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## ARGUMENT

### **I. The Trial Court’s Judgment, Finding That Item 15 Is an Exception and That Mr. Naji Did Not Anticipatorily Repudiate the Contract, Should Be Reversed Under *Murphy v. Carron’s De Novo* and Evidentiary Standards of Review.**

#### **A. The Judgment Should Be Reversed Under the *De Novo* Standard of Review.**

It is true that, as a general principle, the resolution of a contractual ambiguity presents a question of fact. *Langdon v. United Restaurants, Inc.*, 105 S.W.3d 882, 887 (Mo. App. 2003). But this Court carved out an exception to the general rule long ago, and that exception – firmly embedded in Missouri precedent – applies here. Specifically, where “[t]here is no real conflict of evidence upon any of the essential facts necessary to be considered in construing the contract involved . . . though the contract be conceded to be in itself ambiguous, its construction is nevertheless for the court, and not the jury.” *Keyes Farm & Dairy Co. v. Prindle*, 155 S.W. 391, 393 (Mo. 1913). In such a situation, the appellate court applies the *de novo* standard of review under *Murphy v. Carron* just as it would in instances of ordinary contract interpretation. *See Crossman v. Yacubovich*, 290 S.W.3d 775, 778 (Mo. App. 2009); *Muilenberg, Inc. v. Cherokee Rose Design & Build, L.L.C.*, 250 S.W.3d 596, 598 (Mo. App. 2008).

Although an ambiguous contract term was before the trial court below, resolution of its ambiguity became a matter of law for the court’s determination because the parties presented no conflicting “evidence upon any of the *essential* facts necessary to be

considered” in construction of the contract. *Keyes Farm & Dairy Co.*, 155 S.W. at 393 (emphasis added). JAS’s substitute principal brief lays out three undisputed facts that are alone dispositive of—and consequently, alone “essential” to—the “exception v. requirement” issue. *See* JAS Substitute Brief,<sup>1</sup> pp. 26-27.

Among the three undisputed essential facts is the single fact that the trial court below determined was dispositive; namely, that Item 15 “could be reworded to become” an exception. In light of the three undisputed facts, each affirmatively admitted by the Najis’ expert witness,<sup>2</sup> the conclusion that Item 15 was a requirement and not an exception is a logical imperative. Illustratively, because it was undisputed and affirmatively admitted by the Najis that:

- (1) Schedule B contains both requirements and exceptions<sup>3</sup>;
- (2) that Item 15 must be “converted” or “reworded” to “become” an exception<sup>4</sup>;

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<sup>1</sup> To avoid duplication of argument, as directed by Rule 84.04(g), JAS incorporates by reference herein the entirety of its substitute principal brief, in all instances in which such brief is herein referenced.

<sup>2</sup> The Najis are “bound by,” and estopped from denying, “the uncontradicted testimony of their own witness.” *Racer v. Utterman*, 629 S.W.2d 387, 398 (Mo. App. 1981); *see also Furlong v. Stokes*, 427 S.W.2d 513, 518 (Mo. 1968) (holding a party bound by the uncontradicted testimony of its expert witness).

<sup>3</sup> JAS Substitute Brief, pp. 27-28.

(3) and that the express written waiver of JAS would need to be procured before Item 15 could become an exception<sup>5</sup>, but that JAS never gave executed such a waiver,

no other piece of evidence can logically be considered material or “essential”<sup>6</sup> because Item 15 *could not have been*, by inference or in fact, an exception as it appeared in the Title Commitment. Accordingly, the trial court’s “exception v. requirement” holding was a conclusion of law on undisputed essential facts, was erroneous as a matter of law, and is subject here to *de novo* review.

The foregoing is true even though the *Naji I* court remanded the case with directions for the trial court to make a *factual finding* of Chicago Title’s intent. Even the Najis’ Substitute Brief concedes that the trial court made no factual finding of Chicago Title’s intent despite the court of appeals’ clear direction to do so. Sub. Resp. Brief, p. 24. And although facts are presumed to have been found in a manner consistent with the judgment, (*Nail Boutique, Inc. v. Church*, 758 S.W.2d 206, 208 (Mo. App. 1988)), such presumption

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<sup>4</sup> *Id.* at 28-29.

