IN THE
MISSOURI SUPREME COURT

No. SC96280

SUN AVIATION, INC.

Plaintiff/Respondent,

v.

L-3 COMMUNICATIONS AVIONICS SYSTEMS, INC.

Defendant/Appellant.

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

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

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I. L-3's products are not covered by the Acts.

Sun's prolix brief devotes 60 pages to L-3's Point I, rendering it impossible to respond in full. Sun argues repeatedly for a "liberal" interpretation of a "remedial statute," citing *State ex rel. Ashcroft v. Wahl*, 600 S.W.2d 175 (Mo.App. 1980). *Ashcroft* discussed interpretation of statutes prohibiting deceptive sales practices and pyramid sales schemes, but there is nothing "iniquitous" inherent in L-3's termination of its at-will distributor. Regardless, L-3's products do not fall within the plain meaning of the Power Equipment Act or the Inventory Repurchase Act (the "Acts").

A. L-3's parts are aircraft components, not end-use equipment.

Sun ignores L-3's point that the trial court's analysis was flawed because it isolated the term "power equipment," disregarding that the Acts apply to "industrial, maintenance and construction power equipment." Simply combining the separate definitions of "power" and "equipment" produces an "absurd result," as held in *McBud of Missouri, Inc. v. Siemens Energy & Automation, Inc.*, 68 F. Supp. 2d 1076, 1081-82 (E.D. Mo. 1999), *aff'd*, 210 F.3d 379 (8th Cir. 2000).

Sun claims that no "textual support" exists for our argument that "industrial, maintenance and construction power equipment" includes only end-use equipment, and not components like L-3's products (SunBr.-37). As the court stated in *McBud*, "it strains common sense to conclude that the Missouri legislature intended the term 'power equipment' to include items of equipment or component parts which work in an auxiliary or supplementary manner with other machines or equipment." *Id.* Rather, the statutory language "indicates that, at minimum, 'power equipment' must refer to end use machines

and equipment which operate and perform work using some power source." *Id.* As the definitions of "power duster," "power mower," and "power shovel" demonstrate, "power," used in conjunction with a specific kind of equipment, connotes "motor-driven" or "power-operated" (L-3's Brief ("Br.")-37-38). Likewise, "power equipment" means equipment that is motor-driven or operating under its own power. Such equipment would necessarily be end-use, and certainly not a directional gauge or back-up battery. The court's conclusion that "power equipment" means any part that uses power is irrational.

Sun finds significant L-3's admissions that Sun distributes "power equipment used in the aircraft industry" and that L-3's products are "self-contained," "whole pieces" of "stand-alone" equipment (SunBr.-39). But Sun distributed the products of 25 manufacturers besides L-3, and L-3 did not admit that its *own* products are power equipment. On the contrary, L-3 moved for summary judgment and opposed Sun's motion on the grounds that its products are *not* power equipment. The terms "self-contained," "whole," and "stand-alone" have no legal or other significance to whether products are covered under the Acts. Sun's Gregg admitted L-3's products were components (LF-271, 496), which *McBud* held are not covered by the Power Equipment Act.

Sun's assertion that the products "do not require any other part or equipment" to "perform their function" (SunBr.-49) is simply untrue. L-3's products are textbook examples of "auxiliary" components: Gyros cannot gauge the aircraft's attitude without the rest of the aircraft, and they require external power (LF-282). The sole function of

power supplies is conducting back-up power to aircraft instruments, and they need to be constantly charged (LF-271).

L-3 is not suggesting that the Acts include "size," "weight," or "cost" thresholds (SunBr.-40-43).[1/] L-3 referred to "large equipment that require significant outlay" in the context of explaining why *McBud*'s analysis is persuasive (Br.-41). The phrase "construction power equipment," for example, indicates heavy equipment such as bulldozers, and not shoebox-sized components like gyros. But the Acts cover any industrial, construction, and maintenance equipment that meets *McBud*'s criteria and is used for industrial, construction, and maintenance applications.

Sun asserts that because some statutes define certain equipment as "motorized" or "self-propelled," the absence of such a definition "proves" that the Acts have no " self-propelled/motorized requirement" (SunBr.-44). But those statutes are distinguishable because the terms they define do not include the word "power," which connotes "motorized" or "power-driven."

Sun's argument that §407.753 has no "complete or whole machine" requirement (SunBr.-45) misreads the statute. The statute applies to distributors of "industrial, maintenance and construction power equipment" when the distributor "agrees to maintain a stock of parts or complete or whole machines or attachments." In other words, a distributor must distribute "complete or whole machines," but can maintain a stock of

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1/ Sun refers to "$10,000 L-3 gyros" (SunBr.-43), but it is the digital gyros made by Sun's amicus, Mid-Continent, that cost "around $10,000" (Tr.-29).

only "parts." Sun distributed some products that it did not maintain in stock, placing an order with L-3 after receiving orders from its customers (LF-270).

After arguing that the Acts should not be interpreted to include *McBud*'s end-use requirement, Sun claims that *McBud* is "indistinguishable" from the trial court's interpretation of "power equipment" (SunBr.-51). According to Sun, *McBud's* reference to "end-use machines" simply means that power equipment cannot be "merely a conduit" (SunBr.-52). But *McBud* starkly distinguishes "end-use machines" from "auxiliary" or "supplementary" "component parts." L-3's products are supplementary components, excluded under the Acts.

Machine Maintenance, Inc. v. Generac Power Systems, Inc., 2013 WL 5538778 (E.D.Mo. 2013), does not support Sun's position. *Generac* adopted *McBud*'s definition of "power equipment," including that the term "at minimum, … must refer to end use machines and equipment." *Id.* at *4. The court held that Generac's portable generators met the definition because they "are engines, which produce power and operate under their own internal power source to do work—generate power." *Id.* The court had previously noted, in denying Generac's motion to dismiss, that the generators "do not simply conduct power like the component parts in *McBud*—rather, they produce power." 2012 WL 2339332, *3 (E.D. Mo. 2012). Sun's unsupported assertion that L-3's products "are substantially more complex" than *Generac*'s portable generators (SunBr.-53) overlooks that the generators "are engines" that "generate power." L-3's power supplies, which must be charged before installation and remain charged during flight (LF-271), only *conduct* and store power, they do not generate it. Unlike portable generators, which

can function in a variety of applications, L-3's power supplies are installed in cockpits and used only in aircraft (LF-271).

