

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**

**BRIEF OF MID-CONTINENT INSTRUMENT CO., INC.
AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT**

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INTEREST OF AMICUS CURIAE

Mid-Continent Instrument Co., Inc. (“Mid-Continent”), is a Texas corporation with its principal offices in Wichita, Kansas. Mid-Continent manufactures some of the same type of power equipment as Appellant L-3 Communications. For example, both Mid-Continent and L-3 manufacture electric gyros and power supplies for the aviation industry.

Mid-Continent markets its equipment through a network of distributors. Distributors are an essential part of the route to market for many products including power equipment used in the aviation industry. Mid-Continent’s Missouri distributor is Sun Aviation. Most distributors of power equipment used in the aviation industry are small businesses which market and sell products supplied by several manufacturers.

Mid-Continent has an interest in the stability and predictability of the distribution network for power equipment used in the aviation industry. Statutes like §407.753.1 RSMo, which prohibit termination of distributors without good cause, reduce distributor concerns about the potential for unjustified termination. This motivates distributors to stock more equipment, train more employees, promote the manufacturer's brand name more passionately, and generally improve the market for power equipment.

A notice and right to cure provision like §407.753.2 RSMo encourages suppliers and distributors to identify and cure problems without the disruption foisted upon customers when a distributor is replaced. The communication and concerted effort

required by such provisions make the marketplace more stable, predictable and successful.

The stability and predictability of the distribution network for power equipment used in the aviation industry is also important to public safety. Electric gyroscopes and power supplies are essential aircraft equipment. The Federal Aviation Administration requires that all passenger aircraft (including helicopters) have gyroscopes. *14 CFR §91.205; 14 CFR 121.305*. It is important that aircraft owners and repair shops have access to reliable gyroscopes and power supplies quickly when maintenance is performed. Aircraft are expensive and having them grounded because replacement equipment is unavailable is costly. A reliable stocking distributor can provide the needed equipment promptly.

Power equipment used in the aviation industry must be certified. One aspect of this requires distributors to maintain inventory under certain conditions. For example, gyros must regularly be rotated to avoid potential issues with functionality. Long-term distributors are more adept at compliance with the best practices for inventory maintenance than a new distributor would be. This improves equipment reliability, market stability, and aircraft readiness, which are all important to Mid-Continent and similarly situated manufacturers.

CONSENT OF THE PARTIES

Counsel for Respondent Sun Aviation consents to filing this brief. However, counsel for Appellant L-3 Communications has not consented. A motion for leave to file an amicus brief pursuant to Rule 84.05(f)(3) has been filed contemporaneously with this brief.

STATEMENT OF FACTS

Mid-Continent adopts Respondent's Statement of Facts.

ARGUMENT

I. THE PURPOSE OF §407.753 RSMo IS TO PROTECT DISTRIBUTORS OF POWER EQUIPMENT LIKE THAT USED IN THE AVIATION INDUSTRY

Brown-Forman Distillers Corp. v. McHenry, 566 S.W.2d 194, 197 (Mo. 1978)

stated Chapter 407 RSMo “had for its general purpose the security of business franchises [and] the prohibition of cancellation or termination of such franchise agreements without cause and notice.” *Id.*, *Bishop v. Shelter Mut. Ins. Co.*, 129 S.W.3d 500, 505 (Mo. App. S.D. 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*).

Remedial statutes like §407.753 RSMo “are to be ‘construed so they provide the public protection intended by the legislature.’” *Frye v. Levy*, 440 S.W.3d 405, 412 (Mo. 2014) *quoting*, *Ross v. Dir. of Revenue*, 311 S.W.3d 732, 735 (Mo. 2010); *Tolentino v. Starwood Hotels & Resorts Worldwide, Inc.*, 437 S.W.3d 754, 761 (Mo. 2014) (“construed broadly to effectuate the statute's purpose”). “Doubts about the applicability of a remedial statute are resolved in favor of applying the statute.” *Id.*; *Holtcamp v. State*, 259 S.W.3d 537, 540 (Mo. 2008) (“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...”).

The Trial Court and the Missouri Court of Appeals for the Western District have both independently reviewed §407.753 RSMo and unanimously agreed it applies to power equipment used in the aviation industry. These rulings effectuate the purpose of the statute and address the exact problem the statute was designed to remedy. “[T]he 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 at 197.

