IN THE SUPREME COURT OF MISSOURI

GARY S. HEIFETZ, JEFFREY S. GERSHMAN, STEVEN B. SPEWAK, JEAN MAYLACK, FALLON MAYLACK, STEVEN M. STONE, Individually and as Personal Representatives of THE ESTATE OF SIDNEY L. STONE, and SIDNEY M. STONE,	)	
Respondents,	)	
vs.	)	**Case No. SC96514**
APEX CLAYTON, INC.,	)	
Appellant.	)	

Appeal from the Circuit Court of St. Louis County
Twenty-First Judicial Circuit
The Honorable Robert S. Cohen, Circuit Judge

APPELLANT'S SUBSTITUTE REPLY BRIEF

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REPLY CONCERNING STATEMENT OF FACTS

Limited Partners[1] contend Apex's appeal should be dismissed because it did not appropriately state the facts. (Resp. Br. at 7-11.) A statement of facts should "be fair and concise, relevant to the questions presented, and without argument." *S.M. v. E.M.B.R.*, 332 S.W.3d 793, 822 (Mo. banc 2011). A review of Limited Partners' additional facts shows that Apex fairly covered the relevant facts and Limited Partners included irrelevant evidence.

Heifetz

Limited Partners cover witness names, early history of 8182 Partnership, capital contributions, and a 1999 letter about cash distributions. These details are undisputed but immaterial. Notably, the statute of limitations for a breach-of-fiduciary-duty claim is five years,[2] and Limited Partners' petition was filed December 3, 2010. (LF 17; A12.) Any complaints about matters pre-dating December 3, 2005 are time barred.

Capital calls and "squeeze out"

Limited Partners include information about objections to a 1999 capital call for a parking garage expansion. They say they objected but paid to avoid forfeiting their interests. (Resp. Br. at 14.) On pages 18-19, Limited Partners describe a scheme by Apex to "squeeze out" Limited Partners, Apex's buyout of two limited partners in "distress

[1] Apex's Reply brief uses the same naming conventions as its opening brief.

[2] *Klemme v. Best*, 941 S.W.2d 493, 497 (Mo. banc 1997).

sales," and a capital call that occurred 24 years ago. (*See* A3; Exs. 104-105 at LF 773-97.)

These matters are time barred. No party to this case forfeited partnership interests. Limited Partners held their full interests during trial and, through their breach-of-contract claim, forced Apex to buy their interests for the value found on Verdict A. (LF 555; A26.)

Other non-party, former limited partners agreed to buyouts. (Tr. 219.) There is no evidence that their buyouts damaged Limited Partners, so Limited Partners lack standing to complain about them. *State ex rel. Delmar Gardens N. Operating, LLC v. Gaertner*, 239 S.W.3d 608, 610 (Mo. banc 2007) (third-party standing rules).

In addition, Limited Partners recovered substantial gains over their capital contributions. The approximate total of Limited Partners' capital contribution appears on page 13 of Limited Partners' brief. Heifetz's capital contributions were approximately $212,000. (Tr. 171.[3]) On Verdict A, the jury valued his interest in 8182 Partnership at $1,348,793. (LF 555; A26.) Apex paid him that amount (and attorneys' fees) as part of the parties' settlement of his breach-of-contract claim. (A43-46.) Thus, Heifetz has received from Apex more than 600% of the value of his capital contributions. Each of the other Limited Partners likewise received more than 600% the value of their capital contributions. (*Compare* Tr. 171-172 *with* LF 555; A26.)

[3] Limited Partners' brief incorrectly cites Tr. 71-72. (Resp. Br. at 13.)

1999 land exchange

Limited Partners highlight a 1999 land contribution that 8182 Partnership made for an interest in Forsyth Centre. During pre-trial, Apex objected that it was not pled and time barred. (Tr. 9, 11, 15-16, 19, 21-23.) Limited Partners agreed that it was not part of their damages but argued it was pattern evidence. (Tr. 16.) The trial court agreed with Apex. (Tr. 23.) Apex renewed its objection when Heifetz testified, and the trial court held to its ruling. (Tr. 177-78.)

Limited Partners also lack evidence that the contribution damaged them. 8182 Partnership used the land to acquire its interest in Forsyth Centre. (Tr. 478, 505.) Limited Partners' valuation evidence showed that Forsyth Centre contributed $12,638,017 to 8182 Partnership's value.[4] Limited Partners have now received the value of their interest in 8182 Partnership, including their share of value attributable to Forsyth Centre. (A43-46.)

$2.4 million loan

Pages 15-16 mention a $2.4 million loan to Forsyth Centre. Heifetz and Limited Partners' accounting expert Mr. Prost testified about it. (Tr. 244, 387-88.)

Heifetz said the loan should have counted as available cash flow. (Tr. 244-45.) But there was no foundation for Heifetz, who is not an accountant (Tr. 245), to opine on accounting issues.

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[4] Limited Partners' real estate expert found Forsyth Centre's value to be $43,920,000. (Tr. 283-84.) Their accounting expert found $12,638,017 "flowed" to 8182 Partnership. (Tr. 403.)