Although we agree that the Court need not consider *McBud*'s Section B because Section A is dispositive here, the unopposed affidavits from four individuals involved in drafting and passing the Power Equipment Act provide persuasive context for determining the legislative intent, which supports *McBud*'s definition of power equipment in Section A.[2/]

B. L-3's products are not "industrial" power equipment or used for "industrial" applications.

1. L-3 preserved its argument.

Sun claims that L-3 waived its argument that the interpretation of "industrial" in the Acts must be guided by the accompanying words, "maintenance and construction" (SunBr.-60-64). Sun ignores its own failure to argue that L-3's products were "industrial" and relies on a crabbed reading of Rule 83.08.

In its own summary-judgment papers and in opposing Sun's motion, L-3 consistently argued that its products were not "industrial, maintenance and construction power equipment" and were not used for "industrial, maintenance and construction applications" (LF-334, 653, 656-57, 688-89, 691). In contrast, Sun focused on "power

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2/ Sun suggests that the legislature may have been responding to *McBud* when it moved inventory-return limitations to §407.850 (SunBr.-59). Had it wanted to "invalidate" *McBud*, the legislature would have defined "power equipment" accordingly.

equipment" in isolation, *mentioning the rest of the defining language only in quoting §407.753* (LF-347-48, 604-613, 703-12). Sun made only the bare assertion that gyros are used in aviation industry applications (LF-613), without drawing the conclusion that such use rendered them "industrial" equipment used in "industrial" applications. The trial court likewise focused on "power equipment," adding, as an afterthought, that "it is not disputed these products are used in the avionics industry" (Apdx-A5). The court did not, as Sun contends, hold that L-3's products were "used for industrial, maintenance and construction applications" (SunBr-65).

On appeal, L-3 (a) continued to argue that "power equipment" should be interpreted in the context of the entire defining phrase; (b) criticized the trial court's failure to do so; and (c) pointed out that the statute does not mention "avionics" (SunApdx-A137, 143-45). L-3 plainly did not understand Sun to be arguing, or the court to have concluded, that the products were "industrial" because they were used in the "avionics industry" (*see* SunApdx-A134). Sun did not mention the word "industrial" until its Western District brief (at 40), quoting the definition, but it still did not make the connection that the products were "industrial" because they were used in the avionics industry. Sun's failure to articulate its current position that the products were "industrial" because they were used in the avionics industry excuses any possible inadequacy in L-3's preservation of its response.

Even if Sun had expressly sought summary judgment on the basis that L-3's products were "industrial" power equipment used for "industrial" applications, L-3 has consistently maintained that its products did not satisfy the Acts' "industrial, maintenance

and construction" requirements. What Sun calls L-3's "processing and manufacturing" claim is the argument that the Court's analysis should be guided by the maxim of construction, *noscitur a sociis*. Application of statutory maxims, when appropriate, is integral to this Court's *de novo* statutory interpretation. The Court has never held that an appellant has waived application of an appropriate canon of construction. As this Court explained in *Cox v. Kansas City Chiefs Football Club, Inc.*, 473 S.W.3d 107, 114 n.4 (Mo. 2015), "Rule 83.08(b) does not prohibit a party filing a substitute brief with this Court from improving the brief with more detailed legal analysis than that articulated below." Otherwise, "there would be no point in encouraging or allowing substitute briefs at all." *Id.* L-3's invocation of the statutory maxim amplifies but does not alter the basis of its claim that the court's coverage holding was wrong because L-3's products do not meet the "industrial, maintenance and construction" requirements.

2. Under the Acts, "industrial" connotes processing or manufacturing activities.

Sun notes that L-3's substitute brief "does not dispute" the definition of "industrial" quoted (inaccurately) by the Western District (SunBr.-65-66). We need not address the Rule 84.16(b) memorandum because it was nullified on transfer. *Williams v. Hubbard*, 455 S.W.3d 426, 431 (Mo. 2015). The definition actually supports L-3's position that "industrial," as used in the Acts, means processing and manufacturing activities and not a specific "line of business endeavor." *See* Br.-42-43. The dictionary defines "industrial" as "of or belonging to industry" – not *an* or *any* industry – and sets out eight separate definitions. Neither the Western District nor Sun indicates which

definition supports their assertion that L-3's products are "industrial." After quoting the definition, the Western District opaquely concluded, "Therefore we see a direct relationship between these products and the statutes used to protect their distributors" (SunApdx.-A186 n.4). The definition demonstrates, at minimum, that "industrial" is ambiguous.

According to Sun, "'[i]ndustrial equipment' means equipment used in an 'industry'" because "every dictionary uses the word 'industry' to describe 'industrial'" (SunBr.-67). Sun's fatuous argument disregards the multiple meanings of "industry" and "industrial."[3/] Its reliance on *Generac* is again misplaced. Despite Generac's admission that it was "part of the power generation industry" (SunBr.-68), the court found that its generators were "*construction* power equipment," not industrial. 2013 WL 5538778, *4.

Sun's extended discussion of "integrated plant doctrine" cases (SunBr.-70-72) is also irrelevant. That doctrine holds that machines that are critical to a plant's manufacturing process but don't themselves change the composition of raw materials are still "used directly in manufacturing" for purposes of a sales-tax exemption.

Sun distorts L-3's reliance on cases including *Aquila Foreign Qualifications Corp. v. Director of Revenue*, 362 S.W.3d 1 (Mo. 2012) (SunBr.-73-74). *Aquila* supports the application of *noscitur a sociis* to determine the meaning of "industrial" to avoid

[3/] Given Sun's refusal to acknowledge that "industrial" can mean manufacturing activities, one wonders how Sun would define "Industrial Revolution" or "industrial Midwest."

"unintended breadth." *Id*. at 5. *Aquila* also referred to the "industrial" connotations of manufacturing and processing. *Id.*

Sun's tortuous argument that L-3 "seeks to make 'industrial' a subset of 'construction'" (SunBr.-75-76) requires no response, but we note that Sun inaccurately "quotes" L-3's brief.