<sup>5</sup> *Id.* at 37-39.

<sup>6</sup> In accord with this understanding, the facts “relevant to the questions presented” were fully and fairly elucidated in the JAS Statement of Facts. To the extent the Najis disagree as to the issues before the Court, and therefore to the facts relevant to those issues, they have availed themselves of the Rule 84.04(f) option to supply their own statement of facts and should not, therefore, be heard to complain further.

does nothing to alter the applicable standard of review when a trial court’s judgment, as here, embodies a *legal conclusion* on a matter of contract interpretation, and *not* a finding of fact as to intent.

In this sense, the trial court’s Judgment is in accord with the *Naji I* court’s mandate. Specifically, prior to remand, the court of appeals held that the ultimate issue of anticipatory repudiation or breach depends “squarely” on “*the issue* of whether or not Chicago Title’s provision concerning Hala Naji’s joining in the agreement *was* an exception or a requirement.” *JAS Apts., Inc. v. Naji*, 230 S.W.3d 354, 363 (Mo. App. 2007) (emphasis added). The court then decreed that “[r]esolution of *this issue* depends on the circuit court’s factual finding of whether or not the title insurer intended the title insurance commitment to require Hala Naji’s joining in the contract or whether or not Hala Naji’s joining in the contract was an exception to the promised title insurance.” Thus, “the issue” identified for resolution on remand was whether Item 15 “*was* an exception or a requirement,” a matter of contract interpretation.

As fully set forth in JAS’s substitute principal brief, incorporated herein by reference, under a *de novo* standard of review, the trial court’s Judgment should be reversed.

**B. The Judgment Should Be Reversed Under Other Prongs of *Murphy v. Carron*<sup>7</sup> Review.**

Even assuming *arguendo* that the other *Murphy v. Carron* standard of review prongs apply, and with JAS’s evidence considered only to the extent “as it may support the

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<sup>7</sup> 536 S.W.2d 30 (1976).

judgment,” (*Neal v. Sparks*, 773 S.W.2d 481, 486 (Mo. App. 1989)), the Judgment must be still be reversed as unsupported by substantial evidence, as against the weight of the evidence, and as an erroneous declaration/application of the law.<sup>8</sup>

The evidence offered by JAS on which the trial court’s Judgment is *explicitly predicated* is the testimony of title insurance expert and former Chicago Title regional counsel Stephen Todd to the effect that “Chicago Title could reword Item 15” and “Item 15 can be converted by Chicago Title into an exception that would carry over to the title policy.” (LF 120-21; A6-7). Mr. Todd’s testimony on this point, then, is appropriate for the Court’s consideration under *Neal v. Sparks*.

Q (by Najj’s counsel): Okay. So any matter can become an exception, true?

A (by Stephen Todd): Yes.

Q: Including *the requirement* as outlined in paragraph 15?

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<sup>8</sup> The Najjis’ assertion that JAS’s first Point Relied On does not encompass JAS’s argument that the trial court erroneously declared or applied the law, (*see* Sub. Resp. Br., p. 38), is unfounded. In addition to encompassing trial court errors predicated on the weight of the evidence, JAS’s first Point Relied On preserves JAS’s argument that, by concluding from the evidence that Item 15 was an exception, the trial court erroneously construed a contract. Because “[c]ontract interpretation is a question of law,” *Grand Inv. Corp. v. Connaughton, Boyd & Kenter, P.C.*, 119 S.W.3d 101, 112 (Mo. App. 2003), the “erroneous declaration or application of the law” prong of *Murphy v. Carron* review clearly falls within the purview of JAS’s first Point Relied On.

A: That is correct. . . .

Q: [Paragraph 16] does not always have to stay a requirement even if we agree with what you say, true?

A: It would have to be reworded to be something other than a requirement.

