crider*, 317 S.W.3d 178, 187 (Mo. App. 2010).

[47] *Amended Judgment* at 34 (LF 1391) (A-91).

(A-66) *citing TT 153* (*Buckley*); *TT 158* (*Riddle*); *TT 179-80* (*Stephenson*)." This is completely incorrect. L-3 takes the ¶52 finding completely out of context in the extreme.

First, the organizational structure of the Court's Amended Judgment shows a 25 page gap between the two findings. Only the not-terminate finding (LF 1391) (A-91) was in the context of discussing whether termination could have been avoided. Second, the trial testimony cited by the Trial Court was in the context of what actions Sun might have taken in connection with its performance as a distributor to avoid termination. It was *not* in the context of what Sun might have said to decision makers to avoid termination, if Sun had been told of the potential for termination. L-3 has completely ignored this important factual distinction.

Specifically, the testimony of Buckley cited by the Trial Court came in the context of providing a laundry list of things Sun Aviation might have done or failed to do that constituted good cause for termination. (*TT 151-52*). It was in the context of operations and performance as a distributor and culminated with a wrap-up as follows:

Q. Let me just ask it this way, was Sun Aviation given a chance to make any *adjustments or change its operations* in any way whatsoever in order to avoid termination?

A. No.

Q. Was there anything that you're aware of that Sun Aviation could have done to avoid termir

A. No.

TT 153 (*Buckley*).

Stephenson's testimony was also regarding what actions Sun might have taken in the context of performance as a distributor. It did not include the hypothetical "what could Sun have done *if* Sun had known about the pending termination."

Q. Was Sun Aviation ever given the opportunity to take any action to avoid being terminated, to do something to prevent the termination?

A. Nothing, there, nothing prevents Sun from taking action.

Q. Well, what I'm wondering is what could Sun have done to avoid being terminated, if anything, that you know of?

A. Nothing, to my knowledge.

TT 179-180 (*Stephenson*).

Stephenson's testimony that "*nothing* prevents Sun from taking any action" obviously did not contemplate what Sun might have done *if* Sun knew about the potential for termination. Concealment of the termination potential obviously prevents Sun from taking action. The context of the questioning was limited to the performance of Sun as a distributor. It had nothing to do with what might have happened if Sun knew about the termination potential.

The same is true with the testimony of Mr. Riddle who said "I can't, I can't recall anything that they should or shouldn't have done." (*TT 158*). He would not say "I can't recall

anything" if the context included talking with decision-makers about reasons for not being terminated. Again, the context was clearly limited to performance as a distributor.

Appellate courts "defer to the circuit court's credibility determinations." *Ivie*, 439 S.W.3d at 199-200. This applies to important context issues like the above.

Other evidence also supports the Trial Court's finding that if Sun had known about the potential for termination, it could have repeated its success in avoiding termination. Sun Aviation was a perfect distributor ideal for the job, and there was no reason not to keep Sun as a distributor. Retaining Sun was a no-brainer, because the undisputed facts show:[48]

* L-3 needs, wants and plans to continue using distributors: "The distributorship program was working and successful, and very much a part of L-3 Avionics' global reach. It was an effective ingredient needed to get the L-3 products to customers. It was a good thing for L-3. Distributors were a valued component of the avionics business program." (¶58) (LF 1367) (A-67) (*internal quotes and cites omitted*). L-3 has "distributor applications in process" and the distributor function "would be the same as it's always been." *Riddle* at 23-25 (*LF 948-50*).

* Sun Aviation had an "excellent" relationship with L-3, and there were never any "problems, disagreements, personality conflicts, personal disagreements or problems of any kind with Sun Aviation." (¶¶30-31) (LF 1364) (A-64). Sun

[48] The "¶ xx" citations are to the *Amended Judgment*.

"complied with all requirements of L-3." (*TT 153*).

* L-3 Avionics had "trust and confidence" in Sun Aviation, and knew that Sun Aviation placed trust and confidence in L-3 Avionics." (¶32) (LF 1364) (A-64).

* L-3 appreciated the years of "partnership" and support of Sun Aviation. (¶46) (LF 1364) (A-66).

* L-3 appreciated the "passion and devotion" Sun Aviation used to represent the L-3 product line. (¶47) (LF 1364) (A-66).

* Nobody ever claimed or suggested that there was any inadequacy or insufficiency with Sun Aviation's performance, operations, facilities, marketing, inventory stocking, payment history or timeliness, credit worthiness, or financial condition. (¶49) (LF 1364) (A-66).

* L-3 Avionics did not agree with the decision to terminate Sun Aviation. (¶59) (LF 1367) (A-67).

* Terminating distributors caused "a negative effect overall on our sales." (¶61) (LF 1367) (A-67).

* Since 1975 Sun Aviation has never voluntarily or involuntarily stopped representing any manufacturer except for L-3 Avionics. (¶75) (LF 1369) (A-69).

* Sun Aviation had the ability to continue to sell L-3 Avionics' products with the facilities, staff and resources it had. (¶78) (LF 1369) (A-69).

* Sun Aviation's sales of L-3 products were increasing in the few months before termination. (¶36) (LF 1365) (A-65).

* L-3 Avionics is constantly developing new products and Sun Aviation could have expanded with L-3 Avionics on new ventures. (¶99) (LF 1372) (A-72).

The Sector did not explain why the consolidation process had to result in Sun being terminated. As shown above, Sun was a perfect distributor. The Sector who made the termination decision clearly did not have the above facts. They did not know who they were terminating. *Stephenson* at 49 ("I don't know what their awareness was of Sun Aviation.") (LF 1035). Had Sun been able to explain its relationship and benefit to L-3, history would have repeated itself and Sun would be a distributor today.

The only evidence which might arguably controvert the finding that Sun could have avoided termination is that Stephenson warned the bosses that cancelling Sun would not be in L-3's best interest and Sun was still cancelled. The Trial Court considered that. *Amended Judgment* at 34 (LF 1391) (A-91). However, according to Buckley, Stephenson was supposed to communicate the warning to the Sector, *TT 145-46*, but Stephenson could not remember whether she did this or not. *TT 175*. Stephenson testified it was not her responsibility to voice such an objection to the Sector; but, it was her responsibility to voice it to her boss within L-3. *Stephenson p. 52-53* (L.F 1036). Her bosses were Vice President Larry Riddle and

corporate attorney Steve Blank and Stephenson received her marching orders from them. *Stephenson p. 46 (LF 1035*). While it is clear that Buckley and Stephenson discussed and agreed the important warning should be given, it is possible Stephenson chickened-out and it never reached the decision-makers. If anything, this supports the Trial Court finding that Sun could have avoided termination by informing the Sector that Sun was the perfect distributor.