Sun tries but fails to downplay the consequences of the trial court's holding that the Acts cover any equipment that uses or supplies power and is used in any industry. It doesn't explain why that broad interpretation will not cover everything from hairdryers to digital telephones. Sun's claim that it is "improper to consider the impact" of the holding because "each [case] must be decided on its own facts" (SunBr.-78) ignores the role of statutory interpretation in providing individuals and businesses alike guidance to order their behavior to avoid civil liability or criminal sanction. According to Sun, "only the most egregious terminations will trigger liability," but there was nothing egregious about L-3's terminating an at-will distributor due to its parent's restructuring. Sun claims that litigation "rarely happens," but affirming a $7,600,659 judgment will not only lead to more lawsuits, but may lock manufacturers into distribution systems that are no longer ideal and discourage innovation and strategic thinking.

Finally, L-3 quoted a Seventh Circuit case (Br.-41), which Sun requotes (SunBr.-78, 107). But Sun ignores L-3's explanation why that quotation does *not* apply here: Sun sold equipment for 26 manufacturers; it had already recouped its initial investment in L-3 products; it had not invested in developing L-3's reputation because it was selling to

owners-operators of aircraft that already used L-3 parts; and L-3 sales were "easy sales" that did not require expanded facilities or workforce (Br.-41-42).

The judgment against L-3 on Counts I, II, and III was based on a severely-distorted interpretation of the Acts and should be reversed.

II. L-3 had no duty to disclose.

In defending the court's conclusion that L-3 had a duty to disclose, Sun misrepresents L-3's arguments, the record, and Missouri law. Even with those liberties, Sun cannot justify the judgment in its favor.

A. L-3 did not know Sun might be terminated.

L-3 is *not* arguing that it owed no "duty to disclose the potential for termination because L-3 was not 100% certain Sun would be terminated" (SunBr.-85). Rather, L-3 had no duty to disclose because, first, the mere possibility of termination in the future is not a material fact, subject to disclosure. *Hess v. Chase Manhattan Bank, USA N.A.*, 220 S.W.3d 758, 765-66 (Mo. 2007), is inapt because this Court held that "Chase had a duty to disclose" "the material fact" of "the EPA investigation." The EPA investigation was a fact, not a mere possibility.

Second, L-3 had no reason to believe that its parent's consolidation process might lead to Sun's termination. Sun says this is a "fact-based claim" (SunBr.-87), but concedes that whether a duty exists is a question of law (*see* Br.-34, 47). L-3 agrees that the evidence on whether L-3 knew that the process would lead to Sun's termination is "undisputed," but that evidence actually demonstrates that L-3 did not know that termination was a possibility "until the end of the process" (LF-809, 1035). *See* Br.-51-

52. Sun misrepresents that L3's Shelly Buckley and Kim Stephenson decided *at the time that Sun's written agreement expired in December 2010* that Stephenson would "warn their bosses" that terminating Sun was not "in our best interest" (SunBr.-88-89). Buckley made clear that L-3 did not know termination was a possibility until "the end of the process":

> "Q.: [S]o Kim Stephenson tells you, … I presume towards the front end of this deal she's relayed to somebody that matters … that she does not think terminating Sun Aviation is a great idea and then this process continues for a year … or eighteen months, maybe, and then the final decision comes down that these are the dealers to be terminated, am I right so far?
>
> A. Not totally…. Because when the renewals of the agreements, [including Sun's], went into this black hole … throughout this consolidation process, there was not an indication that there would be a termination. So, there was no need to make a play to say … keep these guys or … get rid of these guys …. And while the agreements were being debated, discussed at the sector level we just continued business as usual, so there was no concern.
>
> Q. …[W]hen this [consolidation] process started, …were you told that, … we're not sure how … but we are definitely going to consolidate and there's going [to be] some terminations?
>
> A. No.
>
> Q.. Was that communicated to you?
>
> A. No.

Q. In some fashion or another?

A. No.

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Q. …[S]o, there would have been no reason to go to management and try and … make the play to save Sun Aviation until the end of the process, because there wasn't any worry that they were going to be terminated until the end of the process?

A. Correct" (LF-807-09).

When Buckley said she was not surprised "when somebody suggested termination of Sun," she was referring to the period *after* the sector had directed that distributor agreements "were out of our divisional control" (LF-800-01). L-3 had "no reason" to believe Sun's termination was a possible – let alone "probable" – outcome of the sector's consolidation process (SunBr.-87, 89-90).

B. Sun could not have avoided termination.

Sun asserts that Point II.C.1.b violates Rule 83.08(b) because L-3's Western District brief did not specifically contend that Sun could not have avoided termination even had it known in advance that termination was a possibility. L-3 did not raise this specific issue in its previous brief, but its analysis of the trial court's highly speculative, burden-shifting conclusion that Sun "could have convinced" L-3's parent not to terminate Sun did not alter but properly amplified L-3's claim of error: that the court erred in entering judgment for Sun because L-3 had no duty to disclose. *See Cox*, 473 S.W.3d at 114 n.4. L-3's argument does not violate Rule 83.08, but even if this Court should

decline to consider it, the remainder of L-3's Point II raises ample grounds for this Court to reverse the judgment on Sun's concealment claim.

Sun also improperly labels L-3's argument "fact-based" and asserts that L-3 should have raised it in a separate point. But the court erred as a matter of law in concluding that Sun's successful persuasion of L-3 to retain it as a distributor in 2003 proves that it could have convinced different, unidentified decision-makers at L-3's parent not to terminate it in 2012. The court also erred as a matter of law in shifting the burden to L-3 to rebut Sun's claim that it could have talked its way into retention, even though "it [was] unclear what Sun Aviation could have said to the decision-makers to change their minds" (Apdx-A40).

Once Sun finally turns to the merits of L-3's argument, it fails to address the court's statement that "it is unclear what Sun could have said" to avoid termination. Instead, Sun cobbles together "undisputed facts" that supposedly show its retention "was a no-brainer" (SunBr.-95). The first "fact" – that L-3 "plans to continue using distributors" and "has 'distributor applications in process'" – is misleading at best. Sun cites the testimony of L-3's Larry Riddle, who made it clear that L-3's post-consolidation distributors "represent all of APS" – Avionics Products Sector, which includes L-3 and four other divisions – and that the "distributor applications in process … are for all of APS" (LF-948-49).

Most of Sun's other "facts" concern L-3's satisfaction with and appreciation for Sun's work. None of those "facts" bear on whether the decision-maker – the Sector – would have considered Sun, let alone retained it. Asked whether there was "any reason

that Sun Aviation would not be considered" for a Sector-wide distributorship, Riddle explained that "[w]hen we had Sun they only represented Avionics Systems, and … we need our distributors … to offer more of a larger breadth of products, so that's what prompted … us to terminate that distributor agreement, because …we think there's other distributors out there that could do a better job for us and get us a bigger reach for all of the sector divisions" (LF-949-50).