Q: *That's correct. And it could be reworded, right?*

A: It could be. . . .

Q: The act of [Hala Naji's] signature can become an exception?

A: It can be.

Q: All right. And it *becomes* an exception through *rewording* . . . .

Q: So bottom line is this: The contract says what it says, even in spite of what you call it, a requirement, but that act need not stay a requirement, true?

A: Correct.

Q: It can become an exception?

A: It can.

(Tr. 81:9-83:25, A119) (emphasis added).

This testimony—by which the trial court itself “supported” its Judgment—demonstrates without question that the conclusion that Item 15 is an exception is erroneous as a matter of law. The *Naji I* court tasked the trial court with determining whether “Hala Naji’s joining in the agreement *was*”—past or present tense—“an exception or a requirement.” *JAS Apts., Inc.*, 230 S.W.3d at 362. Thus, the trial court was to have determined the nature of Item 15 as it appeared before the parties in the Title Commitment, and not whether Item 15 “could be” an exception under a hypothetical set of events. Mr.

Todd's testimony demonstrates that, because Item 15 would have to be "converted" or "reworded to become" an exception, Item 15 was not and could not have been an exception as it appeared in the Title Commitment.

Much of the non-essential evidence the Najis offer to attempt to bolster the trial court's erroneous conclusion that Item 15 is an "exception" is testimony from both parties' witnesses to the effect that Schedule B does not contain the word "requirements" and "is clearly prefaced with the term 'exceptions.'" *See* Sub. Resp. Br., pp. 30-34. But to offer such evidence as support for the trial court's "exception" holding is contrary to the law of the case: the *Naji I* court concluded that the very "placement and wording of" Item 15 within Schedule B is what rendered Item 15's classification as "an exception or a requirement . . . a matter of ambiguity." 230 S.W.3d at 358, n. 3.

Also, the Najis' citation to Ms. Vestal's testimony on pages 34 to 35 in their substitute brief is incomplete, and misleadingly so. While Ms. Vestal gave the testimony described, she explicitly clarified that in order to issue a title policy listing Mrs. Naji's interest as an exception to coverage and to close the transaction, Chicago Title would have required JAS's written consent. (Tr. 32:21-33:5, A138-A139). Again, such consent was never given. (Tr. 49:2-6; A112).

The Title Commitment's Item 15, and not Item 15 as it hypothetically could have appeared in a final policy, governed the behavior of the parties prior to and leading up to closing. Accordingly, and in light of the evidence and argument set forth more fully in JAS's substitute principal brief, incorporated herein by reference, the trial court's Judgment, finding Item 15 to be an exception so as to preclude a finding of anticipatory repudiation by

Mr. Naji, is not supported by sufficient evidence, is against the weight of the evidence, and is erroneous as a matter of law.

**C. Mohamad Ali Naji Anticipatorily Repudiated the Contract.**

Because the trial court's Judgment on the "exception v. requirement" issue should be reversed, for all the reasons stated *supra* and as set forth more fully in JAS's substitute principal brief, incorporated herein by reference, the trial court's dependent ruling that Ali Naji did not anticipatorily repudiate the Contract should likewise be reversed.

**D. Judgment in JAS's Favor Should Be Entered on JAS's Claims, and the Cause Should Be Remanded for a Determination of Proper Remedy.**

For the reasons set forth above, judgment should be entered in JAS's favor on its breach of contract claim. Further, as set forth at length in JAS' substitute principal brief, the record is fully developed on the marital fraud issue central to JAS's declaratory judgment claim. *See* JAS Sub. Brief, at pp. 43-44. That record reflects that consummation of the Newbern transaction would not defraud Hala Naji's marital interest, and thus speaks in favor of entering judgment in JAS's favor on its declaratory judgment claim. *See id.*