4. L-3's Substantial-Evidence Case Citations are Inapposite

L-3 cites three substantial-evidence jury cases to argue the Trial Court's factual finding that Sun could have avoided termination is speculative.[49] None of them involve the case where, as here, the challenged finding was supported by evidence. Here, the evidence is uncontroverted that Sun Aviation was the perfect dealer, there was no reason to terminate Sun, and Sun and had successfully avoided termination before. There is also sketchy proof the warning actually reached the decision makers.

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[49] *See, Cent. Am. Health Scis. Univ. v. Norouzian*, 236 S.W.3d 69, 84 (Mo. App. 2007) ("Mr. Norouzian did not offer any evidence to establish the occurrence of these contingencies."); *Linneman v. Freese*, 362 S.W.2d 585, 586 (Mo. 1962) (auto crash case where defense jury verdict upheld); *Wagner v. Bondex Int'l, Inc*., 368 S.W.3d 340 (Mo. App. 2012) (asbestos triggered mesothelioma claim where defendant argued there was not substantial evidence of causation.).

E. L-3's Knowledge Sun Aviation Was a Missouri Small Family Business That Had Reposed Trust and Confidence in L-3 Triggers a Duty to Disclose

Point II(C)(2) claims L-3's knowledge that Sun was a Missouri small family business who had reposed trust and confidence in it cannot, as a matter of law, trigger a duty to disclose. This is flatly wrong.

The Trial Court correctly held: "The duty to disclose 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." *Amended Judgement* at 32 (LF 1389) (A-89) *quoting Reeves v. Keesler*, 921 S.W.2d 16, 21 (Mo. App. 1996) *citing Andes v. Albano*, 853 S.W.2d 936, 943 (Mo. banc 1993) and *Triggs v. Risinger*, 772 S.W.2d 381, 382 (Mo. App.1989). Appellant's Substitute Brief contains the same quote so there should be no dispute this states Missouri law. *App. Sub. Br.* at 49 *citing Andes v. Albano*, 853 S.W.2d 936, 943 (Mo. 1993).

L-3 claims its admission of trust and confidence is "vague" and cannot trigger a duty to disclose. In fact, L-3's admission was clear, comprehensive and uncontroverted. It was also repeated in several formats.[50] L-3 offered no testimony or other evidence attempting to limit,

[50] Buckley testified she knew "Sun Aviation had confidence and trust in L-3." *Buckley TT 154.* L-3 admitted it in its summary judgment response that "L-3 ... knew that Sun Aviation placed trust and confidence in L-3." *SOF #15* (LF 670) (A-27). And, the Trial

reduce or recant these admissions. L-3 knew and understood that Sun Aviation had reposed trust and confidence in L-3. L-3 violated this trust by concealing the most important thing to this Missouri small family business - a surprise, without-cause termination of its largest supplier to whom Sun had attached its good will and had no possible way of anticipating.

L-3 claims that in commercial environments only a fiduciary duty can trigger a duty to disclose, and cites *Blaine v. J.E. Jones Constr. Co.*, 841 S.W.2d 703 (Mo. App. 1992), in support. However, *Blaine* held that a duty to disclose arises "where one party expressly or by clear implication places a special confidence in the other." *Id*. at 705. *Blaine* recognized that each case must be decided on its own facts. In *Blaine* "There was no evidence that a confidential relationship of any sort developed between the parties or that the parties were in a fiduciary relationship." *Id*. This is inapposite to the case here where, after a lawsuit alleging concealment had been filed, L-3 knowingly and repeatedly admitted this financially vulnerable, small family business reposed trust and confidence in its largest supplier.

L-3 cites other cases scattered across time and space, but they do not apply Missouri law and are factually distinguishable because none have direct evidence that the defendant knew the Plaintiff reposed trust and confidence in the defendant like the case *sub judice*.

The Trial Court and Court of Appeals unanimously agreed this trust and confidence

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Court made a factual finding which L-3 has not challenged. *Amended Judgement* at ¶32 (LF 1364) (A-64) ("L-3 Avionics had trust and confidence in Sun Aviation, and knew that Sun Aviation placed trust and confidence in L-3 Avionics.").

supports a duty to disclose. *Opinion* at 14 (A-191) ("[B]ecause the presented evidence displays that a relationship of trust and confidence existed between L-3 and Sun, the trial court's judgment finding a duty to disclose is supported by substantial evidence.").

The duty to disclose also and independently arises when one party has superior knowledge of a material fact that is beyond the reach of the other. *Andes*, 853 S.W.2d at 943 ("The duty to disclose arises ...where one party has superior knowledge or information not within the fair and reasonable reach of the other party."). This not only bolsters the finding based on trust and confidence, but serves as an independent basis for affirming the Trial Court, to wit:

> L-3 does not deny nor appeal the trial court's factual finding that "defendant did not tell plaintiff about the consolidation plan or any potential termination or non-renewal of Sun Aviation's distributorship," or that "Sun Aviation did not know of the consolidation plan and knowledge of it was not within Sun Aviation's reach." (LF 1390) Because it is unchallenged that L-3 failed to tell Sun about the consolidation plan or potential termination and that Sun would not be able to discover this plan through the exercise of ordinary diligence it is clear that the duty of disclose was also evoked by superior knowledge.

Opinion at 15 (A-192).

Missouri law holds that a duty to disclose may be triggered in cases like this where there is an admitted relationship of trust and confidence reposed in the defendant who knows

critical information beyond the reach of the plaintiff.

F. Arms-Length Relationships are Not Exempt from the Duty to Disclose

Point II(C)(3) argues that no duty to disclose can be triggered when the parties are in an arms length relationship. Missouri law does not contain any such exemption and L-3 cites none. Many cases apply the duty to disclose in arms-length business transactions, including the ones cited by the Trial Court here.

In *Andes v. Albano*, 853 S.W.2d 936 (Mo. banc 1993), Andes and her husband filed for divorce. A settlement was reached which released "all claims known and unknown against the other & their respective counsel." *Id*. 939. Years later Andes sued her ex-husband's lawyer, Albano, for participating in the wiretapping of her home. Albano asserted release as a defense. Andes claimed the release was fraudulently induced because Albano had not disclosed his role in the wiretap. The Supreme Court noted "Andes and Frick, represented by their respective counsel, *negotiated at arm's length*." *Id. (emphasis added)*. The test for a duty to disclose in such an arms-length situation was "[the duty to disclose] 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." *Id*. Ultimately, the Andes-Albano relationship did not meet that test.

In *Reeves v. Keesler*, 921 S.W.2d 16 (Mo. App. W.D. 1996), the Reeves purchased a house from the Kesslers. The seller's disclosure statement represented there were no material defects in the septic system, but shortly after moving in the Reeves experienced

problems. The Reeves sued the Kesslers for fraud and sued the Kessler's real estate agent, Coldwell Banker, for concealment. The relationship between the Reeves and Coldwell Banker was arms-length. The court of appeals noted that as between the Reeves and Coldwell Banker, "The duty to disclose 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." *Reeves v. Keesler*, 921 S.W.2d 16, 21 (Mo. App. 1996) *citing Andes v. Albano*, 853 S.W.2d 936, 943 (Mo. banc 1993). The Reeves Court rejected the claim because Coldwell Banker did not know about the septic system problems.