C. L-3's mere acknowledgement that Sun had trust and confidence in L-3 does not support a duty to disclose.

Sun mischaracterizes L-3's argument in Point II.C.2 so we will restate it: The mere recitation of "confidence and trust" between companies that transact business cannot suffice to impose a standing duty to disclose. Only a fiduciary relationship, or a "similar relation of trust and confidence," triggers a duty to disclose (Br.-55).

Sun quarrels with our reference to Buckley's "vague" acknowledgement of Sun's "trust and confidence" in L-3 (SunBr.-99). The acknowledgement was vague because it lacked context – Sun offered no evidence of the nature and extent of that trust and confidence. There was no testimony, for example, (a) that Sun ever sought and received assurances from L-3 to support its supposed expectation of a permanent distributorship; (b) that L-3 shared confidential information with Sun that it did not disclose to other distributors; or (c) that Sun's dealings with L-3 differed materially from Sun's relationship with the other 25 manufacturers whose products Sun distributed.

Every mercantile relationship involves a baseline of mutual trust and confidence – buyers, for example, trust sellers to fill orders timely and accurately, and sellers trust

buyers to pay for those orders seasonably and in full. *See Bain v. Champlin Petroleum Co.*, 692 F.2d 43, 47 (8th Cir. 1982) ("although the existence of trust and confidence in another is inherent in all fiduciary relationships, its mere presence does not suffice to automatically make either party to a business relationship such as here present a fiduciary in every aspect of that relationship"). Sun does not explain how its relationship with L-3 fits within Restatement (Second) of Torts §551(2)(a) – which explains that a duty to disclose exists when the parties have "a fiduciary or other similar relation of trust and confidence." Buckley's broad, generic affirmation of trust and confidence does not a "relationship of trust and confidence" make.

Sun has no response to our cases holding that the bare expression of trust and confidence between businesses does not support a duty to disclose (Br.-56). That they are from other jurisdictions is no basis for ignoring their uniform conclusions on this point. Sun does not argue that the common law of concealment varies significantly in those jurisdictions, nor does it cite *any* authority imposing a duty to disclose based solely on a recitation of trust.

D. Arm's-length relationships are by definition not confidential.

Sun does not dispute that its relationship with L-3 was arm's length, but argues that Missouri law does not exempt such relationships from the duty to disclose (SunBr.-102). Sun overlooks that the nature of an arm's-length relationship – in which each party acts to further its own economic interests – is the antithesis of a confidential relationship. *See Atmos Energy Corp. v. Office of Public Counsel*, 389 S.W.3d 224, 231 (Mo.App. 2012) (in arm's-length transaction, parties "are not related" or "on close terms," and "are

presumed to have roughly equal bargaining power") (citation omitted). Sun also ignores *Andes v. Albano*, 853 S.W.2d 936, 943 (Mo. 1993), and *Blaine v. J.E. Jones Constr.*, 841 S.W.2d 703, 708 (Mo.App. 1992) (Br.-58).

Sun cites no cases in which a "relation of trust and confidence," triggering a duty to disclose, was found between parties in an arm's-length relationship. As Sun admits, no duty was recognized in *Reeves v. Keesler*, 921 S.W.2d 16 (Mo.App. 1996). And in *Hess*, this Court held that Chase had a "duty to speak" based not on a confidential relationship but on Chase's "superior knowledge" of the EPA investigation, which induced the plaintiff to purchase the property. 220 S.W.3d at 766-67.

E. A duty to disclose is contrary to the nature of an at-will relationship.

L-3 is not arguing 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 informed Sun of anything Sun did not already know" (SunBr.-104). Rather, since Sun had no contractual expectation of a relationship of any particular duration, and L-3 had the right to terminate the arrangement at any time, L-3 cannot be liable for providing Sun no advance notice of its potential termination. Because their relationship was at will, it was "not the kind of confidential or fiduciary relationship" that would impose a duty to disclose. *Coburn Supply Co. v. Kohler Co.*, 342 F.3d 372, 377-78 (5th Cir. 2003).

This is not a "fact-based claim," as Sun asserts, but a question of law. The situation is analogous to courts' refusal to imply a covenant of good faith and fair dealing in at-will agreements. Such a covenant "imposes a duty on each party 'to cooperate with the other to enable performance and achievement of the expected benefits' of a contract."

Newco Atlas, Inc. v. Park Range Constr., Inc., 272 S.W.3d 886, 893 (Mo.App. 2008) (citation omitted). "Since an at-will contract allows an employer to terminate an employee for no cause, … to impose a covenant of good faith and fair dealing would contradictorily alter an intrinsic function of the contract." *Id.* at 894. In other words, because an at-will employee has no right to "expect" the contractual "benefits" to continue for any particular duration, imposing the covenant would "run counter to the very nature of such a contract." *Id.* By the same logic, imposing a duty on L-3 to disclose the possibility that Sun might be terminated would "run counter to" the nature of the parties' at-will arrangement.

Sun cites no cases imposing a duty to disclose under circumstances remotely similar to those here. Whether Sun "expected" the relationship "to last indefinitely" (SunBr.-104) is irrelevant. L-3 had the right to terminate it at any time, and imposing a duty to disclose – especially on as tenuous a theory as Sun's supposed ability to talk its way out of termination – would impermissibly undermine that right.

F. A party's "superior knowledge" of its internal plans cannot trigger a duty to disclose.

Responding to L-3's argument that the duty to disclose does not extend to a company's strategic plans, Sun tries to distinguish *Blaine*, L-3's "only case applying Missouri law." But *Blaine*'s recognition of the danger of "saddling" businesses with "an affirmative duty to disclose" their decision-making processes, 841 S.W.2d at 709, is consistent with L-3's cases from other jurisdictions (Br.-59-60). Sun, in contrast, cites *no* case holding a defendant liable for not disclosing its internal plans. No other Missouri

case has addressed the issue because a duty to disclose based on "superior knowledge" is imposed only in transactional contexts, typically when, as in *Hess*, the defendant's nondisclosure of a material fact has induced the plaintiff to enter into a contract. *See* Br.-50 (Restatement (Second) of Contracts §161 and Restatement (Second) of Torts §551 address the duty to disclose only in a transactional context). Here, though, Sun has not alleged fraudulent inducement, but would impose on L-3 a paralyzing duty to disclose not only its own internal planning, but its parent's, whenever that information had the potential to impact Sun.