The Najis' arguments to the contrary are unavailing. Judge Messina's holding that JAS's declaratory judgment claim was not yet ripe for adjudication was reversed by the *Naji I* court. (A49-A53). And the Najis' argument that this Court's adjudication of the marital fraud issue "would deprive Mrs. Naji of her right to fully present evidence" (Sub. Resp. Brief, p. 43), ignores the fact that the judicial admissions made by the Najis on this point in

the first trial are dispositive of the issue and are, as a matter of law, controlling for the remainder of the litigation.<sup>9</sup> *See* JAS Sub. Brief, pp. 43-44. JAS therefore respectfully requests that this Court render Judgment on the marital-fraud issue “as ought to be given.” *Marks v. Marks*, 625 S.W.2d 700, 702 (Mo. App. 1981) (holding that “where no further factual adjudication is necessary, a court of appeals may give such judgment as ought to be given pursuant to Rule 84.14”).

In sum, JAS respectfully requests that the Court reverse the Judgment of the trial court, and enter Judgment on JAS’s breach of contract claim in its favor and against Defendant Ali Naji, enter a declaratory judgment concerning Hala Naji’s marital rights, award attorney’s fees and costs in favor of JAS for its protracted attempts to enforce the Contract, and remand for purposes of determining an appropriate remedy.<sup>10</sup>

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<sup>9</sup> *Pennington v. Kansas City Rys. Co.*, 223 S.W. 428, 431 (Mo. 1920) (holding that an admission of record is binding, even where made for purposes of a former trial).

<sup>10</sup> JAS’s suggestion, in its substitute principal brief and herein, that specific performance may no longer be the appropriate remedy for Mr. Naji’s breach, (JAS Sub. Brief, p 45), does not run afoul of Rule 83.07(b)’s directive that a substitute brief “not alter the basis of any claim raised in the court of appeals.” The *bases* for the relief JAS seeks, *i.e.* the contract-, caselaw-, and logic-based arguments that were advanced in JAS’s appellant’s brief below in favor of reversal, are the very arguments now presented to this Court.

## **II. The Trial Court Abused Its Discretion in Granting the Najis Fees Under the Contract.**

### **A. The Trial Court Did Not Find that JAS Was a Defaulting Party.**

“Where a party’s claim to attorney fees is based upon a contract the court must adhere to the terms of the contract and may not go beyond it.” *Trimble v. Pracna*, 167 S.W.3d 706, 714 (Mo. 2005). The trial court abused its discretion in awarding fees to the Najis under the Contract because the Contract only provides for fees to be paid to a non-defaulting party by a defaulting party; the trial court’s Judgment is bereft of a finding that JAS was a defaulting party. The Najis’ argument that the question of default must be deemed to have been found in a manner consistent with the Judgment is incorrect as a matter of Missouri law. The rule, rather, is that “[t]he question of what facts constitute a breach of contract is one of law to be decided by the court.” *Abrams v. B-Mark Pools, Inc.*, 616 S.W.2d 143, 144 (Mo. App. 1981). The court’s Judgment, then, awarding the Najis fees without finding JAS to be a “defaulting party,” violates the terms of the Contract to which the court was obligated to adhere, and thus serves as an inadequate predicate to the trial court’s award of attorneys fees.

The Najis now ask this Court to “go beyond” the Contract terms by applying the inapposite *Fleetwood* case to affirm the trial court’s erroneous fee award. The application of *Fleetwood* here would supercede the terms of the JAS/Naji Contract because the attorneys’ fee provision at issue in *Fleetwood* materially differs from that at issue here. Illustratively, consider the following excerpts:

*Fleetwood* provision: “In the event either party shall employ an attorney for enforcement . . . the prevailing parties shall be entitled to recover . . .

reasonable attorneys' fees." *Fleetwood/Edwards Chevrolet, Inc. v. Fleetwood Chevrolet*, 9 S.W.3d 62, 67 (Mo. App. 2000).

JAS/Naji provision: "If, as a result of a default under this Contract, either Seller or Buyer employs an attorney to enforce its rights, the *defaulting party shall . . . reimburse the nondefaulting party* for all reasonable attorney's fees." Contract, at ¶ 16.