Prost's view was that loans never damaged Limited Partners. (Tr. 439.) Some additional information puts the matter in context. Apex's accountant Mr. Twele concluded there had been no available cash flow as defined in the Partnership Agreement. (Tr. 648-49.) Limited Partners asked Prost, *inter alia*, to examine Twele's calculations and prepare an independent available-cash-flow calculation. (Tr. 373.) Prost testified he disagreed with Twele's placement of anticipated expenditures into reserves and subtraction of expenditures from cash in subsequent years. (Tr. 375-78.) Prost opined there had been available cash flow under the Partnership Agreement in six of the 13 years that spanned 2002 through 2014, specifically in 2003, 2008, and 2010-2013. (Tr. 393; Ex. 147 at 7.)[5]

On cross, Apex elicited that Prost did not dispute Twele's handling of loans since Twele also considered loans as available cash. (Tr. 437-439.) Prost then admitted that loans to Forsyth Centre never took money from Limited Partners. (Tr. 439.)

Heifetz's 2005 letter

Page 16 of Limited Partners' brief discusses a 2005 attempt by Heifetz and others to exercise the forced-sale provision. Page 9 of Apex's opening brief mentioned the letter.[6] Limited Partners provide details that Heifetz complained about the 1999 property contribution, Forsyth Centre loans, and lack of cash distributions.

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[5] Prost found negative cash flow all other years. (Ex. 147 at 7.)

[6] Heifetz's testimony shows he was referring to the September 9, 2005 demand. (Tr. 176-177.) Contrary to Limited Partners' footnote 4, the demand letter leading to Limited

The 1999 property contribution and Forsyth Centre loans are not material for reasons discussed above. With respect to the 2005 complaint about cash distributions, even if Limited Partners had a breach-of-fiduciary-duty claim for non-distribution of cash flow (they do not), Prost determined there was negative cash flow in 2002 and 2004-2005. (Ex. 147 at 7.) Any claim for 2003 cash flow became time barred two years before this suit was filed.

Heiftetz's belief about Apex's cash distribution duty

On page 17, Limited Partners say Heifetz's testimony about Apex's duty to distribute cash shows their breach-of-fiduciary-duty claim was broader than the contract provision they pled. But "[t]he existence of a duty is purely a question of law." *Parr v. Breeden*, 489 S.W.3d 774, 779 (Mo. banc 2016). It is "a question for the court alone." *Lumbermen's Mut. Cas. Co. v. Thornton*, 92 S.W.3d 259, 266 (Mo.App.W.D. 2002). Lay testimony like Heifetz's has no bearing on whether Limited Partners had a viable claim. *Harris v. Mo. Pac. Ry. Co.*, 166 S.W. 335, 340 (Mo.App.E.D. 1914) (the "mere legal conclusion of the witness" that a conductor had a duty to look out for members of the train crew was "without probative force"); *Howell v. Autobody Color Co., Inc.*, 710 S.W.2d 902, 905 (Mo.App.S.D. 1986) ([t]estimony of lay witnesses that someone is an "agent" "could be given no weight as '[s]uch statements are mere legal conclusions of the witness").

Partners' breach-of-contract recovery was sent August 4, 2010. (LF 98.) The 2005 letter was insufficient to trigger the forced-sale provision. (A5, A10.)

Maylack

On pages 19-21, Limited Partners cover matters that were resolved twenty years ago. (Resp. Br. at 21.) In terms of relevance, these events are waters that long went under the bridge and have been subsumed into the ocean of immateriality. Suffice it to say: the Maylacks (1) indisputably held their full interest in 8182 Partnership at trial and (2) thereafter received from Apex $297,714 for the fair market value, plus attorneys' fees. (LF 555, A26, A43.)

Twele

Pages 21-23 cover Twele's relationship with Apex's president. These details are immaterial. Apex does not dispute that available cash flow calculations were not done until 2012. Apex's appellate points are that the failure to perform calculations is the subject of a breach-of-contract claim alone and does not support punitive damages.

Novelly

Pages 23-25 highlight that Novelly testified he used information about 8182 Partnership's business to determine there was no distributable cash, not the Partnership Agreement's available cash flow formula. Novelly's testimony does not define the scope of any fiduciary duties Apex had. "The existence of a duty is purely a question of law." *Parr*, 489 S.W.3d at 779.

Prost

Pages 26-30 detail Prost's criticisms of Twele's calculations. This discussion is notable for how often Limited Partners recount Prost's criticisms as being breaches of contract. (*See* Resp. Br. at 26 (Twele subtracted from cash flow "numerous categories of

expense not mentioned in the Agreement's ACF formula" and created "fictitious reserves" for items that "the ACF definition in the Agreement does not reference"), *id.* at 27 (Twele's ACF calculations set up paper reserves), *id.* at 28 (Twele "double-counted expenses in determining ACF")).

In footnote 8, Limited Partners complain about the time-barred, irrelevant land contribution to Forsyth Centre and assert that Apex tried to squeeze out Limited Partners by amplifying their tax burdens. The trial court agreed that Limited Partners did not plead tax burden issues. (Tr. 8.) Apex pointed out that Prost agreed any tax payments were irrelevant to cash flow. (Tr. 6-7.) The trial court correctly prevented Limited Partners from presenting their irrelevant tax burden theory. (Tr. 338-345.)