Sun argues that "immunizing" businesses from disclosing strategic plans "would trample Missouri public policy" protecting franchisees and distributors "from the onerous effects of bad faith at-will termination" (SunBr.-106-07). There is no "bad faith" inherent in terminating an at-will relationship; regardless, "Missouri courts have designated the recoupment doctrine as the remedy to be utilized by parties to an at-will distributorship agreement." *Newco Atlas*, 272 S.W.3d at 894. *See also Armstrong Bus. Servs., Inc. v. H&R Block*, 96 S.W.3d 867, 879 (Mo.App. 2002) ("[A]ny further protection" for terminated franchisees beyond §407.405's 90-day notice provision and the recoupment doctrine "is for the Missouri General Assembly to provide").

L-3 is not arguing that "Missouri law should be changed" (SunBr.-83). Sun has cited no case, from Missouri or elsewhere, imposing a duty to disclose on as slight a foundation as the acknowledgement by one party to a commercial relationship that the other party has trust and confidence in it. Nor has Sun identified any cases where a party's "superior knowledge" of its own or its corporate parent's organizational plans has

triggered a duty to speak. It is Sun who is arguing for a radical extension of the duty to disclose. If affirmed, the judgment would inject a duty to disclose into almost every commercial relationship, and would disrupt the ability of enterprises to undertake business planning without disclosing any possible outcomes that might affect their distributors, vendors, and other business partners. The judgment against L-3 on Sun's concealment claim should be reversed.

III. Damages for L-3's failure to give Sun the 90-day notice required under the Franchise Act are limited to 90 days' lost profits.

Sun does not come close to justifying the court's $7,600,659 damages award for L-3's failure to give the 90-day notice of termination mandated under the Franchise Act, §407.405. L-3 does not claim, as Sun maintains, that the recoupment "doctrine overrides the 'damages sustained' remedy provided by §407.410.2" (SunBr.-109). Rather, §407.410.2 "codified the limited remedy under Missouri common law" known as the recoupment doctrine.[4/] *See* Br.-65 (quoting *Ridings v. Thoele, Inc.*, 739 S.W.2d 547, 549 (Mo. 1987) (citing *Beebe v. Columbia Axle Co.*, 117 S.W.2d 624, 629 (Mo.App. 1938)). In other words, the doctrine and §407.410.2 provide the same measure of damages. Hence, Sun's extended discussion of the recoupment doctrine as a "claim" and as an

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4/ Although at common law the doctrine "imputes into a contract a duration equal to the length of time reasonably necessary for a dealer to recoup its investment plus a reasonable notice period before termination," *Ernst v. Ford Motor Co.*, 813 S.W.2d 910, 918 (Mo.App. 1991), §407.405 imputes a 90-day notice period.

"affirmative defense" is irrelevant (SunBr.-112-115). For franchisees who have received less than the statutorily-mandated 90-day notice of termination, the recoupment doctrine, codified in §407.410.2, provides the proper measure of damages. *See Newco Atlas*, 272 S.W.3d at 893-94 (referring to doctrine as "the *remedy* in situations involving certain types of at-will agreements") (emphasis added).

Sun acknowledges this Court's "rationale" in *Ridings* that §407.410.2 codified the recoupment doctrine, but asserts that *Ridings*' reasoning is flawed because §407.410.2 also provides the remedy for termination of wholesale liquor franchises without good cause in violation of §407.413. Sun appears to argue that because recoupment applies only to at-will relationships, it cannot apply to claims under §407.413, which Sun says "completely undercuts the *Ridings* rationale" (SunBr.-111).

Sun misconceives §407.410 and this Court's opinion in *Ridings*. Whether a franchisee is suing for insufficient notice of termination in violation of §407.405, or for termination of a liquor franchise without good cause under §407.413, §407.410 provides that a prevailing franchisee may recover "damages sustained to include loss of goodwill, costs of the suit, and any equitable relief that the court deems proper." "Damages sustained" connotes a causal connection between the particular statutory violation and the injury. *Ridings* addressed the meaning of "damages sustained" in the context of a §407.405 action: when a franchisee is terminated without 90 days' notice, the "damages sustained" are the recoupment doctrine's "limited remedy," *i.e.*, profits lost for the 90-day period which would have allowed recovery of the franchisee's investment in establishing the business, as well as any "loss of goodwill."

The "damages sustained" for violation of §407.413 were not at issue in *Ridings*, nor are they here. But as the Court stated in *Ridings*, §407.410's language "evince[s] a compensatory purpose, to make whole a plaintiff whose expectations have been frustrated." 739 S.W.2d at 549 n.4. The expectation protected under §407.405 is that a franchisee would receive 90 days' notice before termination is effective, not that it could continue to earn profits for 18 years.

The two federal cases Sun cites do not conflict with *Ridings*, and hardly endorse a damage award equal to 18 years' lost profits for failure to give 90 days' notice of termination. *Saey v. Xerox Corp.*, 31 F. Supp. 2d 692, 702 (E.D. Mo. 1998), recognized that *Ridings* "points out that 'damages sustained' includes any remedy that was available before passage of the statute." Sun's citation to *Lift Truck Lease & Services, Inc. v. Nissan Forklift Corp.*, 2013 WL 3092115 (E.D. Mo. 2013), is particularly curious. Not only does it involve a claim under the Power Equipment Act, §407.753, not the Franchise Act, but the court expressed its "preliminary view" that the 24-month recoupment period that the plaintiff's expert calculated damages on "appears rather speculative," and "would overcompensate" plaintiff, "result[ing] in a windfall." *Id.* at *4, 6-7.

Sun's final defense against application of the recoupment doctrine is that the doctrine applies only to at-will agreements, while under the Power Equipment Act, the parties' agreement could be terminated only for good cause (SunBr.-115, citing §407.753.1). As Point I demonstrates, the Acts do not apply here. Regardless, Sun's argument is specious. Section 407.410 codified recoupment as the remedy for violation of the Franchise Act's notice provision. It is the appropriate measure of damages for any

franchisee that prevails on a claim under that provision, regardless of whether that franchisee has a cause of action under a separate statute.