The JAS/Naji provision awards fees to a non-defaulting party where the opposing party has been found to have defaulted; conversely, the *Fleetwood* provision more broadly awards attorneys fees to any and all "prevailing parties." As the court in *Fleetwood* acknowledged, the result in that case may have been different had the provision at issue been "intended to provide an additional remedy only to a non-breaching party," as is the provision at issue here. *Fleetwood/Edwards Chevrolet, Inc.*, 9 S.W.3d at 67 (citing *Walton Gen. Contractors, Inc. v. Chicago Forming, Inc.*, 111 F.3d 1376 (8th Cir. 1997)).

Consequently, the trial court's failure to make a finding of default against JAS is fatal to the Najis' fee award under the clear terms of the Contract, and as a matter of Missouri law. See *Shirley's Realty, Inc. v. Hunt*, 160 S.W.3d 804, 809 (Mo. App. 2005) (holding, where real estate contract contained identical attorneys' fee provision to that at issue here, that "[a] prerequisite to awarding legal fees . . . under this provision is that the party from whom the attorney's fees are sought . . . defaulted on the contract").

Under *Trimble*, the trial court abused its discretion in awarding fees to the Najis, and that award must be reversed.

**B. JAS Did Not Default.**

While the trial court indeed held that Mr. Naji did not anticipatorily repudiate the contract, it does not necessarily follow, as a matter of law or logic, that JAS defaulted. On this point, it is helpful to review certain rulings of the *Naji I* court:

- (1) The [C]ontract obligated Naji to deliver a general warranty deed that conveyed “marketable fee simple title to the Property, free and clear of all liens and encumbrances, other than the Permitted Exceptions.” *JAS Apts., Inc.*, 230 S.W.3d at 357.
- (2) The [C]ontract defined “permitted exceptions” as “[a]ny matters” that the title insurer set out in its commitment to insure the property’s marketable title and that JAS Apartments did not object to in writing within 10 days after receiving the title insurance commitment. *Id.*
- (3) Chicago Title’s commitment included a schedule, entitled Schedule B, which purported to contain exceptions to Chicago Title’s insurance coverage. *Id.*
- (4) Among the schedule’s provisions was one that said, “The wife, if any, of Mohamad Ali Naji must join in the proposed agreement.” *Id.*
- (5) On February 10, 2003, a representative of JAS Apartments telephoned Naji to ask about the status of the sale scheduled for closing the next day and learned that Naji’s wife had not consented to the sale and would not. *Id.* at 357-58.
- (6) JAS Apartments never made a written objection concerning the issue of Naji’s wife joining in the sales agreement. *Id.* at 358.

- (7) Because JAS anticipated that Naji would be unable to deliver marketable title without his wife's consent, it refused to close the transaction and filed this lawsuit. *Id.*

Notwithstanding the fact that JAS never made written objection to Item 15, the Najis' sole witness at the remand trial nevertheless testified that, in order for Item 15 "to become a "permitted exception" and "in order to issue a policy," Chicago Title "would require written consent [concerning Item 15] from JAS." (Tr. 105:1-5; 106:5-11; A122). JAS never gave written consent for Item 15 to become a "permitted exception." On the basis of the Naji witness's admissions at trial, Chicago Title would not have issued its policy of fee simple marketable title subject to Item 15.

But JAS cannot be found to have defaulted for refusing to consent to Item 15: JAS had no duty under the Contract to give such consent or to procure title insurance. JAS cannot therefore be held to be in "default" as a result of Chicago Title's lack of willingness to insure title. For this additional reason, the trial court's fee award was not based on the necessary predicate of default under the Contract's clear fee provision, and should be reversed.