II. DISTRIBUTORS OF POWER EQUIPMENT USED IN THE AVIATION INDUSTRY SHOULD NOT BE EXCLUDED FROM THE PROTECTIONS OF 407.753 RSMo JUST BECAUSE IT THAT EQUIPMENT PERFORMS ITS FUNCTION ON AIRCRAFT

Aviation gyros and power supplies are stand-alone, self-contained equipment which need no other equipment to assist them in performing their function/work. *LF 679-680*. They are whole machines – sophisticated and complex – which the FAA requires to be installed on civil aircraft. *LF 680*. They can range in price from \$4,000 to \$10,000. *TT 29*. They do not need or depend upon any other equipment to operate or to perform their function. *LF 679-680, 574-76, 580*. The function of the gyro is to compute and report the attitude or direction of the aircraft. *LF 679*. The power supplies’ function is to store and supply power to the aircraft when needed and particularly in an emergency. *Id.* Both gyros and power supplies have self-regulating and self-reporting functions to assist them

in reliably performing their functions. *L.F. 574-76, 580*. Gyros and power supplies last for several years. *TT 26*.

The Missouri Court of Appeals correctly rejected the claim that §407.753 RSMo does not apply to gyros and power supplies because they are not “end use” equipment. Section 407.753 RSMo does not say only sellers of end-use equipment are protected. Neither does §407.753 RSMo or any other part of Chapter 407, define end-use in any context. Section 407.753 RSMo is devoid of any nomenclature describing characteristics that might be attributed to end-use machines, such as being self-propelled, motorized or motor-driven. Other sections of Chapter 407 contain such limitations. *See*, RSMo §§407.585(5); 407.815(2); 407.815(15); 407.838(1); and, 407.1025(2). Other sections of Chapter 407 limit their application based on size or weight restrictions.¹ The failure of §407.753 RSMo to include a definition of power equipment or otherwise limit its application, despite defining similar terms in other parts of Chapter 407 and providing other limitations on application, “is powerful evidence” the legislature did not intend for such limitations to apply. *Denbow v. State*, 309 S.W.3d 831, 835 (Mo. App. W.D. 2010), *State v. Bass*, 81 S.W.3d 595, 604 (Mo. App. W.D. 2002); (“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. [(citations

¹ *See*, RSMo §§ 407.815(2), 407.815(15), 407.1025(2); §407.1360(11); and, §407.1360(12).

omitted.)] A disparate inclusion or exclusion of particular language in another section of the same act is 'powerful evidence' of legislative intent." (*citations omitted*); *See also, Anani v. Griep*, 406 S.W.3d 479, 482 (Mo. App. E.D. 2013), *Whitelaw v. Dir. of Revenue*, 73 S.W.3d 731, 735 (Mo. App. E.D. 2002).

The legislature used the unencumbered, and undefined term "power equipment" which has the plain meaning stated and applied by the Trial Court and Court of Appeals. *Judgment 9/4/15 at 4 (L.F. 717)*. Appellant unconditionally admitted gyros and power supplies are "power equipment," presumably because that is true. *LF 668*. While gyros and power supplies are sophisticated and complex machines, there is no technical or latent meaning to their characterization as power equipment. As this Court noted in *Lincoln Indus. v. Dir. of Revenue*, 51 S.W.3d 462, 466 (Mo. 2001), "the dictionary definitions [of machinery and equipment] do not distinguish between machinery that is valuable or quite inexpensive. These distinctions ...are irrelevant. The legislature made no distinction between more or less expensive, or between complex and simple machinery, and neither should the Court." *Id.* "[C]omponents are machinery even though they are subordinate elements of more complex machinery that is part of the 'integrated plant.'" *Id.* "In common usage 'machinery' includes not just a complex machinery, but also simple machinery." *Id.*

The holding in *McBud of Missouri, Inc. v. Siemens Energy & Automation, Inc.*, 68 F. Supp. 2d 1076 (Mo. App. E.D. 1999), supports the trial court judgment. In *McBud* the products were circuit breakers, switches, bus plugs, unassembled panelboards and similar

parts (from now on collectively “switches”). *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 switches did not use power to operate, function or work. Instead, power passed through them. The *McBud* court analogized them to “electrical outlets or electrical wiring.” *Id.*