As noted above, in *Hess, supra.*, Chase Bank sold property to Hess without disclosing that the EPA was concerned about the property because the prior owner may have improperly disposed of paint cans on the property. This buyer-seller relationship was at arms-length. This Court held "A duty to speak arises where one party has *superior knowledge* or information that is not reasonably available to the other." *Hess,* 220 S.W.3d at 765 (*internal cites and quotes omitted*).

The Trial Court did not erroneously declare the law regarding when a duty to disclose may arise. Missouri does not have a separate test for cases involving arms-length relationships.

G. At-Will Relationships are Not Exempt from the Duty to Disclose

Point II(C)(3) also argues there is no duty to disclose the potential for termination because Sun did not "have a reasonable expectation that it would remain as L-3's distributor for any particular duration." *App. Sub. Br. at 58*. The gist appears to be that Sun already knew L-3 may be considering termination and so disclosing that L-3 was probably going to terminate Sun would not have as informed Sun of anything Sun did not already know. This fact-based claim is unsupported and incorrect.

The Court of Appeals held: "L-3 does not deny nor appeal the trial court's factual finding that 'defendant did not tell plaintiff about the consolidation plan or any potential termination or non-renewal of Sun Aviation's distributorship,' or that 'Sun Aviation did not know of the consolidation plan and knowledge of it was not within Sun Aviation's reach.'" *Court of Appeals Opinion at 15* (A-192).[51] The uncontroverted evidence proves that Sun Aviation did not know about a potential termination for any reason.

Sun Aviation's President testified that since 1975 Sun Aviation has never been terminated nor otherwise ended a relationship with a supplier. *TT 14-15*. Sun Aviation's relationship with L-3 was "one of the best relationships" and Sun Aviation expected it to last indefinitely, because Sun Aviation "didn't see any reason why it would end." *TT 16*. "In [Sun Aviation's] viewpoint, it was a continual thing; It was not something that was going to end." *TT 54*. "I expected no termination." *TT 56*. Sun Aviation wanted to remain a distributor.

[51] *See also, Amended Judgment at 33 (LF 1390).*

TT37. Its 46 year old President hoped to pass it to his sons. *TT 37.* L-3 was Sun Aviation's largest supplier, representing 30% of sales. *TT 14.* Sun Aviation expected to be dealer for a very long time, *TT 37*, and was reasonably certain that Sun Aviation would have and could have been an L-3 dealer for over 30 years. *TT 38*. Sun Aviation had no expectation that it was a candidate for termination, which was a "compete shock." *TT 32.* This evidence "has some probative force on the fact that is necessary to sustain the circuit court's judgment," *Ivie*, 439 S.W.3d at 199-200 ("Appellate courts accept as true the evidence and inferences . . . favorable to the trial court's decree and disregard all contrary evidence."). Sun Aviation did not expect to be terminated, and there is no evidence to the contrary.

Moreover, there was no evidence of any reason for L-3 to terminate Sun either. There was no connection between terminating Sun and the consolidation process. L-3 is continuing to use distributors and Sun could have and, but for the concealment, would have been one of them. Sun was the perfect distributor.

L-3 cites *Bayne v. Jenkins*, 593 S.W.2d 519, 529 (Mo. 1980), but *Bayne* involved what by today's standard would be entitled a substantial evidence challenge. The claimant claimed he was induced to buy securities by a shareholder report that omitted material negative information. The court held there was a duty to disclose facts omitted from the shareholders report. *Bayne* does not support L-3's claim.

H. Missouri Law Does Not Prohibit a Duty to Disclose from Arising Where "Strategic Plans" Are Involved

Point II(c)(4) claims a business should never have to disclose "strategic" plans. The only case applying Missouri law that L-3 cites for this proposition is *Blaine v. J.E. Jones Constr. Co., supra*., which specifically held that a duty to disclose arises "where one party expressly or by clear implication places a special confidence in the other." *Id*. at 705. *Blaine* made no exception for the plans of a developer defendant to build a multi-family apartment near single-family residences he sold. The linchpin in *Blaine* was not that the plans were exempted from disclosure but, rather, that they were publicly available and, indeed, had been given to the plaintiffs. *Id*. at 709.

Here, the fact concealed was the likelihood Sun would be terminated. Had that been disclosed, Sun could have and would have avoided the termination. The consolidation process would likely have been mentioned but, standing alone, the consolidation process had no impact on Sun Aviation. There was no evidence introduced explaining why exactly the consolidation process had to result in the termination of Sun Aviation.

There was no evidence that the consolidation plan was secret. There was no evidence that disclosure would hurt L-3, be a burden on L-3, cost L-3 money or work any sort of hardship on L-3.

Immunizing suppliers from an otherwise applicable legal duty to disclose because the disclosure may include strategic plans would trample Missouri public policy. "Missouri

policy, both at common law and by statute, is to protect franchisees and those operating under distributorship agreements from the onerous effects of bad faith at-will termination." *Bishop v. Shelter Mut. Ins. Co.*, 129 S.W.3d 500, 505 (Mo. App. 2004); *High Life Sales Co. v. Brown-Forman Corp.*, 823 S.W.2d 493, 498 (Mo. 1992) (en banc). As L-3 noted, "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." *App. Sub. Br. at 41, citing FMS, Inc. v. Volvo Constr. Equip. N. Am., Inc.,* 557 F.3d 758, 761 (7th Cir. 2009).

POINT III

RECOVERY OF "DAMAGES SUSTAINED" AS PROVIDED BY §407.410 ARE NOT LIMITED TO 90 DAYS

The Standard of Review

This challenge claims the Trial Court "misapplied and/or erroneously declared the law. Therefore, review is *de novo*.

Procedural Background

Plaintiff's motion for summary judgment argued that Sun Aviation be granted partial summary on Count I (improper notice) because L-3 violated §407.405 which entitled Sun to the remedy provided by §407.410, and that L-3 violated §407.753(2) which entitled Sun to the remedy provided by §407.755. (LF 598-99)(A-1). L-3's Response opposing summary judgment under Count I argued that §407.405 did not apply because there was a warehouse exception. (LF 686)(A-43). L-3's Response did not mention §407.753(2). The trial court granted partial summary judgment on Count I. (LF 720)(A-4). At trial both parties asked for findings of fact and conclusions of law. After trial, the Court entered an Order and Judgment which contained extensive findings of fact and conclusions of law. (LF 1165). The Judgment discusses the damages remedy under both §407.410 and §407.755 and entered one damages amount of $7,600,659 (LF1185-87). L-3 did not file any post-trial motions.