**C. The Najis Have Only Sought Attorneys Fees Under the Contract.**

Even assuming *arguendo* that JAS had been found in default, the Najis could only recover fees to the extent they sought to enforce the Contract. Because, however, the Najis at all times sought to avoid the Contract and to solely enforce the Contract's attorney's fee provision, only those fees related to the Najis' pursuit of attorney's fees—*i.e.*, fees almost exclusively limited to those incurred in relation to the Naji's post-Judgment Motion to

Amend briefing—could even arguably be awarded. *See Schnucks Carrollton Corp. v. Bridgton Health & Fitness, Inc.*, 884 S.W.2d 733, 739-40 (Mo. App. 1994) (where contract provided for attorney’s fees incurred “in the enforcement” of a contract provision, it was only proper to award the portion of attorney’s fees attributable to “that part of the action which seeks to enforce [an opposing party’s contractual] obligations”).

But even to that extent, the Najis’ argument for fees should be rejected for all the reasons fully set forth in JAS’s substitute principal brief, incorporated herein by reference.

### **III. The Fee Award Is Unreasonable as a Matter of Missouri Law.**

#### **A. The Trial Court’s Failure to Apportion Fees Resulted in An Unreasonable Award.**

The Najis attempt to distinguish the cases JAS offered to support fee apportionment because those cases purportedly apportion fees based solely on issues pleaded by plaintiffs, and because defendants have “no choice other than to defend claims that have been asserted against” them. Sub. Resp. Brief, p. 51. The “plaintiff/defendant” qualification on which the Najis rely is in this instance, however, a distinction without a difference, for two reasons. First, defendants regularly assert counterclaims, as did the Najis here, and thus the fees at issue are not solely attributable to claims raised by JAS that Defendants had “no choice other than to defend.”

Second, as fully set forth in JAS’s substitute principal brief, courts consider success on appeal in apportioning fees. Here, the Najis appealed, and lost on all but one issue. *See* JAS Sub. Brief, pp. 56-57. Notwithstanding the ultimate outcome of this case or the fact that the Najis prevailed at the remand trial below, the Najis incurred the vast majority of

attorney's fees they now claim on issues they lost on the first appeal, as was revealed by the dates on the attorneys' fee invoices submitted by the Najis in their motion for fees below. *See Wooten v. DeMean*, 788 S.W.2d 522, 529 (Mo. App. 1990) (appellate court declined to award all attorneys' fee requested, having concluded that "a reasonable allowance" must "different[iate] between time spent in prosecution of [an] unsuccessful appeal and time spent in defending [an] unsuccessful appeal"). Under Missouri law, then, apportionment is necessary to comply with the Contract provision's term of a "reasonable" award. The trial court's failure to apportion fees was, consequently, an abuse of discretion warranting reversal.

**B. The Trial Court's Failure to Hear Evidence and Grant of All Attorney's Fees Reflects An Arbitrary Decision That Fails For Evidentiary Support.**

JAS's third Point Relied On properly preserved for the Court's consideration JAS's argument that the fee award was arbitrary and fails for evidentiary support because that Point asserts that the trial court's award of fees "violates the contractual attorney's fee provision requiring any fee award to be 'reasonable.'" JAS Sub. Brief, p. 55. Missouri courts have defined fee awards as "unreasonable" when the awards "indicate indifference and the lack of proper judicial consideration." *Bacon v. Uhl*, 173 S.W.3d 390, 399 (Mo. App. 2005). Because JAS's "arbitrary" argument asserts that the trial court's "failure to hear evidence" indicates that the fee award was granted "with indifference and a lack of proper judicial consideration," the argument clearly falls within the purview of the Point Relied On, explicitly challenging the reasonableness of the trial court's fee award.

Additionally, the fact that the Armstrong Teasdale billings submitted to the trial court below were not redacted was a surprise to JAS when revealed in the Najis' original respondents' brief below. The Armstrong Teasdale billings that JAS received in connection with the Najis' Motion to Amend to Award Fees were redacted, and thus could not be meaningfully challenged in JAS's briefing on the matter, which is the reason that JAS moved the trial court to hold a hearing and take evidence on the attorney's fee matter. The court's failure to do so resulted in a fee award to the Najis that is not commensurate with their degree of success in litigating various issues raised throughout this matter's pendency.