Both *McBud* and the trial court here applied the same reasoning – both definitions require the equipment to use power to perform some function. Whether described as “using energy in an operation or activity,” as the trial court held or “performing work using some power source” as *McBud* held, the result is the same. Distributors of gyros and power supplies used in the aviation industry are protected from surprise, without-cause termination by §407.573 RSMo. The Missouri Court of Appeals specifically held that: “[T]he holdings of *McBud* ... and *Machine Maintenance* ... do not contradict the trial court’s decision.” *Court of Appeals Opinion* at pg. 10.

In *Mach. Maint., Inc. v. Generac Power Sys., Inc.*, No. 4:12CV793JCH, 2013 U.S. Dist. LEXIS 145275, 2013 WL 5538778 (Mo. App. E.D. Oct. 8, 2013), the court considered whether portable generators are power equipment under the Missouri Industrial Maintenance and Construction Power Equipment Act. The manufacturer pointed to the “end-use” verbiage in *McBud* claiming it created an unexpressed end-use limitation on §407.753 RSMo. However, the *Machine Maintenance* court rejected that claim instead ruling “The Court finds unpersuasive Generac's reliance on *McBud*, 688 F.

Supp.2d 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.” *Mach. Maint., Inc.*, LEXIS 145275, at *12. The linchpin for *Machine Maintenance* was the same as for *McBud* and as for the trial court here – power equipment must use power to operate/function/perform work.

There is no dispute the L-3 power supplies and gyros here use power to operate and function and perform work. They are substantially more complex than the portable generators in *Machine Maintenance* and the machinery in *Lincoln Industries*. Protecting distributors of gyros and power supplies used in the aviation industry follows the intent and purpose of Chapter 407 and franchise security laws.

III. §407.753 RSMo IS NOT LIMITED TO ONLY DISTRIBUTORS WHO STOCK POWER EQUIPMENT USED FOR “PROCESSING OR MANUFACTURING ACTIVITIES”

Gyros and power supplies are “used for industrial, maintenance and construction applications,” because they are used in aviation industry applications such as flying a passenger or cargo carrying aircraft, constructing/manufacturing new aircraft, and maintaining/repairing used aircraft. There is a “direct relationship between these products and the statutes used to protect their distributors.” *Court of Appeals Opinion at pg. 9, n.4.*

The Court of Appeals’ holding follows the plain meaning of the unambiguous words used by the legislature as defined by the dictionary, and the purpose of §407.753 RSMo. The dictionary is the well-settled, if not mandatory way, to define undefined

statutory terms.² The dictionary defines “industrial” as “being in or part of industry.” *Court of Appeals Opinion at pg.9, n.4*. Here, there is no dispute gyros and power supplies are “used in the aircraft industry.” *LF 668*.

If there were several credible definitions of “industrial,” the rules of statutory construction compel application of the definition which effectuates the purpose of the statute:

The primary role of courts in construing statutes is to ascertain the intent of the legislature from the statutory language [and] give an effect to that intent. This generally applicable rule of construction is augmented by the fact that the MMWL, like [Section 407.753 here],³ is a remedial statute with the purpose of ameliorating the unequal bargaining power as between employer and employee and to protect the rights of those who toil, [...].

² *Circuit City Stores, Inc. v. Dir. of Revenue*, 438 S.W.3d 397, 400 (Mo. 2014) (“The plain and ordinary meaning of words used in a statute can be derived from 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.”).

³ “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).

Remedial statutes, like the MMWL, are construed broadly to effectuate the statute's purpose. Doubts about the applicability of a remedial statute are resolved in favor of applying the statute.

Tolentino v. Starwood Hotels & Resorts Worldwide, Inc., 437 S.W.3d 754, 761 (Mo. 2014) (*internal quotes and cites omitted*); *see also*, §1.010 RSMo ("... all acts of the general assembly, or laws, shall be liberally construed, so as to effectuate the true intent and meaning thereof").