Sun agrees that the court's reason for not limiting its damage award under §407.410.2 to 90 days' lost profits "was that no proper notice had been given and it appeared none would be" (SunBr.-117; Br.-64, 68-69). Sun further asserts that "where, like here, no notice is given the measure of damages for termination is not limited to the notice period" (SunBr.-117). But the trial court explicitly found that L-3 sent Sun written notice of termination on August 2, 2012 (Apdx-A15, ¶51). Neither the trial court nor Sun explains how that notice was improper beyond omitting the required notice period. Sun's failure to explain that or to respond to L-3's suggestion that the trial court confused §407.405 with the Power Equipment Act's notice provision, §407.753.2 (Br.-69 n.11) demonstrates that the court's ruling misapplied the law and cannot withstand scrutiny.

Sun fails to effectively distinguish cases limiting damages for violating a notice requirement to lost profits for the notice period. The court's statement in *Asamoah-Boadu v. State*, 328 S.W.3d 790, 796 (Mo.App. 2010), that "[t]he objective in awarding damages is to make the injured party whole by placing it in the position it would have been in if the contract had been performed," is not, as Sun maintains, "much more narrow" than the "damages sustained" provision in §407.410.2 (SunBr.-116). *Ridings* used language almost identical to *Asamoah-Boadu*'s, describing §407.410.2 as "evinc[ing] a compensatory purpose, *to make whole* a plaintiff whose expectations have been frustrated." 739 S.W.2d at 549 n.4 (emphasis added).

Asamoah-Boadu does say that "'the termination notice period does not necessarily and under any and all circumstances set the parameters' for all provable damages." (SunBr.-117, quoting 328 S.W.3d at 797 (citation omitted)). But that statement was *dicta* because, like Sun, the plaintiff in *Asamoah-Boadu* sought damages consisting only of lost profits. *Id.* Sun claims that this Court "did not analyze" the damages period in *American Eagle Waste Industries, LLC v. St. Louis County*, 379 S.W.3d 813 (Mo. 2012), but the Court expressly endorsed the trial court's conclusion "that Haulers' damages are what would have been their *net profit* during the two-year waiting period." *Id.* at 833. If the parties did not "dispute … the damages period," as Sun claims (SunBr.-117), it's because the proper damages period is self-evident.

Sun's only effort to justify the trial court's award of 18 years of lost profits is based on *Beebe*, 117 S.W.2d 624, which this Court described in *Ridings* as an "early case[]" "espous[ing]" the "limited remedy" of recoupment. 739 S.W.2d at 549. Sun cites *Beebe* for the proposition that "[t]he measure of damages under the franchise protection rule/doctrine is the 'value of expenditures made and of services performed'" (SunBr.-118). Sun then contends – notably without support – that "[t]he 'reasonable value of the services" it provided is ultimately measured "by the profit stream" that "the market Sun Aviation created and maintained" "can reasonably be expected to generate" (SunBr.-118). Sun's reliance on *Beebe* is grossly misplaced. *Beebe* makes clear that it was "not a suit for damages based upon the loss of profits," and that the plaintiff sought and was awarded damages for "expenditures made" and the "services performed" in *setting up* an office and staff to sell the defendant's axles. The plaintiff established expenditures of

$1,500 and services performed valued at $4,000, and was awarded the sum of those two amounts minus the $2,500 in sales commissions he had received.

Because Sun has disclaimed damages for diminution in value, lost goodwill, or recovery of start-up costs (Tr.-101-02; LF-1153, 1159-60), the only "damages sustained" are the profits it would have earned over the 90-day notice period, or $19,134.75.

IV. The damage award is against the weight of the evidence and impermissibly speculative.[5/]

Vianello ran eight different projections to forecast Sun's post-termination sales of L-3 products had Sun remained a distributor. His statistical analyses produced results ranging from declining sales, to flat sales, to significantly increasing sales. He chose the significantly-increasing-sales result based primarily upon: (1) L-3's Riddle's outdated projection of future double-digit annual sales increases, and (2) Vianello's opinion, based upon Exhibit 55, that Sun's post-termination sales of non-L-3 products were predictive of Sun's lost L-3 sales because Sun's historical sales of those two product categories were "remarkably stable."

5/ Sun argues that Point IV was not preserved for review because Point III in L-3's Western District brief was multifarious (SunBr.-121). A deficient point relied on in a court of appeals brief can be "cured" in a substitute brief. *Thummel v. King*, 570 S.W.2d 679, 690 (Mo. 1978). The Western District addressed L-3's arguments, and Point IV here is not multifarious. Point IV is preserved.

The court's finding that Sun's gross sales of L-3 products would have increased $358,051 annually for 18 years post-termination is untenable. Lost profits are recoverable only when they are "ascertainable with reasonable certainty," and are "not speculative or conjectural." *Farmers' Elec. Coop., Inc. v. Missouri Dep't of Corr.*, 59 S.W.3d 520, 522 (Mo. 2001). It would be hard to imagine an award more speculative than this one.

Vianello's reliance on Riddle's forecast was unreasonable because Buckley provided uncontroverted testimony that L-3's actual year-over-year sales had *declined* by 10%, rather than increasing by 10% as Riddle had predicted (Tr.-196-97). Buckley concluded: "I think the actuals prove his forecast was incorrect" (Tr.-210). Riddle himself had cautioned that the forecast would need to be reevaluated quarterly or semiannually (Tr.-162-63). Yet Vianello, and thus the trial court, applied that incorrect and outdated forecast to calculate 18 years' worth of substantially-increasing sales.[6/]

Sun asserts that because Buckley deferred to Riddle on forecasted sales, her credibility is somehow undercut (SunBr.-124). But she (and anyone else) can compare L-3's actual sales to Riddle's projected sales and form the only reasonable conclusion: "the actuals prove [Riddle's] forecast was incorrect" (Tr.-210).

[6/] Significantly, the court appears to have accepted Buckley's unchallenged testimony regarding actual declining and flat sales, including reduced sales in 2014. *See* Apdx-A20, ¶¶95-96.

Despite this intuitively obvious conclusion, Sun cites the court's "specific findings" (Apdx-A20-23, ¶¶91-111) pertaining to growth rates and its determination that Vianello's growth-rate and sales projections were credible (SunBr.-124). Those findings can be summarized as follows: (1) Riddle prepared a June 2014 forecast of 10% and "double digit" sales growth; (2) in discovery, L-3 objected to producing "all financial forecasts"; (3) L-3 offered no forecasts at trial; (4) actual sales for 2014 declined to $95 million from $106 million in 2013; (5) actual-versus-forecasted sales for 2015 were not in the record (but trial ended September 2015); (6) sales may have been influenced by Sun's termination; and (7) L-3 constantly develops new products.