And again, despite the Najis' insistence to the contrary, *Fleetwood* does not present analogous facts by which this Court may affirm the trial court's award of all fees incurred by the Najis. Aside from containing a materially different fee provision than is at issue here, *Fleetwood* is additionally distinguishable because there, over the course of five-plus years of litigation, the plaintiff himself twice voluntarily dismissed his own claims, thereby demonstrating their utter lack of merit. 9 S.W.3d at 64-65. The *Fleetwood* plaintiff thereafter unsuccessfully opposed an attorney's fee award to the defendant. *See generally id.*

Here, the *Naji I* court issued an extensive opinion and could not even determine which party should prevail, ultimately remanding the case for further adjudication. *See generally JAS Apts., Inc.*, 230 S.W.3d 354. After the remand trial, a second appellate panel issued an extensive opinion remanding for additional further adjudication. The facts of this case thus present no impetus like that in *Fleetwood* for the Court to impose fees for unmeritorious litigation, and the *Fleetwood* court's willingness to so generously construe a fee provision does not translate here.

The fee award granted by the trial court is grossly disproportionate to the relative degree of the Najis' litigation success in these proceedings, and reflects that the fee award was granted arbitrarily, and with indifference and a lack of proper judicial consideration. For these reasons, as more fully set forth in JAS's substitute principal brief, the trial court's amended Judgment awarding fees should be reversed.

#### **IV. The Trial Court Erred In Granting Prejudgment Interest.**

The Najis' response to Point IV misses the thrust of JAS's argument. The trial court's award of prejudgment interest was erroneous not only because interest was awarded in an improper amount and by an improper calculation, but because it awarded interest on an amount purportedly due under a contract that became "due and payable" only at the time that the Judgment awarding interest was issued, if at all. *See, e.g., Heineman v. Heineman*, 845 S.W.2d 37, 39-40 (Mo. App. 1992) (holding that where amount due was not liquidated prior to the entry of judgment, no "party was liable to the other for any amount until [the] determination" as to an appropriate award was set forth in judgment); *see also Steppelman v. State Highway Comm'n of Mo.*, 650 S.W.2d 343, 345 (Mo. App. 1983) (holding that trial court erred in awarding prejudgment interest where demand was made but damages could not be ascertained until trial). Accordingly, because the attorney's fees awarded here on which prejudgment interest was given could not be ascertained until *after* trial, and only then to the extent of the court's discretion, no prejudgment interest should have been awarded.

Additionally, at all relevant times, including in the present period of appellate briefing, JAS has vigorously argued not only that it is ultimately not liable for attorney's fees, but also that the amount of attorney's fees properly awardable—if any—must be

determined by the trial court's discretionary apportionment; *i.e.*, that the fee award was unliquidated. *See H&B Masonry Co. v. Davis*, 32 S.W.3d 120, 125 (Mo. App. 2000) (holding that amount of damages was "unliquidated" given that "the proper amount of damages was disputed throughout the litigation" and "the measure of damages was uncertain"). Because the apportionment that JAS has consistently urged is necessary is a matter of judicial discretion, the amount awarded was not "readily ascertainable by reference to recognized standards." *Id.* Consequently, the Najis' argument that JAS has not "ever challenged" Mr. Naji's claim for attorney's fees "as being unliquidated or incapable of being determined" is simply incorrect.

The trial court's award of prejudgment interest should be reversed.

### **CONCLUSION**

For all these reasons, as set forth herein and in JAS's substitute principal brief, incorporated herein by reference, JAS respectfully requests that the Court reverse the trial court's Judgment, in its original and amended forms, and enter Judgment in JAS's favor on its breach of contract claim, and on its declaratory judgment claim concerning Hala Naji's marital rights, for an award of attorney's fees and costs in favor of JAS, and for such other and further relief as is just, equitable and proper. And at the very least, the Judgment should be modified to reduce the trial court's prejudgment interest award of \$150,058.50 to \$48,285.00.

Respectfully submitted,

POLSINELLI SHUGHART PC

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## CERTIFICATE OF SERVICE

I hereby certify that two copies of the above and foregoing were served via US mail,  
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