Pages 30-31 claim Prost opined that Limited Partners should have received the quoted cash distribution amounts. The quoted figures come from the background section of Prost's report, which repeats figures from the petition. (*Compare* Ex. 147 at 5 with LF 21 at ¶¶31-36.) Prost testified that between 2002 and 2014, there were six years that had positive available cash flow, and if all positive cash flow were added together (including 2003 and without considering negative cash flow), 8182 Partnership had $7,136,734 available cash flow. (Tr. 393-94.) Prost said one could multiply $7,136,734 by each partner's percentage share. (Tr. 394.) That calculation led to $198,000 for Heifetz. (Tr. 394.)

As Apex's opening brief noted, Prost agreed that if cash distributions had been made, they would have reduced the value of a partner's interest by the amount of the cash distribution. (Tr. 435-37; 443-44.) But when Prost provided a separate opinion about the

value of Limited Partners' partnership interest, he did not deduct for any prior omitted cash distributions. To value 8182 Partnership, Prost used asset and liability information from its 2014 income tax returns and adjusted for real estate. (Tr. 396-404; Ex. 147 at 11-12.)[7] Apex did not include Prost's available cash flow liabilities in its tax returns, and Prost never testified that when making his adjusted-book-value calculation he took into account his available cash flow opinions. That omission explains why Limited Partners asked for nominal breach-of-fiduciary-duty damages and told the jury that the verdict form listed "nominal damages" because "You heard Mr. Prost, our expert accountant, say, well, every dollar that goes out in distribution reduces the value of the whole partnership." (Tr. 785.)

Price

Limited Partners' points concerning Mr. Price are directed at whether there was a fiduciary duty apart from contractual provisions. "Duty is a matter of law. It is not established by an expert opinion of proper procedure; that evidence deals only with

[7] The parties agreed to a March 15, 2013 valuation date. Prost did not testify to a specific March 15, 2013 value, but opined that 8182 Partnership's adjusted book value at the end of 2012 was $47,301,300 and at the end of 2014 was $53,616,000. The jury's award reflects that they found 8182 Partnership's value as of March 15, 2013 to be $48,408,900, which is consistent with Prost's testimony. Apex's valuation figures used the same adjusted-book-value methodology but were lower than Prost's because they utilized lower real estate valuations. (Tr. 688-91.)

breach if a legally existing duty is present." *Ackerman v. Lerwick*, 676 S.W.2d 318, 321 (Mo.App.E.D. 1984). "Generally, the opinion of an expert on issues of law is not admissible. This is because such testimony encroaches upon the duty of the court to instruct on the law." *Howard v. City of Kans. City*, 332 S.W.3d 772, 785 (Mo. banc 2011) (internal citations omitted).

Under this standard, most of Price's testimony was not evidence. Of Price's opinions, his most relevant is that Apex breached the Partnership Agreement "by not making annual determinations of available cash flow, and not paying those distributions to the limited partners when there was available cash flow." (Tr. 131.) This is an opinion that Apex breached a contract.

REPLY ARGUMENTS

I. Limited Partners' properly pleaded fee claim was pending and unresolved on June 26. (*Replying to Resp. Br. 38-51)*

A. Limited Partners pleaded an attorneys' fee claim.

Limited Partners contend the appeal was filed out-of-time because there was no properly pleaded fee claim that would have prevented the June 26 Judgment from resolving all pending claims. (Resp. Br. at 41-42.) But the petition *did* raise a fee claim in the prayer for relief. (LF 23; A18.) This was sufficient. *Lucas Stucco & EIFS Design, LLC v. Landau*, 324 S.W.3d 444, 445-46 (Mo. banc 2010) (plaintiff sufficiently pleaded attorneys' fees under a statute by request in prayer and pleading substantive claim

elements); *Scheck Indus. Corp. v. Tarlton Corp*, 435 S.W.3d 705, 732-33 (Mo.App.E.D. 2014) (same for contract-based fees).

When Apex previously suggested fees were not pled, Limited Partners disagreed, citing *Lucas Stucco*. (LF 914-15.) In this Court, Limited Partners have about faced and cite *State ex rel. Hammerstein v. Hess*, 472 S.W.2d 362 (Mo. banc 1971), an inapposite case holding that a party cannot convert an in-personam trustee action into an in-rem action by including a quiet-title request in the prayer.

B. Limited Partners should be estopped from contending otherwise.

Limited Partners' position change is not fair turnabout. Although Limited Partners ultimately submitted their fee claim post-trial, their intent to seek fees was clear at trial. In the same filing citing *Lucas Stucco*, Limited Partners stated:

> plaintiffs did assert before and during the trial that they were entitled to attorney's fees under the partnership agreement as amended. Plaintiff Maylack read the relevant contractual provisions into evidence. The attorneys' fees claim was discussed in chambers, and possibly on the record as well, both before and during trial.

(LF 913.)

Maylack even asked the jury to award attorneys' fees. (Tr. 336.) While Limited Partners ultimately had the judge render the award, "[t]he issue of attorney's fees is not a question of law and is something, of course, which juries are not uncommonly asked to do." *Sterbenz v. Kans. City Power and Light Co.*, 333 S.W.3d 1, 17 (Mo.App.W.D. 2010) (internal citation omitted). *See also Eagle v. Redmond Bldg. Corp.*, 946 S.W.2d 291, 292-

93 (Mo.App.W.D. 1997) (jury award for attorneys' fees); *Halamicek Brothers, Inc. v. R & E Asphalt Service, Inc.*, 737 S.W.2d 193, 197 (Mo.App.E.D. 1987) (same).