Appellant's Brief in the Court of Appeals did not argue the partial summary judgment, Judgment or Amended Judgment were incorrect as regards Count I. Point III argued "The trial court erred in awarding Sun damages for lost profits in the amount of $7,600,659.00 for Sun's claims of (a) improper termination of franchise under RSMo §407.405; (b) termination of distributorship without good cause under RSMo §407.753; and (c) concealment..." *App. Br. at 46-47* (A-154-55). Appellant's Brief does not mention §407.753.2 or §407.755. It does not mention the statutory remedy in §407.410. In focuses entirely on the common law recoupment doctrine. Respondent's Brief argued the statutory remedies apply. The Court of Appeals agreed. (A-195).[52]

L-3's Substitute Brief contains a new Point III which now limits the recoupment doctrine argument to Count I only. L-3 again claims that doctrine overrides the "damages sustained" remedy provided by §407.410(2). L-3's Substitute Brief asks this Court to apply the recoupment doctrine to Count I and limit the award damages for 90 days of lost profits which L-3 computed to be $19,134.75. *App. Sub. Br. at 82*.

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[52] *Opinion* at 18 (A-195) ("Therefore, because the relevant statutes specifically indicate that a franchise agreement for these material requires notice and good cause, it is clear that this agreement is not terminable-at-will and does not require that damages be limited on the basis of the recoupment doctrine. Instead, *the remedy is governed by statutory remedies.*").

A. The Statutory Remedy of "Damages Sustained" Does Not Limit Lost Profits to 90 Days

Section §407.410.2 provides the remedy for violation of Sections §407.400 to §407.420. Those sections prohibit termination of all franchises without 90 days notice (§407.405) and prohibit termination of liquor franchises without good cause (§407.413)."A franchisee suffering damage as a result of the failure to give notice as required or the cancellation or termination of a franchise ... 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." *§407.410(2)*. Like all remedial statutes, §407.410 must be "construed broadly to effectuate the statute's purpose." *Tolentino v. Starwood Hotels & Resorts Worldwide, Inc.*, 437 S.W.3d 754, 761 (Mo. 2014). "Doubts about the applicability of a remedial statute are resolved in favor of applying the statute." *Id*.

Section §407.410.2 does not contain any textual limit on "damages sustained." Therefore, L-3 argues non-statutory basis to prove the 90 day limitation. Specifically, L-3 claims this Court's holding in *Ridings v. Thoele, Inc.*, 739 S.W.2d 547 (Mo. 1987), sharply limits the damages sustained remedy for both improper notice and termination without good cause. L-3 offers no other basis for its claim.

In *Ridings* this Court accepted transfer to determine whether punitive damages were allowed under §407.410.2. The Court held that "damages sustained" did not include punitive

damages because they were not available at common law.[53] The rational was that §407.410.2 merely "codified the limited remedy under Missouri common law espoused in early cases such as *Beebe*." *Id*. at 549. The problem with this reasoning is that §407.410.2 also applies to termination without good cause in §407.413. *Beebe* had nothing to do with good cause. In fact, a perquisite to the recoupment doctrine is an at-will relationship, but no good cause relationships are at-will ,i.e., they require good cause to terminate. This oversight completely undercuts the *Ridings* rationale. This oversight is likely because the focus of *Ridings* was punitive damages only. Extending *Ridings* as L-3 suggests here is wholly unfounded. The "damages sustained" statutory language is intact.

In *Saey v. Xerox Corp.*, 31 F. Supp. 2d 692 (E.D. Mo. 1998), the defendant claimed "damages sustained" under §407.410(2) were limited to "loss of goodwill, costs of the suit, and any equitable relief that the court deems proper." *Id*. at 702. The Court held that "damages sustained" may "include loss of goodwill, costs of the suit, and *any other actual damages* the franchisee has sustained." *Saey* 31 F. Supp. 2d at 702 (*emphasis added*). The *Saey* Court discussed *Ridings* and noted "According to the *Ridings* Court, punitive damages

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[53] This Court's has subsequently held, however, that "there is no question that punitive damages (exemplary damages), as well as actual damages, were recognized under the common law in 1820." *Scott v. Blue Springs Ford Sales, Inc.*, 176 S.W.3d 140, 142 (Mo. 2005) *citing Lake Shore & M.S. Ry. Co. v. Prentice*, 147 U.S. 101, 13 S. Ct. 261, 37 L. Ed. 97 (1893).

were not previously available and therefore could not be recovered under the statute... However, there is *no indication that the legislature otherwise intended to limit the actual damages available under the statute*." *Id.*(*emphasis added*). This makes sense.

In *Lift Truck Lease & Serv. v. Nissan Forklift Corp.*, 2013 U.S. Dist. LEXIS 85183 (E.D. Mo. June 18, 2013), the Court interpreted "damages sustained" under §407.755 (Count II here) and held "The plain language of the statute, however, would appear to permit recovery of both actual and consequential damages." *Id. at *17*. "[T]he damages available to [Plaintiff] are those provided by §407.755, which broadly allows 'damages sustained . . . as a consequence of the violation of §407.753, which may include but is not limited to lost profits." *Lift Truck Lease, supra., at* 17-18; *see also Gateway Foam Insulators, Inc. v. Jokerst Paving & Contr., Inc.*, 279 S.W.3d 179, 184 (Mo. 2009) ("... lost profits may be necessary to accomplish fully compensating the claimant for his loss.").

The case law does not hold that the "damages sustained" remedy is limited as pertains to compensatory damages.

B. The Recoupment Exception Does Not Apply Because In the Franchise/Distributorship Context, it is a Claim and Not a Defense

In non-franchise contract cases "[R]ecoupment is a defense that reduces or eliminates a plaintiff's recovery through proof of plaintiff's defective performance but does not permit an affirmative judgment in favor of a defendant." *Unerstall Founds., Inc. v. Corley*, 328 S.W.3d 305, 311 (Mo. App. 2010) (*citations omitted*). "To establish a right to recoupment,

a defendant must prove that the plaintiff performed defective work." *Id.*; *Birkenmeier v. Keller Biomedical, LLC*, 312 S.W.3d 380, 387 (Mo. App. 2010) ("Under Missouri law, 'the doctrine of recoupment--whether called a counterclaim or an affirmative defense--is solely a matter of defense.'").

In the franchise/distributorship context, the recoupment doctrine is just the opposite; it is a claim and not a defense. It has been called the "franchisee protection rule." *Bishop v. Shelter Mut. Ins. Co.*, 129 S.W.3d 500, 505 (Mo. App. 2004). It creates an independent cause of action a franchisee may pursue when a supplier *lawfully* terminates an at-will franchise contract. It is intended to create a remedy when no other exists.