These findings do not support the conclusion that Sun's future L-3 sales would have increased $358,051 annually for 18 years. On the contrary, this analysis, by switching the burden of proof from Sun (to prove likely increased sales) to L-3 (to provide forecasts to disprove the assumed increased sales), merely highlights the lack of credible evidence underpinning Vianello's conclusions. Findings (6) and (7) also do not support the conclusion that Sun's sales of L-3 products would have significantly increased annually for 18 years. Sun might not have sold any such new L-3 products, and any such products might merely have replaced old products that Sun had been selling. And even if Sun's termination may have impacted L-3 sales, it does not follow that, absent the termination, Sun's L-3 product sales would have increased almost 20% rather than declining 9% or 10%, as discussed below.

To demonstrate the irrational and unreliable nature of Vianello's damage template, one need only compare L-3's actual overall sales declines to Vianello's exuberant

projections of increasing Sun sales for 2012 through 2014. Buckley testified that L-3's *actual sales declined*, from $116 million (2012), to $106 million (2013), to $95 million (2014) (Tr.-196-97). Those are reductions of almost 9% from 2012 to 2013, and over 10% from 2013 to 2014. Yet Vianello's Exhibit 52 hypothesized an increase in Sun's sales of L-3 products from $2,041,513 in 2012,[7/] to $2,433,112 in 2013, and to $2,791,163 in 2014. In other words, while L-3's actual sales decreased by 9% and 10%, Vianello told the court that Sun would have increased its sales of L-3 products by 19% in 2013 and another 15% in 2014. *See* Ex.-54 (graphing Vianello's projected annual sales increases of $358,051 as percentage year-over-year increases). All of his assumptions about increased sales for 2013 and 2014 entered into the damage calculation the trial court accepted. (*See* Ex.-52, line 2030, last column).

Sun claims that Vianello relied on Riddle's testimony only to corroborate his adoption of his most optimistic sales forecast showing significant annual increases from 2013-2030 (SunBr.-124). But Vianello also used Riddle's discredited forecast to corroborate another of his faulty conclusions, namely that Sun's sales of L-3 products would have followed its sales of non-L-3 products, and that because Sun's sales of non-

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[7/] Vianello's 2012 sales projection is calculated by adding actual sales of $1,310,043 through August 2012 (Ex.-55) to his generous projected final four-month sales of $731,470 (Ex.-52). Actual monthly sales through August averaged $163,755, while Vianello's projected monthly sales for September through December averaged $183,867.

L-3 products increased post-termination, its L-3 sales would have increased as well. The facts do not support that syllogism either.

As we noted from Exhibit 55 and a corresponding graph, Sun's sales of L-3 and non-L-3 products usually moved in opposite directions and, even when moving in the same direction, moved at significantly different rates (Br.-77-79). When Sun's sales of L-3 products increased, as they did from 2005-06, 2006-07, and 2007-08, Sun's sales of non-L-3 products declined. So too, when Sun's L-3 sales declined, as they did from 2008-09, its sales of non-L-3 products increased. Hence, non-L-3 sales are a defective predictor of L-3 sales, contrary to the trial court's conclusion.

Sun cannot, and does not, dispute these facts or the reasonable conclusions that inevitably follow. Rather, it insists that L-3 misunderstands Vianello's testimony. Vianello said that his review of Sun's L-3 and non-L-3 sales, as shown on Exhibit 55, caused him to conclude that the sales were "remarkably stable" and, therefore, Sun's increased non-L-3 sales post-termination show that, absent termination, Sun's L-3 sales would likewise have increased. Sun further suggests that one should not be concerned with the direct relationship between Sun's L-3 and non-L-3 sales. Rather, one should view Sun's L-3 sales as a percentage of all sales, and so long as that percentage is within a 5% range of total sales for the six years in question, the sales should be considered "remarkably stable" (SunBr.-126). No thesis endorses such a theory.

Sun says Exhibit 55 shows that its L-3 sales were never less than 28.1% and never more than 33.1% of total sales (SunBr.-126). But Exhibit 55 shows that in 2005, Sun's L-3 sales were 15.1% of total sales (Ex.-55; $1,054,551/$6,963,825). So even if the sales

ratios were probative, they are not "remarkably stable." Moreover, the sales-ratio approach does not directly compare the changes in sales of L-3 and non-L-3 products (*see* Br.-77-78). If Sun's L-3 sales were to decline every time its non-L-3 sales increased, and in the post-termination years non-L-3 sales increased, one would expect Sun's L-3 sales to decrease in those years, not increase.

Sun claims that other evidence supports the conclusion that Sun's sales of L-3 products post-termination would have increased (SunBr.-127-29). It contends that at the time of termination, Sun's L-3 sales were increasing. Exhibit 55 again disproves that assertion. Sun's sales of L-3 products in 2011 were $2,101,328, and its sales for January-August 2012 were $1,310,043. Its L-3 sales were therefore on pace for $1,965,065 that year ($1,310,043 x 12/8) – a decline of more than 6% from 2011.

Finally, Sun argues that L-3 failed to prove that "Sun could not have maintained its distributorship for 15 years" (SunBr.-129-30). First, the court awarded *18* years of lost profits. Second, Sun bore the burden of proof. As shown above, the presumed lost sales are grossly exaggerated and against the weight of the evidence. Sun refers to finding 112 and the list of "squishy" reasons that Sun could have remained a distributor until 2030, but the great weight of the evidence and plain logic indicate the opposite.

The evidence shows that (a) Sun began distributing L-3 products in 2003; (b) L-3 terminated Sun in 2003 but Sun convinced L-3 to retain it; (c) in 2008 the parties entered into a two-year written agreement that provided that L-3 could terminate Sun without cause on 90 days' written notice; (d) the agreement expired without renewal; and (e) L-3 terminated Sun in 2012 (Apdx-A11-12, ¶¶-8, 11, 15-16, 19). These hard facts

demonstrate that the court's determination that Sun would remain an L-3 distributor through 2030 offends common sense. In Sun's less-than-10-year experience with L-3, it was terminated twice and had a written agreement for only two years, which provided for termination without cause on 90 days' notice. The court's 18-year horizon was a mirage, and its damage award was totally flawed.