"Judicial estoppel will lie to prevent litigants from taking a position, under oath, in one judicial proceeding, thereby obtaining benefits from that position in that instance and later, in a second proceeding, taking a contrary position in order to obtain benefits . . . at that time." *State Bd. of Accountancy v. Integrated Financial Solutions, L.L.C.*, 256 S.W.3d 48, 54 (Mo. banc 2008) (internal quotation omitted). Courts consider whether: (1) a party's later position is clearly inconsistent; (2) "the party has succeeded in persuading a court to accept that party's earlier position;" and (3) "the party … would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Strable v. Union Pac. R. Co.*, 396 S.W.3d 417, 421 (Mo.App.E.D. 2013) (internal quotations omitted).

Here, Limited Partners took the position below that they *did* sufficiently plead and pursue fees, and they benefitted from that position. The trial court agreed, awarded them fees, and Apex paid. Limited Partners would derive an unfair advantage by changing position because they are effectively claiming they were *not* actually entitled to the fees they already received. The inconsistent positions are not because of "a good-faith mistake;" which makes estoppel proper. *Id.* at 422. Their current contention that they did *not* sufficiently plead attorneys' fees contravenes *Lucas Stucco*, an opinion Limited Partners previously cited but now ignore.

C. Limited Partners unavailingly attempt to distinguish cases holding that an unruled fee request precludes a final judgment.

Limited Partners unsuccessfully distinguish *State ex rel. Kinder v. Dandurand*, 261 S.W.3d 667 (Mo.App.W.D. 2008); *Ackerson v. Runway II, Inc.*, 961 S.W.2d 933 (Mo.App.S.D. 1998); *Rheem Mfg. v. Progressive Wholesale Supply Co.*, 28 S.W.3d 333 (Mo.App.E.D. 2000), and *Bituminous Cas. Corp. v. Moore*, 64 S.W.3d 356 (Mo.App.S.D. 2002).

Limited Partners argue the fee petition in *State ex rel. Kinder* was filed before the purported judgment was entered, 261 S.W.3d at 669, whereas, they filed their fee motion after June 26. But *Kinder* does not turn on when the fee motion is filed but rather on whether all pending issues are resolved by a judgment. The *Kinder* motion was against the attorney's client. *Id.* at 671. Because the attorney filed her motion before the trial court entered a purported judgment, *Kinder* held that the purported judgment was not final, as "it did not dispose of all of the issues pending between the parties." *Id.* Here, Limited Partners sought attorneys' fees in their petition and at trial. Consequently, the fee issue was pending before entry of the June 26 Judgment.

Limited Partners' reliance on *Drake Development* is misplaced. In that case, there was an underlying contractual dispute that was resolved, appealed, and an amended judgment entered on remand, which was not appealed. *Drake Dev. & Constr. LLC v. Jacob Holdings, Inc.*, 366 S.W.3d 41, 43-44 (Mo.App.S.D. 2012). *Seven months later*, the attorney for the defendant (Jacob) moved to assess his attorneys' fees and a lien on

the real estate Jacob obtained. *Id.* Jacob complained that the lien action could not proceed by motion in the original case. *Id.* at 45.

Drake Development held that, because the statute authorizing attorneys' liens does not state a collection method, an attorney can collect by filing an independent action or by motion in the original case. *Id.* at 45 (citing *Kinder*, 261 S.W.3d at 671). In rejecting the necessity of an independent action, the court noted that the attorney and Jacob were the only parties involved, notice and a full opportunity to defend were provided, an evidentiary hearing held, and a "completely separate judgment" entered. *Id.* at 45-6. The court held the trial did not abuse its discretion under all the circumstances to determine the fee claim in this manner. *Id.* at 46.

The facts of this case are easily distinguished. Limited Partners' claim for attorneys' fees *is* one of the claims in the underlying suit between the parties, not an "independent civil action." The petition raised the fee claim, and the claim was pending until ruled.

Limited Partners say *Ackerson* is distinguishable because "the petition [in this case] did not assert a claim for attorney fees." (Resp. Br. at 47.) But Limited Partners' petition did state a fee claim. *Ackerson* is on point and holds that a judgment that does not resolve a litigant's "petition seeking attorney fees, expenses of litigation and court costs" and which does have a Rule 74.01(b) finding "is not final." 961 S.W.2d at 934-35 (internal quotations omitted).

Limited Partners claim that *Rheem* is inapposite because the prevailing party requested attorneys' fees in an authorized after-trial motion "that kept the initial judgment

open for 90 days until the fee issue was resolved." (Resp. Br. at 49.) *Rheem* held that the "[initial] judgment" was not a judgment because it did not dispose of all the issues between all the parties. 28 S.W.3d at 343. The June 26 Judgment is not a judgment for the same reason.

Limited Partners' attempt to distinguish *Bituminous* similarly falls short. Limited Partners insist it is unclear whether *Bituminous* held that the judgment was not final because the party "had sought attorney fees at trial—or because a request for attorney fees had been made in the petition." (Resp. Br. at 50.) *Bituminous* repeatedly noted that the declaratory judgment count included a fee request. 64 S.W.3d at 357-58. Here, Limited Partners sought attorneys' fees in their petition *and* at trial, so *Bituminous* is indistinguishable either way.