The origin of the franchisee protection rule is *Beebe v. Columbia Axle Co.*, 117 S.W.2d 624 (1938), *but see also Glover v. Henderson*, 25 S.W. 175, 177 (Mo. 1894) (same principle applied to individual sales agent). In *Beebe*, the defendant appointed plaintiff as a commissioned sales agent for a designated territory, and plaintiff performed under the agreement. Defendant terminated plaintiff who sued to recover the expenses of performing during the relationship plus the value of the services performed. The Court permitted a recovery based on *quantum meruit* but not for breach of the original agreement (which had not been breached because it was at-will). The Court held "it could not be permitted that the principal should then terminate the agency, and take advantage of the agent's services, without rendering any compensation therefor." *Beebe*, 117 S.W.2d at 629 *quoting Glover*, 25 S.W. at 177.

In *Royal Remedy & Extract Co. v. Gregory Grocer Co.*, 90 Mo. App. 53 (Mo. App. 1901), a distributor of chewing gum stopped paying the supplier who had breached an exclusive distribution agreement. Supplier sued for unpaid invoices and distributor counterclaimed for lost profits caused by breach of oral distribution agreement. The supplier argued that because the contract was indefinite and could be terminated at any time, distributor could not recover lost profits. The Court ruled it would be dishonest "to permit [supplier] to appropriate the result of the [distributor's] services without compensation." *Id*. at 59-60. *Royal Remedy* establishes that a distributor can maintain a breach of contract claim for lost profits after the contract has been terminated even though the contract is indefinite. *See also, Gibbs v. Bardahl Oil Co.*, 331 S.W.2d 614, 619-22 (Mo. 1960).

In *Ernst v. Ford Motor Co.*, 813 S.W.2d 910 (Mo. App. 1991), distributors entered contracts with VFEC for the sale of agricultural equipment. The contract could be terminated at any time by giving 90 days notice. VFEC sold its business to Ford New Holland ("FNH") and in doing so terminated 150 distributors including plaintiffs. The plaintiffs sued for breach of contract and recoupment among other things. The *Ernst* Court held that "plaintiffs may have a claim for recoupment against VFEC, if the Court finds that they had entered into terminable-at-will dealership agreements with VFEC." *Ernst*, 813 S.W.2d at 919. *Ernst* requires an at-will contract to file a recoupment claim. *See also Armstrong Bus. Servs. v. H & R Block*, 96 S.W.3d 867 (Mo. App. 2002).

In *Bishop*, 129 S.W.3d 500, the Court held "[Plaintiff] fails to recognize that although Missouri policy, both at common law and by statute, is to protect franchisees and those operating under distributorship agreements from the onerous effects of bad faith at-will termination, that rule is unique to franchise/distributorship type agreements." *Bishop*, 129 S.W.3d at 505.

These cases clearly show that the recoupment exception creates a quasi-contract cause of action triggered upon *lawful* termination of an at-will franchise agreement. It creates a remedy when there is no other (because the contract was lawfully terminated). It is not an affirmative defense and does not limit damages, and no case or Court has ever applied the recoupment exception to limit damages claimed by a terminated franchisee/distributor.

C. The Recoupment Exception Does Not Apply, Because the Agreement Between Sun Aviation and L-3 Was Not an At-Will Agreement

The agreement between Sun Aviation and L-3 was not terminable at will, because it could only be terminated for good cause. *§407.753.1; Ernst*, 813 S.W.2d at 919 ("plaintiffs argue ... the agreement ... could only terminate it for good cause ... If the Court finds the agreement not terminable at will, the recoupment doctrine will not apply."); *see also Smith v. City of Byrnes Mill, Mo.*, 2015 U.S. Dist. LEXIS 103711, at *10-13 (E.D. Mo. Aug. 7, 2015) (termination in violation of public policy does not trigger at-will status).

D. The Recoupment Exception Does Not Apply Because Affirmative Defenses are not Available in Chapter 407 Claims

Even if recoupment was an affirmative defense instead of a cause of action, it would not apply because of the strong public policy protecting distributors. *Huch v. Charter Communications, Inc.*, 290 S.W.3d 721, 725 (Mo. banc 2009) (affirmative defense of voluntary payment doctrine unavailable: "because of the act's broad scope and the legislature's clear policy to protect consumers, certain legal principles are not available to defeat claims authorized by the act."); *Peel v. Credit Acceptance Corp.*, 408 S.W.3d 191, 201-02 (Mo. App. 2013) ("[E]ven if properly pled, ... the affirmative defense of mitigation of damages may be unavailable to defeat claims in the context of the MPA."); *High Life Sales Co.*, 823 S.W.2d at 498 (forum selection clause rejected); *Pointer v. Edward L. Kuhs Co.*, 678 S.W.2d 836, 844 (Mo. App. 1984) (estoppel rejected); *Whitney v. Alltel Communications, Inc.*, 173 S.W.3d 300, 314 (Mo. App. 2005) (arbitration clause rejected because it denied statutory protections).

E. Appellant's Cases do Not Support a Limitation on Statutory Damages

L-3 cites *Asamoah-Boadu v. State*, 328 S.W.3d 790, 797 (Mo. App. 2010), which was a breach of contract case where the court's objective was to "make the injured party whole by placing it in the position it would have been in if the contract had been performed." Id. at 796. This is much more narrow than "damages sustained to include loss of goodwill, costs of the suit, and any equitable relief that the Court deems proper." *§407.410(2)*. For example,

the loss of goodwill is not something that occurs within a contractual notice period. The legislature would not say "recover lost good will for 90 days." Goodwill takes a long time to build and the effects of its destruction can last for years. Section 407.410 would not contain a remedy like goodwill if it had intended an arbitrary time frame. Even the court in *Asamoah-Boadu* held that "the termination notice period does not necessarily and under any and all circumstances set the parameters for all provable damages." *Id*. at 797.

L-3 also cites *American Eagle Waste Indus., LLC v. St. Louis County*, 379 S.W.3d 813 (Mo. banc 2012), but in that case there was no dispute over the damages period and the court did not analyze it. The issue was how to calculate the damages for the agreed upon period (net or gross).

F. Where, Like Here, No Notice is Given The Measure of Damages for Termination is Not Limited to the Notice Period

The Trial Court explained its damages award for improper notice under both §407.410 and §407.755. The explanation under §407.410 was that no proper notice had been given and it appeared none would be. This is similar to *Farmers Ins. Exch. v. Goldan*, 378 P.3d 1163, 1170 (Mt. 2016), where an employer terminated an employee whose contract required a 90 day notice. The Supreme Court of Montana explained that the complete failure to give the required notice permitted the employee to prove whatever damages the evidence allowed. As "[a] career agent with twenty-one years of successful employment with Farmers, Goldan established for the jury his understandable expectation that his contract would continue into

the future, as well as the detriment caused by Farmers' breach of contract." *Id. at* 1172.

This is similar to the situation here where L-3 terminated without any cause and there was an expectation and, indeed, desire by both parties (L-3 disagreed with the termination-*TT 206-07*) to continue the relationship.