V. The trial court erred in entering judgment against L-3 on its account-stated counterclaim.

Beyond its two procedural challenges to L-3's Point V, Sun has little to say in support of the trial court's ruling, and nothing to say in response to L-3's brief. L-3's substitute brief fully addresses Sun's thin defense of the trial court's ruling on L-3's account-stated counterclaim, and we will not repeat those arguments here.

Sun argues that L-3 failed to preserve its challenge to the trial court's judgment on its counterclaims for account stated (Point V) and for action on account (Point VI) because Point IV of L-3's Western District brief was multifarious (SunBr.-131). L-3 acknowledges that that Point was multifarious because it asserted "multiple substantial evidence and against-the-weight-of-the-evidence challenges" to the trial court's rulings on L-3's counterclaims. But the point was easily understood, the Western District "gratuitously address[ed] the merits of the claims" (SunApdx-A198 n.9), and Sun does not allege that any points in L-3's Substitute Brief are multifarious. In *Thummel*, 570 S.W.2d at 690, the seminal case analyzing Rule 84.04, this Court clarified that a deficient point relied on can and should be "cured" in a substitute brief in this Court. Because

Points V and VI are not multifarious and the Western District addressed (albeit erroneously) the allegations of error raised therein, those allegations have been preserved.

Sun also argues that Point V violates Rule 83.08(b). The basis of L-3's claim regarding its account-stated counterclaim has remained the same throughout this appeal. Point IV in L-3's Western District brief claimed that the trial court erred in entering judgment against L-3 on its account-stated counterclaim "because the trial court's findings that … there was no evidence that Sun promised to pay the amount due or that the parties agreed on an amount" are "unsupported by substantial evidence and against the weight of the evidence in that Sun's president testified and documentary evidence proved that Sun agreed on the amount it owed and promised to pay but did not have the money" (SunApdx-A164).

Point V in L-3's substitute brief correspondingly argues that

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

Sun repeatedly stated its intention to pay the outstanding invoices; and (e) Sun admitted that it sold its products at a profit." (Br.-83).

Sun asserts that Point V was not raised in the Western District because it characterizes the trial court's error as a misapplication of law, while L-3's Western District brief raised substantial evidence and against-the-weight-of-the-evidence challenges. But the claim raised in both briefs, and the basis for it, is the same: the trial court erred in entering judgment for Sun because Sun's Gregg's own testimony, along with the documentary evidence admitted without objection, established the required elements of L-3's account-stated claim. Both Point IV in L-3's Western District brief and Point V here ask the reviewing court to consider whether Gregg's testimony and the pertinent documents established L-3's right to recovery.

Because the evidence was uncontested in that Gregg's testimony admitted "the basic facts" of L-3's case, "the issue is legal, and there is no finding of fact to which to defer." *White v. Director of Revenue*, 321 S.W.3d 298, 308 (Mo. 2010). L-3's substitute brief simply directs the Court to the proper standard of review, which is a question of law. *Cf. Kesler-Ferguson v. Hy-Vee, Inc.*, 271 S.W.3d 556, 558 (Mo. 2008) (whether trial court applied proper legal standard is reviewed de novo). Rule 84.04 does not require a point relied on to identify the standard of review. *See Thummel*, 570 S.W.2d at 685 (discussing Rule 84.04). L-3 cannot have waived its right to have this Court apply the appropriate standard of review merely because its Western District brief improperly framed the standard.

If the Court considers Point V to violate Rule 83.08, the Court should not "disregard" it (SunBr.-131). Instead, in furtherance of this Court's "policy 'to decide a case on its merits' whenever possible," the "appropriate remedy" is for the Court to consider the issue as it is raised in Point IV.A in L-3's Western District brief. *Williams*, 455 S.W.3d at 432.

VI. The trial court erred in entering judgment against L-3 on its action-on-account counterclaim.

Sun "renews" the procedural objections to L-3's Point VI that it raised to Point V (SunBr.-133). L-3's discussion in Point V holds true here: Rule 83.08 contemplates that an appellant's substitute brief can "cure" a deficient point.

Likewise, L-3 has not violated Rule 83.08 by altering the basis of its challenge to the judgment against L-3 on its action-on-account claim. Both Point IV.B in L-3's Western District brief and Point VI here argue that the court erred in denying L-3's claim because the law does not require express testimony that charges are "reasonable," and that the "first-to-breach rule" does not apply. *See* Br.-91-97; SunApdx.-A164, 168-171. The substitute brief simply identifies the proper legal standard of review for L-3's claim. *See* Point V, *ante*. Again, should the Court determine that Point VI violates Rule 83.08, L-3 requests that the Court consider the issue as it is raised in Point IV.B in L-3's Western District brief.

Sun again barely responds to the merits of Point VI. In support of the court's application of the inapposite first-to-breach rule, Sun asserts that it "was current on all invoices before termination" (SunBr.-133). That is irrelevant, because the unpaid

invoices were for products ordered after L-3 received the August 2, 2012 termination notice. Regarding those invoices, Sun explained its position as follows: "After Sun Aviation was terminated, Sun Aviation stopped paying some invoices in order to off-set damages caused to Sun Aviation by the termination. … The amount of damage that L-3 has caused to Sun Aviation greatly exceeds the unpaid invoice claims of L-3" (LF-364, ¶¶101-02). Missouri law does not allow such self-help measures. The Court should reverse the judgment for Sun on L-3's action-on-account counterclaim.

CONCLUSION

This Court should reverse the judgment in favor of Sun on Counts I through IV; reduce the judgment in favor of Sun on Count I (under the Franchise Act) to $19,134.75; and enter judgment for L-3 on its counterclaims in the amount of $278,372.65.

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Supreme Court Rule 84.06(c), that this Substitute Reply Brief for Appellant complies with Rule 55.03, and with the limitations contained in Rule 84.06(b), as modified by this Court's Order dated August 22, 2017, granting Appellant's Motion For Leave to File Substitute Reply Brief Exceeding Word Limit. I further certify that this brief contains 9,248 words, excluding the cover, this certificate, and the signature block, as determined by the Microsoft Word 2010 Word-counting system.

/s/ *Elizabeth C. Carver*

CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2017, I electronically filed the foregoing Substitute Reply Brief for Appellant with the Clerk of the Court using the Court's electronic filing system, which will send a notice of electronic filing to all counsel of record.

/s/ *Elizabeth C. Carver*
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