II. Even if the June 26 Judgment were a judgment, the October 26 Amended Judgment was a new judgment for all purposes. (*Replying to Resp. Br. 52-72)*

Limited Partners claim the trial court lacked authority to enter the October 26 Amended Judgment because the fee motion was not an authorized after-trial motion. (Resp. Br. at 53.) The Court need not reach this issue because the June 26 Judgment was not a judgment. But even if the June 26 Judgment had resolved all pending claims, Limited Partners are mistaken.

A motion to amend the judgment is an authorized post-trial motion. Rule 78.04; *Taylor v. United Parcel Service, Inc.*, 854 S.W.2d 390, 392 n.1 (Mo. banc 1993) (listing six authorized motions, including "a motion to amend the judgment); *Massman Const.*

Co. v. Missouri Highway & Transp. Comm'n, 914 S.W.2d 801, 803 (Mo. banc 1996) (reaffirming *Taylor*'s list of authorized post-trial motions).

"A motion need not be formally designated a 'motion to amend the judgment' or a 'motion for new trial' to constitute a motion under Rule 78.04." *Payne v. Markeson*, 414 S.W.3d. 530, 538 (Mo.App.W.D. 2013) (internal citation omitted). Courts look "not to the nomenclature employed by the parties, but to the actual relief requested in the motion." *Id.* (internal quotation omitted).

Limited Partners' fee motion asked the trial court to "enter a judgment in the amount of attorneys' fees and expenses as the court deems reasonable and proper as an addition to the judgment previously entered in this case." (LF 613.) This is a request to amend a judgment. *See* Webster's New Twentieth Century Dictionary Unabridged 57 (2nd ed. 1970) ("amend" means "to alter (a motion, law, etc.) by formal action of an authorized body").

Limited Partners' reply suggestions in support of their fee motion specifically requested an amended judgment. (LF 917.) There, Limited Partners said the judgment "should be amended" to include the sought-after attorneys' fees and requested that the "additional sum should be made in favor of the plaintiffs collectively." (*Id.*) Although Limited Partners now seek to characterize their motion as something other than a motion to amend the judgment, it is the character of the pleading that matters.

Limited Partners filed their fee motion on July 24, 2015 (LF 12), within 30 days of the June 26 Judgment, so the trial court had authority to enter the relief sought, even if the June 26 Judgment had ruled all pending claims. Rule 78.07(d).

The October 26 Amended Judgment did not specify that it should be treated as anything other than a new judgment (LF 924-26; A37-39) and therefore would be deemed "a new judgment for all purposes" under Rule 78.07(d). And "the trial court again [would have had] 30 days in which to open, vacate, set aside, or amend the new judgment, and any party may again file any authorized after-trial motion within that same 30-day period." 17 Mo. Prac., Civil Rules Practice § 78.07:5 (2015 ed.).

III. Limited Partners failed to establish any fiduciary duty that is separate and distinct from the Partnership Agreement. *(Replying to Resp. Br. 72-92)*

A. *Peterson* bars Limited Partners' breach-of-fiduciary-duty claim.

Limited Partners' claim that Apex should have made cash distributions is, at its core, a claim for breach of Paragraph 9.2(A) of the Partnership Agreement. The petition, evidence, and arguments at trial confirm that this contractual obligation is at the heart of Limited Partners' claim. According to *Peterson*, Limited Partners cannot transmute their breach-of-contract claim into a breach-of-fiduciary-duty claim.

Limited Partners attempt to avoid *Peterson's* holding by mischaracterizing Apex's discussion. Their digression into differences between the "duty of loyalty" and "fiduciary duties" misses the point. *Peterson* states that the origin of "fiduciary principles" is the idea that corporate managers owe their "primary responsibilities" to shareholders because they own the corporation, "not as a result of any contractual arrangement." 783 S.W.2d at 904. *Peterson* characterizes the "primary responsibilities" as a "duty of loyalty" owed to shareholders, and then identifies specific circumstances in which this "duty of loyalty" is subject to breach. *Id.* at 904-05.

Peterson then considered whether the plaintiffs alleged a breach of any "fiduciary duties that arise as a result of the Petersons status as shareholders" rather than a breach of "contractual obligations that arise by virtue of the agreement," and found that the plaintiffs did not allege "any of the breaches of fiduciary duty" noted in its prior discussion. *Id.* at 905. After reviewing the allegations in the petition and the evidence presented at trial, the Court reversed the punitive damage award because "[t]he fiduciary duty *must exist separately from and independently of contractual obligations*." *Id.* (emphasis added).

Limited Partners have failed to plead and prove a "breach of a fiduciary duty, independent of [a defendant's] alleged breach of its contractual obligations." *Id.* Their petition expressly premised the breach-of-fiduciary-duty claim on Apex's alleged contractual obligation under Paragraph 9.2(A). (LF 24; A19.) Even in the most favorable light, Limited Partners' evidence at trial failed to distinguish their claim for breach of fiduciary duty from Apex's alleged contractual obligation to make distributions under the Partnership Agreement, and the jury instruction for this claim similarly references the failure to make cash distributions when cash was available.[8]

[8] Limited Partners' contention that Apex either failed to preserve its argument that the pleadings were insufficient or impliedly consented to try Limited Partners' "common-law fiduciary duty" theory is a red herring. Apex has consistently argued that Limited Partners failed to make a submissible case for breach of fiduciary duty under *Peterson*, not that Limited Partners' pleadings were insufficient. *See* Apex Br. at 17-18, 29-31.