G. Assuming *Arguendo* That the Recoupment Doctrine Applied, the "Value of the Expenditures Made and Work Performed" Is Equal to the Value of the Income Stream That Work Generated

The measure of damages under the franchise protection rule/doctrine is the "value of expenditures made and of services performed." *Beebe,* 117 S.W.2d at 635; *Royal Remedy,* 90 Mo. App. at 60 (supplier may not "appropriate the result of the [distributor's] services without compensation."); *Gibbs*, 331 S.W.2d at 619-22 (Mo. 1960) ("recoup his expenses and receive a reasonable value for his work and services."). There is no mandatory time period. Nor is the damages period restricted by any notice period.

The "reasonable value of the services" provided by Sun Aviation is equal to the value of the market Sun Aviation created and maintained. The value of that market is measured by the profit stream that market can reasonably be expected to generate. Sun Aviation's expert computed that amount and presented it to the Court in its lost profits analysis. *Exhibit 52*. Therefore, the "value of expenditures made and of services performed" is equal to the amount of future lost profits determined by the trial Court.[54] Therefore, there was substantial

[54] *Newco Atlas, Inc. v. Park Range Constr., Inc*., 272 S.W.3d 886, 893 (Mo. App. 2008)

evidence supporting this alternate, and albeit inapplicable, method of damage computation.

("This Court is primarily concerned with the correctness of the trial court's result, not the route taken by the trial Court to reach that result. Therefore, we will affirm the judgment if the trial Court reached the correct result, regardless of whether the reasons advanced by the trial Court are wrong or not sufficient.").

POINT IV

THE *AMOUNT* OF DAMAGES DETERMINED BY THE TRIAL COURT IS NOT AGAINST THE WEIGHT OF THE EVIDENCE

Standard of Review - Against the Weight of the Evidence

"[A] claim that the judgment is against the weight of the evidence presupposes that there is sufficient evidence to support the judgment." *Ivie v. Smith*, 439 S.W.3d 189, 205 (Mo. 2014). "The trial court's judgment is presumed valid, and the burden is on the appellant to demonstrate its incorrectness." *Sauvain v. Acceptance Indem. Ins. Co.*, 437 S.W.3d 296, 303 (Mo. App. 2014) *citing Houston v. Crider*, 317 S.W.3d 178, 186 (Mo. App. S.D. 2010). "The against-the-weight-of-the-evidence standard serves only as a check on a circuit court's potential abuse of power in weighing the evidence, and an appellate court will reverse only in rare cases, when it has a firm belief that the decree or judgment is wrong." *Ivie v. Smith*, 439 S.W.3d 189, 206 (Mo. 2014). "This Court defers on credibility determinations when reviewing an against-the-weight-of-the-evidence challenge, because the circuit court is in a better position to weigh the contested and conflicting evidence in the context of the whole case."*Id.* "The circuit court is able to judge directly not only the demeanor of witnesses, but also their sincerity and character and other trial intangibles that the record may not completely reveal." *Id.* "Accordingly, this standard of review takes into consideration which party has the burden of proof and that the circuit court is free to believe all, some, or none of the evidence offered to prove a contested fact, and the appellate court will not re-find facts

based on credibility determinations through its own perspective." *Id.*

"Fact issues for which no specific findings are made shall be presumed to have been found in accordance with the result reached. When the evidence poses two reasonable but different conclusions, appellate courts are obligated to defer to the trial court's assessment of the evidence." *State ex rel. Greitens v. Am. Tobacco Co.*, 509 S.W.3d 726, 741 (Mo. 2017) (*internal cites and quotes omitted*); *see also Laut v. City of Arnold*, 491 S.W.3d 191, 197 (Mo. 2016) (*same*).

Failure to Preserve and Violation of Rule 83.08(b)

Point III of Appellant's Brief in the Court of Appeals combined misapplication of law and substantial evidence challenges. Respondent's brief in the Court of Appeals objected on this basis. Respondent renews that objection. Because Point III was multifarious, it did not preserve anything for review and should be disregarded. *Ivie*, 439 S.W.3d at 199 n.11 (Mo. 2014) ("These are distinct claims. They must appear in separate points relied on in the appellant's brief to be preserved for appellate review."); *Pasternak*, 467 S.W.3d at 270 n.4 (Mo. banc 2015); *Laut*, 491 S.W.3d at 197.

Additionally, Point IV here does not follow the required framework for against-the-weight-of-the-evidence challenges. *Houston v. Crider*, 317 S.W.3d 178, 186-87 (Mo. App. 2010) ("[A]gainst-the-weight-of-the-evidence challenge requires completion of four sequential steps (describing steps)."). This makes responding all but impossible, because Sun cannot determine what fact that is necessary to the judgment L-3 claims is missing.

A. The Standard of Proof for Lost Profits

"[L]ost-profits determinations are based on estimations of prospective or anticipated profits and cannot be expected to operate as an exact science." *Gateway Foam Insulators, Inc. v. Jokerst Paving & Contracting, Inc.*, 279 S.W.3d 179, 186 (Mo. 2009). "Because lost profits are of a character that defies exact proof, the trial court had a greater degree of discretion to weigh the lost-profits award based on common experience demonstrating that a substantial pecuniary loss has occurred." *Id*. "While an estimate of prospective or anticipated profits must rest upon more than mere speculation, uncertainty as to the amount of profits that would have been made does not prevent a recovery." *Id*

"The modern emphasis on the requirement that damages be shown with certainty is on the fact of damages and not on the particularized amount." *Penzel Constr. Co. v. Jackson R-2 Sch. Dist.*, 2017 LEXIS 493, at *35-36 (Mo. App. Feb. 14, 2017) *citing Gasser v. John Knox Village*, 761 S.W.2d 728, 731 (Mo. App. 1988). "If the evidence in a case...demonstrates that a party had a substantial pecuniary loss, but it is apparent that the loss is of character which defies exact proof, a lesser degree of certainty as to the amount of the loss is required, leaving a greater degree of discretion to the finder of fact as to the amount of damages to be awarded." *Am. Eagle Waste Indus.*, 463 S.W.3d at 20.[55]

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[55] L-3 cites *Farmers' Elec. Coop. v. Mo. Dep't of Corr.*, 59 S.W.3d 520 (Mo. 2001), where damages were awarded to plaintiff past the 20 year term of its contract in hopes plaintiff would get a new contract with a different customer. *Farmers* concerned the *measure* of

B. Vianello's Testimony Is Not Deprived of All Weight Because He Considered the Testimony of Mr. Riddle or the Correlation Between Sun's L-3 and Non L-3 Sales

1. The Trial Testimony of L-3 Employee Buckley that L-3 Sales Stayed Flat One Year Does Not Obliterate all of Vianello's Admitted, Substantial Testimony

L-3 claims the admissible, substantial testimony of Sun's expert is so lacking in probative value that the trier of fact could not have reasonably believed it and, therefore, the circuit court's judgment was an "abuse of power in weighing the evidence." *Ivie*, 439 S.W.3d at 206.