“Industrial” is not limited to “processing or manufacturing activities,” and there is no credible authority so stating. Repeated opinions from this Court applying the integrated plant doctrine counsel just the opposite. Specifically, §144.030(3) and (4) RSMo provides in pertinent part that “machinery and equipment” that is “used directly in manufacturing” is exempt from sales/use tax. *Floyd Charcoal Co. v. Dir. of Revenue*, 599 S.W.2d 173 (Mo. 1980). *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 manufacturing process would ignore the essential contribution of the devices required for such operation.” *Id.* at 178.

Floyd and its progeny⁴ hold that equipment “used directly in manufacturing” can be component parts that do not process or transform anything, and which work in

⁴ *See, Southwestern Bell Tel. Co. v. Dir. of Revenue*, 182 S.W.3d 226, 229 - 232 (Mo. 2005) (discussing cases).

combination with other components and companies to manufacture a product. Section 407.753 RSMo here merely requires equipment to be “used for industrial... applications” rather than “used *directly* in manufacturing” as required by the exemption statute. *Id.* In that regard, §407.753 RSMo is broader. And the tax exemption statutes are narrowly construed,⁵ whereas §407.753 RSMo is broadly construed. *Tolentino*, 437 S.W.3d at 761.

Applying the dictionary definition to each of the three terms used in §407.753 RSMo will cause overlap, but each term will still have independent meaning and, therefore, not be useless surplusage. *See, e.g., State v. Loughridge*, 395 S.W.3d 605, 610 (Mo. App. S.D. 2013) (“While § 568.045 and § 568.060 may overlap to some extent, neither is a subset of the other.”). The history and growth of the good cause requirement proves this broad intent.

⁵ “Exemptions from taxation are to be strictly construed against the taxpayer, and any doubt is resolved in favor of application of the tax.” *Southwestern 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).

**IV. APPLYING THE PLAIN MEANING OF §407.753 RSMo WILL NOT
CREATE A NEW OR LARGE SWATH OF PERPETUAL
DISTRIBUTORSHIPS, BUT WILL BE GOOD FOR MISSOURI
DISTRIBUTORS AND MANUFACTURER’S ALIKE**

The good cause requirement in §407.753 RSMo is broad and includes “failure by the retailer to substantially comply with essential and reasonable requirements imposed upon the retailer by the contract” plus a laundry list of other events. §407.753 RSMo. This creates no risk of perpetual retailer contracts because the manufacturers and distributors have the ability with their contracts to set essential and reasonable requirements on the retailer, and with notice and opportunity to cure, terminate the retailer if it violates the contract terms. The broad scope of distributors protected by the statute is off-set by the extremely narrow scope of potential liability. In nearly a half-century there have only been a handful of reported lawsuits based on a supplier terminating a distributor without good cause. Affirming the Amended Judgment will not change that.

Both manufacturers and distributors benefit from a good cause requirement and a right-to-cure requirement. Statutes like §407.753.1 RSMo reduce distributor concerns about the potential for unjustified termination which motivates distributors to stock more equipment, train more employees, promote the manufacturer's brand name more passionately, and improve the market for power equipment.

A notice and right to cure provision like §407.753.2 RSMo encourages suppliers and distributors to identify and cure problems without the disruption foisted upon customers when a distributor is replaced. The communication required by such provisions makes the marketplace more stable, predictable and successful. Long-term distributors know the manufacturer's equipment better, know how to market the equipment better, and usually develop better operating procedures with suppliers. This benefit both manufacturer and distributor. This improves equipment reliability and market stability.

CONCLUSION

The Trial Court and Court of Appeals holdings follow the purpose of the statute. They protect a small, good-performing, non-breaching Missouri distributor who continuously invested in and depended upon its' supplier from surprise termination without good cause. Excluding distributors of power equipment used in aviation industry applications by artificially narrowing its plain meaning would reward the supplier for prohibited business practices, ignore the policy and purpose of Chapter 407, and be detrimental to Missouri distributors and suppliers. This Court should affirm the Amended Judgment in this case.

Respectfully,

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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 3472 words, excluding the cover, this certificate, and the signature block, as counted by Word software; and
2. The attached brief includes all the information required by Supreme Court Rule 55.03; and
3. The attached brief was served using the electronic filing system on August 7, 2017, upon counsel of record.

/s/ Douglas D. Silvius