Limited Partners quote out of context a statement made by the trial court during the instructional conference. The statement was in response to the parties' argument over an affirmative defense instruction Apex offered. It was not made in connection with, and does not support, Limited Partners' assertion that they pleaded and proved the existence of what they now call a "common-law fiduciary duty of a general partner to make distributions." (*See* Tr. 763-64.)

The trial court's statement also did not speak to and does not decide whether Apex breached any duty independent of the contract. The existence of such a duty is a question of law. *Parr*, 489 S.W.3d at 779. Limited Partners' trial evidence did not expand the scope of their claim, for reasons stated on pages 1-9, *supra*.

B. Limited Partners cite no Missouri authority recognizing a common-law duty to make cash distributions.

Limited Partners cite no Missouri authority recognizing a "common-law fiduciary duty of a general partner to make distributions" (Resp. Br. at 78), and Apex has located no Missouri case holding that such a duty exists. Instead, they rely on an out-of-state opinion, *Labovitz v. Dolan*, 545 N.E.2d 304 (Ill. App. 1st Dist. 1989).

Labovitz considered the fiduciary obligations of a general partner vested by the parties' contract with "wide latitude in deciding whether or not to distribute cash to the limited partners" and concluded that the partner's discretion was limited by his "fiduciary duty" to exercise "good faith, honesty, and fairness in his dealings with them and the funds of the partnership." *Id.* at 310. *Labovitz* did not consider whether the plaintiffs stated a claim for breach of fiduciary duty consistent with *Peterson*, 783 S.W.2d at 905.

In addition, the *Labovitz* defendant had "broad discretion" regarding distributions, which the court indicated was limited only by his fiduciary duties to the limited partners. 545 N.E.2d at 310. Here, the Partnership Agreement affirmatively required cash distributions according to the contractually-specified formula. This factual distinction is material because, under *Peterson*, contractual obligations cannot form the basis of the fiduciary duty allegedly breached. 783 S.W.2d at 905.

Finally, *Labovitz* does not establish the existence of a narrow and specific fiduciary duty to make cash distributions that is separate from a contractually-imposed obligation to make distributions, as Limited Partners suggest. 545 N.E.2d at 412.[9]

[9] Limited Partners cite other out-of-state cases. Like *Labovitz*, each considers whether a general partner can breach a fiduciary duty for conduct over which the partnership agreement gives the general partner authority or discretion. None of these cases considers whether limited partners have a breach-of-fiduciary-duty claim based on failure to perform a *contractually obligated* action, nor do they consider whether the claimed fiduciary duty is separate and distinct from contractual obligations. *See Alloy v. Willis Family Trust*, 944 A.2d 1234, 1266 (Md. App. 2008) (citing *Labovitz* as holding that "[a] general partner's broad authority over distributions, although granted by a partnership agreement, is conditioned by his unwaivable duties of loyalty and good faith," and holding that the trial court should have permitted the plaintiff to submit its breach of fiduciary duty claim to the jury because any such duty was not waived by the terms of the partnership agreement); *BT-I v. Equitable Life Assurance Soc'y*, 75 Cal. App. 4th 1406,

Labovitz holds that the general partner owed duties of "good faith, honesty, and fairness" in its economic dealings with the limited partners despite contractual provisions vesting him with discretion in making distributions. 545 N.E.2d at 310. Under the analysis in *Peterson*, 783 S.W.2d at 905, a contractual agreement "does not destroy [a manager's] fiduciary duty" to shareholders, "nor does that agreement create additional fiduciary duties."

IV. Limited Partners failed to establish actual damages for a breach-of-fiduciary-duty claim. *(Replying to Resp. Br. 93-105)*

A. Actual damages are necessary.

Limited Partners unsuccessfully seek to distinguish or discredit *Henry v. Farmers Ins. Co., Inc.*, 444 S.W.3d 471 (Mo.App.W.D. 2014) (transfer denied Oct. 28, 2014). They argue that *Henry* holds only that nominal damages cannot be "presumed," not that they cannot be awarded, for a breach-of-fiduciary-duty claim. This is a misunderstanding of *Henry*.

Henry notes that the concept of nominal damages came from "the common law action for trespass for violence to person or property" types of cases, such as nuisance, trespass, ejectment, false arrest, and assault and battery, in which "harm or damages is

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1412 (Ca. Ct. App. 1999) (similar); *Kanover Dev. Corp. v. Zeller*, 635 A.2d 798, 801, 808 (Conn. 1994) (similar); *Wartski v. Bedford*, 926 F.2d 11, 20 (1st Cir. 1991) (similiar).

not an element of the cause of action because the law simply *presumes* that damages are allowed." *Id.* at 480-81 (internal quotations omitted) (emphasis added).