On September 11, 2014, L-3 Vice-President Riddle's testified that in June of 2014 L-3 prepared a forecast that projected "double-digit growth" for the aftermarket. *TT 163* (*Riddle*).[56] At trial one year later L-3 employee Buckley testified that the AIM and JET product lines "stayed pretty flat over that period of time." *TT 197* (*Buckley*). L-3 did not offer any documents supporting this claim:

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damages under contract theory rather than the *amount* of damages (which is L-3's challenge here).

[56] *Amended Judgment* at 26 (LF 1383) (A-83).

> L-3 Avionics prepares and possess a variety of written forecasts but objected to producing them as "irrelevant" and did not offer them at trial. *See Exhibit 44 at #1 and #2*. L-3 Avionics prepares and maintains quarterly and annual financial statements but objected to producing those as "irrelevant" and did not offer them at trial. *Id*. at *#3*. L-3

Amended Judgment, ¶93 (LF 1371) (A-71).

This glaring absence raises credibility issues. Buckley further undercut her own credibility when testifying that she defers to her boss Mr. Riddle with regard to financial forecasts and things like that because he is more knowledgeable. *TT 138, 205-06* (*Buckley*). Buckley did not comment on Riddle's overall forecasts. *TT 210* (*Buckley*).[57] L-3 did not produce Mr. Riddle at trial and did not object to admitting his deposition testimony.

The trial Court made specific findings of fact related to growth rate,[58] and held "The growth rates projected by Vianello using L-3 and non-L-3 are credible as are his overall sales projections," and likewise "The conclusions set forth in Exhibit 52 are credible and establish Plaintiff's loss by a preponderance of the evidence." *Amended Judgment FOF* ¶106 (LF 1373) (A-73).

L-3 claims Buckley's non-corroborated testimony about flat sales deprives Vianello's admitted testimony and all other evidence of any probative force. However, the well-settled

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[57] *Amended Judgment* 4/5/16, *FOF* ¶98 (LF 1372) (A-72).

[58] *Amended Judgment*, *FOF* ¶91-111 (LF 1371-1374) (A-71-74).

standard of review instructs that Buckley's credibility-riddled trial testimony is the one to be disregarded. *Ivie*, 439 S.W.3d at 200; *Houston*, 317 S.W.3d at 186; *see also Am. Eagle,* 463 S.W.3d at 27 ("[A]ny weakness in the factual underpinnings of [an expert]'s testimony and any question as to the sources and basis of his opinion [do] not affect the admissibility of [the expert]'s testimony but [goes] to his credibility and the weight to be given to his testimony.").

Moreover, Vianello did not rely on Riddle's testimony as anything other than corroboration, so any infirmity thereof is immaterial. Vianello prepared two separate models which were independently computed using different data points:

> I considered a variety of different methodologies. ... two, actually, were both consistent with Mr. Riddle's testimony *and cross corroborated each other* because they're using completely different sales data points --sales databases. And although there's the similar statistical modeling that goes into it, the sales databases themselves are different. And yet I reached a consistent result, which gives me a lot of comfort in the outcome.

Vianello at 27 (LF 1091) (*emphasis added*).

"Vianello used Riddle's testimony to corroborate his growth conclusions by noting they were consistent." *Amended Judgment*, *FOF* ¶103 (LF 1372) (A-72) *citing Vianello Depo*. at 26. Vianello used Riddle's testimony to bolster rejection of the flat projection models which Vianello had already rejected because they were inconsistent with non-L-3 historical sales. *Id. citing Vianello at 17.*

As mentioned, Buckley had credibility issues at trial.[59] However, assuming *arguendo*, she testified truthfully, the explanation for L-3 sales staying flat was obviously the loss of distributors. *Amended Judgment*, *FOF* ¶97 (LF 1372) (A-72); FOF ¶61 ("terminating distributors had a negative effect overall on [L-3] sales.") (LF 1367) (A-67).

2. Vianello's Comparison of L-3 Sales to Non-L-3 Sales Was Reasonable

L-3 claims the correlation between Sun's L-3 and non-L-3 sales is so tenuous that it deprives Vianello's admissible, substantial testimony of any weight. L-3 did not raise this objection at trial or in the Court of Appeals.

Trial Exhibit 55 shows L-3 and non-L-3 sales as a percentage of total sales. Throughout the six year historical sales period included on Exhibit 55, the variance was never more than 5%. Specifically, L-3 sales ranged from a low of 28.1% of total sales in 2006 to a high of 33.1% in 2008. The average was 29%. As total sales went up and down, L-3 sales always stayed within that narrow window. The fact L-3 sales stayed in this very narrow range over such a long period shows remarkable stability:

> [W]e analyzed Sun's sales of non-L-3 products, and, as I will show you later in my testimony, considered the long-term relationship of the -- of Sun's mix

[59] At trial it was exposed that Buckley had not been truthful about her knowledge of the A.I.M. divestiture. *See TT 202-05.* That is not germane to the damages issue but shows she was not always believable.

of sales, L-3 and non-L-3 products. And although there is, of course, *some fluctuation from year to year in that mix, it's frankly remarkably stable*.

Vianello Trial Testimony at 19 (LF 1083) (*emphasis added*).

L-3 looks at the short term and claims that when non-L-3 sales go up then L-3 sales go down so the correlation is weak. L-3 misunderstands. When talking about a percentage of total sales, of course when one goes up the other goes down. The important fact is that the variance is *never* more than 5% and that is what shows stability. This 5% window is not against the weight of the evidence.

C. Decreased Sales in 2009-2011 Do Not Deprive Vianello's Admitted Testimony of Any Tendency to Make the Fact of Damages More Likely

L-3 claims Vianello's growth rate is too high, because Sun had decreased sales in 2009-2011. Exhibit 54 shows the growth rate curve. It is based on actual historical sales of L-3 and non-L-3 products as independently computed. The growth rate curve goes down, decreasing each year. The decreased sales in 2009-2011 we considered and explained. They do not eviscerate all other growth rate evidence and compel convicting the Trial Court of abusing its' power. There are credible, reasonable explanations for the temporary downturn, and sales were increasing when termination occurred.

Sun Aviation sales increased every year except they decreased in 2009-2011 because of the economy, and a problem with its inventory listing. *Amended Judgment at 7-8, FOF* ¶¶*34-37* (LF 1365) (A-65) (*includes TT and Exhibit cites*). The computer problem was fixed

and sales were spiking up before termination. *Id*.