"Where pecuniary damage is an element of the tort cause of action, however, nominal damages cannot be presumed" because more emphasis is placed on "the plaintiff's loss" in actions characterized by "fraud, deceit, inattention, carelessness, and the like." *Id.* at 481. "A breach of a fiduciary obligation is constructive fraud," *Id.* (quoting *Klemme v. Best*, 941 S.W.2d 493, 495 (Mo. banc 1997)), and is, therefore, an "action sounding in fraud or deceit" in which proof of substantial injury and damage is "essential to recovery." *Id.*

Henry holds that nominal damages cannot be awarded for causes of action in which pecuniary loss is an element because nominal damages are never proven, but are always the product of a legal presumption. *See Simpkins v. Ryder Freight Sys., Inc.*, 855 S.W.2d 416, 423 (Mo.App.W.D. 1993) ("It is evident that our law marks a difference between nominal and actual damages and that one is not a species of the other. They are neither fungible nor admixable."). Nominal damages are legally presumed when a right has been invaded, and the presence of actual damages is neither an element of the cause of action or proven at trial. *Henry*, 444 S.W.3d at 480; *see also Simpkins*, 855 S.W.2d at 423. ("It is the absence of actual damage that renders the defendant's misconduct liable to nominal damages.").

Limited Partners argue that *Henry* is a flawed "syllogistic Jenga tower" (Resp. Br. at 95), but they fail to point to any fallacious principle or cite any cases contrary to *Henry*. Instead, they cite breach-of-contract cases as evidence that nominal damages can

be awarded when damage is an element of the cause of action. The point falls short. The "damages" element in a breach-of-contract action requires only proof of the contract and its breach to make a submissible case;[10] in contrast, a breach-of-fiduciary-duty claim requires proof of actual damage. *Henry*, 444 S.W.3d at 481.

B. Limited Partners did not prove actual damages arising from the alleged failure to make distributions.

Limited Partners acknowledge that an award of actual damages for Apex's alleged breach of fiduciary duty "would inevitably duplicate a portion of the 'value' to be awarded to the Limited Partners under the breach of contract count." (Resp. Br. at 96-7.) They cannot recover twice for the same injury. *See Meco Sys., Inc. v. Dancing Bear Entm't, Inc.*, 42 S.W.3d 794, 810-11 (Mo.App.S.D. 2001).

Limited Partners point to language in the breach-of-fiduciary-duty verdict-directing instruction as evidence that they were required to prove actual damages to support that claim. Even on appeal, however, they have not identified any additional damages that were not already included in the jury's award for breach of contract. Their allegations of pecuniary loss from the 1999 land contribution, loans to Forsyth Centre, tax burdens, and unpaid cash distributions all fall apart under scrutiny, for reasons set forth on pages 3-4 & 6-8, *supra.*

Limited Partners also claim that the trial court specifically enforced the forced-sale provision of the contract, so they were not technically awarded damages on their breach-

[10] *Carter v. St. John's Regional Med. Ctr.*, 88 S.W.3d 1, 12 (Mo.App.S.D. 2002).

of-contract claim. But whether the award was technically damages or specific performance, Apex was forced to buy Limited Partners' interests for the Verdict A amounts. And at trial, it was undisputed that any allegedly undistributed cash that a jury could have found for breach of fiduciary duty was already included within the Verdict A values. (*See* Apex Br. at 18-19; pages 7-8, *supra*.)

Finally, Limited Partners' use of the phrase "nominal actual damages" does not mean they obtained actual damages. The phrase is a "fiction" that "means nothing" and cannot be used to "evade the common law rule" that punitive damages cannot be awarded in the absence of actual damages. *Simpkins*, 855 S.W.2d at 423 n.5.

V. Limited Partners did not have a submissible punitive damage claim. *(Replying to Resp. Br. 105-116)*

Punitive damages are generally not awarded in breach-of-contract claims. *Peterson*, 783 S.W.2d at 902. This rule has two narrow exceptions: if (1) the breaching party's conduct is a separate, independent tort or (2) there is a breach of the "public trust." *Id*. at 902-03.

A. Limited Partners failed to plead and prove a fiduciary-duty breach that was separate from a breach of contract.

The first exception requires the plaintiff to (1) allege that the breach arises from fiduciary responsibilities; and (2) show that the alleged fiduciary duty "exist[s] separately from and independently of contractual obligations." *Peterson*, 783 S.W.2d at 905. The tort action must be separately pled and all tort elements satisfied. *Gibson v. Adams*, 946 S.W.2d 796, 802-03 (Mo.App.E.D. 1997); *see also Rock Port Mkt., Inc. v. Affiliated*

Foods Midwest Co-op, Inc., 2017 WL 3136402 at *5-6 (Mo.App.W.D. July 25, 2016) (*reh'g and/or transfer denied* Sept. 5, 2017) (court erred in instructing on and awarding punitive damages where tort claim was not separately pled and proved).

Citing Instruction No. 9, Limited Partners argue that their claim sounds in tort. (Resp. Br. at 106-07.) In evaluating the submissibility of a punitive damages claim *Peterson* examined the plaintiffs' pleading. 783 S.W.2d at 905. In the petition at issue here, the alleged breach is of a contract provision. (LF 24; A19.)

In any event, a broader inquiry does not help Limited Partners. Trial testimony did not expand the source of Apex's duty to make cash distributions, as explained in pages 1-9, *supra*. Limited Partners' own expert arrived at his available cash distribution figures by applying the available cash flow language of the *Partnership Agreement*. (Tr. 374-94; Ex. 147 at 7.) In addition, Limited Partners presented their breach-of-fiduciary-duty case as being about a failure to make contractual cash distributions. (Tr. 43; Tr. 770.)

B. Limited Partners' contract claim did not involve a breach of "public trust."

The second exception permits punitive damages where a contractual breach is coupled with violations of a fiduciary duty that constitute a breach of "public trust." *Brown v. Mercantile Bank of Poplar Bluff*, 820 S.W.2d 327, 340 (Mo.App.S.D. 1991). Limited Partners argue that this exception "is not as narrow as Apex states." (Resp. Br. at 107.) While acknowledging that *Peterson* does not authorize extending punitive

damages to private actions, Limited Partners argue that "it is not at all clear" why this would be. (*Id.*)

The "public trust" requirement is well-reasoned. *Peterson* cited *Brown v. Coates*, 253 F.2d 36 (D.D.C. 1958), which states that the public-trust exception is intended to protect *the public* by deterring bad conduct by someone holding himself out to the public as trustworthy for a particular endeavor. 253 F.2d at 40. Apex did not hold itself out, or cause harm, to the public. Its duty was to 8182 Partnership. *Cf. Nickell v. Shanahan*, 439 S.W.3d 223, 227 (Mo. banc 2014) (officer of corporation owes duty to the shareholders).

Limited Partners say *Brown v. Mercantile Bank* is distinguishable because punitive damages were *not* awarded, and that was found not to be an abuse of discretion, and because *Brown* did not involve a fiduciary relationship. (Resp. Br. at 109.) None of those facts affects *Brown's* recitation of the law, so they are not relevant here.

Limited Partners urge the Court to follow *Forinash v. Daugherty*, 697 S.W.2d 294 (Mo.App.S.D. 1985). (Resp. Br. at 110-11.) *Forinash* relied on a case applying Kansas law to find that punitive damages could be awarded in a breach-of-fiduciary-duty case involving a private corporation. 697 S.W.2d at 306-07. *Forinash* has been strictly limited to its facts. *Id.* at 298-99; *Jones v. Sherman*, 857 S.W.2d 468, 472 (Mo.App.E.D. 1993). Further, *Peterson* criticized *Forinash* as "not particularly instructive," 783 S.W.2d at 903, and "both contrary to *Brown* and without sanction of this Court." *Id.* at 904.

C. Limited Partners cannot recover punitive damages because they were not awarded actual damages.

As discussed in Part IV.A, *supra*, the general rule is that punitive damages cannot be awarded absent actual damages, particularly where the underlying claim includes actual damages as an essential element. Limited Partners allege that their claim is for the tort of breach of fiduciary duty. (*E.g.*, Resp. Br. at 106.) An essential element of this claim is "that the breach caused the proponent to suffer harm." *Western Blue Print Co., LLC v. Roberts*, 367 S.W.3d 7, 15 (Mo. banc 2012). Nominal damages cannot be awarded on a breach-of-fiduciary-duty claim. *Henry*, 444 S.W.3d at 481.

Limited Partners primarily rely on *Herberholt v. dePaul Community Health Center*, 625 S.W.2d 617 (Mo. banc 1981), and *Simpkins v. Ryder Freight Sys., Inc.*, 855 S.W.2d 416 (Mo.App.W.D. 1993), for the assertion that they can recover punitive damages based only on nominal damages.[11]

Herberholt upheld a punitive damage award after nominal damages were awarded for violation of the employer "service letter statute." 625 S.W.2d 617. Service letter claims do not require actual damages. *Id*. at 623-24. Under *Herberholt*, nominal damages must be "properly found" before they can support punitive damages. *Id.* at 624.

[11] Limited Partners cite *Coonis v. Rogers*, 429 S.W.2d 709 (Mo. 1968). In *Coonis*, actual damages were awarded, and thus it does not address whether nominal damages can provide the basis for punitive damages in a case where actual damages are an element.

Thus, *Herberholt* merely holds that *if nominal damages are properly awarded under a given cause of action*, they can support a punitive damages award.

Simpkins is an assault and battery case and likewise inapposite because actual damages are unnecessary for the underlying tort. *A.R.B. v. Eiken*, 98 S.W.3d 99, 104 (Mo.App.W.D. 2003).

To the extent that Limited Partners rely on Restatement (Second) of Torts § 908, comment c, that argument also falls short. That section states:

> … an award of nominal damages (see § 907) is enough to support a further award of punitive damages, when a tort, such as trespass to land, is committed for an outrageous purpose, but no significant harm has resulted.

Section 908 refers to § 907 ("nominal damages"), which states, "If actual damage is necessary to the cause of action, as in negligence, nominal damages are not awarded." Restatement (Second) of Torts, § 907, comment a. Thus, § 908 is limited to the situation where nominal damages may properly be awarded. Since breach of fiduciary duty is not such a case, Limited Partners' nominal damage recovery cannot sustain the $2.8 million punitive award.

CONCLUSION

For reasons stated in Apex's opening brief and in this reply, Apex respectfully requests that the Court reverse the breach-of-fiduciary-duty and punitive damage portions of the judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically with the Clerk of the Court on this 11th day of October, 2017, to be served by operation of the Court's electronic filing system on all counsel of record.

/s/ Heidi Doerhoff Vollet
Heidi Doerhoff Vollet

CERTIFICATE OF COMPLIANCE

Pursuant to Supreme Court Rule 84.06(b) and Rule 55.03, the undersigned hereby certifies the following:

1. This brief includes the information required by Rule 55.03.

2. This brief complies with the limitations contained in Rule 84.06(b) and contains 7,678 words.

3. Microsoft Word 2010 was used to prepare Appellant's Reply Brief.

/s/ Heidi Doerhoff Vollet
SIGNATURE