The trial Court correctly found that Vianello's overall analysis and damages calculation "is a more reliable indicator of future sales than the general decline in those years."[60] Facts cited by the trial Court in support of the growth rate include:

(a) the correlation between L-3 sales and non-L3 sales is remarkably stable;[61]

(b) Non-L-3 sales increased beginning in 2012 and are still increasing today;[62]

(c) Sun Aviation sales of L-3 products was increasing [at the time of termination];[63]

(d) Sun Aviation received orders for L-3 products that could not be processed due to termination; [64]

(e) Sun Aviation estimated 2012 sales would have been $2.5 million;[65]

(f) During 2010 and 2011, L-3's ongoing consolidation process stalled a lot of efforts which presumably impacted sales;[66]

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[60] *Amended Judgment, Finding of Fact ("FOF")* ¶*110* a-h (LF 1373) (A-73).

[61] *Id.; see also FOF* ¶40 (LF 1365) (A-65); TT113-114; *Vianello Depo*. at 19 (LF 1064) (A-64).

[62] *Id.; see also FOF* ¶41, 42 (LF 1365-66) (A65-66); TT 23, 113-14; Exhibit 206 at 1.

[63] *Id.; see also FOF* ¶36 (LF 1365) (A-65); TT 22.

[64] *Id.; see also FOF* ¶39 (LF 1365) (A-65); TT 22.

[65] *Id.; see also FOF* ¶38 (LF 1365) (A-65); TT21, 93.

[66] *Id.; see also FOF* ¶37 (LF 1365) (A-65); TT 143.

(g) The economy impacted all sales but has improved;[67]

(h) Sun Aviation found and fixed its web site inventory listing error which had impacted sales since 2011.[68]

The above evidence explains the causes for lower sales in 2009-2011, that the problems had been corrected, and that sales were increasing. *TT 22*. These facts bolster Vianello's growth rate testimony. The decrease in sales does not deprive all other evidence of any probative weight.

D. L-3 Failed to Carry its Burden of Proving that Sun Could Not Have Maintained its Distributorship for 15 Years

The trial Court found that "The preponderance of the credible evidence presented supports that Sun Aviation would have remained in its relationship with L-3 Avionics at least through the year 2030 or 15 years into the future." *Amended Judgment FOF ¶113* (LF 1375.) (A-75). In so finding the trial Court considered twenty factors. *Id.* ¶112 (a-t) (LF 1784-85) (A-84-85). L-3 has not claimed any of those factors are incorrect. Further, L-3 has not pointed to any evidence which would nullify the admitted evidence.

Riddle testified the distributorship program was working, successful, and "still very much part of our global reach." *TT 158* (*Riddle*). L-3 manager Kim Stephenson testified the distributorship program was an effective ingredient needed to get the L-3 products to

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[67] *Id.; see also FOF* ¶34 (LF 1364-65) (A-64-65); TT 107, 208; Exhibit 207.

[68] *Id.; see also FOF* ¶35-36; TT 22, 107; Exhibit 207 at 1-2; Exhibit 214 at 2.

customers. *TT 175*. "It was a good thing for L-3." *TT 181*. "Distributors were a valued component of the avionics business program." *TT 206*. And, terminating Sun Aviation caused "a negative effect overall on our sales." *TT 207*. Sun was the "perfect" distributor. Sun offered uncontested evidence that there would be strong market demand for L-3 equipment for at least 20 years, and that Sun's relationship with other suppliers had lasted more than 20 years. Exhibit 52 presented a lost profits claim extending 20 years (to 2035), but the Court used 2030 instead.

In the absence of any contradictory evidence, let alone overwhelming contradictory evidence, the Trial Court cannot be convicted of entering judgment against the weight of the evidence.

POINT V

ACTION ON ACCOUNT COUNTERCLAIM

Standard of Review

L-3 claims the Trial Court misapplied the law after trial when it found against L-3 on its claim for account stated.

Failure to Preserve and Violation of Rule 83.08(b)

Point IV of Appellant's Brief in the Court of Appeals combined multiple substantial evidence and against-the-weight of the evidence challenges. Respondent's brief in the Court of Appeals objected on this basis. Respondent renews that objection. Because Point IV was multifarious, it did not preserve anything for review and should be disregarded. *Ivie v. Smith*, 439 S.W.3d 189, 199 n.11 (Mo. 2014) ("These are distinct claims. They must appear in separate points relied on in the appellant's brief to be preserved for appellate review."); *Pasternak v. Pasternak*, 467 S.W.3d 264, 270 n.4 (Mo. banc 2015); *Laut v. City of Arnold*, 491 S.W.3d 191, 197 (Mo. 2016).

L-3's instant misapplication of law challenge is a brand new "distinct" claim not raised in the Court of Appeals. Therefore, this Point IV should be disregarded. *Mo. Sup. Ct. Rule* 83.08(b) (a litigant "shall not alter the basis of any claim that was raised in the court of appeals brief..."); *Barkley v. McKeever Enters.*, 456 S.W.3d 829, 839-40 (Mo. 2015).

A. L-3 Failed to Carry is Burden to Prove The Trial Court's Judgment Denying L-3's Counterclaim for Account Stated Is Wrong

L-3 brought one witness to trial, Shelly Buckley. She did not testify about any matter related to L-3's counterclaims. The trial Court made extensive findings of fact, and L-3 does not challenge one of them. Instead, L-3 challenges the conclusions drawn from the uncontroverted facts by the trial Court (e.g., does the uncontroverted testimony constitute an "unconditional promise to pay."). The bottom line is L-3's strategy to prove its counterclaims solely through the testimony of Sun Aviation's President failed.

As in *Sheck*, there was no agreement on the amount owed, only the amount billed. L-3's cite to TT 62-63 (*App. Br.* 59) does not prove otherwise.

Also, there was never any "unconditional" promise to pay and L-3 does not argue otherwise. The trial Court was not wrong.

POINT VI

ACTION ON ACCOUNT COUNTERCLAIM

Standard of Review

L-3 claims the Trial Court misapplied the law when after trial it found against L-3 on its claim for account stated.

Failure to Preserve and Violation of Rule 83.08(b)

Respondent renews its objection and requests this Point be disregarded for the same reason as new Point V.

A. L-3 Failed to Carry is Burden to Prove The Trial Court's Judgment Denying L-3's Counterclaim for Action on Account Stated Is Wrong

No witness testified the amount L-3 claimed for the products was reasonable. L-3 wants this Court to infer it, but that is not the standard of review.

The first-to-breach defense applies, because L-3 wrongfully terminated Sun Aviation. Sun Aviation was current on all invoices before termination. *TT 115*. The trial Court was not wrong.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Court AFFIRM the judgment of the trial Court, award Respondents their costs and fees on appeal and for all such other and further relief as is just.

Respectfully Submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

1. The attached brief complies with the word limitations in Supreme Court Rule 84.06(b) and contains 27,823 words, excluding the cover, this certificate, and the signature block, as counted by Corel Word Perfect software. Numbers and abbreviations like SOF and LF are not words for this count; and

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

3. The attached brief was served by means of the electronic filing system on August 4, 2017 , upon counsel of record.

Michael Healy